Articles

The Psychology of Secret Settlements

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The #MeToo movement called attention to the use of non-disclosure clauses in settlement agreements as a tool to silence victims of sexual wrongdoing by repeat offenders such as movie mogul Harvey Weinstein and Olympic gymnast doctor Larry Nassar. The exposure of such secret settlements prompted a fierce policy and scholarly debate on the legitimacy and desirability of NDAs. Though the risk of NDAs hindering accountability is hardly new, NDAs are now increasingly the subject of legislative action, in states ranging from California and New York to Nevada and Tennessee. But should all NDAs be banned or limited by sunshine-in-litigation laws? And will such legislation adequately reflect the public's attitudes regarding what it wishes (and doesn't wish) to know? Existing legal scholarship on the regulation of sexual harassment NDAs fails to benefit from the theoretical wisdom and empirical methods which psychological research can offer regarding these questions.

This Article is the first to empirically identify psychological factors affecting lay attitudes towards secret settlements. Using a survey experiment conducted with a large representative sample, it brings to light the mechanisms underlying the public's tendency to seek information or remain in the dark regarding sexual harassment. The findings suggest that, counter to existing psychological theories, lay people actually prefer public disclosure of arguably the most uncomfortable information. Furthermore, according to the findings, the severity of the wrongdoer's misconduct and the victim's financial status each have an independent negative effect on lay people's endorsement of NDAs.

These empirical findings will allow legislatures to regulate secret settlements in a manner that appropriately embodies the scope of the public's right to know. Such regulation will in turn help preserve both employees' willingness to come forward about sexual harassment and employers' inclination to settle. Moreover, these findings should encourage victim advocates to explore ways to maintain disadvantaged victims' bargaining power under a confidentiality ban regime. Prudent advocacy would help ensure that the choice between settlement and trial remains available to financially unstable victims. The findings further show the potential

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promise of bipartisan collaboration over sunshine-in-litigation laws, at least when it comes to severe acts of sexual harassment.

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INTRODUCTION: #METOO AND SECRET SETTLEMENTS

The #MeToo hashtag began to spread virally on social media with the exposure of sexual misconduct by repeat offender Harvey Weinstein, the Hollywood mega-producer that more than eighty women brought sexual misconduct allegations against and was subsequently convicted and jailed.[1] But many other public scandals fueled the movement. These include, for instance, the uncovering of repeated sexual assault crimes perpetrated by Dr. Larry Nassar, former USA Gymnastics national team doctor and Michigan State physician, and sexual misconduct allegations brought by twenty-three women against the late Roger Ailes, former Fox News chairman and CEO. Other examples abound.[2]

Aside from bringing the issue of sexual wrongdoing to the fore, these three cases—like many others—share another important feature: the use of nondisclosure agreements as part of claim settlement agreements ("NDAs" or "secret settlements"). That is, victims in the context of all three cases have agreed to confidentiality in exchange for monetary compensation. In 2016, Fox News host Gretchen Carlson got a reported $20 million settlement after she sued, claiming Roger Ailes demoted and then fired her when she rejected his sexual advances.[3] As part of the settlement, Carlson signed an NDA that bars her entirely from discussing what happened to her at Fox News. She has since been vocal in her attempts to get out of that agreement.[4] In December 2016, McKayla Maroney, a gold medal winning gymnast, agreed to resolve her lawsuit against USAG for enabling Nassar to abuse her. In the settlement agreement, Maroney promised to either refrain from further speech about her ordeal or pay a more

1. To me, as to others before me, "sexual misconduct" encompasses behaviors ranging from sexual assault to verbal harassment unrelated to the offender's sexual desires. *See* David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 167–68 (2019).

2. *See generally* Sarah Almukhtar, Michael Gold & Larry Buchanan, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES (Feb. 8, 2018), https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html (discussing the aftermath of Harvey Weinstein's firing, including a list of men who were fired or otherwise suffered consequences as of 2018).

