

HUSHING CONTRACTS

DAVID A. HOFFMAN & ERIK LAMPMANN*

ABSTRACT

The last few years have brought a renewed appreciation of the costs of nondisclosure agreements that suppress information about sexual wrongdoing. Recently passed bills in a number of states, including New York and California, have attempted to deal with such hush contracts. But such legislation is often incomplete, and many courts and commentators continue to ask if victims of harassment can sign enforceable settlements that conceal serious, potentially metastasizing, social harms. In this Article, we argue that employing the public policy doctrine, courts ought to generally refuse to enforce hush agreements, especially those created by organizations. We restate public policy as a defense which should be concerned with managing externalities, and which expresses a legitimating account of contract law.

* Hoffman is a Professor of Law, University of Pennsylvania Law School, where Lampmann will graduate in 2020. For comments on earlier drafts, we thank Adam Badawi, Jean Galbraith, Leora Eisenstadt, Serena Mayeri, Brishen Rogers and Tess Wilkinson-Ryan.

TABLE OF CONTENTS

INTRODUCTION.....	166
I. THE PUBLIC COSTS AND PRIVATE BENEFITS OF SECRECY ABOUT SEXUAL WRONGDOING	171
<i>A. The Costs of Hush Contracts</i>	174
<i>B. The Costs of Nonenforcement: What do Hush Contracts Achieve</i>	182
II. PUBLIC POLICY & HUSH CONTRACTS	189
<i>A. NDAs and Employer Breach in the Public Interest</i>	192
<i>B. NDAs and Court-Approved Settlements</i>	195
<i>C. NDAs and Whistleblowers</i>	196
<i>D. NDAs and Adulterers</i>	197
III. PUBLIC POLICY AS AN EXTERNALITY PROBLEM.....	198
IV. TOWARDS AN EXPRESSIVE THEORY OF CONTRACT DEFENSES.....	203
<i>A. An Expressive Account of Public Policy in Contract</i>	204
<i>B. Application to Hush Contracts</i>	213
<i>C. A Few Obvious Objections</i>	215
CONCLUSION	219

INTRODUCTION

Contracts are making news.

In December 2016, McKayla Maroney, a gold medal winning American gymnast, agreed to settle her lawsuit against USA Gymnastics (USAG) for enabling Dr. Larry Nassar to abuse her. In the settlement agreement, Maroney promised to either refrain from further speech about her ordeal or pay a \$125,000 liquidated damages fee,¹ together with the costs and fees of enforcement.² Revelation of this stipulation created a national furor,³ and USAG ultimately abandoned it.⁴

1. Victor Mather, *McKayla Maroney Says USA Gymnastics Forced Confidentiality in Sexual Abuse Settlement*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/sports/olympics/mckayla-maroney-usa-gymnastics-confidentiality-agreement.html> [https://perma.cc/H8S3-498Y].

2. Complaint for Damages at 56, *Maroney v. Mich. State Univ.*, No. BC-687396 (Cal. Super. Ct. Dec. 20, 2017) [hereinafter *Maroney Complaint*].

3. Scott Gleeson, *Chrissy Teigen Offers to Pay \$100,000 Fine for McKayla Maroney to Speak Out Against Nassar*, USA TODAY (Jan. 16, 2018, 4:01 PM), <https://www.usatoday.com/story/sports/olympics/2018/01/16/chrissy-teigen-offers-pay-100000-fine-mckayla-maroney-larry-nassar/1036339001/> [https://perma.cc/C93D-Y7VZ].

4. Heather Tucker, *USA Gymnastics Says It Will Not Fine McKayla Maroney if She Speaks Out Against Larry Nassar*, USA TODAY (Jan. 16, 2018, 10:40 PM), <https://www.usatoday.com/story/sports/olympics/2018/01/16/usa-gymnastics-mckayla-maroney-larry-nassar/1039025001/> [https://perma.cc/5CGW-28QA].

In October 2017, Zelda Perkins, the longtime assistant to Miramax's Harvey Weinstein, broke a nineteen-year-old agreement in which she agreed not to reveal that the mogul had harassed her in return for £250,000.⁵ Perkins's breach of contract sparked a swell of stories by other victims of Weinstein, and, along with his resignation and the firm's bankruptcy, intensified the burgeoning #MeToo movement.

Finally (and you knew this was coming), on October 28, 2016, ten days before the Presidential election, Michael Cohen executed an agreement with Stephanie Clifford, in which Clifford agreed to keep silent about an alleged affair with Cohen's client, Donald Trump, as well as return evidence of the relationship, in return for a sum of \$130,000.⁶ Clifford's 2018 suit to render the agreement unenforceable ignited a political and legal battle that encompassed the Special Counsel's office, guilty pleas for criminal violations of campaign finance laws,⁷ and weighty matters of Presidential immunity.⁸

These agreements concern underlying behavior with sundry culpabilities and quell disclosure with a variety of contractual spurs. As a threshold matter, they deal with different sorts of behavior—from a consensual affair involving the President to criminal sexual assault. But, notwithstanding the obvious differences, each, when revealed, engendered a similar public response: disgust. Indeed, our present moment of reconceiving and coming to terms with sexist and sex-based misconduct, organized around #MeToo, is driven largely by a reaction to wrongdoing buried by contract, and revealed by its breach. Public disclosures of contractual secrets are giving breach a good name.

This Article considers the emerging political and legal movement surrounding *hush contracts*—which we define as nondisclosure agreements covering sexual misconduct.⁹ We use the term “sexual misconduct”

5. Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES (Oct. 23, 2017), <https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589> [https://perma.cc/S3ZW-KXLZ].

6. Complaint for Declaratory Relief at 4, *Clifford v. Trump*, No. BC-696568 (Cal. Super. Ct. Mar. 6, 2018), <http://documents.latimes.com/stormy-daniels-donald-trump-complaint/> [https://perma.cc/ZA5M-NZWA] [hereinafter *Clifford Complaint*].

7. Plea Agreement, *United States v. Cohen*, No. 1:18-cr-00850-WHP (S.D.N.Y. Nov. 29, 2018), <https://assets.documentcloud.org/documents/5331554/Michael-Cohen-plea-agreement-from-the-Special.pdf> [https://perma.cc/T857-V9RW].

8. *Clifford Complaint*, *supra* note 6, at 2.

9. The parlance of “hush” or “hushing” contracts extends back to at least 1995, and continues to surface in popular press articles concerning settlement agreements which contain nondisclosure and confidentiality provisions. See, e.g., Sharon Walsh, *Hushing Up Harassment?*, WASH. POST (Apr. 9, 1995), <https://www.washingtonpost.com/archive/business/1995/04/09/hushing-up-harassment/184827af-21de-49ad-9cb0-b94917ef5592/> [https://perma.cc/7Q64-749R]; see also Eliza Dushku, *Eliza Dushku: I Worked at CBS. I Didn't Want to be Sexually Harassed. I Was Fired.*, BOS. GLOBE (Dec. 19, 2018),

deliberately to refer to the widest possible category of wrongdoing of a sexualized or sex-based nature.¹⁰ In so doing, we thread the needle between employment discrimination scholars' power-based account of sexual harassment (which considers "harassment as an expression of workplace sexism, not sexuality or sexual desire")¹¹ and the commonplace use of sexual harassment to refer only to sexual advances motivated by desire.¹² We focus on those instances where parties contract to conceal misconduct of a sexual nature whose nondisclosure carries a steep cost to the public.

The moment is ripe for such a treatment, as hush contracts are increasingly the subject of legislative action. In one recent, and salient, example, in its 2018 budget, New York State passed a law that Governor Cuomo bragged would "end the secrecy and coercive practices that have enabled [sexual] harassment for far too long."¹³

Upon closer inspection, New York's bill (like many recently passed or considered laws across a variety of jurisdictions) is a virtual husk.¹⁴ The key language permits a hush contract if it is the "complainant's preference," defined as the victim agreeing to the wrongdoer's proposal after a twenty-one day waiting period.¹⁵ Or, to put it differently, New York State prohibits only those hush contracts that lack mutual assent. Nondisclosure about

<https://www.bostonglobe.com/opinion/2018/12/19/eliza-dushku-responds-what-happened-cbs-took-job-and-because-objected-being-sexually-harassed-was-fired/OCh7h0pwwg4Aq7xfwOUasyO/story.html> [<https://perma.cc/EQ3R-EQWF>]. For our purposes, "hush contracts" include both those agreements concealing potentially unlawful sexual misconduct and consensual sexual acts found objectionable for other reasons, *see, e.g., infra* Part IV.B (applying our framework to President Trump's dealings with Ms. Clifford).

10. For us, "sexual misconduct" therefore encompasses behaviors ranging from sexual assault to verbal harassment unrelated to the offender's sexual desires, *see infra* notes 86–89.

11. Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 24 (2018), <https://www.yalelawjournal.org/forum/reconceptualizing-sexual-harassment-again> [<https://perma.cc/W4FG-EWMG>]; *see also* Vicki Schultz, Essay, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018), <https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars/> [<https://perma.cc/DH55-D6TQ>]. By defining the scope of our inquiry into hush contracts in terms of sexual misconduct, we attempt to sweep in the widest possible variety of sex-based or sexual behavior hushed by contractual agreement.

12. *See, e.g., Sexual Harassment*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003) ("[U]ninvited and unwelcome verbal or physical behavior of a sexual nature especially by a person in authority toward a subordinate (such as an employee or student).").

13. David Klepper, *Cuomo to Push for Legislation to Combat Sexual Harassment*, ASSOCIATED PRESS (Jan. 2, 2018), <https://www.apnews.com/438907e689ba483a93bfb63099451990> [<https://perma.cc/c/5DJM-UMYJ>].

14. 2018 N.Y. Sess. Laws Ch. 57, pt. KK, subpt. D, § 1 (McKinney) (codified at N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2018)); *see also infra* Part I.B for a discussion of these state laws and exceptions.

15. N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2018).

sexual wrongdoing may be politically disfavored, but lawmakers have been largely unwilling to make such contracts categorically unenforceable.¹⁶

Why are hush contracts so hard to kill? The most flattering accounts posit that nondisclosure agreements (NDA) are necessary for corrective justice.¹⁷ As the argument goes, settlement often can occur only if the parties agree to hold its terms (and very existence) silent.¹⁸ Because compromise can be the only practical recourse for private parties, making nondisclosure clauses enforceable may be necessary to remedy harms.¹⁹

In this Article, we argue that even those who are attracted by utilitarian accounts of contract law ought to reject this defense of hush contracts.²⁰ After collecting information from a variety of sources and disciplines, we argue that not only do hush contracts encourage specific acts of repeated (and spiraling) misconduct,²¹ but also they can corrupt entire organizations and communities.²² As a recent exposé put it, “[l]ike a stealthy virus, sexual harassment impacts the wellbeing of society at every level.”²³ Consequently, we conclude that even when the parties consent at arms-

16. We will discuss the key counterexample, California, *infra* notes 138–142.

17. See generally Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 314 (2018) (recommending that the fact of settlement, but not the amount, might in extraordinary circumstances be kept public); see also Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76 (2018) (arguing NDAs should be enforceable only if they meet certain formalities).

18. For example, Debra Katz, a plaintiff’s attorney, argues that confidentiality is necessary to settlement agreements because plaintiffs “want their privacy protected and if they feel like they can’t end these situations with a private resolution, they’re not going to come forward.” Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment Settlements*, NATION (Jan. 12, 2018), <https://www.thenation.com/article/how-to-end-the-silence-around-sexual-harassment-settlements/> [https://perma.cc/6BUH-Q4D7].

19. See Ayres, *supra* note 17. Ayres’s proposal takes on the “difficult task of proposing an intermediate reform” to protect what he sees as the legitimate “survivor privacy” and “false accusation” interests in enforcing NDAs. *Id.* at 77–78. We take on those objections below.

20. For previous work, see Levmore & Fagan, *supra* note 17; Orly Lobel, *NDAs Are Out of Control. Here’s What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), <https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change> [https://perma.cc/LJ96-HVTY]. See also Ayres, *supra* note 17. For a consideration of the corporate law implications of nondisclosure clauses, see Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583 (2018).

21. See Jana Costas & Christopher Grey, *Bringing Secrecy into the Open: Towards a Theorization of the Social Processes of Organizational Secrecy*, 35 ORG. STUD. 1423 (2014) (emphasizing the ways that organizational secrecy is less an official policy and more a combination of formal and informal social processes).

22. See Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 RES. ORGANIZATIONAL BEHAV. 1, 3 (2003) (describing the process by which wrongdoing by individual actors becomes endemic within an organization through institutionalization, rationalization, and socialization).

23. Lynn Parramore, *\$MeToo: The Economic Cost of Sexual Harassment* (Inst. for New Econ. Thinking, Conference Paper, 2018), <https://www.ineteconomics.org/research/research-papers/metoo-the-economic-cost-of-sexual-harassment> [https://perma.cc/G24J-7APG].

length and after due reflection to a hush contract, courts should be very hesitant to enforce this contract.

Our chosen doctrinal hook—increasingly employed by lawyers in hush contract cases²⁴—is the oft-criticized doctrine of contractual public policy. Like other writers—including one in these pages,²⁵ we give that doctrine content by focusing on third-party harm.²⁶ That is, rather than ask if the parties to a contract really consented to it—an inquiry invited by various legislatures’ procedural approaches—we would judge such contracts by their negative externalities.

Grounding public policy in public harms advances two important goals. First, it provides contract law a way to infuse public values, and concerns, into private agreements whose cost and benefits aren’t easily cabined. In an era when contract cases increasingly vanish into secret arbitral tribunals,²⁷ and where digital consent is notional, courts ought to seize the limited opportunities available to demonstrate that the state’s enforcement powers can serve ends that ultimately maximize the public’s welfare, rather than maximizing the goals of parties entering into private agreements which might harm third parties. Moreover, because public policy defenses rely on the factually intense and inherently conservative common law for their articulation, public policy doctrine is self-limiting. That is: unlike legislation, if we are wrong about the balance of costs and benefits hush contracts create, courts will reverse course, and with less difficulty than gridlocked legislatures.

Second, in quieting hush contracts, we seek to revitalize contract doctrine more broadly. The practice of contracting, and the resolution of claims both

24. See, e.g., *Maroney* Complaint, *supra* note 2, at 27, ¶72.

25. See Nancy Leong, *Them Too*, 96 WASH. U. L. REV. 1 (2019) (cataloguing forms of third-party harms implicated in many forms of consensual and non-consensual sexual behavior).

26. We are not the first to suggest that public policy is intertwined with externalities, though we do take the account further than it’s been, particularly with respect to remedies, and importantly, expressive effects. The others we have drawn on in crafting our argument include FARSHAD GHODOOSI, *INTERNATIONAL DISPUTE RESOLUTION AND THE PUBLIC POLICY EXCEPTION* (2017); Adam B. Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 GEO. MASON L. REV. 483 (2010); Aditi Bagchi, *Other People’s Contracts*, 32 YALE J. ON REG. 211, 243 (2015); Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 670–72 (1999) (arguing for whistleblower protection in the case of public hazards); F. H. Buckley, *Perfectionism*, 13 SUP. CT. ECON. REV. 133, 143 (2005); Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115 (1988); Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 HARV. L. REV. 1445 (2006) [hereinafter *Law and Economics*]; Ryan M. Philp, Comment, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL L. REV. 845 (2003) (arguing that courts should refuse to enforce NDAs that threaten the public welfare); James E. Rooks, Jr., *Let the Sun Shine In*, TRIAL, June 2003, at 18.

27. Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law* (N.Y. Univ. Law & Econ., Working Paper No. 18-33, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3261372 [<https://perma.cc/Y54Z-WVE9>].

in court and in arbitration is increasingly a sterile exercise—a joke about “clicking to agree” whose punchline is rote enforcement. We think this trend is pernicious: it threatens to rob contracting of the moral force that it needs to achieve efficacy and legitimacy in a world where almost no contracts are read, breached, or sued upon.²⁸ Courts should push back by seizing on particularly high-profile examples where enforcement of contracts violates ordinary intuitions of fairness and distributive justice. Hush contracts are a good place to start that project of resistance. By refusing to enforce such agreements, courts will give an expressive voice to contract law that it is currently missing.

We proceed as follows. Part I reviews the private benefits and public costs of hush contracts. Part II describes the existing state of public policy doctrine on NDAs. Part III argues for a reimagining of public policy as an engine to reduce external harm. Part IV reveals the need for an expressive account of contract law and ties that account to public policy.

I. THE PUBLIC COSTS AND PRIVATE BENEFITS OF SECRECY ABOUT SEXUAL WRONGDOING

*“With sexual-abuse scandals bubbling out of Hollywood, Capitol Hill, and corporate boardrooms nationwide, you might wonder why the accusers kept their suffering a secret for years, before realizing in recent weeks that they weren’t alone. There’s more than fear behind their silence: Their lips were sealed with a signature.”*²⁹

The antisocial consequences of private civil settlements are a well-trod subject.³⁰ Indeed, there have been repeated cycles of public concern with, and reaction to, secrecy about litigation.³¹ The patterns are illustrative of where the hush contract movement may be going. In the last decades, fights against secrecy about automobile manufacturing defects³² and molestation

28. David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1409–10 (2018); David A. Hoffman & Zev J. Eigen, *Contract Consideration and Behavior*, 85 GEO. WASH. L. REV. 351, 396 (2017).

29. Michelle Chen, *How Forced Arbitration and Non-Disclosure Agreements Can Perpetuate Hostile Work Environments*, NATION (Nov. 30, 2017) <https://www.thenation.com/article/how-forced-arbitration-and-non-disclosure-agreements-can-perpetuate-hostile-work-environments> [https://perma.cc/6XWU-72N6].

30. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2621 (1995).

31. For a lucid discussion, see Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109, 122–24 (2013).

32. Elizabeth E. Spainhour, Recent Development, *Unsealing Settlements: Recent Efforts to Expose Settlement Agreements that Conceal Public Hazards*, 82 N.C. L. REV. 2155, 2172 (2004). The

by priests³³ built on powerful personal narratives to generate public pressure against secrecy.³⁴ Victims organized—helped along by the trial bar³⁵—to increase public scrutiny of private practices, and ultimately successfully generated pressure for law reform.³⁶

Increasingly, advocates are beginning to conceptualize efforts to regulate or eliminate hush contracts in similar ways, arguing that individuals' lives and well-being are threatened every time a perpetrator of sexual misconduct is allowed to retain his or her privacy at the expense of a far more numerous pool of potential future victims.³⁷ Empirical studies of the incidence of sexual harassment support these advocates' decision to sound the alarm.

