HOW A GOOD IDEA BECAME A BAD IDEA: UNIVERSITIES AND THE USE OF NON-DISCLOSURE AGREEMENTS IN TERMINATIONS FOR SEXUAL MISCONDUCT

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I. INTRODUCTION

One of the challenges that face every third-party intervenor in a conflict is what the parties shall agree about the public nature of an agreed outcome. In private dispute resolution, in contrast to adjudication by courts, there is neither a requirement nor (with a few exceptions) a legal compulsion to reveal those outcomes, if one or more parties prefer to keep the matter private.

Dispute resolution scholars have written about these issues for many years, which center on the question of whether outcomes need to be public to ensure public accountability.[1] The often controversial introduction of "sunshine laws" requiring the disclosure of settlements that relate to public safety has been one consequence of this debate.[2] This discussion also implicates the continuing use of mandatory arbitration, which, as scholars point out, effectively excludes those settlements from public scrutiny.[3]

At an individual level, this dilemma highlights the practical need for access to previous settlements by other litigants in the same class. At a policy level, there are questions about the nature of the wrong that has led to the settlement and whether, if con-

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1 *See*, *e.g.*, David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. J. 2619 (1995); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L. J. 2663 (1995).

2 Alison Lothes, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433, 462–64 (2005); *see, e.g.*, Erik S. Knutsen, *Keeping Settlements Secret*, 37 FLA. ST. U. L. REV. 945, 969 (2010).

3 Jean Sternlight has written extensively on this. Most recently, *see* Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 155, 156–61 (2019); *see also* Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 952–54 (2002).

cealed, it poses risks for others; these questions may be especially pertinent when compensation is being paid by a public institution using public money to cover up a wrong. Underpinning all of these considerations, of course, is the desire to protect the privacy and reputation of individual litigants.

Into this arena now breaks growing alarm about the widespread use of non-disclosure agreements ("NDAs") in settlement agreements. A quick review of the history of NDAs is instructive here. NDAs were initially popularized in the 1970s as the "tech bubble" produced many new and entrepreneurial information technology start-ups and competition for the ownership of new ideas.[4] When an employee of one company moved to a rival, it seemed natural to ask them to keep certain information confidential. Moreover, specific NDAs (usually time-limited) targeted at particular information seemed less likely to raise concerns of unlawful restraint of trade than more broadly drawn traditional non-compete clauses.[5]

In practice, NDAs have come to be used much more widely. Research indicates that most NDAs now have no time limitations, and are often unlimited in scope; that is, they forbid disclosure of anything relating to the litigation and settlement.[6] Furthermore, the original association between NDAs and confidential "insider" IT information has been lost in the widespread use[7] of NDAs in litigation over, for example, employment termination, sexual harassment, and discrimination. Cases with high public profile, including the President of the United States,[8] have demonstrated a link between cases that would damage personal, institutional, or corporate reputation and the use of NDAs to "gag" the parties.

The challenge presented by suppressing the disclosure of what might be considered to be important public information relating to individual safety and protection—rather than commercial "secrets" and new ideas—raises the same issues of finding an appropriate

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4 Orly Lobel, *Trump's Extreme NDAs*, ATLANTIC (Mar. 4, 2019), https://www.theatlantic.com/ideas/archive/2019/03/trumps-use-ndas-unprecedented/583984/.

5 *See* Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 20–21 (2015).

6 *Id.*

7 Moya Crockett, *How this Important New Law Will Help UK Workplace Sexual Harassment Victims*, STYLIST (Oct. 2018), https://www.stylist.co.uk/life/non-disclosure-agreements-gagging-orders-ndas-banned-uk-sexual-assault-harassment-workplace-government-domestic-violence-bill/231653.

8 Lobel, *supra* note 4.

public/private distinction in litigation that dispute resolution scholars have struggled with for decades.[9] This paper argues that the use of NDAs in cases involving the public interest in safety (for example, the protection of school and university students from known sexual harassers) and freedom from discrimination and harassment of all forms (for example racism, gender harassment, transphobia, religious discrimination) is both immoral and unlawful.

While many of the same moral and legal issues arise in relation to NDAs in cases involving discrimination and other forms of harassment, my focus here is on NDAs that are a consequence of settlements made following allegations of sexual misconduct. Sexual misconduct includes sexual harassment, both in real-time and online, unwelcome touching, sexualized references in conversations (verbal harassment), sexual assault, and rape.[10] The legal context of the suits I shall focus on include a civil action for sexual assault or harassment brought by a victim, or an employee dismissed for sexual misconduct who sues their former employer to contest their termination. I will also write from my personal experience as the subject of a defamation suit brought by a former colleague protected by an NDA when I provided truthful information about the reasons for his termination to prospective employers.

II. Who Do NDAs Benefit?

NDAs are often presented as a means to protect victims of sexual assault or harassment at their request. This is a misleading framing. Victims are often not even consulted where NDAs are used between an employer and an employee as part of a deal reached following the termination of employment for sexual misconduct (as in the case of my former colleague). In such cases, the alleged victims of the person being terminated are rarely asked to sign (they are not parties to the litigation between employer and employee). It is important, therefore, to recognize that such agreements are not concerned with protecting the privacy of victims.