3. The scandal was portrayed in the 2019 film "Bombshell." BOMBSHELL (Lionsgate 2019).

4. Clare Duffy, *Gretchen Carlson Fights Back Against Nondisclosure Agreements Like the One She Signed with Fox News*, CNN: BUS. (Dec. 15, 2019, 4:26 PM), https://www.cnn.com/2019/12/15/media/gretchen-carlson-fox-news-nda-reliable-sources/index.html. Carlson has founded, along with fellow former Fox News colleagues Julie Roginsky and Diana Falzone, the nonprofit organization "Lift Our Voices" to advocate for an end to NDAs that prohibit people who have been sexually harassed at work from speaking about it. *See* LIFT OUR VOICES: NEWSROOM, https://www.liftourvoices.org/in-the-news (last visited Jan. 3, 2022). Fox News was recently sanctioned by the New York City Commission on Human Rights for its conduct in the context of sexual harassment complaints. *See* David Bauder, *Fox News Fined $1 Million Following Sexual Harassment and Retaliation Investigation*, HUFFPOST: POLS. (June 30, 2021, 4:44 AM), https://www.huffpost.com/entry/fox-news-fined-1-million_n_60dc2a7be4b0d3e35f9ac4ec.

than $100,000 liquidated damages fee,[5] plus the costs of enforcement.[6] In October 2017, Zelda Perkins, the longtime assistant to Weinstein, broke a nineteen-year-old agreement in which she agreed not to reveal that Weinstein had harassed her in return for £250,000.[7] Perkins's unveiling sparked a swell of stories by other victims of Weinstein, and, along with his resignation and the firm's bankruptcy, intensified the #MeToo movement.

Indeed, the #MeToo movement made salient the use of non-disclosure clauses in workplace sexual harassment settlements as a tool to silence victims.[8] When some victims breached their NDAs—exposing multiple instances of abuse—a fierce policy and scholarly debate ensued on the legitimacy and desirability of secret settlements. Though the risk of NDAs hindering accountability in other contexts is hardly new,[9] secret settlements of sexual harassment claims are now increasingly the subject of legislative action, with states ranging from New York and New Jersey to Tennessee and Nevada adopting various measures to combat the phenomenon.[10] Taking the most

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5. 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.

6. Complaint for Damages at 53–54, Maroney v. Mich. State Univ., No. BC-687396 (Cal. Super. Ct. Dec. 20, 2017). Revelation of this stipulation eventually led USAG to abandon it. 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/usagymnastics-mckayla-maroney-larry-nassar/1039025001.

7. 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.

8. *NDAs 'Should Not Silence Sexual Harassment Claims,'* BBC NEWS (Feb. 10, 2020) https://www.bbc.com/news/business-51438851 (quoting Acas chief executive Susan Clews, explaining that NDAs can be used legitimately but that they should not be used routinely to silence employees from reporting harassment). Indeed, sexual harassment can be defined in different ways. Employment discrimination scholars adopt a power-based account of sexual harassment (which considers "harassment as an expression of workplace sexism, not sexuality or sexual desire"). *See* Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L. J. F. 22, 24 (2018); Vicki Schultz, Essay, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 18–19 (2018). On the other hand, the commonplace use of the term "sexual harassment" refers only to sexual advances motivated by desire. *See Sexual Harassment*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003) ("uninvited 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)"). To the extent that these definitions do not coincide in the context of this piece, I borrow from the U.S. Equal Employment Opportunity Commission (EEOC), which defined sexual harassment as: "unwelcome or offensive conduct based on a protected characteristic under employment anti-discrimination law." CHAI R. FELDBLUM & VICTORIA A. LIPNIC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 3 (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace.

9. *See, e.g.*, Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 932 (2006) (criticizing secret settlements in the context of labor discrimination cases and suggesting policy solutions); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 873 (2007) (economically analyzing confidential settlements and concluding that given competing effects it is difficult to predict the net result of a confidentiality ban); Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. STUD. LEGAL ETHICS 115, 119 (1999) (arguing against secret settlements in a variety of tort-related cases, including defective products).

10. *See generally* ANDREA JOHNSON, RAMYA SEKARAN & SASHA GOMBAR, NAT'L WOMEN'S L. CTR., 2020 PROGRESS UPDATE: METOO WORKPLACE REFORMS IN THE STATES (2020), https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020States_Report-MM-edits-11.11.pdf [hereinafter NWLC REPORT]

aggressive stand against NDAs, a recent California statute effectively made it unlawful for an employer to require an NDA in sexual harassment and related claims.[11]

Should sexual harassment NDAs be completely banned, limited, or left entirely to the parties? To what extent should such sunshine-in-litigation laws ("sunshine laws") embody not only the public's right to know, but also what the public wishes to know? While the practice of NDAs raises legal, ethical, social, and public policy questions, existing legal scholarship has so far analyzed these questions through a theoretical or economic prism,[12] and has failed to embrace the wisdom and empirical methods of psychology.[13] This Article aims to begin closing this gap by assessing the effect of two factors theorized to drive lay people's moral judgments regarding secret settlements. It embarks on a series of experimental studies that will help policymakers better understand and regulate secret settlements. Such regulation will, in turn, improve the prospects of maintaining both employees' willingness to come forward about sexual harassment and employers' inclination to settle such complaints.