A survey conducted in 2017 by *Business Insider* and MSN revealed that "45% of women polled . . . have been sexually harassed at work. This translates to about 33.6 million women in the US."³⁸ An exhaustive review by the Equal Employment Opportunity Commission (EEOC) of attempts to quantify the occurrence of sexual harassment led its commissioners to report

Post's series of articles surrounding these efforts led to two reporters being named finalists for the 1989 Pulitzer Prize for Investigative Reporting. See, e.g., Elsa Walsh & Benjamin Weiser, *Court Secrecy Masks Safety Issues*, WASH. POST (Oct. 23, 1988) <https://www.washingtonpost.com/archive/politics/1988/10/23/court-secrecy-masks-safety-issues/09db3810-feb8-4d5e-8d97-69871e384475/> [<https://perma.cc/4AR2-X6VS>]; see also Ashley Gauthier, *Secret Justice: Alternative Dispute Resolution, Secret Settlements in Hazardous Cases*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Fall 2001), <https://www.rcfp.org/wp-content/uploads/imported/SJADR.pdf> [<https://perma.cc/N99C-GRVX>].

33. Confronted with organized breaches of confidentiality provisions, the Church decided to largely refrain from suing to enforce liquidated damages provisions in order to save whatever face they could. See Adam Liptak, *Price of Broken Vows of Silence*, N.Y. TIMES (May 26, 2002), <https://www.nytimes.com/2002/05/26/us/price-of-broken-vows-of-silence.html> [<https://perma.cc/F483-PJDT>]; see also Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 KAN. L. REV. 1457 (2006); Philp, *supra* note 26, at 880 (explaining ways the Catholic Church sex abuse scandal brought confidential settlement agreements into the limelight).

34. Barry Siegel, *Dilemmas of Settling in Secret: Companies Offer Hefty Sums in Exchange for Keeping the Details of Public-Hazard Lawsuits Quiet. Plaintiffs Must Choose Their Own Interest or the Public Good*, L.A. TIMES (Apr. 5, 1991), http://articles.latimes.com/1991-04-05/news/mn-1990_1_public-interest [<https://perma.cc/759F-WJDP>] ("Today, I regret that deal . . . There are things that you all should know. I can't say some things. And those things could save lots of lives . . . Lives would be saved if people knew.").

35. Notably, American Association of Trial Attorneys, now known as the American Association for Justice (AAJ), played an integral role in this fight. See *Court Secrecy*, AM. ASS'N FOR JUST., <https://www.justice.org/what-we-do/advocate-civil-justice-system/issue-advocacy/court-secrecy> [<https://perma.cc/TJ8W-HAE4>].

36. See Joseph F. Anderson, Jr., *Secrecy in the Courts: At the Tipping Point*, 53 VILL. L. REV. 811, 815 (2008) (providing one example of a motivated lawyer pressuring elected officials to reign in the scope of confidential settlements through legislative action).

37. Work in this vein is of course not new, though the #MeToo movement has revitalized it. See, e.g., Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 929 (2006).

38. Rachel Gillett, *Sexual Harassment Isn't a Hollywood, Tech, or Media Issue—It Affects Everyone*, BUS. INSIDER (Nov. 30, 2017, 10:49 AM), <http://www.businessinsider.com/sexual-harassment-affects-nearly-everyone-2017-11> [<https://perma.cc/L5TV-JV44>].

even higher numbers.³⁹ In a 2016 report, the EEOC concluded that “60% to 70% of women have been on the receiving end of sexual harassment on the job at some point during their careers.”⁴⁰

Worse, most individuals who experience harassment never take steps to report the misconduct. According to a report by EEOC Commissioner Chai Feldblum and acting EEOC Chair Victoria A. Lipnic, a full “85% of employees who experience harassment don’t bring charges to [the Commission], and up to 70% never complain internally to their employers.”⁴¹ The EEOC explains that “[e]mployees who experience harassment [often] fail to report the harassing behavior or to file a complaint because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.”⁴²

But notwithstanding these sobering statistics about the prevalence of harassment, scholars, advocates, attorneys, and even survivors themselves are divided on whether hush contracts ought to be permitted and, if so, to what extent.⁴³ Hush contracts covering sexual wrongdoing do benefit both parties involved in settlements. But, as Jodi Short has observed, “[H]arassment has been seen as harming an individual The challenge for advocates . . . will be stressing that the harm is more widespread,” ideally

39. We borrow from the Equal Employment Opportunity Commission’s definition of sexual harassment as “unwelcome or offensive conduct based on a protected characteristic under employment anti-discrimination law.” U.S. EQUAL EMP. OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 3 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [<https://perma.cc/W6L5-CNVV>] [hereinafter EEOC, TASK FORCE].

40. Chai R. Feldblum & Victoria A. Lipnic, *Breaking the Silence*, HARV. BUS. REV. (Jan. 26, 2018), <https://hbr.org/2018/01/breaking-the-silence> [<https://perma.cc/87P7-TV4N>] (describing the relevancy of the EEOC’s 2016 report to the debate on sexual harassment spurred by the #MeToo movement). Too often, the image we have of the women subjected to workplace sexual misconduct are affluent professionals. But blue-collar and working-class women have been equally vocal about their mistreatment even as they have lent their support to women with high-profile stories of harassment and abuse. See, e.g., Susan Chira, *We Asked Women in Blue-Collar Workplaces About Harassment. Here are Their Stories*, N.Y. TIMES (Dec. 29, 2017), <https://www.nytimes.com/2017/12/29/us/blue-collar-women-harassment.html> [<https://perma.cc/U26M-UNX7>]; see also *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/> [<https://perma.cc/4UL6-ED8W>]. A similar story can be easily told about race and the dimensions of social bias. In fact, “[p]eople on the margins—women of color, poor women, undocumented women, and trans men and women—are uniquely impacted by sexual assault and harassment” and subjected to sexual misconduct at disproportionately high rates. Collier Meyerson, *Sexual Assault When You’re on the Margins: Can We All Say #MeToo?*, NATION (Oct. 19, 2017), <https://www.thenation.com/article/sexual-assault-when-youre-on-the-margins-can-we-all-say-metoo/> [<https://perma.cc/2LX3-DNW3>]; see also Sarah Childress, *Undocumented Sexual Assault Victims Face Backlash and Backlog*, PBS (June 23, 2015), <https://www.pbs.org/wgbh/frontline/article/undocumented-sexual-assault-victims-face-backlash-and-backlog/> [<https://perma.cc/7KG L-2KS9>].

41. Feldblum & Lipnic, *supra* note 40.

42. EEOC, TASK FORCE, *supra* note 39, at v.

43. See Parramore, *supra* note 23; cf. Russell-Kraft, *supra* note 18.

through the use of empirical evidence to demonstrate that the problem is not isolated.⁴⁴ In the rest of this Part, we inventory and address scholarship from different ideological perspectives and disciplines that grapple with the effects of hush contracts on both the parties to the agreement as well as the general public.⁴⁵

A. *The Costs of Hush Contracts*

In this section, we describe the social costs of hush contracts. While the benefits to survivors of sexual harassment of being paid are obvious—though not so obvious for us to avoid dilating on this topic in a few pages—the costs are diffuse and less well studied.⁴⁶ We begin with costs rather than benefits because our position faces the normal obstacles put to any proposed doctrinal change (why now? why courts?), as well as the familiar convention that private parties should be left to their own contracting devices. We aim for the reader to leave this section convinced that there are social costs to hush contracts that are more significant than they previously appreciated.

Let's start with the manifest. When a firm pays a survivor to remain silent about past abuse, it is more likely to leave in place abusers and the culture that enables them.⁴⁷ The result is to increase the incidence of and harm caused by sexual harassment. It does so directly: when firms hide information about wrongdoing, they can avoid reputational harm for retaining abusers in their positions. It also does so indirectly: organizational cultures that pay off survivors of harassment are ones where, over time, women feel themselves unwelcome.

Stating these propositions is easier than proving them. We do not have a counterfactual firmly in hand. That is, to know what hush contracts do to the incidence of sexual harassment, the gold standard test would be to find

44. Nitasha Tiku, *How to Pierce the Secrecy Around Sexual Harassment Cases*, WIRED (Dec. 4, 2017, 7:00 AM), <https://www.wired.com/story/how-to-pierce-the-secrecy-around-sexual-harassment-cases/> [https://perma.cc/8SSV-PMBK].

45. For an extended discussion of the ethical implications for lawyers drafting such contracts, see generally Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1, 22 (2002), arguing that lawyers who draft noncooperation clauses for settlement agreements are breaking federal law by obstructing justice and likely violating their ethical obligations as officers of the court. See also Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481 (2008).

46. Lizzie O'Leary & Peter Balonon-Rosen, *How Women Pay an Economic Price After Sexual Harassment*, MARKETPLACE (Nov. 3, 2017, 1:55PM), <https://www.marketplace.org/2017/11/03/business/how-women-pay-economic-price-after-sexual-harassment> [https://perma.cc/DC2J-QPUV].

47. Please note we focus here on hush contracts entered into by firms either on their own behalf or on the behalf of members of their leadership team. Since our framework does not distinguish between these two paths towards hush agreements, we do not linger on it.

a legal regime that switched from enforcement to nonenforcement of hush contracts, and a measure of harassment, and attempt to correlate the two. To date, such a natural experiment has been unavailable.⁴⁸ Alternatively, we might want to look at workplaces where hush contracts are more difficult to enforce (such as the federal government) and gather information about how employees learn about bad acts and worse co-workers.⁴⁹

In the absence of that kind of evidence, any accounts are necessarily anecdotal. Consider, in this light, the claims by Gretchen Carlson, herself party to a hush contract, who expressed a concern shared by many critics of these agreements, telling *Wired* that they “both silence the victims and fool our culture into thinking we’ve come so far when we have not.”⁵⁰ She continued that “[these agreements are] a way for companies to cover all of their dirty laundry before it happens.”⁵¹

Maureen Ryan’s story is similar.⁵² A widely published television critic, Ryan was in her forties in 2014 when she was sexually assaulted by a TV executive, with whom she later entered into a hush contract.⁵³ She broke her silence in 2017 in a personal essay published in *Variety* after hearing rumors that her attacker had begun preying on young assistants.⁵⁴ Ryan took aim at the “culture of complicity” reinforced by hush contracts and urged survivors to come out of the shadows in order to protect colleagues,⁵⁵ explaining that

48. With the recent enactment of a California state law regulating hush contracts, we may see empirical evidence in the next couple years. See *infra* notes 138–140.

49. Historically, courts have permitted state actors to negotiate for non-disparagement and nondisclosure clauses when the information at stake is critically important for the public good. See *Am. Foreign Serv. Ass’n v. Garfinkel*, 490 U.S. 153 (1989) (per curiam) (allowing the government to protect classified information through contractual relationships with federal employees privy to sensitive matters). Scholarly debate concerning whether or not government actors should be able to enforce nondisclosure and/or non-disparagement clauses against individuals continues, though. See, e.g., Eugene Volokh, *Settlement Deal: Former VA Employee May Not Make ‘Negative Comments to Any Member of Congress . . . or Any Newspapers’*, WASH. POST (Apr. 27, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/27/settlement-deal-former-va-employee-may-not-make-negative-comments-to-any-member-of-congress-or-any-newspapers/> [https://perma.cc/3AHM-SHKE] (discussing whether political accountability ought to weigh against such enforcement).

50. Tiku, *supra* note 44.

51. Tiku, *supra* note 44; see also Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, NEW YORKER (July 27, 2018), <https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct> [https://perma.cc/6SK4-H3WW] (describing a variety of allegations made against CBS chief Les Moonves, who several women characterized as creating and sustaining culture of permissiveness towards sexual harassment from the top, which corrupted the whole organization).

52. Maureen Ryan, *A TV Executive Sexually Assaulted Me: A Critic’s Personal Story*, VARIETY (Oct. 18, 2017, 6:30 AM), <https://variety.com/2017/tv/columns/harvey-weinstein-sexual-assault-me-too-television-hollywood-1202591406/> [https://perma.cc/ALS9-4HNNX].

53. *Id.*

54. *Id.*

55. *Id.* (“If you don’t prioritize the health and safety of survivors over the futures of those who repeatedly hurt others, all your posturing on social media won’t help you.”).

“[i]f you have credible reports of abuse, harassment or assault, that man has already damaged many careers.”⁵⁶ The problem, according to Ryan, was not just with high-profile abusers like Harvey Weinstein but with similarly predatory figures across the industry, leading her to conclude, “Harvey is not the whole story. There are many Harveys, with varying amounts of influence . . . [a]nd at every level, formally and informally, they are covered for.”⁵⁷

Actress Eliza Dushku tells another story of hush contracts insulating attackers from accountability.⁵⁸ Dushku alleged that CBS actor Michael Weatherly made inappropriate comments and threats while they were jointly employed on a television show, some of which were captured on camera, that led her to feel “disgusting and violated.”⁵⁹ Shortly after she confronted him, her role was written off of the show.⁶⁰ She eventually settled with CBS after coming forward, signing a hush contract instead of pursuing what she imagined would be several years of confidential arbitration.⁶¹ As part of her settlement, she insisted “that CBS designate an individual trained in sexual harassment compliance to monitor Weatherly and the show in general.”⁶² The real extent of workplace harassment at CBS only became clear in August 2018, when outside law firms investigated misconduct allegations against then-CEO Les Moonves. The firms eventually issued a report stating that the network’s “handling of Ms. Dushku’s complaints was not only misguided, but emblematic of larger problems at CBS.”⁶³ The report continued, explaining that “[w]hen faced with instances of wrongdoing, the company had a tendency to protect itself, at the expense of victims.”⁶⁴

Finally, investigative journalists in 2017 revealed that Fox News had entered into at least five hush contracts, worth more than \$13 million, with individuals who came forward alleging sexual misconduct by TV pundit Bill O’Reilly.⁶⁵ Journalists covering the settlements described the reports as

56. *Id.* (emphasis removed).

57. *Id.*

58. Dushku, *supra* note 9.

59. Rachel Abrams & John Koblin, *CBS Paid the Actress Eliza Dushku \$9.5 Million to Settle Harassment Claims*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/business/media/cbs-bull-weatherly-dushku-sexual-harassment.html> [<https://perma.cc/R6PY-AW75>].

60. *Id.*

61. Dushku, *supra* note 9.

62. *Id.*

63. Abrams & Koblin, *supra* note 59.

64. *Id.*

65. Emily Steel & Michael S. Schmidt, *Bill O’Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html> [<https://perma.cc/4UTP-DMME>]. The New York Times reported the existence of these settlements following

creating a pattern of behavior extending from at least 2002 until 2016 and directed towards producers, TV hosts, anchors, and on-air personalities.⁶⁶ The *New York Times* reported that, “[a]s an influential figure in the newsroom, Mr. O’Reilly would create a bond with some women by offering advice and promising to help them professionally. He then would pursue sexual relationships with them, causing some to fear that if they rebuffed him, their careers would stall.”⁶⁷ Allegations from two additional women, not party to hush contracts, aligned with this pattern.⁶⁸

While less anecdotally rich, a few studies have carefully tracked the costs of sexual harassment at the team or organizational level. In one, researchers noted that “sexual harassment is an *organizational stressor* that has significant, negative outcomes for targets.”⁶⁹ The study noted that these negative outcomes, including career interruption, had “consistently been found across a variety of organizational settings and across cultures.”⁷⁰ For example, researchers identified a “food services organization in the mid-Atlantic United States” where teams were organized such that they “operated independently of one another (i.e., a loosely coupled organization)” and where financial data was available for each team’s performance.⁷¹ Over time, the researchers learned that incidence of sexual harassment negatively impacted each factor they monitored—the amount of conflict in teams, team cohesion, the willingness of team members to engage in activities on behalf of the whole, and financial performance.⁷² A 2013 paper by Anne Maass, Silvia Galdi, and Mara Cadinu confirms that power imbalances can be self-perpetuating, so that more hierarchical

more than five dozen interviews with current and former employees of Fox News and its former and current parent companies, News Corporation and 21st Century Fox; representatives for the network; and people close to Mr. O’Reilly and the women. . . . The Times also examined more than 100 pages of documents and court filings related to the complaints.

Id.

66. Settlements were reached with Rachel Witlieb Bernstein in 2002, Andrea Mackris in 2004, Rebecca Gomez Diamond in 2011, Laurie Dhue in 2016, and Juliet Huddy in 2016. *See id.*

67. *Id.*

68. *See id.*

69. Jana L. Raver & Michele J. Gelfand, *Beyond the Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance*, 48 ACAD. MGMT. J. 387, 388 (2005) (emphasis added); *see also* Leora Eisenstadt & Deanna Geddes, *Suppressed Anger, Retaliation Doctrine, and Workplace Culture*, 20 U. PA. J. BUS. L. 147 (2018) (explaining that employees’ suppressed anger surrounding perceived injustices in the workplace which go unaddressed by management leads to negative organizational outcomes).

70. Raver & Gelfand, *supra* note 69, at 388.

71. *Id.* at 390.

72. *Id.* at 393–94.

workplaces see more harassment on balance than workplaces in organizations where power is less stratified.⁷³

We can put some dollar figures on these costs. Turnover in harassing organizations can be large.⁷⁴ The EEOC has estimated that “over two years, as a result of sexual harassment, job turnover (\$24.7 million), sick leave (\$14.9 million), and decreased individual (\$93.7 million) and workgroup (\$193.8[million]) productivity had cost the government a total of \$327.1 million.”⁷⁵ While this figure may seem quite high, it makes sense. As individuals are made subject to unwelcome, unwanted advances or to generally hostile workplaces, they probably focus less on day-to-day tasks and devote increasing energy to avoidance, minimizing exposure, and ensuring one’s own safety. In today’s economy, where many of us work in collaborative teams, this social isolation can be devastating to productivity and group cohesion.⁷⁶ For these reasons, the EEOC termed sexual harassment in workplaces an “organization stressor.”⁷⁷

Other costs of hush contracts are harder to quantify.⁷⁸ For example, when hush contracts keep secret the details of sexual misconduct, they make it next to impossible for new entrants to the workplace (or community, market, etc.) to be certain of their safety. The effects of this uncertainty deserve exploration. How are candidates for entry-level positions navigating the information asymmetry they face when deciding whether to enter into a new workplace full of landmines they couldn’t unearth through even the most exhaustive due diligence?⁷⁹ Additionally, the widespread use

73. Anne Maass, Mara Cadinu & Silvia Galdi, *Sexual Harassment: Motivations and Consequences*, in THE SAGE HANDBOOK OF GENDER AND PSYCHOLOGY 341, 351 (Michelle K. Ryan & Nyla R. Branscombe eds. 2013); see also Parramore, *supra* note 23.

74. See EEOC, TASK FORCE, *supra* note 39, at 22.

75. *Id.*

76. *Id.* at 21 (“Work withdrawal and disengagement due to harassment can also go beyond the individual to affect team and group relationships.”).