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[9] For an examination of how the #MeToo movement is affecting the ongoing debate over mandatory arbitration, *see* Sternlight, *supra* note 3, at 159.

[10] For two comprehensive definitions, *see What is Sexual Misconduct and What Does it Include?*, Saint Joseph U., https://sites.sju.edu/support/sexual-misconduct/ (last visited May 18, 2020); *see also Sexual Misconduct Definitions*, Geo. U., https://sexualassault.georgetown.edu/definitions/ (last visited May 18, 2020).

They are expressly for the protection of the employer and employee.

In other instances, where a civil action for sexual assault or harassment is brought by a person alleging they are a victim, a settlement agreement including an NDA may be signed by the victim and the alleged perpetrator. It will typically forbid any public discussion of the matter now or in the future. This is the modality that is most commonly reported in new media; for example, the "secret settlements" made by Harvey Weinstein.[11] I have been told by a number of individuals that they were pressured into signing such agreements and told that they would not receive a negotiated monetary settlement until they did so. Some refuse to sign such a "gag order"; they prefer to reserve the right to talk about the case in the future if they wish to, as they go through a recovery process, and do not receive their settlement.[12]

The false framing of NDAs as necessary to protect victims has been exposed by recent cases[13] in which the victim has spoken up in breach of the NDA because they saw their perpetrator getting away with further abuse. The protection of victim identity does not require a promise by the victim to never to speak about the matter themselves. A simple confidentiality clause regarding their identity facilitates their protection, without the need to limit public discussion of the case, and without constraints on the identification of the alleged perpetrator. It could also be waivable in the future on the victim's part—for example if the alleged victim wished to identify herself in the public domain by speaking up about the case. Unlike an NDA, a simple clause of this nature would not forbid any information about the alleged perpetrator being disclosed to future prospective employers or others who might be affected.

In contrast, an NDA allows both the employer plaintiff and the employee defendant to escape public scrutiny because it binds the parties to confidentiality about both the fact of and the reasons for the termination. It reflects some mutuality of interests between the employer and former employee. The employer will often want to hide the shame of having employed them at all (especially given

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11 Described at length in JODI KANTOR & MEGAN TWOHEY, SHE SAID (2019).

12 *See, e.g.*, *Jumping Off the Ivory Tower with ProfJulieMac: NDAs: A Toxic Bargain*, NSRLP (June 4, 2019), https://representingyourselfcanada.com/ndas-a-toxic-bargain/.

13 *See, e.g.*, Chris Cook & Lucinda Day, *Commons Speaker John Bercow Accused of Bullying Private Secretary*, BBC NEWS (May 2, 2018), https://www.bbc.com/news/uk-politics-43963788; Harry Litman, *Stormy, Don't Worry About Violating Your NDA*, CNN, https://edition.cnn.com/2018/03/25/opinions/trump-unreasonable-damages-daniels-opinion-litman/index.html (last updated Mar. 26, 2018).

how long it usually takes for the employer to take decisive action and issues of safety for co-workers and others). Employing a sexual predator does not look good for investors, alumni, congregants or others. The employee will not want a prospective future employer to know why they were terminated. Covering it up is in the interests of both parties.

The courts have recently begun to consider whether there are implications for other parties by the making of such agreements. In *Giannecchini v. Hospital of St. Raphae*l,[14] following his termination for serious medication errors, Mr. Giannecchini, a nurse, and his employer entered into a settlement agreement.[15] This required the hospital to expunge all termination records and provide him with a limited reference letter.[16] However, when Mr. Giannecchini was subsequently employed at another hospital, his former employer forwarded all termination documents to the new employer which clearly stated the reasons for his termination.[17]

The court acknowledged that in cases such as this, there is a third-party interest that is "unrepresented at the bargaining table:" here, the patient.[18]

> . . . [T]he contract affects a third interest unrepresented at the bargaining table. That interest is the interest of the patient. A patient in a hospital is frequently helpless and utterly dependent on the nurses assigned to care for him. Any patient in any hospital would surely hope that the hospital hiring his nurses would receive full information about any medication errors that the nurse had committed in the course of prior health care employment. As far as the patient is concerned, this is potentially a life and death matter. It is no answer to the patient's legitimate concerns that a contract of silence is mutually advantageous between the nurse and his former employer. A contract of this nature is affirmatively disadvantageous to the patient. If contractual provisions like this are judicially enforceable, some of the most vulnerable citizens in our society—patients in hospitals—will inevitably be exposed to a risk of physical harm.[19]

Similarly, in *Bowman v. Parma Board of Education*, the plaintiff was a teacher at a public school who was dismissed following

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14 *Giannecchini v. Hosp. of St. Raphael*, 47 Conn. Supp. Ct. 148, 154–61 (Conn. Super. Ct. 2000).

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 155.