This Article is the first to examine psychological factors affecting lay attitudes towards secret settlements. In so doing, it provides a sorely missed empirical foundation to current policy and scholarly debates. By adopting an interdisciplinary perspective, this Article makes two important contributions. *First*, it enriches the theoretical literature on secret settlements, by drawing a connection between the public's right to know as lauded in legal scholarship based on the assumption that certain information will generate more benefits than costs, and the public's potential desire to remain in the dark about uncomfortable information as identified in psychological literature. *Second*, it has an immediate real-world impact, ensuring that policymakers are informed about factors that affect public attitudes regarding secret settlements in workplace sexual harassment, and can consequently design more effective policy.

On the *theory* front, this Article pushes beyond the silo of current literature on secret settlements. To do so, it uses theories drawn from the realm of social psychology, and behavioral law and economics to form hypotheses about lay

(surveying state laws in the post-#MeToo era). For a relatively recent review of such laws in the context of workplace sexual misconduct claims, see generally Mushu Huang, *Legislative Responses to the Use of Non-Disclosure Agreement Regarding Workplace Sexual Misconduct Claims: From Information Transparency to Systematic Protection*, 1 SETON HALL L. SCH. STUDENT SCHOLARSHIP 1023 (2019), https://scholarship.shu.edu/student_scholarship/1023.

11. Stand Together Against Non-Disclosure Act, CAL. CIV. PROC. CODE § 1001 (West 2018).

12. *See, e.g.*, Kotkin, *supra* note 9, at 948; Zitrin, *supra* note 9, at 123 (both analyzing the implications of secret settlements from a legal and ethical perspective).

13. However, more work has been done on lay perceptions of settlement more generally. For example, recent work reveals that "[d]espite common models of settlement as a cost-benefit analysis not necessarily tied to responsibility, lay people attribute responsibility to settling defendants." *See* Jessica Bregant, Jennifer K. Robbennolt & Verity Winship, *Perceptions of Settlement*, HARV. NEGOT. L. REV. (forthcoming) (manuscript at 1), https://ssrn.com/abstract=3868526.

people's desire to know or remain in the dark regarding sexual harassment. To the extent that theories such as taboo tradeoffs and deliberate ignorance apply here,[14] what are their implications for the public's attitudes regarding NDAs? Since uncomfortable tradeoffs—like exchanging money for physical or emotional injury—are difficult for lay people to stomach, I expected that lay people will prefer to keep such exchanges under wraps, even at the cost of limiting accountability for sexual misconduct. Yet, as detailed below, the findings show that lay people actually prefer public disclosure of what might be considered the most uncomfortable information: severe sexual misconduct. In this sense, this Article helps crystalize the relationship between the public's right to know about incidents of sexual harassment on the one hand, and the public's delimitation of its desire to know on the other, opening the door for future research to determine the underlying mechanisms driving this desire.[15]

As for *policy*, this Article offers guidance to policymakers seeking to successfully regulate secret settlements and minimize attempts to bypass such regulation. The rise of the #MeToo movement has focused public attention on the problem of sexual harassment like never before. Yet, to achieve social change successfully and responsibly, policy should not be based on hunches and media soundbites; rather, it should draw on rigorous social science research. People's beliefs about fairness and justice are the core antecedent of the willingness to cooperate voluntarily and stand behind laws and policies.[16] Therefore, lay attitudes towards legal issues matter if we aspire to change behavior through regulation, thus reducing the need to monitor regulated players.[17] First, data about lay attitudes will provide evidence regarding political will and the scope of the intervention needed. Given the binary interest group politics which characterizes the debate on NDAs, with the plaintiffs' bar and corporations supporting them and feminist groups rejecting them, data on lay attitudes can help nuance the discourse and encourage policymakers to adopt

14. *See* Part III, *infra* (for detailed explanation of theories). Briefly, the combination of insights from these theories suggests that people may prefer to remain in the dark regarding uncomfortable tradeoffs such as exchanging money for misconduct.