77. *Id.* at 22.

78. Early research reports show the #MeToo movement will have profound financial and reputational consequences for firms seeking to limit their exposure to #MeToo allegations, though the specific impact of the sexual misconduct at issue on workplaces is less clear. See Press Release, Globe Newsire, Research Finds Businesses May Soon Feel Financial Impacts of #MeToo in Staffing and Revenue (Oct. 15, 2018), <https://www.apnews.com/Globe%20Newswire/4fd26841325e4724d0322f09a11e0013> [<https://perma.cc/LKF9-57ZH>] (finding that, for instance, “[a]pproximately 55% of professional women surveyed are less likely to apply for a job and 49% are less likely to buy products or stock from a company with a public #MeToo allegation”); see also Steve Hendrix et al., *#MeToo Has a ‘Chilling Effect’ on Workplace Camaraderie*, CHI. TRIB. (Jan. 28, 2018), <https://www.chicagotribune.com/business/ct-metoo-workplace-camaraderie-20180128-story.html> [<https://perma.cc/GHT8-GAWN>] (“As a wave of sexual misconduct allegations against prominent men crested in recent months, relations between men and women in workplaces across the country have shifted . . . sometimes toward more honest discussions of what’s not OK at work, but also toward silence and exclusion.”).

79. As far as we can tell, there is not much published advice for prospective employees concerned with avoiding organizations marred by sexual misconduct. At the same time, some blogs do advise

of hush contracts creates conditions under which potential harassers may be more likely to prey on potential victims. These costs are probably even greater when harassment in a particular firm is especially blatant; when it is an open secret that employees have harassed coworkers and had their misdeeds buried under the legalese of settlement agreements, firms send a message to would-be harassers that they too will find protection—rather than accountability—in management.⁸⁰

The final cost we want to add to the ledger is the deprivation of survivors' ability to openly and honestly talk about their experiences and to form coalitions with other survivors. Increasingly, those who have experienced sexual violence and have shared their stories are said to have “come out” as survivors, in an explicit reference to the decision of LGBTQ people to claim their identity publicly.⁸¹ While imperfect, the analogy implicit in this lexical shift is instructive. In some ways, the experiences of coming out as a queer person and coming out as a survivor of sexual misconduct are related⁸²—and where they are not, there are often lessons to be learned through their juxtaposition.⁸³

women interviewing for new jobs to think carefully about questions they can ask to better understand the firm's commitment to gender parity and equal compensation for equal work. See Lisa Gates, *How to Take a Leadership Role in Your Job Interview ala #MeToo*, SHE NEGOTIATES (June 26, 2018), <https://www.shenegotiates.com/blog/how-to-take-leadership-role-jo-interview-questions-metoo> [<https://perma.cc/P73L-H6KX>] (“the #MeToo movement has made it possible, I say imperative, for you to show you [sic] potential employer that your eyes are wide open,” particularly in the context of gender parity).

80. New research suggests that employees are less likely to come forward to report misconduct, for instance, when they perceive it to be an open secret. See, e.g., Insiya Hussain & Subra Tangirala, *Why Open Secrets Exist in Organizations*, HARV. BUS. REV. (Jan. 14, 2019), <https://hbr.org/2019/01/why-open-secrets-exist-in-organizations> [<https://perma.cc/6PZD-D9AK>] (“[A]s issues become more common knowledge among frontline employees, the willingness of any individual employee to bring those issues to the attention of the top-management decreased. Instead of speaking up, what we observed among our participants was something like the bystander effect.”).

81. See, e.g., Nico Lang, Op-Ed, *What It's Like Coming Out as a Sexual Assault Survivor*, ADVOCATE (Jan. 14, 2014, 11:15 AM), <https://www.advocate.com/commentary/2014/01/14/op-ed-what-it%E2%80%99s-come-out-sexual-assault-survivor> [<https://perma.cc/D9X2-RZHE>]; see also Rachel Kuo, *6 Things to Navigate While Coming Out to Yourself as a Survivor of Sexual Violence*, EVERYDAY FEMINISM (Jan. 7, 2015), <https://everydayfeminism.com/2015/01/coming-out-to-self-as-survivor/> [<https://perma.cc/BJS9-EBZS>].

82. LGBTQ people are disproportionately likely to be affected by sexual violence, with transgender individuals and bisexual women most at risk. See, e.g., *Sexual Assault and the LGBTQ Community*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community> [<https://perma.cc/CF9J-P28D>] (“As a community, LGBTQ people face higher rates of poverty, stigma, and marginalization, which put us at greater risk for sexual assault.”). What's more, many LGBTQ survivors face discrimination when attempting to access services because of their identity. See *id.* (“85 percent of victim advocates surveyed by the [National Coalition of Anti-Violence Projects] reported having worked with an LGBTQ survivor who was denied services because of their sexual orientation or gender identity.”).

83. For just one example, think about the fact that only very seldom are those who come out as queer or as survivors of sexual violence sharing completely new information. For many, the decision to come out is instead the first time they claim as their own insults or rumors with which they are well

The speech act of “coming out” has long been an integral element of the LGBTQ movement’s political and cultural strategy—as well as a critical part of many LGBTQ peoples’ self-discovery and affirmation. Specifically, the call to “come out” and to do so in political terms is deeply entrenched in LGBTQ movement history,⁸⁴ and in the academic study of gender and sexuality.⁸⁵

One such example is that of Eve Sedgwick’s *Epistemology of the Closet*, a pivotal text in queer theory in which Sedgwick blurs the line between the public and the private.⁸⁶ She argues that there’s a sort of language to silence, that is, when we reveal and hide different elements of ourselves, we play an evolving and performative role (think, for instance, of certain celebrities whose queerness is widely understood but never publicly acknowledged).⁸⁷ In the constant navigation of secrecy and disclosure,⁸⁸ Sedgwick suggests that queer people weigh risk and reward, sometimes choosing to identify within a particular label (e.g. “LGBTQ”) or to elude labels altogether.⁸⁹ That throngs of LGBTQ have come out not once but over and over, and that they have latched onto these shared labels for their community, has likely led to the growing support for LGBTQ rights today, as fewer and fewer Americans

acquainted. For a discussion, see EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 80 (1990) (“Living in and hence coming out of the closet are never matters of the purely hermetic; the personal and political geographies to be surveyed here are instead the more imponderable and convulsive ones of the open secret.”).

84. Harvey Milk was known to encourage young LGBTQ people to come out to their families and friends in order to normalize queerness. See, e.g., Jennifer Knapp, ‘You Must Come Out’: How Harvey Milk’s Challenge Resonates with Gay Christians Today, HUFFPOST (Feb. 2, 2016), https://www.huffingtonpost.com/jennifer-knapp/how-harvey-milks-challeng_b_5960258.html [<https://perma.cc/XTK7-XYJ4>] (“Gay brothers and sisters, you must come out. Come out to your parents. I know that it is hard and will hurt them, but think about how they will hurt you in the voting booth! Come out to your relatives. Come out to your friends, if indeed they are your friends. Come out to your neighbors, to your fellow workers, to the people who work where you eat and shop. Come out only to the people you know, and who know you, not to anyone else. But once and for all, break down the myths. Destroy the lies and distortions. For your sake. For their sake.”).

85. See, e.g., SEDGWICK, *supra* note 83; Michael Warner, *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* (1993) (cataloguing early works in the queer theory tradition, including pieces exploring the political dynamics of “coming out”).

86. SEDGWICK, *supra* note 83.

87. See *id.* at 3 (“‘Closeted-ness’ itself is a performance initiated as such by the speech act of a silence—not a particular silence, but a silence that accrues particularity by fits and starts, in relation to the discourse that surrounds and differentially constitutes it.”).

88. See *id.* at 68 (“[E]very encounter with a new classfull of students, to say nothing of a new boss, social worker, loan officer, landlord, doctor, erects new closets whose fraught and characteristic laws of optics and physics exact from at least gay people new surveys, new calculations, new draughts and requisitions of secrecy or disclosure. Even an out gay person deals daily with interlocutors about whom she doesn’t know whether they know or not . . .”).

89. *Id.* at 13.

report opposing full equality for LGBTQ people.⁹⁰ But for members of the LGBTQ community, coming out is about far more than policy victories; “[i]t is a shift from the private sphere to the public, and also a shift from silence into speech.”⁹¹ This courage and desire to control the narrative may link together the #MeToo movement and the ongoing struggle for LGBTQ rights.⁹²

Consider, as an analogy, the recent First Circuit case of *Franchina v. City of Providence*, where a lesbian firefighter was driven from her workplace by incessant harassment from her male subordinates.⁹³ The harassment was not linked to desire by the subordinates for their supervisor; instead, the harassers were trying to police their supervisor’s gender presentation and performance—effectively penalizing her for being LGBTQ.⁹⁴ As Judge Rovner, in a Seventh Circuit case, concluded:

Lesbian women and gay men upend our gender paradigms by their very status—causing us to question . . . antiquated and anachronistic ideas about what roles men and women should play in their relationships. Who is dominant and who is submissive? Who is charged with earning a living and who makes a home? . . . In this way the roots of sexual orientation discrimination and gender discrimination wrap around each other inextricably.⁹⁵

This citation offers perhaps the clearest illustration of a principle stated earlier in this paper: sexual violence is about power and any attempt to combat the prevalence of sexual misconduct in society ought to grasp it at the roots.

90. “By a margin of nearly two-to-one (62% to 32%), more Americans now say they favor allowing gays and lesbians to marry than say they are opposed.” *Support for Same-Sex Marriage Grows, Even Among Groups that Had Been Skeptical*, PEW RES. CTR. (June 26, 2017), <http://www.people-press.org/2017/06/26/support-for-same-sex-marriage-grows-even-among-groups-that-had-been-skeptical/> [<https://perma.cc/TK9S-6HLF>] (describing, as well, that “[v]iews on same-sex marriage have shifted dramatically in recent years. As recently as 2010, more Americans opposed (48%) than favored (42%) allowing gays and lesbians to marry legally”).

91. Jen Bacon, *Getting the Story Straight: Coming Out Narratives and the Possibility of a Cultural Rhetoric*, 17 *WORLD ENGLISHES* 249, 251 (1998).

92. See, e.g., Brian Soucek, *Queering Sexual Harassment Law*, 128 *YALE L.J.F.* 67, 69–70 (2018), https://www.yalelawjournal.org/pdf/Soucek_ncrxrrgq.pdf [<https://perma.cc/LQ28-LAL4>] (“Hearing the story of a queer harassment victim teaches (or reminds) us that sexual harassment, in all its forms and no matter the sexuality of the victim, is ultimately about policing gender roles and hierarchies.”).

93. 881 F.3d 32 (1st Cir. 2018); see also Soucek, *supra* note 92, at 70–72.

94. Soucek, *supra* note 92, at 83 (“And while her harassment occasionally took sexualized forms, it was not about desire; it was about power and exclusion.”); see also *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 706 (7th Cir. 2016), *rev’d en banc*, 853 F.3d 339 (7th Cir. 2017).

95. Soucek, *supra* note 92, at 80–81 (quoting *Hively*, 830 F.3d at 706).

Perhaps most critically both the #MeToo and LGBTQ movements owe their success to the willingness of courageous individuals to continue to tell their stories. Both are “built on repetition—the ‘too’ is crucial, for only cumulatively do the stories show how common sex-based harassment continues to be.”⁹⁶ By helping everyday people acknowledge their proximity to the crisis of sexual violence and anti-LGBTQ hate, coming out familiarizes the “other” and paves the way for political advocacy on behalf of those affected. For our purposes, coming out also allows you to stand and be counted—for the total impact of sexual wrongdoing to be counted not only in numbers but in stories. When hush contracts choke off those stories, therefore, their impact extends far beyond one workplace or one individual; the silence reverberates across a movement whose chorus always needs one more voice.

B. The Costs of Nonenforcement: What do Hush Contracts Achieve

We now turn to the other side of the ledger: the benefits of enforcing hush contracts. The bottom line here is simply stated: proponents argue that hush contracts are necessary to a privately-ordered anti-harassment regime. That is, because all agree that anti-harassment law needs private plaintiffs and the private bar requires settlements to be economically viable, the real question is whether such settlements could exist without enforceable confidentiality clauses. The defenders of hush contracts take significant comfort from the status quo, where hush contracts are both enforceable and nearly omnipresent.⁹⁷ They also point out, not unreasonably, that plaintiffs may want secrecy, even if defendants are indifferent to it.

Again here we are proceeding without compelling empirical evidence as to the effects at equilibrium of confidentiality in litigation.⁹⁸ The studies that do exist are often observational in nature—finding that slightly more, or slightly fewer, cases are filed after a particular kind of confidentiality regulation is put into place.⁹⁹ But *ex post* litigation data tells us very little

96. *Id.* at 72.

97. *See, e.g.*, Russell-Kraft, *supra* note 18 (Gillian Thomas of the ACLU Women’s Rights Protect observed, “If an employer can’t get a settlement that’s going to provide a [NDA], employers are going to settle less, they’re going to force whoever is bringing the claim to think long and hard about pursuing litigation instead, and litigation is a horrible alternative”).

98. Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 726 (2004) (finding no evidence in data of a chilling effect); James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859, 867–68 (2004) (reviewing anecdotal evidence of a chilling effect); Drahozal & Hines, *supra* note 33, at 1467–69 (noting lack of evidence).

99. “In those states that have developed the strongest anti-secrecy regulations, there has been no indication of a resulting court logjam, or even that settlement rates have gone down.” Richard A. Zitrin,

about the effects of confidentiality on the first order (bad) behavior that the regulatory regime was designed to govern.

Indeed, much of the work here is frankly theoretical in ambition and tone. Scott Moss, whose 2007 paper on the economics of confidentiality remains the best and most complete approach,¹⁰⁰ describes a model in which confidentiality might, by increasing the bargaining range, improve the likelihood of settlement.¹⁰¹ That is, confidentiality can be priced, and parties can extract value for that concession.¹⁰²

But the problem in determining whether secrecy promotes deterrence is that information about wrongdoing has competing effects. On the one hand, making litigation fully transparent (by prohibiting hush contracts) might reduce the likelihood of settlement post-filing, and therefore the present value of claims and deterrence. But, on the other hand, potential defendants in a transparent regime may be more likely to “settle” pre-filing so as to avoid the publicity of litigation, even if they cannot be assured that such settlements will be truly secret.¹⁰³ There is no easy way at present to disentangle such effects, and, as Moss concludes, the “big picture” is “indeterminate.”¹⁰⁴ Complicating matters further, given lawyer networks, even confidential settlements are already, in effect, semi-public.¹⁰⁵

Recent proposals have tried to normalize and publicize such intermediate confidentiality regimes. A recent example is Levmore and Fagan’s “semi-confidentiality,” where “the disclosure of the substance of settlement but not the magnitude of monetary payments” ought to be required by law.¹⁰⁶ Levmore and Fagan argue that semi-confidentiality “rewards plaintiffs in proportion to their injuries and encourages all of them to come forward with their individual claims.”¹⁰⁷ They seem reasonably confident that semi-confidentiality will benefit plaintiffs on the whole, allowing them to make better strategic litigation choices and recover potentially more from

The Case Against Secret Settlements (or, What You Don’t Know Can Hurt You), 2 J. INST. FOR STUDY LEGAL ETHICS 115, 118 (1999) (footnote omitted).

100. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867 (2007); see also Zitrin, *supra* note 99, at 118.

101. Moss, *supra* note 100, at 878.

102. See Levmore & Fagan, *supra* note 17, at 314.

103. Moss, *supra* note 100, at 891.

104. *Id.*

105. Ben Depoorter, Essay, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 966–67 (2010) (noting evidence from survey that few attorneys found confidentiality clauses a barrier to learning about settlement behavior).

106. Levmore & Fagan, *supra* note 17, at 311.

107. *Id.* at 341.

defendants.¹⁰⁸ But the claim is difficult to evaluate without a better specification as to when evidence from the real world would falsify it.¹⁰⁹

Putting aside the deterrence problem, victim compensation alone might justify the current regime. Wealth transfers to victims as part of confidential settlements are not trivial.¹¹⁰ Survivors of sexual misconduct can sometimes recoup significant compensatory awards, which can give them a sense of closure as well as tangible gains. According to the EEOC, from 2010 to 2016, “employers have paid out \$698.7 million to employees alleging harassment through the [EEOC’s] administrative enforcement pre-litigation process alone.”¹¹¹ Some of these settlements have also been quite substantial on an individual basis. A study cited by the EEOC and conducted by a national liability insurance provider examined “a representative sample of closed employment dispute claims” and revealed “that 19% of the matters resulted in defense and settlement costs averaging \$125,000 per claim.”¹¹²

The frequency of sexual wrongdoing complaints, their severity, and the increasing costs of settlements have led companies to take preemptive steps to guard against unforeseen pay-outs. Companies are now diverting substantial funds to insurance policies for sexual misconduct settlements, though most companies are not taking parallel steps to address the harm of sexual misconduct within their organizations by, for instance, re-examining the demographic composition of the organization’s leadership or restructuring the firm.¹¹³

Aggregating total payouts to survivors does risk obscuring differences in the rate of sexual misconduct for specific communities, like those with lower incomes and communities of color. In one of the only studies of its kind, researchers recently conducted a six-year study on anonymously

108. See *id.* at 348 (“Translucency drives up the costs of settlement, whether [the plaintiff] underestimates its value or not, and can deter [a tortfeasor] ex ante or provide compensation to individual victims ex post.”); cf. Alison Lothes, Comment, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants’ Economic Incentives*, 154 U. PA. L. REV. 433, 456 (2005) (describing how lack of information about settlement amount might increase litigation costs).

109. We are also not convinced that the argument fully accounts for the public benefits of adjudication, nor the wealth effects between plaintiffs that Moss describes. Moss, *supra* note 100, at 893.

110. See Parramore, *supra* note 23.

111. EEOC, TASK FORCE, *supra* note 39, at 18.

112. EEOC, TASK FORCE, *supra* note 39, at 19; EMPLOYEE CHARGE TRENDS ACROSS THE UNITED STATES, HISCOX, (2015), <https://www.hiscox.com/documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf> [<https://perma.cc/CB73-PV7R>].

113. The 2016 EEOC report contains helpful, yet simple, guidance on this matter. Quoting the writer James Baldwin, Robert J. Bies, Professor of Management and Founder of the Executive Masters in Leadership Program at Georgetown University’s business school, commented, “Not everything that is faced can be changed, but nothing can be changed until it is faced.” EEOC, TASK FORCE, *supra* note 39, at 1.

coded harassment cases settled in Chicago, and found that claimants, on average, recovered less than \$60,000 each.¹¹⁴ Indeed, an analysis of unpublished EEOC data reveals that “sexual harassment appears to happen more frequently in industries dominated by low-wage workers, with minority women working in services industries especially vulnerable.”¹¹⁵ In those industries, women file 300% more claims than in professional fields.¹¹⁶ This would suggest that the individuals filing most often are likely those who need the pay-outs most—and therefore may be more likely to settle at lower amounts, which fail to deter tortfeasors from repeat wrongdoing.