19 *Id.*

numerous allegations of sexual misconduct.[20] Following his termination, the plaintiff, Ginebaugh entered into a settlement agreement that contained a non-disclosure clause.[21] The defendant, Smallwood, a teacher at the school, subsequently telephoned Ginebaugh's new employer and advised them that he had been fired for child molestation.[22] The NDA was held to be void as against public policy.[23] The court said that it would "expose [the] most vulnerable citizens to . . . unacceptable . . . harm."[24]

III. What are the Implications of NDAs in Cases of Sexual Misconduct?

NDAs appear to have become a common bargaining chip in the negotiation of a settlement in a termination case where the context is "sensitive"; that is, where there are allegations accepted by the employer as "just cause" for termination including sexual misconduct or discriminatory, bullying, or racist behavior. In contested cases involving sexual misconduct allegations, adjudication or arbitration will require testimony by victims who may be unwilling to participate for a variety of reasons and who may attract unwelcome publicity.

The incentive to settle such cases for employers is high. Employers can use the prospect of an NDA to persuade the plaintiff to settle with them before a hearing; equally, the employee plaintiff may propose an NDA as a branch of their settlement proposal. While no formal data is available on how often NDAs are introduced into such negotiations, recent reports suggest that they are increasingly common in the context of employment terminations.[25]

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20 *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663, 664 (Ohio Ct. App. 1988).

21 *Id.* at 665.

22 *Id.* at 666.

23 *Id.*

24 *Id.*

25 *See, e.g.*, Simon Murphy, *UK Universities Pay Out £90m on Staff 'Gagging Orders' in Past Two Years*, Guardian (Apr. 17, 2019), https://www.theguardian.com/education/2019/apr/17/uk-universities-pay-out-90m-on-staff-gagging-orders-in-past-two-years; *see also National Inquiry into Sexual Harassment in Australian Workplaces – Limited Waiver of Confidentiality Obligations*, Australian Hum. Rts. Commission, https://www.humanrights.gov.au/national-inquiry-sexual-harassment-australian-workplaces-limited-waiver-confidentiality-obligations (last visited May 18, 2020). (A practical difficulty is obtaining information about the existence of a non-disclosure agreement and developing data. The Australian National Inquiry into Sexual Harassment in Australian Workplaces, a project of the Australian Human Rights Commission, asked

However, as *Giannecchini* and *Bowman* set out, this practice has many implications for third parties, including individual victims, potential future victims, and the public at large, where the individual works in a public space.

A. *NDAs Enable Employers to "Pass-the-Trash" to Another Workplace*

NDAs enable an alleged (and sometimes acknowledged, following a workplace investigation) sexual harasser or someone who has sexually assaulted someone in their workplace to move to a new job, hiding the real circumstances of their "departure." On the face of it, an NDA absolves an employer from responding truthfully and honestly to reference requests and direct questions about the circumstances of the predator's departure.

This has been challenged in litigation. Employers owe a duty of care towards third parties in a number of contexts; for example, to students in a university or a school or to other employees to ensure they are protected from harassment by co-workers. Not telling the truth about a history of misconduct could be a breach of this duty of care, which may extend beyond the immediate workplace or environment. In *Doe-3 v. McLean County Unit District No. 5 Board of Directors*,[26] the plaintiffs—two children who had been sexually molested by the defendant and their mothers—argued that since the McLean School District administrators had been aware of the "teacher-on-student sexual harassment, sexual abuse, and/or sexual 'grooming' of minor female students,"[27] their failure to pass this information along to the defendant teacher's new school (in the Urbana School District) was a breach of their duty of care to the plaintiff students at the new school, whom he subsequently abused.[28] The defendant teacher was an admitted abuser, a so-called "mobile molester."[29] Specifically, the Illinois

organizations to waive confidentiality to enable employees to come forward and contribute to their enquiry.).

[26] *Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Dirs.*, 973 N.E.2d 880 (Ill. 2012).

[27] *Id.* at 885.

[28] *Id.* at 891.

[29] Clay Webb & Richard Fossey, *Doe v. McLean County Unit District No. 5: School Officials Who Make False Statements about a Former Teacher who is a Sexual Abuser Can be Held Liable to the Abusive Teacher's Future Victims*, EDUC. L. ASS'N (Mar. 2013), https://educationlaw.org/453-slr-recycle/2388-doe-v-mclean-county-unit-district-no-5-973-ne2d-880-ill-2012 ("Everyone in public education knows about the so-called 'mobile molester,' the teacher who sexually abuses

Supreme Court held that ". . . [the] defendants' act of misstating White's employment history on the employment verification form sent to Urbana"[30] was a breach of their duty of care towards students.[31] The decision found that a school district employer that passes off an employee to another school district by misstating the employee's history owes a duty of care to students later injured by the employee and may be held liable for instances of harm.[32] As the court observed, "[w]here a teacher who is known to have abused children is hired in a teaching position at another school, the likelihood that students at the next school will be abused by that teacher is within the realm of reasonable probability."[33]

Similarly, in *Randi W. v. Muroc Joint Unified School District*,[34] a 1997 California case also involving a school board, the court held that the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons.[35] The court emphasized the importance of public policy considerations protecting young persons, and noted that even in the absence of a "special relationship" of care, in California "all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct."[36]

While by no means yet settled, the likelihood that an NDA does not protect a former employer who provides inaccurate information or fails in a duty to warn appears to be growing, at least in relation to educational institutions. In Canada, a recent decision of the Ontario Superior Court (in which I was the plaintiff) cites these U.S. cases in holding that an insurer is liable to indemnify where an accurate reference has been given despite the existence of an NDA signed by the university administration and an individual termi-

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children in a school district, is terminated, and then moves on to work in another school district because the teacher's former employer provided the teacher with a good employment reference in order to quietly get rid of him").