15. Indeed, as detailed below, these findings may reflect people's taste for titillating gossip regardless of the public interest.

16. Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 115, 121–22 (1999); *see also* Daron Acemoglu & Matthew O. Jackson, *Social Norms and the Enforcement of Laws* 28 (Stan. L. Econ. Olin Working Paper, Paper No. 466, 2016), https://ssrn.com/abstract=2443427 (showing that laws that are in strong conflict with prevailing social norms may backfire, while gradual tightening of laws can be more effective in influencing social norms and behavior); Clifton B. Parker, *Laws May Be Ineffective if They Don't Reflect Social Norms, Stanford Scholar Says*, STAN. NEWS (Nov. 24, 2014), https://news.stanford.edu/news/2014/november/social-norms-jackson-112414.html (arguing that while laws that conflict with norms are likely to go unenforced, laws that influence behavior can change norms over time).

17. *See generally* Kenworthey Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, *in* OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (Eyal Zamir & Doron Teichman eds., 2014). Indeed, one salient example is the laws against smoking in the U.S. *Id.* at 250–53. As in that context, identifying lay people's moral intuitions can help design policy that either adequately reflects these sentiments or, if necessary, seeks to override intuitions by engaging reason. *See* Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, 40 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 193, 218 (2008).

balanced regulation in this area. Second, since even the most carefully drafted confidentiality bans might be prone to manipulations and loophole-seeking by reluctant parties, public buy-in is crucial. To ensure such buy-in, we first need data assessing the public's current attitudes regarding NDAs. Based on the findings of this Article, policymakers will be able to better design partial or blanket confidentiality bans, pass the needed legislation, and ultimately increase the impact such bans will have on the public's behavior.

To embark on this endeavor, this Article employs a survey experiment administered to a nationally representative sample.[18] The experiment tests the effect of two independent variables on lay people's approval of secret settlements in the context of sexual harassment: the *severity of the wrongdoer's misconduct* on the one hand, and the *victim's financial status* on the other. Additionally, building on previous research in this vein, the study assesses whether attitudes towards NDAs are associated with, among other factors, acceptance of sexual harassment myths, party affiliation, or demographic characteristics.

Using these methods, I find that both severity of misconduct and a victim's financial status had a significant negative effect on the approval of a secret settlement. That is, a minor act of sexual harassment and a victim's unstable financial status each independently increased the probability of NDA approval compared to a severe act and a victim's stable financial status. I also find that participants' reactions were only weakly correlated with their general views on NDAs, their acceptance of sexual harassment myths, and their political party affiliation, indicating that participants were sensitive to the specifics of the case rather than guided solely by their preexisting opinions and values. Interestingly, exploring the interaction effect between severity of misconduct and participants' party affiliation, I find that a Republican affiliation decreased the probability to reject a secret settlement when it attempted to conceal a *severe* act of harassment. Finally, I find evidence to suggest a stronger intuition among financially stable individuals that information about sexual harassment should be public, when it pertains to *victims of similarly financially stable background*.

These findings offer guidance for the future of the #MeToo movement and for policymakers contemplating confidentiality bans. *First*, the findings should encourage leaders of the #MeToo movement to ensure they are protecting the interests of marginalized groups, because the interests of such groups are not tantamount to those coming from more privileged backgrounds, especially when it comes to secret settlements. Specifically, the findings suggest that policymakers and victim advocates should explore ways to preserve disadvantaged victims' bargaining power under a confidentiality-restricting regime, to ensure that victims with an unstable financial status can still choose a settlement over a court process and that such a settlement adequately reflects

18. For a detailed explanation of the research design and sample used for the experiment, see *infra* Part IV.

their injury.[19] *Second*, the findings emphasize the important role of severity of misconduct in determining lay people's attitudes towards secret settlements, suggesting a pathway towards bipartisan policy prohibiting NDAs at least when they attempt to conceal severe acts of harassment. Taken together, these findings emphasize the importance of supporting the current wave of policy with real data on lay people's attitudes towards NDAs. Backing such policy moves with empirical knowledge on the public's current moral attitudes will help increase the chances of changing behavior through regulation, minimize attempts to bypass the legislation, and reduce the need for monitoring and enforcement. In this sense, the research goes well beyond sexual harassment, and bears implications for other contexts where NDAs might hinder social change, such as police brutality.