Lastly comes the intuitive argument that enforcing hush contracts respects the private wishes of the parties involved, and does so quickly, without impeding the efficient resolution of disputes by the courts.¹¹⁷ Arthur Miller’s early statement of this argument more than twenty-five years ago remains canonical.¹¹⁸ Miller starts by pointing out that the public right of access within American jurisprudence has never been absolute.¹¹⁹ Rather, “[the] justice system recognizes a variety of situations in which confidentiality is not only acceptable, but essential,” like “[d]iscovery,

114. Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 148 (2007).

115. Parramore, *supra* note 23.

116. *See id.*

117. These privacy considerations also beg the question of how we ought to think about false accusations, specifically those made in the context of sexual misconduct. Scholars and commentators are often preoccupied with this question, spilling a considerable amount of ink debating what value ought to be placed on falsely accused defendants’ rights to avoid harm, even should they settle with an accuser to avoid the spotlight. *See* Levmore & Fagan, *supra* note 17, at 344 (“Mandatory transparency, as required by some sunshine laws, likely goes too far because news of [a plaintiff’s] claim will bring forth claimants who erroneously, irrationally, or strategically believe [the tortfeasor] injured them.”); *see also* Ayres, *supra* note 17, at 77 (“NDAs may also help protect those who are falsely accused or have a valid legal defense from the negative reputational consequences of having been accused and having paid to settle an accusation of sexual misconduct.”); Bret Stephens, *For Once, I’m Grateful for Trump*, N.Y. TIMES (Oct. 4, 2018), <https://www.nytimes.com/2018/10/04/opinion/trump-kavanaugh-ford-allegations.html> [<http://perma.cc/VK2Q-J752>] (“Falsely accusing a person of sexual assault is nearly as despicable as sexual assault itself. It inflicts psychic, familial, reputational and professional harms that can last a lifetime.”). Nevertheless, commentators fixated on the threat of false accusations often overstate the frequency of unsubstantiated allegations. *See* Katie Heaney, *Almost No One is Falsely Accused of Rape*, N.Y. MAG. (Oct. 5, 2018), <https://www.thecut.com/article/false-rape-accusations.html> [<https://perma.cc/5PRP-L3A6>] (explaining that, even though five percent of reported rapes may be unsubstantiated, only eight to ten percent of rapes are reported, meaning that false accusations account for only around half of a percent of all occurrences of rape). In short, while a concern for those whose livelihoods may be affected by unsubstantial allegations is well-founded, scholars’ concern over the frequency of such allegations is often misplaced. For our purposes, false accusations are therefore an important but peripheral concern.

118. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 464 (1991).

119. *See id.* at 429.

grand jury proceedings, settlement negotiations, and jury deliberations.”¹²⁰ He observes that in each of these instances, the public’s interest in knowing the details of a case pale in comparison with the justice system’s interest in the resolution of disputes.¹²¹ Since the primary aim “of the judicial system is to resolve private disputes, not to generate information for the public,” we must favor privacy over transparency whenever they are in tension.¹²²

Unlike Miller, however, not all scholars frame their arguments in such absolute terms. Ian Ayres has recently rejected what he characterizes as the “all-or-nothing choice” between enforcing or not enforcing these NDAs.¹²³ The key question for Ayres is whether or not enforcing the NDA would enable repeat wrongdoing—something Miller did not grapple with it at all.¹²⁴ He balances the court’s commitment to individual privacy and honoring valid contracts with the public’s interest in avoiding harm to third parties who are prevented from identifying patterns of wrongdoing by strategically employed NDAs.¹²⁵ Ayres argues that courts should hold NDAs unenforceable if they prohibit survivors from reporting to the EEOC, if the accused does not misrepresent past dealings between accuser and the accused, and “if the underlying survivor allegations are deposited in an information escrow that would be released for an investigation by the EEOC if another complaint is received against the same perpetrator.”¹²⁶

To be sure, Miller and Ayres raise important points. Plaintiffs’ interests in their own privacy, particularly when that privacy is threatened by invasive discovery tactics or the media, are important; we should worry, on the margin, about chilling plaintiffs.¹²⁷ And yet, given the evidence that we have adduced, it is at least unclear if confidentiality is systemically useful,

120. *See id.*

121. *See id.*

122. *See id.* at 441; *see also id.* at 431 (“If public access assumes an importance on a par with the system’s concern for resolving disputes among the litigants, the traditional balance would be upset and the courts diverted from their primary mission.”).

123. *See Ayres, supra* note 17, at 77, 85.

124. *See id.* at 78 (“[T]hese provisions would deter or incapacitate the worst types of repeat offending . . . [but] these reform proposals would do almost nothing to deter offenders from committing their first offense.”).

125. *See id.* (“The contestable choice here is to suggest that the legitimate privacy interests predominate with regard to first offenses, but not with regard to offenders who have embarked on a succession of settlements.”).

126. *Id.* at 79.

127. Plaintiffs’ lawyer Debra Katz has observed that “[f]or some victims, the promise of confidentiality is actually alluring.” Russell-Kraft, *supra* note 18. She explained that survivors “want their privacy protected and if they feel like they can’t end these situations with a private resolution, they’re not going to come forward.” *Id.*

especially when it results from power and informational imbalances that are endemic in this arena.¹²⁸

Regulating or eliminating the use of hush contracts thus mainly involves a tradeoff between the privacy and compensatory duties owed to survivors and the public's right to know. Writing off the privacy interests of survivors of sexual misconduct as irrelevant factors in the analysis compounds the damage already inflicted. Yet, with empathy for those who have suffered themselves or witnessed that suffering, those giving shape to legal frameworks must weigh those privacy interests alongside the community's interest in accountability for wrongdoing.

As Anita Allen has explained, "privacy isn't everything."¹²⁹ On moral grounds, we regularly accept that our desire for privacy is circumscribed by our community's interest in health and safety.¹³⁰ Who would not agree, for that matter, that it is important to hold each other accountable for actions we take that affect the well-being of other members of our community? Allen describes these communal ties aptly, noting that "[a]ccountability norms are ties that bind."¹³¹ If we consider ourselves to be in a community with survivors of sexual misconduct, we have to grapple with the interests of privacy *and* the potential harms of allowing harm to be secreted from view. Accounting for these costs and benefits needs to be far more thoughtful; there are costs to confidentiality which are real and need measuring.

Balancing this admixture of public losses and private benefits is a task that has social welfare implications. In the last year, a number of states have begun to propose and pass legislation in response. We earlier described New York's approach to hush contracts, which solves one problem (hush contracts inconsiderately agreed-to) without dealing at all with the public values at issue.¹³² Other states, like Washington, have recently followed

128. Elizabeth Bernstein, *Power's Role in Sexual Harassment*, WALL STREET J. (Feb. 5, 2018, 10:33 AM), <https://www.wsj.com/articles/powers-role-in-sexual-harassment-1517844769> [<https://perma.cc/C4NT-4WEP>]; see also Zeba Blay, *Sexual Harassment Isn't About Sex, It's About Power*, HUFFPOST (Mar. 23, 2017, 5:12 PM), https://www.huffingtonpost.com/entry/sexual-harassment-isnt-ab-out-sex-its-about-power_us_58d13b9fe4b00705db52c340 [<https://perma.cc/KV5T-JQFS>]; Claire Potter, *Sexual Harassment Is About Power. Why Not Fight It as We Do Bullying?*, GUARDIAN (Feb. 10, 2018, 6:00 AM), <https://www.theguardian.com/commentisfree/2018/feb/10/sexual-harassment-power-bullying-metoo> [<https://perma.cc/VV67-8RXA>].

129. Anita L. Allen, 2003 *Daniel J. Meador Lecture: Privacy Isn't Everything: Accountability as a Personal and Social Good*, 54 ALA. L. REV. 1375, 1375 (2003).

130. *Id.* at 1387.

131. *Id.* at 1389.

132. See *supra* notes 13–16 and accompanying text.

New York's signaling approach.¹³³ Moreover, Congress,¹³⁴ and a number of states, including Florida,¹³⁵ have bills in draft form that would accomplish much the same thing, and New Jersey has passed a similar bill,¹³⁶ but none had advanced past drafting stages as of the early winter of 2019.¹³⁷

One singular form of legislative medicine comes from California. In September 2018, Governor Jerry Brown signed a series of laws that significantly changed the landscape governing sexual harassment claims in California.¹³⁸ In addition to a rule that changed the burden of proof and persuasion in plaintiffs' favor,¹³⁹ one of the newly enacted statutes, S.B. 820, effectively made it unlawful (and against public policy) for an employer to create a nondisclosure clause in a sexual harassment case (and related causes of action) for any claims "related to" a claim filed in court or in an administrative proceeding.¹⁴⁰

The California Act thus permits some hush contracts (those entered post-demand letter but pre-suit),¹⁴¹ and explicitly provides that victims can request nondisclosure of personally identifying facts, and that parties can freely agree to keep the amount of settlement secret (but not the underlying

133. 2018 Wash. Legis. Serv. Ch. 117 (S.S.B. 5996) (West) (codified at WASH. REV. CODE § 49.44.210 (2018)).

134. See, e.g., Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting Act, H.R. 6406, 115th Cong., 2d Sess. (2018); Sunlight in Workplace Harassment Act, S. 2454, 115th Cong., 2d Sess. (2018); Congressional Accountability Act of 1995 Reform Act, H.R. 4822, 115th Cong., 2d Sess. (2018).

135. H.B. 1259, 172d Leg. Sess. (Fla. 2018) (making nondisclosure clauses in sexual harassment settlements void as against public policy).

136. 2019 N.J. Sess. Law Serv. Ch. 39 (S. 121) (West) (codified at N.J. REV. STAT. § 10:5–12.7 (West)).

137. See generally Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 255 (2018) (collecting extant legislative responses).

138. 2018 Cal. Legis. Serv. Ch. 953 (S.B. 820) (West) (codified at CAL. CIV. PROC. CODE § 1001 (West 2018)) (prohibiting nondisclosure of sexual assault in settlement agreements); 2018 Cal. Legis. Serv. Ch. 955 (S.B. 1300) (West) (codified at CAL. GOV'T CODE §§ 12940, 12965, 12923, 12950.2, 12964.5 (West 2018)) (creating new employee protections in sexual harassment actions); 2018 Cal. Legis. Serv. Ch. 956 (S.B. 1343) (West) (codified at CAL. GOV'T CODE §§ 12950, 12950.1 (West 2018)) (expanding requirements for sexual harassment training to all employees of employers with five or more employees).

139. CAL. GOV'T CODE § 12923 (West 2018); see also Paula M. Weber & Cara Adams, *California Laws Change Legal Landscape on Sexual Harassment*, PILLSBURY WINTHROP SHAW PITTMAN LLP (Oct. 8, 2018), <https://www.pillsburylaw.com/en/news-and-insights/california-laws-change-harassment-landscape.html> [https://perma.cc/N4YU-JCH4].

140. 2018 Cal. Legis. Serv. Ch. 953 (S.B. 820) (West) (codified at CAL. CIV. PROC. CODE § 1001 (West 2018)).

141. CAL. CIV. PROC. CODE § 1001(a) (West 2018). This point has been noted by practitioners. See *Legal Alert: California Employers to Face Raft of New #MeToo Laws*, FISHER PHILLIPS (Oct. 1, 2018), <https://www.fisherphillips.com/resources-alerts-california-employers-to-face-raft-of-new> [https://perma.cc/4XNF-D4XH] ("Therefore, there may be a narrow set of circumstances in which such clauses may still be utilized in sexual harassment and other similar cases.").

facts).¹⁴² But, overall, it represents a significant strike against hush contracts, and would seriously dampen the harm that they cause. Courts considering California-drafted contracts need read no further in this paper: hush contracts are unenforceable in the Sunshine State.

California's statutory solution rests on the understanding that hush contracts engender third-party harm and consequently require public responses.¹⁴³ For courts in jurisdictions outside of California, where statutory rules are not yet in hand, ordinary contract law would seem to be an ill-fit to the problem of policing such diffuse injuries. However, as we will now argue, common law contract law does have a vehicle for asserting the interests of the public at large within private disputes. Though long neglected, and often criticized, public policy doctrine might be just what is needed to highlight the consequences of enforcing hush contracts.

II. PUBLIC POLICY & HUSH CONTRACTS

We should not be surprised by the extent that current approaches largely fail to grapple effectively with the problems posed by hush contracts. The problem is hard: how to balance the needs of autonomy with those of distribution, or, more concretely, how to decide when the state will not recognize freely-chosen bargains. Happily, public policy doctrine is ideally suited to that balancing task. Unfortunately, it is a doctrine in somewhat bad odor. After all, it is said to be “never argued at all but when other points fail.”¹⁴⁴

If that were not promising enough, almost all discussions of public policies begin equinely. The oft-repeated dicta (now almost 200 years old) claims that public policy “is a very unruly horse, and when once you get astride it you never know where it will carry you.”¹⁴⁵ Others warn that public policy is “a vast, confusing and rather mysterious area of the law.”¹⁴⁶

142. CAL. CIV. PROC. CODE § 1001(c), (e) (West 2018).

143. S. Floor Analysis, S.B. 820, 2017-2018 Reg. Sess., at 6 (Cal. 2018), http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB820# [<https://perma.cc/8VRW-LD98>] (“This bill addresses . . . the use of non-disclosure provisions in settlement agreements, often referred to as ‘secret settlements.’ These agreements bind people to silence, generally with regard to all of the underlying allegations in a civil case. As has been seen in widespread media coverage, these secret settlements have the effect of preventing word from spreading about harassing or discriminatory behavior. This is part of what allows serial harassers to go undetected, sometimes for years.”).

144. Richardson v. Mellish (1824) 130 Eng. Rep. 294, 303, 2 Bing. 229, 251–52 (Burrough, J.) (C.P.).

145. *Id.*

146. George A. Strong, *The Enforceability of Illegal Contracts*, 12 HASTINGS L.J. 347, 347 (1961).

It's difficult to know what to make of this hand-wringing. No one has fit public policy cases into a neat box.¹⁴⁷ But that is probably true of any frequently argued problem that requires judgment. The litigated cases will be roughly divided between wins and losses,¹⁴⁸ and courts with varying priors will weigh even cognizable standards distinctly. Indeed, one commentator, discussing Corbin's "exhaustive and almost scientific" treatment on public policy, counts "128 different subspecies of the public policy defense in action," and claims that the whole "reads a bit like Charles Darwin's *The Zoology of the Voyage of H.M.S. Beagle*."¹⁴⁹

Rather than re-catalogue this menagerie, we instead aim to illuminate by setting out a few common fact patterns through which confidentiality clauses and public policy have tangled.¹⁵⁰ Our goal is not to be comprehensive. Indeed, "gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society."¹⁵¹ We moreover do not limit ourselves to published policy defenses to hush contracts for a simple, inconvenient, reason—there are almost no such cases in the recorded history of Anglo-American law.¹⁵² Our approach must therefore build from a broader base.

147. Julie M. Spanbauer, *Selling Sex: Analyzing the Improper Use Defense to Contract Enforcement Through the Lens of Carroll v. Beardon*, 59 CLEV. ST. L. REV. 693, 718 (2011) (arguing that courts typically use an incoherent multi-part approach adapted from the Restatement). Friedman, for instance, found a forty-five percent success rate for public policy defenses based in a statute. David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 566, 581 (2012). One should be cautious in interpreting this result—case and opinion selection make it impossible to understand much about a doctrine's strength by how it is resolved in reported opinions. What is most striking about Friedman's paper is that more than 1000 cases talked about the defense in a six-month period. *Id.* at 577.

148. Friedman shows this precisely. *See* Friedman, *supra* note 147, at 567.

149. *Id.* at 572–73.

150. *See* Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1954–56 (1996) (discussing the risks of pigeonholing public policy in the tort context).

151. *Shaw v. Dir. of Pub. Prosecutions* [1962] A.C. 220, 268 (H.L.).

152. Almost none is not the same as none. There may be more which talk about public policy without naming the doctrine as such. *See, e.g.,* *Hasbrouck v. BankAmerica Hous. Servs.*, 187 F.R.D. 453, 459, 461 (N.D.N.Y. 1999) (refusing to order disclosure of a confidential settlement of a harassment claim, the court noted that "[w]hile protecting the confidentiality of settlement agreements encourages settlement, which is in the public interest, permitting disclosure would discourage settlements, contrary to the public interest," and that "[t]here is a strong public interest in encouraging settlements and in promoting the efficient resolution of conflicts"); *Gulliver Schs., Inc. v. Snay*, 137 So. 3d 1045, 1046, 1048 (Fla. Dist. Ct. App. 2014) (enforcing clause); *Smelkinson Sysco v. Harrell*, 875 A.2d 188, 194–95, 197–99 (Md. Ct. Spec. App. 2005) (enforcing liquidated damages); *Carlini v. Gray Television Grp., Inc.*, No. A-15-1239, 2017 WL 1653624, at *4 (Neb. Ct. App. May 2, 2017) (enforcing provision). *But see* *Waterson v. Plank Road Motel Corp.*, 43 F. Supp. 2d 284, 288 (N.D.N.Y. 1999) (permitting disclosure).

We undertook a wide-ranging search for all cases of interest without date restrictions.¹⁵³ Only several hundred cases resulted, which probably reflects that confidentiality clauses were relatively rarely employed until the mid-1980s.¹⁵⁴ (This temporal fact, incidentally, suggests why the Restatement (Second), drafted in the 1960s and 1970s, with an effective date of 1981, is so singularly vague and unhelpful).¹⁵⁵

The vast majority of such cases concerned NDAs about trade secrets coupled with noncompetition clauses. Many state courts remain suspicious of noncompetes, which are thought to restrain competition in violation of public policy.¹⁵⁶ States are split about whether to be as suspicious of NDAs as they are noncompetes, in part because the private harm from the former's breach might be worse.¹⁵⁷ Some require geographic or temporal limits on NDAs about trade secrets, others do not.¹⁵⁸

The remaining cases defy easy categorization. Before diving in, we will note that all courts agree that NDAs which prohibit speech, notwithstanding a legal duty to disclose (such as that owed to another named person,¹⁵⁹ or to public authorities),¹⁶⁰ are void. As we discussed above, many states have

153. That is, the cases cited in *supra* note 152 were full opinions, and were in turn collected by Westlaw. In particular, we ran the following search in Westlaw's All Federal and State cases database: "adv: ('public policy' illegal void) /75 ((non-disclosure /3 agree!) OR NDA)". That resulted in 321 hits, which we then read.