30 *Doe-3*, 973 N.E.2d at 889.

31 *Id*.

32 *Id*. at 892.

33 *Id*. at 891. For a critique of the decision, *see also* Jessica R. Sarff, *An Incomplete "Pass": Why the Illinois Supreme Court Dropped the Ball in Jane Doe-3 v. McLean Cnty. Unit Dist. No. 5 Bd. of Dirs., 973 N.E.2D 880 (ILL. 2012)*, 38 S. ILL. U. L. J. 165, 173–81 (2013).

34 *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591 (Cal. 1997).

35 *See also Davis v. Bd. of Cty. Comm'rs of Doña Ana Cty.*, 987 P.2d 1172, 1183-84 (N.M. Ct. App. 1999).

36 *Randi W.,* 929 P.2d at 588.

nated for sexual and other misconduct.[37] Full and accurate disclosure regarding employees with dangerous or questionable propensities promotes a safe work environment, and a safer society. For this reason, courts have tended to find in favour of free and open communication between past and prospective employers, finding NDAs relating to misconduct in the workplace to be unenforceable on public policy grounds.

B. *NDAs Mean that Co-Workers Must Dissemble or Even Tell Outright Lies—or Risk a Defamation Suit*

Where there is an NDA, a co-worker—even where they do not sign that agreement, like me—may find it becomes dangerous to tell the truth about the termination of a sexual predator. In my case, it got me sued for telling the truth.

My employer (the University of Windsor) refused to defend me for responding truthfully to a request for a professional character reference because they pretended that the employee simply "chose to leave," or that there was "an amicable parting of the ways." The university administration and the faculty association signed an NDA with their former employee[38] to suppress information about their formal intention to dismiss him for "just cause" (specifically, sexual and other misconduct) under the collective agreement. The parties to the NDA continue to perpetuate what they and everyone else knows to be a fiction.

This means that by acting in the interests of students, which I believe to be our responsibility as university professors, and in particular protecting their safety from serial sexual harassers, one is penalized. My university employer would presumably have expected me not to respond to a reference request, or to dissemble and not tell the truth about the circumstances of my colleague's departure. Justice Kimmel's recent decision,[39] as well as earlier U.S. decisions about reference writing for those terminated for misconduct and given an NDA, suggests it is also unsustainable as a legal or administrative strategy in both Canada and the U.S.

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[37] *Macfarlane v. Canadian Universities Reciprocal Insurance Exchange*, 2019 ONSC 4631, para. 55 (Can. Ont. Super. Ct.).

[38] *See* Letter from Anne Forest, then-President of the Windsor University Faculty Association, to the University of Windsor Administration (Mar. 13, 2019) (on file with author). The decision in *Macfarlane v. Canadian Universities Reciprocal Insurance Exchange*, ibid, acknowledges the existence of the NDA multiple times.

[39] *Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Dirs.*, 973 N.E.2d 880 (Ill. 2012).

C. *NDAs Chill the Climate for Reporting Sexual Misconduct*

In the wake of the MeToo movement, there are signs of some greater willingness to speak up about sexual harassment and sexual assault, and to identify serial predators. There is more pressure on employers to investigate and take such complaints seriously. However, this shift in the balance of power is neutralized by the use of NDAs for individuals terminated for sexual misconduct. NDAs enable perpetrators to restore their control by silencing the parties to the agreement.

A subsequent and related development in the use of NDAs is the growth in defamation suits against those who do not uphold the secrecy granted to perpetrators by employers. In Canadian universities alone there are presently more than 20 people—students, faculty and others, all but one, women—being sued for "defamation" by the individuals they have accused of sexual misconduct.[40] These include young students, graduate students, and junior and senior faculty. Some, including myself, are being victimized for disclosing factual information that is hidden by an NDA. None are being supported by their university.

The additional irony is that many of those who have been threatened with defamation suits—a far greater but unknown number than those actually being sued—have signed NDAs as a condition of the withdrawal of the threat again them.

D. *NDAs Give Additional Bargaining Power to Individuals Terminated for Sexual Misconduct*

When an employee is terminated for cause, there is always an internal discussion about how much information shall be passed on to prospective employers. As an experienced mediator in termination cases, I have often facilitated such negotiations which tend to be on a case-by-case basis, and usually relate to how references will be provided.