154. See Michelle Dean, *Contracts of Silence*, COLUM. JOURNALISM REV. (Winter 2018), https://www.cjr.org/special_report/nda-agreement.php/ [<https://perma.cc/2UM9-NHCB>]; see also Shannon Bond & Jane Croft, *Non-Disclosure Agreements – An Explainer*, FIN. TIMES (Oct. 24, 2017), <https://www.ft.com/content/80dcdd58-b893-11e7-9bfb-4a9c83ffa852>.

155. RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981) (articulating a balancing test for determining whether to enforce a contract when a term is unenforceable on the basis of public policy). In Section 178, Subsections 2 and 3 articulate a balancing test, which in the end is subsumed into a catchall in Restatement Section 179: "the need to protect some aspect of the public welfare." RESTATEMENT (SECOND) OF CONTRACTS § 179(b) (AM. LAW INST. 1981) *But cf.* Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 347 (1998) (describing contours of public policy defense to nondisclosure clauses using the Restatement factors).

156. See *Buffkin v. Glacier Grp.*, 997 N.E.2d 1, 10 (Ind. Ct. App. 2013) ("Post-employment restraints are scrutinized with particular care because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through loss of his livelihood" (citing Restatement (Second) of Contracts, § 188 cmt. g (1981))).

157. "Once a secret is disclosed, knowledge of the information cannot normally be confined to a particular area." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 cmt. d (AM. LAW INST. 1995).

158. For a lucid discussion of the then case law, see *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 761 (Iowa 1999).

159. See *Unami v. Roshan*, 659 S.E.2d 724 (Ga. Ct. App. 2008) (finding unenforceable a settlement agreement providing for confidentiality regarding debt where contractual parties had an existing contract requiring disclosure of indebtedness).

160. See *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061–62 (9th Cir. 2011); *Fomby-Denson v. Dep't of the Army*, 247 F.3d 1366 (Fed. Cir. 2001) (settlement NDA unenforceable to the extent it prohibited the Army from reporting misconduct to law enforcement); *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1137 (N.D. Cal. 2002) (NDA cannot chill employees from

additionally passed Sunshine-in-Litigation laws, which in effect make it impossible to use NDAs to shield information from discovery or court proceedings.¹⁶¹ Putting those aside, how do courts talk about the public policy defense against nondisclosure claims?

A. NDAs and Employer Breach in the Public Interest

An employee engages in some form of misconduct. Sometimes that misconduct is sexual in nature, while at other times it's a crime. As a part of a severance agreement, the parties agree to a confidentiality clause. Later, the employer violates that agreement and the employee sues. The employer defends, arguing that the confidentiality it agreed to violated public policies. What results?

Public policy defenses to hush contracts sometimes succeed, typically in cases with horrific facts. For example, in *Picton v. Anderson Union High School District*, Picton, a history and social studies teacher, was accused of raping female students.¹⁶² After an investigation, Picton resigned in return for a package of financial incentives as well as a mutual NDA.¹⁶³ Later, the school district released information about the charges to the state's Commission on Teacher Credentialing, and Picton sued for breach. The court held that because the school district was under a legal duty to inform the credentialing commission of facts that led to Picton's dismissal, the nondisclosure clause necessarily violated public policy.¹⁶⁴

Bowman v. Parma Board of Education is similar.¹⁶⁵ In *Bowman*, a teacher molested his charges.¹⁶⁶ When confronted with the school district's knowledge of that fact, the teacher's representatives entered into a settlement which included a confidentiality clause.¹⁶⁷ Later, when a member of the school board heard that the teacher was employed elsewhere as a teacher, he called that district and disclosed what he knew.¹⁶⁸ Nonetheless,

taking part in government investigation); *Burkett v. Crulo Trucking Co., Inc.*, 355 N.E.2d 253, 260–61 (Ind. Ct. App. 1976) (suggesting that NDA involving partial settlement would be unenforceable, and “firing a shot across the bow” to warn future parties).

161. See, e.g., FLA. STAT. § 69.081 (2018) (declaring that, in the state of Florida, “no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard”).

162. *Picton v. Anderson Union High Sch. Dist.*, 57 Cal. Rptr. 2d 829 (Cal. Ct. App. 1996).

163. *Id.* at 831.

164. *Id.* at 834.

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

166. *Id.* at 664–65.

167. *Id.* at 665.

168. *Id.* at 665–66.

the second district employed the teacher. The teacher continued his criminal behavior and was eventually investigated again, resigned, and entered into another settlement agreement.¹⁶⁹

The teacher's estate sued for violation of the confidentiality agreement. Noting that the teacher was "entirely unsuited for the teaching profession," the court went on to hold:

The only possible conclusion under the circumstance of the instant case is that the non-disclosure clause is void and unenforceable and no cause of action will lie for its breach.

[The teacher's] decision to remain in the teaching profession undermines any validity the non-disclosure clause might otherwise have possessed. This court will not countenance an action for breach of such a clause upon such unchallenged facts as those in the instant case, for to do so would be to expose our most vulnerable citizens to a completely unacceptable risk of physical, mental and emotional harm.¹⁷⁰

The court cited no authorities in this passage. Its view of the risk calculus was visceral.¹⁷¹

Of course, public policy defenses also fail. In *Sanchez v. County of San Bernardino*, a high-level county employee had an affair with the head of the sheriff's deputy union.¹⁷² When confronted with this fact, she was advised to resign, which she did after she signed a mutual settlement and release with a confidentiality clause.¹⁷³ The county nonetheless released the news of her affair and she sued.¹⁷⁴ After losing in the trial court on public policy grounds, Sanchez prevailed on appeal.¹⁷⁵

The court first noted that unlike other cases, the county was under no legal duty to disclose the information to a convening or credentialing authority nor had it been requested to disclose.¹⁷⁶ It thus considered whether the public's right to know about wrongdoing by public employees could trump the "broad, general public policy in favor of privacy."¹⁷⁷ In answering that question the court wrote:

"Historically, th[e California Supreme C]ourt has been reluctant to

169. *Id.* at 666.

170. *Id.* at 666–67.

171. *See also* Chappell v. Butterfield-Odin Sch. Dist. No. 836, 673 F. Supp. 2d 818, 829–30 (D. Minn. 2009) (holding an agreement not to report teacher to state board of teaching unenforceable).

172. *Sanchez v. Cty. of San Bernardino*, 98 Cal. Rptr. 3d 96, 97 (Cal. Ct. App. 2009).

173. *Id.* at 100–01.

174. *Id.* at 101–02.

175. *Id.* at 98.

176. *Id.* at 103–05.

177. *Id.* at 104.

declare contractual provisions void or unenforceable on public policy grounds without firm legislative guidance. . . .” “[P]ublic policy’ as a concept is notoriously resistant to precise definition, and [] courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, ‘lest they mistake their own predilections for public policy which deserves recognition at law.’” Thus, in the absence of a statute that required the County to make the disclosures that it did, we cannot say that the County’s agreement not to make such disclosures violated public policy.¹⁷⁸

Giannecchini v. Hospital of St. Raphael provides another illustration.¹⁷⁹ In the case, a nurse was terminated for serious medication administration errors.¹⁸⁰ As a part of a negotiated settlement, his former employer agreed not to disclose the fact of his involuntary termination to any new employer.¹⁸¹ He eventually applied for a new nursing job, and his former employer disclosed the underlying facts as a part of a reference check.¹⁸² When sued for breach, the hospital defended itself by alleging a public policy defense, which the court rejected.¹⁸³ As the court explained, the agreement in question:

[M]ay be advantageous to the parties to the contract . . . but the 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. . . . 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. . . . 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.¹⁸⁴

178. *Id.* (citations omitted) (first quoting *Santisas v. Goodin* 951 P.2d 399, 413 (Cal. 1998); and then quoting *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 543 (Cal. 1999)).

179. *Giannecchini v. Hosp. of St. Raphael*, 780 A.2d 1006 (Conn. Super. Ct. 2000).

180. *Id.* at 1008.

181. *Id.*

182. *Id.* at 1009.

183. *Id.* at 1014.

184. *Id.* at 1010.

Notwithstanding this language, the court upheld the contract, because it believed that the legislature had occupied the field by providing a privacy right in employment records under certain circumstances. “Unhappily,”¹⁸⁵ the court concluded, the public policy horse had been “saddled by the legislature.”¹⁸⁶

B. NDAs and Court-Approved Settlements

Another important context in which NDAs are tested is in Fair Labor Standards Act (FLSA) cases. The FLSA, which regulates largely the conditions of hourly work, is typically litigated on a collective basis,¹⁸⁷ and settlements require court approval.¹⁸⁸ Courts “routinely” have found that nondisclosure provisions violate public policy because they inhibit “one of the FLSA’s primary goals—to ensure that all workers are aware of their rights.”¹⁸⁹ At least according to some courts, the public policy attaches by virtue of court involvement—the FLSA settlement is filed in court, and becomes a “judicial document[,]” which then receives a “presumption of access.”¹⁹⁰

Courts, however, will go further. Because the “purpose underlying the FLSA is the protection of ‘the rights of those who toil,’ . . . the FLSA ‘should be broadly interpreted and applied.’”¹⁹¹ Even if the settlement is available publicly, the “best way for a worker to learn about his or her employment rights is directly or indirectly from a co-worker or an outside organization.”¹⁹²

We note that, in the context of Title VII, while “it is contrary to public policy to block communication needed to carry out the purpose of a federal

185. *Id.* at 1013.

186. *Id.* at 1011.

187. *See* 29 U.S.C. § 216(b) (2018).

188. *See* Ronald L. Burdge, *Confidentiality in Settlement Agreements Is Bad for Clients, Bad for Lawyers, Bad for Justice*, AM. B. ASS’N (Apr. 5, 2019), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2012/november_december2012privacyandconfidentiality/confidentiality_settlement_agreements_is_bad_clients_lawyers_justice/ [<https://perma.cc/3PRP-5J4G>] (pointing to the congressional intent behind FLSA, one of the nation’s most important labor laws, as the reason behind unique disclosure norms and requirements related to FLSA settlements).

189. *Larrea v. FPC Coffees Realty Co.*, No. 15-CIV-1515 (RA), 2017 WL 1857246, at *4 (S.D.N.Y. May 5, 2017) (internal quotations omitted) (quoting *Camacho v. Ess-A-Bagel, Inc.*, No. 14-cv-2592 (LAK), 2015 WL 129723, at *2 (S.D.N.Y. Jan. 9, 2015)); *see also* *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015); *Martinez v. SJG Foods LLC*, No. 16-CV-7890 (RA), 2017 WL 2169234, at *3 (S.D.N.Y. May 16, 2017).

190. *Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 178 (S.D.N.Y. 2015).

191. *Poulin v. Gen. Dynamics Shared Res., Inc.*, No. 3:09-cv-00058, 2010 WL 1257751, at *2 (W.D. Va. Mar. 26, 2010) (quoting *Schultz v. Capital Int’l Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006)).

192. *Lopez*, 96 F. Supp. 3d at 179.

act,”¹⁹³ Title VII has never been so interpreted outside of the context of disclosure to public authorities.¹⁹⁴

Thus, in FLSA cases, courts explicitly brush past concerns that confidentiality promotes settlement by reducing the likelihood of later frivolous litigation.¹⁹⁵ This difference is explained by one court as follows: “in most contexts such logic is perfectly reasonable. But the congressional purposes underlying the FLSA change the calculus.”¹⁹⁶ Because Congress intended the statute to have an educational purpose, fear of embarrassing inquiries is simply seen to be an insufficient reason to permit private control over information flows.¹⁹⁷

C. NDAs and Whistleblowers

A distinct factual context in which sex is at issue is when a private party leaks derogatory information to the media in violation of a confidentiality agreement and claims that the First Amendment (or its embedded values) condones the behavior.¹⁹⁸ Such claims are rarely, if ever, successful.¹⁹⁹

A fraught (and difficult) example of the phenomenon is the claim by a pro-life organization, the Center for Medical Progress, that it had the right to breach a confidentiality clause it had agreed to when it attended the National Abortion Federation’s (NAF) Annual Meetings (the NAF is an organization of abortion providers).²⁰⁰ When the pro-life organization attempted to release secret video recordings of the event (that purported to show the NAF’s willingness to sell human tissues among other sins), the

193. Bast, *supra* note 26, at 655.

194. Cf. EEOC v. Astra, 94 F.3d 738, 744–45 (1st Cir. 1996) (holding a nondisclosure clause which barred EEOC disclosures unenforceable). Though this is not to say courts will not ever expand this Title VII doctrine. See, e.g., Netter v. Barnes, 908 F.3d 932, 939 (4th Cir. 2018) (leaving the door open for the court to hold that revealing confidential information in violation of a contract between private parties is protected under the statute).

195. Lopez, 96 F. Supp. 3d at 180.

196. Camacho v. Ess-A-Bagel, Inc., No. 14-cv-2592 (LAK), 2015 WL 129723, at *3 (S.D.N.Y. Jan. 9, 2015).

197. An excellent introduction to this topic, which has been cited and followed by many district courts, is Wilkins, *supra* note 31.

198. M. P. Furmston, *The Analysis of Illegal Contracts*, 16 U. TORONTO L.J. 267, 295 (1965) (discussing a case in which a newspaper promised not to disclose a fraud, breached, and was excused because of the possibility of harm to third parties).

199. A typical example tangentially involves Donald Trump. See LiMandri v. Wildman, Harrold, Allen & Dixon LLP, No. B234460, 2013 WL 2451322 (Cal. Ct. App. June 6, 2013).

There, parties to a confidentiality agreement involving the Miss America competition (that Trump owned) breached the agreement but argued that breach was excused because the disclosure was in “a public forum in connection with an issue of public interest.” *Id.* at *4. The court dismissed the argument out of hand. *Id.* at *6.

200. Nat’l Abortion Fed’n v. Ctr. for Med. Progress, No. 15-cv-03522-WHO, 2016 WL 454082, at *3–5 (N.D. Cal. Feb. 5, 2016).

NAF sued for breach of contract and a host of other claims.²⁰¹ The defendants argued that the confidentiality clause violated public policy.²⁰²

In preliminary motion practice, the district court rejected the defendant's arguments.²⁰³ It refused to interpret the agreements narrowly in light of the defendant's alleged public-regarding purposes, finding that the NAF's desire for privacy was also justified by public ends.²⁰⁴ In an extended passage, the court considered the risk that confidentiality provisions posed to First Amendment values.²⁰⁵ Relying on *Cohen v. Cowles Media Co.*,²⁰⁶ the court noted that disclosure could be compelled if what would otherwise be hidden was criminal or especially heinous.²⁰⁷ Given the "significant, countervailing public policy arguments weighing in favor of enforcing NAF's confidentiality agreements," such as harm to providers, the court denied the public policy defense to breach.²⁰⁸

D. NDAs and Adulterers

Finally, there are a handful of cases where men have agreed to pay for the silence of women with whom they have engaged in extra-marital sexual relations, typically resulting in a contested claim of paternity. Unlike Donald Trump, some of these men have not paid up front for the entirety of the counter-promise, and instead sought to declare their obligations excused due to public policy—that is, society's general view that adultery causes harm, and that keeping silent about that harm makes things worse.²⁰⁹

We have not found an example of that argument prevailing in a modern case.²¹⁰ A more typical result is that obtained by former basketball great Michael Jordan, who paid a woman with whom he had been intimate \$250,000 and promised to pay \$5,000,000 more if she kept quiet about his alleged paternity of a child that had resulted from their affair.²¹¹ Though the trial court had denied enforcement to any "hush money" agreement,²¹² the

201. *Id.* at *4.

202. *Id.* at *17.

203. *Id.* at *19–21.

204. *Id.* at *20.

205. *Id.* at *18–19.

206. 501 U.S. 663 (1991).

207. *Nat'l Abortion Fed'n*, 2016 WL 454082, at *18.

208. *Id.* at *15.

209. *Jordan v. Knafel*, 823 N.E.2d 1113, 1121 (Ill. App. Ct. 2005).

210. Earlier cases often would impose moral values in just this way. RESTATEMENT (FIRST) OF CONTRACTS § 557 (AM. LAW INST. 1932) ("A Bargain that has for its consideration the nondisclosure of discreditable facts . . . is illegal.").

211. *Jordan*, 823 N.E.2d at 1117.

212. *Jordan v. Knafel*, No. 02-CH-19143, 2003 WL 25669296, at **9–10 (Ill. Cir. Ct. June 12, 2003).

appellate court reversed.²¹³ It held that contracts for silence might be unenforceable, if, for example, they “suppress[ed] information . . . about public safety.”²¹⁴ Jordan’s contract was not such a contract; it was, rather, a fair exchange in return for a “good-faith claim of right.”²¹⁵

III. PUBLIC POLICY AS AN EXTERNALITY PROBLEM

It is our sense, canvassing the case law, that those few cases considering the public policy defense applied to general nondisclosure clauses are struggling with two competing intuitions.²¹⁶ The first is that private bargains ought to be respected, and that secrecy, like a price or a warranty term, is worthy of deference. This is the idea that appears in *Sanchez* and like cases: finding that the risks of secrecy outweigh the benefits somehow exceeds the judicial role.²¹⁷ The roots of such a pro-bargain principle are deep in contract doctrine.²¹⁸

The second concern, most evident in the FLSA context, is that secrecy creates a unique set of problems when it is attached to the settlement of legal rights that have collective attributes.²¹⁹ Those include the worry that silenced parties cannot generate the reputational sanctions that usually make private law deterrence-based regimes work.²²⁰ There is also a sense that giving court imprimatur to confidentiality would makes judges complicit—that contracts that silence talk about sexual wrongdoing enact a form of moral wrong on future potential victims.

213. *Jordan*, 823 N.E.2d at 1123.

214. *Id.* at 1119.

215. *Id.* at 1120. The court distinguished *In re Yao*, 661 N.Y.S.2d 199 (N.Y. App. Div. 1997), where an appeals court upheld the finding that an attorney’s contract with a wealthy individual for \$10,000 a month in return for not publicizing personal information was against public policy. *Id.* at 1119–20.

216. Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 77 (1928) (explaining the role of intuition in public policy analysis).

217. *Sanchez v. Cty. of San Bernardino*, 98 Cal. Rptr. 3d 96, 104 (Cal. Ct. App. 2009); see also *Law and Economics*, *supra* note 26, at 1452 n.35 (noting that courts might be less well-positioned than legislatures in thinking about externalities).

218. See RESTATEMENT (SECOND) OF CONTRACTS ch. 8, intro. note (AM. LAW INST. 1981) (“In general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance.”).