The growing use of NDAs where there is dismissal for sexual misconduct (not an issue in any of the termination cases I have mediated over the years) gives those dismissed for this reason a bargaining advantage over others dismissed for cause. Employers

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[40] Mandi Gray, Cease and Desist/Cease or Resist? Civil Suits and Sexual Violence (forthcoming 2020) (unpublished Ph.D. thesis, York University).

want to avoid the high cost of litigation over the termination for cause, and sexual harassment and assault is notoriously hard to prove at an evidentiary level without multiple victims being willing to testify. Victims are often traumatized as a result of not only the assaults but a subsequent internal investigation process in which they have been involved. They are often unwilling to testify in a further court or arbitration hearing. This means that the employer is facing the possibility of losing in an adjudication, and the perpetrator knows it. The NDAs are offered as a "deal sweetener."

Further, an employer will often want to hide the shame of having employed an individual who was a workplace harasser or predator. Many of these cases take a long time and many complaints before the employer takes decisive action, and this will not enhance their reputation. This means that covering up what happened using an NDA is often in the interests of both the employer and the employee. It is not, however, in the interests or safety of the third parties who may subsequently be affected.

IV. THE USE OF NDAS BY UNIVERSITIES

Both the Anglican[41] and the Catholic[42] churches have become ubiquitous for regularly moving priests and ministers known to have committed sexual misconduct including sexual abuse, rape, and assault to new locations where they continue their predatory behavior. Sometimes described as "pass-the-trash,"[43] this practice has been widely documented and condemned in recent years. But it is not just the churches who use this strategy to move abusers and harassers around and hide their behavior from scrutiny. Universities use NDAs to pass problematic and disgraced faculty onto other institutions. There could be a formal investigation, clear evidence of sexual misconduct, and the consequent termination of a faculty

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41 *See, e.g.*, Greg Rasmussen, *Anglican Church of Canada Apologizes for Keeping Priest's Sexual Abuse Quiet*, CBC (June 15, 2015, 8:35 PM), https://www.cbc.ca/news/canada/british-columbia/anglican-church-of-canada-apologizes-for-keeping-priest-s-sexual-abuse-quiet-1.3114877.

42 *See, e.g.*, *Sex Abuse Victim Abuses Catholic Church of Fraud*, USA TODAY (June 24, 2010), https://usatoday30.usatoday.com/news/religion/2010-06-24-fraud23_ST_N.htm. *See also* SPOTLIGHT (Participant Media, First Look Media, Rocklin/Faust Productions, Spotlight Film, and Anonymous Content 2015).

43 Sandy K. Wurtele, *Preventing the Sexual Exploitation of Minors in Youth-Serving Organizations*, 34 CHILD. & YOUTH SERVS. REV. 2442, 2445 (2012). *See, e.g.*, Billie-Jo Grant, Stephanie Wilkerson & Molly Henschel, *Passing the Trash: Absence of State Laws Allows for Continued Sexual Abuse of K–12 Students by School Employees*, 28 J. CHILD SEXUAL ABUSE 84, 84, 90 (2018).

member, but an NDA will rub out all of that—the faculty member could still be hired at another university and once again be in a position of authority to engage in the exact same behavior.

In late 2013, I became aware that a tenured faculty member at my law school was sexually harassing and intimidating law students while building a cult of "favoritism."[44] It became clear from students and graduates that this behaviour had been going on for many years. A delegation of students and faculty, myself included, went to the administration and five faculty members formally requested the university to act. An internal investigation of this individual followed, and almost a year later they were notified of the University's intention to dismiss them for misconduct including sexual harassment. The University of Windsor has a collective agreement, and the faculty member brought a grievance according to that procedure. In 2015, facing the prospect of a costly arbitration and concerned that students would be reluctant to testify in an arbitration (this individual was widely feared), the university settled with the individual. To sweeten the deal, they gave my former colleague a non-disclosure agreement, which the faculty association also signed on to.

The NDA made it possible for this individual to go on to seek and ultimately obtain employment in another law school. I was contacted by a colleague at the first school that was considering the individual, asking for information about why they left Windsor. I told him the truth. A second school then hired the individual. When I learned of this, I was connected by colleagues to the Dean at this school and I informed him of the circumstances of my former colleague's departure from Windsor. He told me in that telephone conversation that he had wondered about why the applicant would have left a tenured position and had reached out to the Windsor administration for further information. When he received no response, he had gone ahead and made the hire.

Ever since, I have been lobbying the University of Windsor to stop offering such deals to employees terminated for sexual misconduct.[45] A draft policy was developed that was being reviewed by the university administration. However, in February 2019, I was served with papers originating in Trinidad where my former col-

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44 Affidavits filed in *Macfarlane v. Canadian Universities Reciprocal Insurance Exchange*, 2019 ONSC 4631, para. 55 (Can. Ont. Super. Ct.).

45 Lori Ward & Mark Gollom, *Universities Should Protect Students, Not Reputation: Professors Call for Elimination of Confidentiality Deals*, CBC (May 7, 2018, 4:00 AM), https://www.cbc.ca/news/canada/windsor/university-windsor-non-disclosure-agreements-professor-1.4645268.

league (who currently resides there) had filed a defamation action against me.