219. A goal of public policy is to advance the public “weal” and the “social fabric.” Thomas H. Breeze, *The Attitude of Public Policy Towards the Contracts of Heirs Expectant and Reversioner*, 13 YALE L.J. 228, 228 (1904).

220. Cf. Levmore & Fagan, *supra* note 17, at 322 (noting that sexual harassment cases against celebrity defendants might settle for an insufficient amount because the accuser doesn’t know their real chances of success given the lack of market signals).

Few cases talk about bargaining or consent explicitly, which is unsurprising given the doctrine's particulars.²²¹ Rather, lurking in the background of the doctrine, but rarely explicitly discussed, is a search for a limiting principle. Courts seem to be asking, if parties can't contract for secrecy here, can they anywhere? What's the line? How can we make this set of rules predictable?²²² Thus, courts will cut off their analysis at the hint of statutory preemption, and, if they see competing policies (like privacy rights) will err on the side of contractual enforcement.

Like other recent authors, we think that courts should, and sometimes do, explicitly focus their analysis on third-party harm.²²³ Indeed, we think that public policy is best thought of as primarily a doctrine about limiting the externalities that result from private contracts. The basic intuition is simple: private bargains generate benefits to contracting parties while externalizing the costs. The owners of Coase's canonical polluting factory internalize the benefits of production while emitting smog (this is the torts classic externality, of course). But that factory arises by virtue of a nexus of contracts.²²⁴ Those external losses will be borne by individuals who can rarely bargain with the contracting parties.

Thus, some have suggested that public policy functions like strict liability in tort to force parties to internalize social costs for particular bargains.²²⁵ Strict liability is typically a doctrine triggered when the underlying activity is dangerous, and the consequent social risks are extreme. In modern confidentiality cases, courts seem to be grasping at this

221. Cf. Complaint at 12, ¶ 49, *Bechard v. Broidy*, No. BC-712913 (Cal. Super. Ct. July 6, 2018), <http://strismaher.com/wp-content/uploads/2018/10/BC712913-Unredacted-Complaint.pdf> [<https://perma.cc/9DWP-JQAU>] (alleging a survivor was coerced into signing a settlement agreement with unconscionable terms by her attorney, who took steps to ensure she would not understand the terms of the settlement to which she agreed). The Complaint alleged that

a review of the Settlement Agreement reveals (1) unconscionable terms to which no reasonable lawyer or informed client would agree, as well as (2) terms that Mr. Davidson either deliberately refused to disclose to Ms. Bechard or about which he affirmatively lied. For example, . . . the Settlement Agreement provides no effective remedy to Ms. Bechard if Mr. Broidy violates its confidentiality or payment provisions In stark contrast, Ms. Bechard faces the threat of a preposterously high liquidated damages penalty and resulting financial ruin if she has the audacity to mention the Settlement Agreement or respond to Mr. Broidy's factual misstatements.

Id. ¶ 50 (emphasis omitted).

222. Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 208 (2013).

223. See, e.g., Bagchi, *supra* note 26, at 212 (proposing an interpretative rule for contracts that "[t]extual ambiguity should be resolved to avoid compromising the legally-recognized interests of third parties").

224. See generally William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 407–08 (1989) (advancing a nexus of contracts view that "explains corporate relationships and structures in terms of contracting parties and transaction costs").

225. *Law and Economics*, *supra* note 26, at 1446–47.

general principle.²²⁶ Both the FLSA courts and *Bowman*'s solicitude for the "most vulnerable" among us evokes the sort of "public danger" rhetoric that characterized tort law. What counts as social harm is mutable: as F.H. Buckley observes, the third-party focus used to be on the harms caused by sexual immorality, but more recent cases worry about commodification and racial stereotyping.²²⁷

The analogy between public policy and strict liability breaks down, however, when we consider differences in how contract and tort adjudicate violations of legal rights. In the strict liability example, tort law says that a victim has the right to recover regardless of the tortfeasor's precaution-taking.²²⁸ The result is that the tortfeasor's level of activity is, in theory, socially optimal: it produces goods so long as its private benefits exceed its social costs. The system is efficient, and distributional concerns can be left to the tax rules.²²⁹

By contrast, a host of doctrinal rules makes it nearly impossible for third-party victims of contractual harms to recover from the parties. That's true in part because only those in privity with the contract can usually sue for its benefits—the specifically named third-party beneficiaries.²³⁰ But it is also the case that both parties to a contract are, in essence, jointly responsible for harms. It boggles the mind to imagine that other victims in a workplace could sue a victim of harassment for a piece of her settlement, as if she had received an ill-gotten windfall recovery.²³¹

Public policy thus is merely a contractual shield, not a sword, and can only be used by those internal to the contractual relationship. It is as if the only recourse against a polluting factory would be to disable its ability to bring a suit against the firm that installed the smokestack. Economically, public policy thus does not result in cost internalization by wrongdoers, but rather merely reduces the value of the counterparty's executory promise.

Further destabilizing the analogy, public policy does not actually prohibit the underlying transaction (payment for silence). Rather, it says that

226. See, e.g., Burdge, *supra* note 188 (explaining that courts have gradually come to view secrecy in FLSA cases as *per se* contrary to public policy given the unique role that statute plays in ensuring transparency around work conditions).

227. Buckley, *supra* note 26, at 143.

228. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 4, scope note (AM. LAW INST. 2005).

229. Stewart Schwab's analysis of the role of externalities in the wrongful discharge tort is illustrative. Schwab, *supra* note 150, at 1950.

230. See RESTATEMENT (FIRST) OF CONTRACTS § 133 (AM. LAW INST. 1932) (setting out definitions and categories of third-party beneficiary enforceability); see also Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1360–70 (1992) (charting the development of American law regarding the enforceability of contracts by third parties).

231. This would treat contract settlements like disaster funds.

you cannot enforce an *executory* contract for silence in court. Reputational sanctions, or private bonds, might promote enforcement of hush contracts even if courts were unwilling to enforce them.²³² Alternatively, executory contracts rendered unenforceable by public policy could become piecework deals: a month or two of silence will precede payment, serially, over years.²³³

What, then, does a public policy defense really gain us if parties can avoid it by recourse to a series of contracts? For one, executory contracts are cheaper to draft and monitor than an endless series of unenforceable micropayments (yes, even in a world of blockchain). Contract law depresses the ability of parties to act opportunistically: depriving parties of the right to contract in this way will depress their interest in the subject.²³⁴ Public policy defenses to hush contracts would reduce the number of such arrangements in the world—just as, for instance, public policy defenses to noncompetes reduce their incidence in states which adhere to the rule (but have not eliminated them).²³⁵

Second, public policy defenses are relatively politically attractive. Unlike unconscionability, public policy does not require courts to make explicit findings about the party's bargaining deficits before ruling for her claims.²³⁶ The result is that it is probably easier to adopt politically. Courts need not limit the ambit of the defense to the politically unpopular or powerless: indeed, many public policy rules (like the ones that prohibit liquidated damages clauses if they are penal) are popular in part because their benefits are broadly felt. Moreover, because public policy elides consent, it similarly avoids the problem that bedevils most contractual defenses: the victim needs to show why her contractual choices ought not be respected.²³⁷

Third, public policy is self-limiting. Unlike, say, a statute which makes every hush contract void, public policy decisions are adopted by common

232. Badawi, *supra* note 26, at 491.

233. This pattern of installment payments is exactly what Sanga finds in noncompetes in California contracts. Sarath Sanga, *Incomplete Contracts: An Empirical Approach*, 34 J.L. ECON. & ORG. 650, 676–77 (2018).

234. Badawi, *supra* note 26, at 492.

235. Sanga, *supra* note 233, at 654.

236. *But cf.* Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. (forthcoming 2019) (manuscript at 15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3213542 [<https://perma.cc/3R3T-FEKD>] (finding examples of courts refusing to enforce bad price bargains in the absence of procedural unconscionability).

237. Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1767 (2014); *see also* Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L.J. 1383, 1422 (2014).

law courts in a step-wise, slow, and accretive manner.²³⁸ If one court goes too far—if, for instance, it turns out that making hush contracts unenforceable has perverse consequences for the reporting of harassment at work—the next court considering such an agreement can choose again. Public policy does not exert the same sort of precedential drag as an ordinary opinion; rather, “[a] contract, or a particular provision therein, valid in one era may be wholly opposed to the public policy of another.”²³⁹ This lawlessness is often seen as a bug of the doctrine. But it is also a virtue: public policy is flexible and unlikely to do real harm where it has gone seriously awry.²⁴⁰

Fourth, the doctrine is relatively easy to grasp, and will be therefore easy to communicate in the news media. This has expressive values (which we will discuss below) but it also has a functional role. Much American contract law is adjudicated not by judges, but by lawyers acting as arbitrators.²⁴¹ The fidelity of such arbitrators to state law contract doctrine is difficult to discern. A clear and publicized rule (“Hush contracts are wrong!”) is more likely to succeed in the arbitration black box.

But these defenses, in the end, do not grapple with the foundational problem of scope. Nearly all contracts externalize costs. As Aditi Bagchi has explained, a “loose construction of public policy” that protected all “legally-recognized third party interests”—would “make adjudication unpredictable and inconsistent.”²⁴² It is fair to say that courts today have managed to find some sort of solution—only some cases are thrown out based on the defense, and few lawyers worry that the ordinary-run commercial contract will founder because it creates the risk of financial contagion. There seemingly exists a sense shared by lawyers and judges: where a contract hides information about physical or severe emotional risks from potential victims, who the parties could have easily identified at contracting, then it may be voided, especially when it does not seem like the disclosing party is acting in bad faith.²⁴³

238. Bagchi, *supra* note 26, at 243.

239. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 95 (N.J. 1960).

240. Some might object that once a contract is prohibited under public policy, test cases will not arise to change the rule. Not so: consider how many liquidated damages clauses remain in contracts despite the historic prohibition, and how the existence of such clauses (and firms’ continued experimentation) has changed the law in important states, like California. CAL. CIV. CODE § 1671 (West 2018) (shifting presumption in California for liquidated damages clauses from invalid to valid).

241. Issacharoff & Marotta-Wurgler, *supra* note 27.

242. Bagchi, *supra* note 26, at 218.

243. Dan M. Kahan, David A. Hoffman, Danieli Evans, Neal Devins, Eugene Lucci & Katherine Cheng, “Ideology” or “Situation Sense”? *An Experimental Investigation of Motivated Reasoning and Professional Judgement*, 164 U. PA. L. REV. 349, 356 (2016).

As a matter of moral psychology, this account of public policy looks a lot like courts practicing counterfactual thinking. Counterfactual thinking is one way that humans assess blame. We are more likely to blame people for things they have control over.²⁴⁴ And, the more salient the alternative that might have prevented a bad outcome (that is, the easier to imagine it is), the more likely we are to believe that it ought to have been prevented. As Tess Wilkinson-Ryan has explained, the fact of consent to a contract is a salient alternative—if only the parties had not chosen that particular course—which makes them culpable.²⁴⁵

And yet, even if courts have muddled through to a doctrine that provides relief to identifiable victims, for psychologically compelling reasons, that can't stand as a complete defense of either the status quo or of our externality theory of public policy. After all, even if our account provides more certainty than the Restatement's vague balancing engine, we might still ask why contract law, rather than tort actions or legislative fiat, is the right institutional locus for our intuitions about third-party harm in confidentiality proceedings. For that defense, we need to develop a narrative of contract law that explains the stories it attempts to tell.

IV. TOWARDS AN EXPRESSIVE THEORY OF CONTRACT DEFENSES

In the previous parts, we have developed a mildly richer link between public policy and third-party harms than the state of the art. Previous work here foundered on the question of remedy, and shied away from arguing that externalities should make contracts unenforceable.²⁴⁶ For instance, Aditi Bagchi would have courts interpret contracts so as to avoid third-party harm,²⁴⁷ but only if they can easily identify it.²⁴⁸ Others, like Adam Badawi, would modify the defense by turning it into a limitation on damages: if the breaching party can identify a concrete third-party harm, then they need not pay the non-breacher.²⁴⁹

These solutions are elegant, though we are not sure that there is that much of a functional difference between interpreting a contract so that it forbids third-party harm (or rendering damages unavailable in that case) and simply

244. Neal J. Roese, *Counterfactual Thinking*, 121 PSYCHOL. BULL. 133, 139 (1997).

245. Wilkinson-Ryan, *supra* note 237, at 1777–78.

246. Bagchi, *supra* note 26, at 241.

247. *See id.* at 242.

248. *See id.* at 243.

249. Badawi, *supra* note 26, at 487. Badawi states that underlying criminal violations will always satisfy the test and focuses his analysis on contracts premised on regulatory problems. *Id.* at 491; *see also* Kostritsky, *supra* note 26, at 122 (arguing there should be a “graduated relief structure [that] will maximize efficient deterrence”).

forbidding enforcement *ex ante*.²⁵⁰ More significantly, a solution that leaves public policy to the job of limiting damages, or adding to the canons of interpretation, misses an opportunity to fashion a remedy with expressive oomph. It would cabin current doctrine but doesn't really explain the hardest cases.²⁵¹ As Badawi acknowledges, saying that a contract violates public policy, but that the parties may nonetheless keep the gains that it created, sends the "message that the state tolerates violation of positive law."²⁵²

In this section, we talk explicitly about the messages that contract law sends, with the aim of convincing the reader that when courts believe that there is significant third-party harm, they ought to loudly proclaim that public policy is violated. We then apply that expressive account of public policy to the sexual harassment example. Finally, we deal with a few objections.

A. An Expressive Account of Public Policy in Contract

Public policy is thought to be incoherent for want of a theory about what such a wayward doctrine usefully does within a regime of law dedicated to predictability and certainty. To develop such a theory, we will focus on contract law's messaging. That is, we want to situate public policy within an *expressive* account of contract doctrine. In so doing, we hope to show that this unruly horse plays an important part in making contract law legitimate.

At "the simplest level, expressive theories posit that, like actions generally, legal actions carry meanings and signal attitudes and commitments."²⁵³ In other words, jurists should not rest merely on an "imperative theory of law"—focused on the commands it issues and

250. Badawi, *supra* note 26, at 528 (finding this approach indistinguishable from nonenforcement in common law cases).

251. GHODOOSI, *supra* note 26, at 48 (describing how a law and economics approach misses the hardest cases).

252. Badawi, *supra* note 26, at 507. Badawi argues that one way to make sense of different outcomes in public policy cases is that courts "may place different weights on the expressive harm" that enforcement of illegal contracts creates. *Id.* at 508. As Badawi points out, some courts could reasonably think that the "message that it is permissible to violate positive law" might influence both the parties to the contract and future parties who face difficult contracting choices. *Id.* at 509. However, Badawi does not extend this account to the expressive function of contract law at a more general level, and his account reads as largely within the deterrence tradition.

253. Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208, 212 (2002) (footnotes omitted) (internal quotations omitted) (first quoting Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021 (1996); and then quoting Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 925 (1996)).

citizens' expected responses²⁵⁴—but also the *messages* that those rules communicate.²⁵⁵ As Cass Sunstein has explained, sometimes the law ought to choose to communicate a message even when it is unsure about what its utilitarian effects are:

A society might identify the kind of valuation to which it is committed and insist on that kind, even if the consequences of the insistence are obscure or unknown. A society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups. A society might protect endangered species partly because it believes that the protection makes best sense of its self-understanding, by expressing an appropriate valuation of what it means for one species to eliminate another. A society might endorse or reject capital punishment because it wants to express a certain understanding of the appropriate course of action after one person has taken the life of another.²⁵⁶

Expressive accounts of law are not consequence-blind.²⁵⁷ Sunstein himself focuses on the relationship between the law's communicative message and the diffusion and evolution of norms.²⁵⁸ But the relationship between expressivist theory and its objects can be confused.²⁵⁹ In a modest sense, an expressive theory of law is no more than the claim that actions of legal officials should be judged by what those actions mean to their audiences.²⁶⁰

Thus, an expressive account of contract law describes the story we tell ourselves about the social meaning of legal agreements. In contrast to

254. On imperative theories in law and economics, see Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 585 (1998).

255. Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 860 (2014). Jonathon Penney and Danielle Citron explore this topic as well, and they assert that “law’s expressive value extends to victims. It makes clear that the democratic majority disapproves of efforts to silence and intimidate victims. It says that the public values victims’ . . . contributions.” Danielle Keats Citron & Jonathon W. Penney, *When Law Frees Us to Speak*, 87 FORDHAM L. REV. 2317, 2327 (2019). Instead of chilling victim speech, they present empirical data showing that strict regulation of harassment online actually incentivizes victims to come forward and share their experiences. *Id.* at 2329–32.

256. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 823 (1994).

257. There are, however, few empirical accounts. Cf. Maggie Wittlin, Note, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. ON REG. 419 (2011) (finding that highly publicized seatbelt laws in one state can affect use in neighboring states).

258. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025 (1996).

259. See Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1412 n.158 (2000).

260. See *id.* at 1384.

criminal law,²⁶¹ constitutional law,²⁶² torts,²⁶³ property,²⁶⁴ and even tax,²⁶⁵ expressive accounts of contract are barely developed. There are, so far as we can tell, only a handful of papers that extensively discuss the expressive function of contract law writ large.²⁶⁶

In one paper, experimentalists suggested the specific performance default rules could shift individual preferences.²⁶⁷ This is, in essence, an argument about the genesis of focal points.²⁶⁸ One way to understand the result is as a form of system justification: the subjects see the law as fair, but do not know much about it; when informed of the presumed rule, they conform their judgment about the system to what they have learned.²⁶⁹

Another well-known paper, by Gillian Hadfield, suggests that the *choices* made by contracting parties have expressive meaning.²⁷⁰ Her rich account responds to purely rational choice theories of contractual consent and suggests that courts ought to be careful in mistaking agreement with

261. See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 382–85 (1997); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 615–17 (1998); cf. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 419–35 (1999) (contrasting deterrence and expressive accounts).

262. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1531–64 (2000).

263. Alan Strudler, *Mass Torts and Moral Principles*, 11 L. & PHIL. 297 (1992).

264. Baron, *supra* note 253.

265. Kitty Richards, *An Expressive Theory of Tax*, 27 CORNELL J.L. & PUB. POL'Y 301 (2017).

266. Other accounts touching on the role of expression in contract include Tal Kastner, Essay, *The Persisting Ideal of Agreement in an Age of Boilerplate*, 35 L. & SOC. INQUIRY 793 (2010) (providing a symbolic account of boilerplate); Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876 (2001) (arguing that consideration theory privileges individualistic accounts of contract law); Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529 (2011) (making the case that contractual rules privilege consent to divert social resources from revenge); Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1011 (2010) (explaining that by denying emotional damages, contract law depresses the expressive stakes of disputes).

267. Ben Depoorter & Stephan Tontrup, *How Law Frames Moral Intuitions: The Expressive Effect of Specific Performance*, 54 ARIZ. L. REV. 673, 713–15 (2012) (proposing that specific performance rules as a default can serve as anchors).

268. There is a rich experimental and theoretical literature about focal points in default rule analysis. Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 233–35 (2009); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1651 (2000) (“[L]aw provides a focal point around which individuals can coordinate their behavior. When individuals have a common interest in coordinating, as frequently occurs, a legal rule may guide behavior merely by influencing expectations about how others will behave.”); Richard H. McAdams & Janice Nadler, *Coordinating in the Shadow of the Law: Two Contextualized Tests of the Focal Point Theory of Legal Compliance*, 42 L. & SOC'Y REV. 865, 887–91 (2008) (proposing that default rules provide coordinating focal points).

269. This reading is supported by David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595, 1615–27 (2016) and Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 121–22 (2017).

270. Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235 (1998).

meaningful consent.²⁷¹ However, Hadfield does not propose a general account of how the decisions of contract judges ought to be informed by the governmental message they communicate.

It is not, of course, as if theorists have ignored the message that contract law communicates. Ian MacNeil long ago explained that contract law functions “as a relatively precise expression—an index if you will—of the great underlying and diffuse sea of custom and social practices in which human affairs are conducted. This function of law is to tell society what is most important among its customs and practices.”²⁷² That is, when courts choose to enforce a contract, or pick a particular default rule as the basis for bargaining, or adopt a damages limitation, they are in effect sending out a message about which (of a competing set of values) our political-legal order privileges.

But a serious complication in developing an expressive account of contract doctrine is that—in partial contrast to cognate fields—contract law contains within it many values.²⁷³ The efficient breach rule propagated in canonical cases like *Peevyhouse v. Garland* tells listeners that contract law denies the value of subjective loss, but *Groves v. John Wunder Co.* makes precisely the opposite point.²⁷⁴ *Leonard v. Pepsico* teaches that contract law has a sense of humor; *Lucy v. Zehmer* calls that idea “bizarre.”²⁷⁵ The traditional contracts course ping-pongs between a vision of contract law which encompasses social facts and one that focuses on predictability. It is no wonder that many students find it exceedingly frustrating.

However—and noting a legion of exceptions—we see the primary thrust of American contract law opinions to be centered around narrowing the ambit of mandatory rules and increasing the scope of (and public store of) default rules.²⁷⁶ Formation rules like *White v. Corlies*²⁷⁷ and *Nebraska Seed*

271. *Id.* at 1284.

272. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* 94 (1980).

273. Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1488 (2005); FREDERICK POLLOCK, *PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY* 1 (1881) (acknowledging “how special and complex a nature the conception really is”).

274. Compare *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962), with *Groves v. John Wunder Co.*, 286 N.W. 235 (Minn. 1939).

275. Compare *Leonard v. Pepsico, Inc.* 88 F. Supp. 2d 116 (S.D.N.Y. 1999), with *Lucy v. Zehmer*, 84 S.E.2d 516, 520 (Va. 1954).

276. Ayres, *supra* note 17, at 78–79.

277. *White v. Corlies*, 46 N.Y. 467, 469 (1871) (“We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act.”).

v. *Harsh*;²⁷⁸ breach rules like *Jacob and Youngs, Inc. v. Kent*²⁷⁹ and *Stewart v. Newbury*;²⁸⁰ and damages rules like *Hadley v. Baxendale*,²⁸¹ *Britton v. Turner*,²⁸² and *Hawkins v. McGee*²⁸³ all explicitly make legal rules with the proviso that they can be bargained out of.²⁸⁴ In perhaps the most infamous such example, Judge Cardozo in *Jacob and Youngs*, after crafting a rule about substantial performance from the parties' implied preferences, states that "[t]his is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery."²⁸⁵ In other words, the case ultimately expresses a message of deference to bargained-for choice.²⁸⁶

These default rules serve as bargaining focal points.²⁸⁷ Default rules, unlike those from torts or criminal law, are uncertain behavioral spurs—indeed, they are “the weakest kind of law.”²⁸⁸ And, it is not obvious that

278. *Neb. Seed Co. v. Harsh*, 152 N.W. 310, 311 (Neb. 1915) (“Care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation.” (quoting *Lyman v. Robinson*, 96 Mass. (14 Allen) 242, 254 (1867))).

279. *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 893 (N.Y. 1921) (McLaughlin, J., dissenting) (“Having departed from the agreement, if performance has not been waived by the other party, the law will not allow him to allege that he has made as good a building as the one he engaged to erect. . . . To hold a different doctrine would be simply to make another contract, and would be giving to parties an encouragement to violate their engagements, which the just policy of the law does not permit.” (quoting *Smith v. Brady*, 17 N.Y. 173, 186 (1858))).

280. *Stewart v. Newbury*, 115 N.E. 984, 985 (N.Y. 1917) (“Where a contract is made to perform work and no agreement is made as to payment, the work must be substantially performed before payment can be demanded.”).

281. *Hadley v. Baxendale*, 9 Exch. 341, 341, 156 Eng. Rep. 145, 145 (1854) (“Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally . . . or such as may reasonably be supposed to have been in the contemplation of both parties . . .”).

282. *Britton v. Turner*, 6 N.H. 481, 490–91 (1834) (“If then the party stipulates in the outset to receive part performance from time to time, with a knowledge that the whole may not be completed, we see no reason why he should not equally be holden to pay for the amount of value received, as where he afterwards takes the benefit of what has been done, with a knowledge that the whole which was contracted for has not been performed.”).

283. *Hawkins v. McGee*, 146 A. 641, 644 (N.H. 1929) (“We therefore conclude that the true measure of the plaintiff's damage in the present case is the difference between the value to him of a perfect hand or a good hand, such as the jury found the defendant promised him, and the value of his hand in its present condition, including any incidental consequences fairly within the contemplation of the parties when they made their contract.”).

284. See, e.g., *Jacob & Youngs*, 129 N.E. at 891; see also *Hadley*, 9 Exch. at 341, 156 Eng. Rep. at 145 (observing that contracting parties can stipulate damage provisions but that in the absence of such provisions, default rules will apply).

285. *Jacob & Youngs*, 129 N.E. at 891. The rule is “infamous” because it is not obvious that Cardozo meant to take it literally rather than seriously.

286. Kreitner, *supra* note 266, at 1953–56 (describing consideration theory as having the effect of advancing a conception of a “calculating individual”).

287. See *supra* note 268.

288. *McAdams & Nadler*, *supra* note 268, at 886.

such rules intend, or succeed, at altering primary behavior in the world.²⁸⁹ Thus, utilitarian and incentive theories of contract law constantly must struggle with the inconvenient fact that contract doctrine is behaviorally flimsy.

What the default rule project does best is to *express a message*: our society values autonomy more than contractual fairness.²⁹⁰ Thus, a central organizing metaphor of contract law—the hypothetical bargain which generates both consideration doctrine and default rule analysis—is explicit in denying the validity of external brakes on what the parties agree to. Default rules are generally majoritarian: what matters is what most parties would have wanted.²⁹¹

Working through the exceptions to this rule is beyond the scope of this paper, but we think in general descriptive terms it ought to be uncontroversial. Contract law shouts choice to the rooftops and it holds consent up as the ideal against which decisions are to be measured. Thus, theorists who work to cabin the scope of choice are not in the heartland of contract doctrine but rather are “feminists” or “paternalists.”²⁹² Those who would upturn parties’ choices must reckon with the cost: better terms = higher price.²⁹³ Unconscionability, good faith, the pre-existing duty rule,

289. David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1836–37 (1991) (discussing how default choosing may be done so as to create social expectations); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1054–56 (2004) (describing the limits of default rules in trusts and estates to influence behavior); Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 414 (1993) (“[P]ersons are unlikely to abandon considered views merely because the state enacts a nonbinding rule that these persons think is objectionable.”).

290. See Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1014 (1985) (“[O]ur principal vision of contract law is still one of a neutral facilitator of private volition. We understand that contract law is concerned at the periphery with the imposition of social duties But we conceive the central arena to be an unproblematic enforcement of obligations voluntarily undertaken. . . . Although we concede that the law of contract is the result of public decisions about what agreements to enforce, we insist that the overarching public decision is to respect and enforce private intention.”).

291. Charny, *supra* note 289, at 1815 (explaining that the trend is toward majoritarian default rule analysis).

292. Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on the Limits of Freedom of Contract*, 33 OSGOODE HALL L.J. 337 (1995); Hadfield, *supra* note 270; Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); cf. David Campbell, *Afterword: Feminism, Liberalism and Utopianism in the Analysis of Contracting*, in FEMINIST PERSPECTIVES ON CONTRACT LAW 161, 165, 172 (Linda Mulcahy & Sally Wheeler eds., 2005) (criticizing Hadfield and arguing that if authors “do not place a pre-eminent value on autonomy, feminists cannot really respect the law of contract, for a law of contract that does not turn on autonomy and choice becomes something like a law of planned, paternalistic exchanges, that is, not contract at all”).

293. Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 29 (1993).

and duress are limited “exceptions” to the mainstream of modern contract law, and must be justified, cabined, and explained away.

This division between the core and periphery of contract law is, at its root, one founded on a vision of a society of equals, bargaining together, and capable of protecting themselves. Contract cases which adopt default rules express a message—a story of the triumph of the will. The expressive story of contract law marks us all as agents capable of choice, members of a community with shared linguistic and social conventions, and consequently citizens.

Those who seek to be freed from obligation are put in a bind. They cannot usually argue that they consented but that the rule is *unfair*.²⁹⁴ Doing so would be akin to claiming that they are not like other citizens—worthy of losing to an equal foe. Rather, those advancing such defenses must find a way to convince the court that their consent was not freely obtained, or their choice otherwise unworthy of deference. Since most of the time, consent in contract law is shallow, many defenses to obligation are losers.²⁹⁵

Public policy offers a notable counter narrative. Here judges indulge the view that consent is less important than social welfare, and that, therefore, the parties’ choices are more-or-less irrelevant to the question of whether those choices should receive a public backing.²⁹⁶ They do so, moreover, explicitly without reference to the tropes of predictability and planning that undergird the consent narrative in other parts of contract doctrine, and with an emphasis on the external consequences that the parties’ choices create. In effect, public policy is a form of contract law anti-matter. Rather than emphasizing private life, it chooses social values; rather than predictability, it trumpets the virtues of flexibility; rather than precedent, it looks to the needs of the moment.

Contract law and its makers profit by celebrating heterodoxy. Doing so may make commentators and members of the public feel better about the mine-run of decisions: they entrench the view that contract cases produce outcomes that are the product of considered judgment. Hot cases can be casebook staples, making future lawyers more likely to see doctrine as

294. See generally RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981) (explaining that consideration is not evaluated for fairness and only rarely is contract formation held unconscionable).

295. See Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57, 60 (2012) (“Contract law’s consent focus is increasingly problematic due to multiple factors. To begin with, consent is an amorphous, difficult-to-define concept that is made increasingly more difficult by the marketplace manipulations of human decision making biases.”); see also DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 247 (1989) (“We use consent theory not as a map, not realizing that like any other map it’s simpler than reality, but as a set of blinders or rose-colored glasses that make the world look clearer, less problematic, than it really is.”).

296. Matsumura, *supra* note 222, at 199 (by denying enforcement, courts show their values).

containing the potential for social change, and thus accepting of the normal science of contract law.²⁹⁷ By acting as a safety valve, public policy doctrine, like unconscionability, makes doctrine more sociologically legitimate.²⁹⁸

As it turns out, shoring up individuals' views about contracting is an urgent social task. The sort of contract encountered daily by citizens—the click-to-agree license—threatens to erode our widely shared view that contracting is a practice that has social utility. Parties, who must agree to an explicit lie every time they consent online (affirming that you have read the contract's terms),²⁹⁹ deal with faceless corporate counterparties who see them as a piece of data to be sold.³⁰⁰ The result: contracts are increasingly the subject of satire.³⁰¹ And, as recent experimental evidence has shown, millennial consumers, who have experienced more digital contracting than the rest of us, have distinct views of what contracting means. They are more likely to think that contract law is formal and does not permit excuses for breach, more likely to breach themselves, and are generally more likely to “chisel and push and shop around whenever possible, because ‘contracts’ are nothing but formal terms that stand in the way of consumption.”³⁰²

297. See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 594 (1982) (“The first step toward this sense of the irrelevance of liberal or left thinking is the opposition in the first-year curriculum between the technical, boring, difficult, obscure legal case, and the occasional case with outrageous facts and a piggish judicial opinion endorsing or tolerating the outrage.”).

298. See, e.g., Fleming, *supra* note 237, at 1422 (describing how a district court's signaling of the unconscionability of a contract involving a low-income individual catalyzed a broader legislative fix, thereby legitimizing government as responsive to the needs of the most vulnerable).

299. See South Park: HumancentiPad (Comedy Central television broadcast Apr. 27, 2011), <http://www.hulu.com/watch/249969> [<https://perma.cc/2YR2-DNEZ>].

Guard: You can't agree by accident. There's a fail-safe built in. Even if you click on 'Agree' another little window pops up that says, 'Are you sure you agree?' and you have to click on 'Agree' again.

Woman: Uh, what are you going to do to us?

Guard: Everything that you agreed to in the iTunes conditions.

Kyle: We didn't read them!

Guard: Heh! Right. Who just agrees to something they don't read?

Id.

300. For evidence that contracts with firms are more likely to be seen as morally inert than contracts with individuals, see Uriel Haran, *A Person-Organization Discontinuity in Contract Perception: Why Corporations Can Get Away with Breaking Contracts But Individuals Cannot*, 59 MGMT. SCI. 2837, 2850–51 (2013).

301. See, e.g., *Nation Shudders at Large Block of Uninterrupted Text*, ONION (Mar. 9, 2010, 5:00 PM), <http://www.theonion.com/article/nation-shudders-at-large-block-of-uninterrupted-te-16932> [<https://perma.cc/5NAL-2R92>] (“Some have speculated that the never-ending flood of sentences may be a news article, medical study, urgent product recall notice, letter, user agreement, or even a binding contract of some kind.”).

302. Hoffman, *supra* note 269, at 1598.

On net, the loss of a shared sense of contract's moral weight is a bad thing. As one of us has previously explored:

Imagining contract doctrine operating on a landscape where its subjects think contracts are forms exposes just how deeply contract theory needs citizens to view contracts as moral promises. In classical and economic contract theory, legal rules provide the primary behavioral spur—toward or against precaution, formation, and contract. For example, our damage-centered remedial regime undercompensates breach, and economists have long suggested that it consequently motivates it. But relational theorists, and more recently behavioralists, have taught us differently: Both moral and reputational norms constrain opportunistic behavior. Thus, we can undercompensate breach, only loosely guard against exploitation, weakly hold parties together, and not give parties the remedies they seek, because parties have moral intuitions about contract, and consequent reputational concerns, that constrain breach and make it abnormal.³⁰³

We suggest that a vibrant public policy doctrine, built around solicitude for third-party harm, could alleviate the trend that we see toward amoral contracting. Experimental evidence does, in fact, suggest that individuals' views of contract law's distributive preferences are labile.³⁰⁴ What is necessary is a way to shock the audience into a new understanding of what contract doctrine is aspiring to—to make them aware that there is a counter-story to the narrative of click-to-consent, and a sense that contract cases are infused with concern for social welfare.

Though we normally think of statutory law as the repository of societal expressions of shared values, common law contract cases may be better suited to this particular task than the legislature, precisely because public policy is rare, salient, and premised on explicitly moral judgments. Though courts routinely engage in political compromises, the public retains trust in the judiciary and generally believe courts are ideologically balanced.³⁰⁵ This should be particularly true when courts go against the normal current, denying the importance of consent and emphasizing the importance of risk

303. See *id.* at 1633 (footnotes omitted).

304. See *id.* at 1611–31; Wilkinson-Ryan, *supra* note 237, at 1778.

305. TOPICS: SUPREME COURT, GALLUP (2018), <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/SN9Y-SANZ>]; Jeffrey M. Jones, *Trust in Judicial Branch Up, Executive Branch Down*, GALLUP (Sept. 20, 2017), <https://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx> [<https://perma.cc/5BG3-UPSQ>]; Harry J. Enten, *What Americans Think of the Supreme Court*, GUARDIAN (June 27, 2012, 6:14 PM), <https://www.theguardian.com/commentisfree/2012/jun/27/what-americans-think-supreme-court> [<https://perma.cc/DG53-DKCD>].

and vulnerable populations. Indeed, the cases that we discussed above all had the flavor of a public speech, focusing on the urgent risks posed by enforcement, and the selfishness of the contracting parties in seeking to amass private gains.³⁰⁶ They were designed for social media consumption.

Thus, we would urge courts to understand public policy defenses not as an undermining of the freedom to contract but rather an expressive shoring up of the entire contractual foundation. Judges should disaffirm bargains that threaten third-party harm, and they should do so loudly. The result is consistent with how public policy has worked historically in nondisclosure cases. It is, more importantly, necessary to break through an increasingly shared skepticism about the moral bases for contractual enforcement that threatens private ordering more generally.

B. Application to Hush Contracts

As we have shown, public policy decisions which refuse to enforce hush agreements on the grounds that they create severe third-party harm ought to be attractive to contract jurists. That is so even though line-drawing problems will be rife, and there is a possibility that courts will chill the market in sexual harassment settlements and consequently deprive some victims of any practical remedy.³⁰⁷

To better motivate our proposal, we would now return to our introduction and offer some guiding thoughts to jurists on particular types of nondisclosure settlements. Our thoughts are necessarily tentative, because the public record is itself sparse on the details. However, we can begin with the easy case: enforcing the *Maroney* Hush Agreement. In that agreement, as you will recall, USA Gymnastics bought the silence of one of its athletes about its possible complicity with Larry Nassar's criminal conduct.³⁰⁸ USAG had approached Maroney in late 2016, just as allegations against Nassar had begun to emerge.³⁰⁹ Fines for violation of this nondisclosure

306. See *infra* Part II.A (cataloguing the NDA cases we examined).

307. After the recent passage of California's law prohibiting most types of hush contracts, practitioners indeed noted the potential for chilling settlements. As one defense practitioner added, "California employers should consider this new law when deciding whether to settle matters. Factual information surrounding allegations of sexual harassment, discrimination, and retaliation will no longer remain confidential, resulting in a greater reputational risk to even the best-run companies." Kristi Thomas, *New California Law Puts an End to Secret Sexual Harassment Settlements*, SHEPPARD MULLIN: LAB. & EMP. L. BLOG (Oct. 1, 2018), <https://www.laboremploymentlawblog.com/2018/10/articles/sexual-harassment/ca-ends-non-disclosure-settlements/> [<https://perma.cc/92ZD-7ZQA>].