The absolute defense of truth[46] can be simply evidenced by the university's original termination letter issued to my former colleague in December 2014. However, because of the NDA they signed with him the following year in order to settle his grievance under the collective agreement, the university refuses to release it (and cannot be compelled to in Trinidad).

The university sent the statement of claim to their insurer.[47] The insurer took months to respond, apparently not having encountered an issue involving an NDA before, and eventually declined coverage in a one-line email.[48] Their initial explanation was that I was not "acting in the course of employment" as the policy required.[49] This was clearly not true, since I was providing a reference.

The insurer refused to negotiate, so I instructed my lawyer Natalie MacDonald (an employment lawyer and a former student acting *pro bono* and supported by a larger group of former students who are now lawyers, arbitrators, and judges) to bring a motion to compel them to defend me in the defamation suit. The date of trial in Trinidad was creeping ever closer, and a sympathetic case management judge in the Ontario Superior Court gave us an expedited hearing date.

At the hearing in July 2019, the insurer argued that professors can only be indemnified where they are acting "under the instructions of" their university employer and not "taking a position critical" of their employer. Justice Jessica Kimmel ruled that this would exclude many courses of employment activities—including providing a reference—from proper indemnification. She stated that:

> While the University of Windsor may have an official position . . . that does not mean that others within the institution no longer speak on its behalf just because they have a different view or perspective.

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46 RAYMOND BROWN, BROWN ON DEFAMATION (2d ed. 2017). *See also Kanak v. Riggin*, 2017 ONSC 2837, para. 29 (Can. Ont. Super. Ct. 2017), affirmed by *Kanak v. Riggin*, 2018 ONCA 345 (holding that employment references attract qualified privilege).

47 There is one insurer for all Canadian universities, the *Canadian Universities Reciprocal Insurance Exchange* or CURIE.

48 Email from University of Windsor counsel Al Formosa citing response from Can. U. Reciprocal Ins. Exchange ("the insurer has declined to provide a defence for Dr. Macfarlane") to my lawyer, Natalie MacDonald (Mar. 15, 2019) (on file with author).

49 *Id.*

> "Acting on behalf of" does not require that the specific act be authorized, instructed, permitted or approved by the University of Windsor . . . .[50]

She also dismissed the insurer's argument that an agency relationship was required for indemnification.[51]

In a comment that is important for university professors more broadly, Justice Kimmel anchored her decision in the following reality: "A university is not an institution with a single voice or a single set of interests—the interests of a university will be broad and diverse and may even be in conflict with one another from time to time."[52]

The judge also dismissed the argument of the insurer that I should not be indemnified for actions that were motivated by moral principles, as follows:

> Even if [Professor] Mac[f]arlane was motivated for personal reasons to make the [i]mpugned [s]tatements . . . I still must consider whether the substance of the claims raise even the possibility that she was also acting in her capacity as a professor [at] the University of Windsor, and not acting solely in her personal capacity. These two capacities are not mutually exclusive.[53]

In fact, Justice Kimmel points out my disclosures to third parties regarding an NDA that I was not party to may in fact rebound to the University of Windsor's benefit:

> [T]he fact that it signed an NDA with Mr. Crowne and may have an interest in upholding that agreement does not mean that the University does not also have an interest in protecting itself and its reputation by endorsing the practice of its professors providing *honest and truthful . . . off-list references*. Similarly, signing the NDA with Mr. Crowne does not mean that the University . . . does not have an interest in protecting itself against claims by students at other universities to whom it may be found to have owed a *legal and moral duty*. . . .[54]

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50 *MacFarlane v. Canadian Universities Reciprocal Insurance Exchange*, 2019 ONSC 4631, para. 43–44 (Can. Ont. Super. Ct.).

51 *Id.* at para. 47–49.

52 *Id.* at para. 43.

53 *Id.* at para. 39.

54 *Macfarlane v. Canadian Universities Reciprocal Insurance Exchange*, 2019 ONSC 4631, para. 45 (Can. Ont. Super. Ct.), (first citing generally *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997); then citing generally *Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Dirs.*, 973 N.E. 2d. 880 (Ill. 2012)).

> There is at least a possibility that [Professor] Mac[f]arlane was acting in the interests of the [u]niversity . . . where the disclosures she made . . . *may protect it from reputational damage or exposure to further third-party tort liability*.[55] (emphasis added)

This point is important in light of current ongoing litigation by students against universities where there is a claim that the universities have failed to protect them from known sexual predators whose activities the universities were aware of for many years.[56] One of these suits, brought against Dartmouth University by a group of students in respect to three psychology professors who were alleged to have turned the department into a "21st Century Animal House" of sexual harassment, settled in August 2019 for $14 million.[57] The students argued that the university failed to protect them from sexual harassment despite being aware of the activities of the three professors.[58]

V. Going Forward: Other Related Developments

As the debate over the use of NDAs to protect known sexual predators continues to expand, it is instructive to review legislative and regulatory responses to this issue. These range from outright bans on the use of NDAs where the dismissal is the result of sexual violence, racism, or discrimination, to more nuanced efforts to distinguish particular circumstances and advice to lawyers on facilitating NDAs.

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[55] *Id.* para. 45, 46.

[56] Danielle Dreilinger, *Dillard Rape Lawsuit Says University Failed to Protect Students*, Nola.com (Mar. 29, 2017, 10:42 PM), https://www.nola.com/education/2017/03/dillard_sexual_assault_lawsuit.html; Emanuella Grinberg et al., *Lawsuit: 'Predatory' Dartmouth Professors Plied Students with Alcohol and Raped Them*, CNN, https://www.cnn.com/2018/11/15/us/dartmouth-title-ix-lawsuit/index.html (last updated Nov. 16, 2018, 3:40 PM); Scott Jaschik, *Redefining the Obligation To Protect Students*, Inside Higher Ed (Dec. 20, 2018), https://www.insidehighered.com/news/2018/12/20/court-revives-lawsuit-over-online-threats-made-feminist-students-u-mary-washington; Bruce Vielmetti, *Lawrence University Sued Over Campus Sex Assault Procedures*, J. Sentinel (July 13, 2018, 12:14 PM), https://www.jsonline.com/story/news/2018/07/13/student-sues-lawrence-university-over-alleged-campus-sex-assault/782109002/.

[57] Madeleine Thompson, *Dartmouth Settles Sexual Harassment Lawsuit for $14 Million*, CNN, https://www.cnn.com/2019/08/06/us/dartmouth-settles-harassment-lawsuit/index.html (last updated Aug. 6, 2019, 8:19 PM).

[58] *Id.*

A. *Legislative Developments*

In the U.S., federal legislation introduced by the Obama administration (the Every Student Succeeds Act 2015) prohibits school employees from assisting other school employees in obtaining new employment if that individual knows or has grounds to believe that the person has engaged in sexual misconduct with a student.[59] A steadily growing number of states have enacted legislation restricting the use of NDAs. California's legislation makes it unlawful to require an employee to sign an agreement "that purports to deny the employee the right to disclose information about unlawful acts in the workplace . . . ."[60] Legislation in Washington State, Tennessee, and Vermont adopts a similar approach.[61] In New Jersey, any contract or agreement to conceal details relating to a claim of discrimination, retaliation, or harassment is now unenforceable against employees, while permitting employers and employees to enter into them if they wish.[62]

In the wake of the scandal surrounding prominent businessman Sir Philip Green and revelations regarding his frequent use of NDAs to silence employees, legislation is planned in England and Wales to restrict the use of NDAs in cases of workplace sexual misconduct and discrimination.[63]

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59 Every Student Succeeds Act, Pub. L. No. 114-95, § 8038, 129 Stat. 1802, 2120 (2015) ("A State, State educational agency, or local educational agency in the case of a local educational agency that receives Federal funds under this Act shall have laws, regulations, or policies that prohibit any individual who is a school employee, contractor, or agent, or any State educational agency or local educational agency, from assisting a school employee, contractor, or agent in obtaining a new job, apart from the routine transmission of administrative and personnel files, if the individual or agency knows, or has probable cause to believe, that such school employee, contractor, or agent engaged in sexual misconduct regarding a minor or student in violation of the law." Exceptions are made when the offence has been reported to a proper authority or a case has been closed following police investigation.).

60 CAL. GOV'T CODE § 12964.5 (Deering 2019) (effective Jan. 1, 2019).

61 *See* S.B. 5996, 65 Gen. Assemb., Reg. Sess. (Wash. 2018) (effective June 7, 2018); H.B. 2613, 110 Gen. Assemb., Reg. Sess. (Tenn. 2018) (effective May 18, 2018); H.B. 707, 74 Gen. Assemb., Reg. Sess. (Vt. 2017) (effective May 28, 2018).

62 S.No. 121, 218 Gen. Assemb., Reg. Sess. (N.J. 2019) (precluding any "provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment.") (effective Mar. 18, 2019).

63 Lewis Radstone-Stubbs, *New Legislation Could Outlaw Non-Disclosure Agreements*, GUARDIAN (Mar. 3, 2019, 1:59 PM), https://www.theguardian.com/law/2019/mar/03/ban-on-gagging-clauses-non-disclosure-agreements-work.

B. *Regulatory Action*

In England and Wales, the Solicitors Regulation Authority ("SRA") issued a "warning notice" on the use of NDAs to its solicitor members in March 2018,[64] followed by further and more restrictive guidance by the Law Society (of which the SRA is an independent branch) in February 2019.[65] This "guidance on the extent of the NDA" advises that an NDA should not prevent an individual from making certain disclosures, including protected whistleblower disclosures; reporting to a professional regulator, giving evidence at disciplinary proceedings brought by a regulator or professional body; reporting an offence to the police; or in relation to the matters arising from their employment. It also stipulates the importance of ensuring that an NDA, where it is used, should be drafted in clear language and easily understood by all signatories. Some feel that this detailed advice does not go far enough to protect parties, especially those without legal representation, from signing NDAs that are prejudicial to themselves or others.[66] Perhaps in response to a rapidly changing climate regarding the use of NDAs, the Law Society has announced a new public education program to inform workers about their rights in relation to signing NDAs in August 2019.[67]

C. *Universities*

The consequences of the Ontario decision remain to be seen,[68] but given the importance of insurers controlling their costs, one possible impact may be that university insurers advise their policyholders not to give NDAs in the case of termination for cause that includes sexual misconduct. The settlement in the Dartmouth case

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64 *Warning Notice: Use of Non-Disclosure Agreements (NDAs)*, SOLIC. REG. AUTH. (Mar. 12, 2018), https://www.sra.org.uk/solicitors/guidance/warning-notices/use-of-non-disclosure-agreements-ndas—warning-notice/.