308. *Maroney* Complaint, *supra* note 2, at 53, ¶ 191–92.

309. John Barr, *Confidentiality Agreement Kept McKayla Maroney from Revealing Abuse*, ESPN (Dec. 20, 2017), http://www.espn.com/olympics/gymnastics/story/_/id/21825575/usa-gymnastics-structure-agreement-mckayla-maroney-keep-larry-nassar-abuse-quiet-lawyer-says [<https://perma.cc/LU29-YPJL>].

clause—alleged to have been one of several entered into by the association³¹⁰—were eventually waived by the association after substantial public outcry.³¹¹

Under our frame, this presents an easy case for nonenforcement. The harm—to third parties—is severe, as it involves an ongoing pattern of criminal assaults on minors, which had not been fully revealed at the time of the case. Indeed, Maroney’s case alleged that the settlement’s goal was to “conceal and shield from public scrutiny, outside investigation, and law enforcement, the true nature of NASSAR’s horrific sexual abuse of minors,” and enable “NASSAR to quietly leave [USA Gymnastics]; further silencing his victims.”³¹²

Moreover, the benefit to the court system for rejecting hush contracts in such publicized settings is evident: it would express a message that contracting to silence about horrific behavior simply is not consonant with our values. Finally, given that California’s law was amended after the agreement’s formation to prohibit its precise scope,³¹³ courts would feel comfortable knowing they were not reaching beyond the statutory rule in making policy.³¹⁴

Zelda Perkins’ case is, we think, similarly straightforward under our theory. Unlike some who are concerned with the incentive effects of hush contracts with famous men, we are not persuaded that making executory settlements about sexual harassment unenforceable will necessarily have much of an effect in the private market for silence.³¹⁵ What it will do is disassociate contract doctrine with spiraling violence on women that hush contracts enable, and state (clearly) that the harms of sexual harassment are social, not merely personal to individual parties.

Courts should simply refuse, as a matter of public policy, to enforce a contract which calls for the victim of sexual harassment to stay silent, just as they would refuse to permit that condition to remain in a FLSA

310. Amanda Turner, *Manly: USAG Lied to Congress on Non-Disclosure Agreements*, INT’L GYMNAST MAG. ONLINE (Feb. 13, 2018, 10:17 PM), http://www.intlgymnast.com/index.php?option=com_content&view=article&id=5013:manly-usag-lied-to-congress-on-non-disclosure-agreements&catid=2:news&Itemid=53 [https://perma.cc/4V6N-CH95].

311. See Tucker, *supra* note 4.

312. Maroney Complaint, *supra* note 2, at 28, ¶ 73.

313. See CAL. CIV. PROC. CODE § 1002(a)(1)–(4) (West 2017); CAL. FAM. CODE § 6500 (West 2017) (setting the age of majority at eighteen in California); see also Maroney Complaint, *supra* note 2, at 27–28.

314. See *Globe Newspaper Co., Inc. v. Clerk of Suffolk Cty. Super. Ct.*, 14 Mass. L. Rptr. 315, 320 (Mass. Supp. 2002) (holding “sexual abuse of children by members of the clergy is . . . a matter of immense public concern and of enormous community interest,” and adding that the public has a valid interest in knowing which members of the clergy have been accused of sexual abuse).

315. Levmore & Fagan, *supra* note 17, at 314–15.

settlement.³¹⁶ Because, as we argued above, the costs to non-signatories of sexual harassment settlements are enormous but diffuse, sexual harassment presents a classic case where public policy should act to reduce the externalization of social harm and the taking of particular private benefits.

Finally, we come to the case of President Trump's purchasing of the silence of his sexual partners.³¹⁷ Unlike the prior examples, the underlying conduct does not create a clear class of particular future victims: there was no allegation in the complaints we have seen that Trump's attentions were unwanted, or that he sought to cover up physical violence or aggression, though the power dynamics in his extra-marital relationships were complicated.³¹⁸ Further, although enforcing such contracts might occasion social harm—the loss of relevant information about a presidential candidate—the candidate's countervailing privacy interests would seem to weigh a bit more heavily here.

Thus, although there is a strong political and moral case for preventing presidential candidates from using contract law to keep information from the public, the public policy case is sufficiently weak that we are not comfortable recommending that courts advance the defense, not least because of the danger that any decision will be read in a partisan light. To the extent that rules against such settlements should be made, we would argue that they ought to be set out prophylactically, in neutral statutes, created by legislatures.

As this typology shows, a public policy defense to hush contracts would have real bite in the set of contracts that is of primary interest in the world: hush contracts about sexual harassment incidents in the workplace. Outside of California, such contracts are largely enforceable today, and they would be episodically unenforceable if our theory were to be widely taken up. We think that the result would be to unshackle victims of sexual violence from agreements that silence them and to promote equality in the workplace and beyond.

C. A Few Obvious Objections

We have already argued that making executory hush contracts unenforceable on public policy grounds will, net-net, have uncertain effects

316. See *infra* Part II.B (discussing courts' application of the public policy doctrine in the context of court-approved FLSA settlements).

317. See, e.g., *infra* Introduction (identifying President Trump's use of a hushing contract to prevent a former sexual partner, Ms. Clifford, from speaking publicly about their relationship).

318. The case of his divorce is different. Jane Mayer, *Documenting Trump's Abuse of Women*, NEW YORKER (Oct. 17, 2016), <https://www.newyorker.com/magazine/2016/10/24/documenting-trumps-abuse-of-women> [https://perma.cc/X6B8-CZGX].

on the ability of victims of misconduct to extract compensatory settlements.³¹⁹ Putting that strong objection to our proposal to one side, what other arguments might defenders of the status quo make against public policy's expansion?

In the end, the best response starts with institutional choice. Judges are ill-equipped to make the nice distinctions between really malignant externalities and those ordinary third-party losses that accompany most contracts. Because we generally think that empirically-based policy ought to be accomplished through democratically accountable means, we too worry that public policy would threaten to leave the wrong sort of decision with courts.³²⁰ We applaud California's recent legislative efforts in this area.³²¹ However, we would also note that contract law decisions advancing progressive goals tend to result in legislative responses. As Anne Fleming has shown, early decisions on unconscionability had the effect of producing a series of laws that in effect carved consumer protection out of contract law.³²² Thus, courts do not preempt legislatures: they provoke them.

Second, we return to the problem of scope. In a sense, our argument is potentially too widely ranging. Though we believe that sexual harassment NDAs provide a particularly salient example of the problem of external harm warranting public policy brakes, we do not think that the defense should be limited to this particular context. To the extent that all contracts entail harm to third parties, known or unknown, and to the extent that all contract cases set up the possibility of expressive judging, have we not created the possibility of a truly destabilizing doctrine?

One answer to this concern, as we have just suggested, is that more expansive defenses will push legislative action, and that to the extent that public policy creeps outside of the hush contract disclosure context, the legislature will intervene. Second, as we have alluded to, common law contract defenses are inherently self-limiting. Courts are conventionally cautious in finding exceptions to consented liability, and there are many reasons to think—based on the caselaw we have studied—that they will look for particularly concrete, visceral, and foreseeable harms before accepting public policy defenses. Moreover, to the extent that they over-deter formation, they can relatively easily retreat from the abyss by cutting back on the defense's application.

These realistic limitations are convenient, but as responses they are

319. See generally *infra* Part I.B (identifying the benefits of enforcing hushing agreements—in particular, the ability of motivated plaintiffs to receive payments in exchange for their silence).

320. Schwab, *supra* note 150, at 1957–58 (suggesting that courts avoid the public policy tort by shifting the analysis to legislative enactments).

321. 2018 Cal. Legis. Serv. Ch. 953 (S.B. 820) (West) (codified at CAL. CIV. PROC. CODE § 1001 (West 2018)).

322. Fleming, *supra* note 237.

perhaps a bit pat. It is true that in theory a public policy defense triggered by external harm and the potential for a highly publicized expressive opinion might seem like a public policy defense to almost all agreements. We concede the point, though we believe that in practice lawyers and judges share a situation sense of the meaning of “external harm” that, however difficult to define, is coherent, and a view about the appropriateness of expressive messaging that is similarly restrained.³²³

Finally, we would be remiss if we did not return to the problem of arbitration. The last two decades have seen an explosion of arbitration in contract cases, and a consequent disappearance of caselaw on important contract topics, ranging from formation to defenses of enforcement.³²⁴ Given these trends, any normative account of contract doctrine needs to at least consider how proposed changes will filter through into the arbitral tribunal, and what that mode of enforcement means for the proposed legal rule.

One of the advantages of a public policy rule for hush contracts is that it is highly salient and easy to understand: courts would broadcast that particular classes of contract offend public policy. Unlike the “reasonableness” tests that mark formation doctrines, or the multi-factor materiality standard that guides breach rules, simple public policy standards might be easier for arbitrators to apply, and thus more likely to be actually taken up in practice. This is the general pattern we see in the analogous situation in California, where arbitrators are obligated to rule against non-competes.³²⁵

However, we must confess a weakness in our claim. We are not sure that legal rules that explicitly call for the adjudicator to involve themselves in social policy fare equally well in the arbitral process. They probably do not, as arbitrators face incentive structures to not depart from the parties’ settled expectations, and are not rewarded, reputationally or otherwise, for issuing public-facing rulings.³²⁶ Thus, readers should understand that whatever the content of a state’s public policy doctrine, it will be muted if the parties have agreed to arbitration.³²⁷ Nonetheless, many hush contracts—even those

323. Kahan, Hoffman, Evans, Devins, Lucci & Cheng, *supra* note 243, at 354–56.

324. Issacharoff & Marotta-Wurgler, *supra* note 27, at 4.

325. See CAL. LAB. CODE § 925(d) (West 2017) (“For purposes of this section, adjudication includes litigation and arbitration.”).

326. See, e.g., Dean B. Thomson & Jesse R. Orman, *Inside the “Black Box”: The Preferences, Practices, and Rule Interpretations of Construction Arbitrators*, 12 J. AM. C. CONSTRUCTION LAW. 37, 74–75 (2018) (few arbitrators would admit to making free-floating policy judgments).

327. Labor arbitration might be an exception. Generally, labor arbitration is distinct from employment arbitration proceedings in that it applies specifically to employees covered under collective bargaining agreements. “In the union context, arbitration is designed to resolve disputes as a substitute for economic pressure in the form of strikes or lockouts.” Barry Winograd, *Employment Arbitration—A*

containing mandatory arbitration clauses—will actually contain a carve-out permitting court enforcement as a way of achieving specific performance, and any attempt by parties to obtain these injunctions would be hard to achieve before a judge.³²⁸

Even if arbitrators were to adopt public policy defenses, the expressive content of their decisions would either be entirely lost (because the proceedings are ordinarily secret) or difficult to attribute to the state (because a “court” would not be making the ruling). This precise argument—that arbitration does not fully vindicate public rights because it strips from the public’s tribunals the right to express social sanctions—is one that the Supreme Court has repeatedly rejected as an argument against the Federal Arbitration Act (FAA).³²⁹ But it remains descriptively correct: arbitrators cannot (and do not) express the public’s view about what counts as good and bad behavior in the way that a judge can. Thus, public policy has little expressive power outside of public tribunals.

The net result is that to the extent that arbitration’s dominion over contract adjudication grows, both the practical and expressive import of our proposal will diminish. This, of course, reduces the stakes of adopting our position. But that is not a particularly compelling affirmative claim. If, in reality, most proposals to change contract doctrine end up being about the rare litigated case, one might fairly wonder why one ought to bother at all.

We offer two responses. First, of course, arbitration’s ascendancy is a recent trend, and might change. Forced arbitration is an increasingly salient political issue.³³⁰ Democratic politicians increasingly seem to be pushing a partial or total repeal of the FAA,³³¹ and a different constellation of justices on an ever-changing Supreme Court could have a different view of the merits of FAA preemption.³³² Scholars ought to arm courts with new

Primer, ARB. INFO: NAT’L ACAD. ARB. & U. MO. SCH. L. (June 20, 2016), <http://law.missouri.edu/arbitrationinfo/2016/06/20/employment-arbitration-a-primer> [<https://perma.cc/3M5J-NFWX>].

328. See Christopher R. Drahozal & Erin O’Hara O’Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1994 (2014) (“[S]ophisticated parties seem to prefer specific performance as the most effective means to protect the value of their exchange. A recent empirical study conducted by Eisenberg and Miller showed that contracting parties commonly incorporate into their documents language designed to enhance the likelihood of obtaining an order for specific performance in the event of breach.”).

329. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

330. So much so, in fact, that sitting Commissioners on the Federal Trade Commission are making public statements about the practice’s potential harm to consumers. See Rebecca Kelly Slaughter, Opinion, *You Should Have the Right to Sue Apple*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/opinion/apple-pepper-antitrust-supreme-court.html> [<https://perma.cc/FRU2-4P6S>].

331. Restoring Justice for Workers Act, H.R. 7109, 115th Cong. (2018).

332. See Luke P. Norris, *The Parity Principle*, 93 N.Y.U. L. REV. 249, 316 (2018) (identifying within the FAA, Section 1 a “parity principle,” signaling “recognition by Congress of how economic

doctrinal approaches in the event that they once again are given the chance to resolve cases.

Second, to the extent that a particular rule is firmly fixed in the courthouse, it should have weight even if it will be rarely exercised. Arbitration decisions require court enforcement if parties are unwilling to pay: a court might well conclude that an arbitral proceeding enforcing a hush agreement was manifestly wrong, and thus unenforceable.³³³ Or, lawyers might be dissuaded from putting such agreements into contracts for fear of social or professional sanctions.³³⁴ The result would be that public policy's defense against hush contracts should be hard to entirely contain within arbitration.

CONCLUSION

In his 2007 article on *Open Secrets*, Malcolm Gladwell explored the origin story of Enron's decline into bankruptcy.³³⁵ He noted various stages along the way where the writing on the wall was not only present but prominently so.³³⁶ That the company was engaging in less than savory business practices was, for all intents and purposes, an open secret.³³⁷ Gladwell offers a novel way of understanding the difference between this set of affairs and, as an example, the fact that no one at the time of

power disparities could infect privatized process and a regulatory commitment to ensuring public process where such disparities existed in order to ensure the social welfare of workers").

333. Cf. *Application Grp., Inc. v. Hunter Grp., Inc.*, 72 Cal. Rptr. 2d 73, 85 (Cal. Ct. App. 1998) (upholding Section 16600 of the California Business and Professions Code, which prohibits the enforcement of noncompetes, as "reflect[ing] a strong public policy of the State of California" (internal quotation omitted) (quoting *KGB, Inc. v. Giannoulas*, 164 Cal. Rptr. 571, 577 (Cal. Ct. App. 1980))); see also *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231, 237 (Cal. 2002) ("California has a strong interest in protecting its employees from noncompetition agreements . . .").

334. See Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 566–72 (2008) (suggesting that drafting settlement agreements that suppress evidence of wrongdoing which may recur is against lawyers' professional responsibilities); see also COWORKER.ORG, *Harvard Law School Students Speak Out Against 'Coercive' Employment Contracts*, MEDIUM (Nov. 20, 2018), <https://medium.com/@TeamCoworker/harvard-law-school-students-speak-out-against-coercive-employment-contracts-6907b2d7f33a> [<https://perma.cc/BY7H-HCHH>] (profiling a campaign launched by law students to strip law firms of their ability to enforce arbitration claims against attorneys and suggesting law firms may be more susceptible to accountability actions than previously assumed).

335. Malcolm Gladwell, *Open Secrets: Enron, Intelligence, and the Perils of Too Much Information*, NEW YORKER, Jan. 8, 2007, at 44, <https://www.newyorker.com/magazine/2007/01/08/open-secrets-3> [<https://perma.cc/S5FJ-79WC>].

336. So much so, in fact, that Cornell students identified the crux of the underlying problem as part of a group project in 1998, based on public data the students found that "Enron was pursuing a far riskier strategy than its competitors," and that "[t]here were clear signs that Enron may be manipulating its earnings." See *id.* at 53 (internal quotation omitted).

337. Indeed, all that was required for Enron to be found out was for investigative reporters to read through publicly-available tax filings. See *id.* at 52.

publication knew where Osama Bin Laden was hiding. Whereas the former was a mystery (where “the hard part is not that we have too little information but that we have too much”), the latter was a puzzle (where we simply do not have the information we need).³³⁸ To Gladwell, the struggle for increasingly complex organizations wishing to remain afloat is how to manage information to effectively resolve mysteries before they tank the ship.

Like others who have been struggling with the #MeToo movement, we think that sexual harassment at work is an open secret³³⁹—one that critically undermines the efficiency of the workplace³⁴⁰—while threatening the well-being of its workers. And, given what we learned (or failed to learn) in the 2016 election, open secrets can have consequences for the body politic. Our proposal offers courts a methodology by which to make secrets at work less poisonous.

What is to be done? We have argued that courts should generally refuse to enforce contracts which create particularly egregious third-party harms. As a case study, we turned to hush contracts, arguing that, especially when created by organizations who are blinding unpaid third parties to abusers, such contracts violate public policy. We further have claimed that recent controversies about such nondisclosure clauses provided jurists a generational teaching moment in just what it means to enter into a legally-enforceable contractual relationship. Private control may be the touchstone of contractual obligation, but it is equally foundational that law does not sanction all promises. Hush contracts should be silenced, so that contract law can find its voice.

338. See *id.* at 44.

339. See, e.g., *An Open Secret: Sexual Harassment at Work*, *ECONOMIST* (Oct. 21, 2017), <https://www.economist.com/international/2017/10/21/sexual-harassment-at-work> [<https://perma.cc/9S7R-QW8A>].

340. In fact, studies of the U.S. government’s classification regimes illustrate the ways keeping excessive secrets and sequestering information in different corners of an organizational apparatus in fact inhibits effective coordination between units. See, e.g., Elizabeth Goitein & David M. Shapiro, *Classification and Consequences: Secrecy Should Be Justified, Not Automatic*, BRENNAN CTR. FOR JUST. (Apr. 16, 2010), <https://www.brennancenter.org/blog/classification-and-consequences-secrecy-should-be-justified-not-automatic> [<https://perma.cc/B62D-88J9>] (“Pointless secrets threaten our safety by blocking the flow of information within government. . . . As the 9/11 commission warned, excessive secrecy stymies information exchange between federal agencies and makes it harder to connect the dots.”); see also Elizabeth Goitein & David M. Shapiro, *Reducing Overclassification Through Accountability*, BRENNAN CTR. FOR JUST. (2011), http://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan_Overclassification_Final.pdf [<https://perma.cc/Z6F4-YQH3>].