65 *Non-Disclosure Agreements and Confidentiality Clauses in an Employment Law Context*, L. SOC'Y (Dec. 12, 2019), https://www.lawsociety.org.uk/support-services/advice/practice-notes/non-disclosure-agreements-and-confidentiality-clauses/.

66 Richard Moorhead, *Law Society's Practice Note on NDAs: I Vote for its Withdrawal*, LAW. WATCH BLOG (Mar. 14, 2019), https://lawyerwatch.blog/2019/03/14/law-societys-practice-note-on-ndas-i-vote-for-its-withdrawal/.

67 *NDAs and Confidentiality Agreements - What You Need to Know*, L. SOC'Y, https://www.lawsociety.org.uk/for-the-public/common-legal-issues/problems-at-work/non-disclosure-agreements/ (last visited Sept. 8, 2019).

68 CURIE has announced that there will be no appeal.

led to an immediate announcement of a new sexual violence policy at the university,[69] a pattern one would expect to see repeated in future successful class actions by students.

Existing case law described above emphasizes the public responsibilities of universities that create a duty of care, in common with public schools, that may extend beyond their immediate students. The special status of public sector institutions also relates to public policy and public interest arguments that might be made regarding the enforceability of NDAs in the future in both Canada and the U.S. It also seems unlikely that privacy legislation could be used to protect sexual miscreants since most privacy of information regimes contain exceptions for access to information that is relevant to the protection of public health and safety.[70] Finally, we have not seen an attempt to engage the statutory occupational health and safety provisions that exist throughout Canada and the U.S. as a means of defeating an NDA that relates to known sexual misconduct, or any effort to require an NDA to be included in a settlement agreement. For example, in Ontario, an employer has a statutory responsibility to ensure a safe and healthy workplace.[71] This appears to be in direct tension with providing NDAs to workers terminated for sexual misconduct.

VI. Conclusions

It is important to protect recourse to private, confidential settlement processes to resolve legal disputes and in particular to create space for creative problem solving outside the win/lose options of litigation. My work as a researcher, mediator, and educator has examined this question time and time again, confronting inevitable questions about the justice and fairness of privately negotiated settlements while simultaneously affirming the need for access to fair settlement mechanisms outside (albeit in the shadow of) the courts.

The scandals created by the use of non-disclosure agreements in cases involving sexual misconduct or allegations thereof is an example of the difficulty of anticipating the many challenges of pri-

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69 *Dartmouth Sexual and Gender-Based Misconduct Policy and Procedures*, Dartmouth, https://sexual-respect.dartmouth.edu/compliance/dartmouth-sexual-and-gender-based-misconduct-policy-and-procedures (last visited Sept. 8, 2019).

70 For an example from Ontario, *see* Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c F.31 § 21(2) (Can.).

71 *See* Occupational Health and Safety Act, R.S.O. 1990, c O.1 § 25(2)(a) (Can.).

vate settlement within a commitment to public good. It shines a light on two issues that I regard as "best practices" among mediators and which are critical to the credibility of private settlement processes.

The first is the need to ensure that settlement is always voluntary and unconditional, not the result of undue pressure on one or more parties. Parties to agreements involving sexual misconduct should not be required or expected to sign NDAs. All victims should have a built-in waiver if they wish to sign now but may change their mind about stepping forward and publicly identifying the perpetrator and/or themselves in the future. This is an important part of recovery and healing for some survivors of sexual violence. Their anonymity and that of the perpetrator are *not* inextricably entwined.

The second "best practice" principle here is the importance of transparency where there are third party interests at stake. While it is often in the interests of corporate and other defendants to keep settlement details confidential, so-called "sunshine regimes" have attempted to limit the circumstances in which this can happen. There is ongoing debate over the extent to which such systems should require publication of privately agreed settlements.[72]

The use of NDAs in sexual misconduct cases in my opinion is a far more straightforward issue. It is an egregious and unnecessary invasion of third-party rights; victims can achieve anonymity without the use of a blanket clause suppressing the passing of any information about a perpetrator to future employers or colleagues. I would argue that it is an indisputable manipulation of private settlement to suppress information that is critical to third parties. In this case, those individuals who may find themselves working or studying alongside known sexual predators—that may affect their personal safety or security.

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72 *See* Lothes *supra* note 3; *See also,* Ross E. Cheit, *Tort Litigation, Transparency, and the Public Interest*, 13 ROGER WILLIAMS U. L. REV. 232 (2008).