This Article proceeds as follows: Part I discusses the theoretical debate in the literature on secret settlements, and specifically the tension between the public's right to know on the one hand, and competing interests such as privacy, efficiency, and freedom of contract on the other. Part II focuses on law and policy developments in the context of sexual harassment NDAs, highlighting the need for empirical data on what the public wants (and does not want) to know. Part III then addresses existing psychological research which can help us decipher lay people's attitudes towards sexual harassment NDAs. Moving to the empirical part of this Article, Part IV describes the methodology used in this study, Part V discusses the main findings, and Part VI delineates the normative implications of the findings for policy that would affect both employers' and employees' behavior in the context of sexual harassment NDAs. The conclusion explores ways of utilizing the findings and methodology to further expand our understanding of lay attitudes towards secret settlements, both within and beyond the realm of sexual misconduct.

I. THE DEBATE OVER SECRET SETTLEMENTS

Over the last several decades, settlements and alternative dispute resolution ("ADR") methods have become the overwhelming norm in the resolution of

19. Potential paths towards protecting victims' bargaining power in the workplace include using union resources to put pressure on management to consider the interests of employees in sexual harassment settlements and bringing a class action against an organization particularly prone to sexual harassment. For an analysis of the relationship between union membership and sexual harassment, and specifically the impact of union resources for dealing with harassment and union tolerance for harassment on antecedents and consequences of harassment, see Carrie A. Bulger, *Union Resources and Union Tolerance as Moderators of Relationships with Sexual Harassment*, 45 SEX ROLES 723, 728, 738 (2001). On factors that influence the decision to seek legal relief in the form of class action in response to sexual harassment, see Caroline Vaile Wright & Louise F. Fitzgerald, *Correlates of Joining a Sexual Harassment Class Action*, 33 LAW & HUM. BEHAV. 265, 267–69 (2009).

civil disputes,[20] despite some important critiques voiced against them.[21] More specifically, it is generally perceived that *secret* settlements are quite common and that their numbers are growing.[22] Indeed, the discussion of public health secret settlements has been percolating for years.[23] To use just one example, the danger of some breast implants was kept from the public through secret settlements, while women continued to undergo this procedure.[24] Several investigative media reports during the late 1980s brought attention to this issue by revealing that secret settlements were concealing information about hazardous products and environmental dangers.[25] Recently, though, one flavor of secret settlements has come to the fore, involving sexual misconduct. In this Part, I sketch the arguments for and against secret settlements and survey the policy suggestions academics have raised in the context of sexual harassment NDAs.

A. Arguments For and Against Secret Settlements

Why are confidential settlements so pervasive, both in general and specifically in sexual harassment claims? Some argue that NDAs are necessary

20. *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2146 (2018).

21. These critiques have been made most famously by Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (critiquing the settlement process); *see also* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2619 (1995) (revisiting Fiss's critiques of settlement). More recently, concerns have been raised about the lack of lawyer accountability in the settlement process. Michael Moffitt, *Settlement Malpractice*, 86 U. CHI. L. REV. 1825, 1862 (2019) (finding that although the vast majority of civil lawsuits are resolved through negotiated settlements, there is currently a lack of lawyer accountability in the context of legal negotiations and arguing that it should not persist).

22. This is the case both specifically in the sexual misconduct context (*see* Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements (discussing how the use of nondisclosure agreements in sexual misconduct cases has become "common practice")) and more generally in the employment context (*see* Randall S. Thomas, Norman D. Bishara & Kenneth J. Martin, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 5, 51 (2015) (explaining that, in general, the use of various restrictive covenants, including NDAs, in employment contracts has increased over time)). This phenomenon has also been noted by judges. *See, e.g.*, Pansy v. Borough of Stroudsburg, 23 F.3d 772, 785 (3d Cir. 1994) ("Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders . . ."); City of Hartford v. Chase, 942 F.2d 130, 137 (2d Cir. 1991) (Pratt, J., concurring) (discussing the "increasing frequency and scope of confidentiality agreements that are ordered by the court").

23. Kotkin, *supra* note 9, at 946; *see also* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 464 (1991) (responding to discovery reform proposals in the context of cases involving public health and safety); Zitrin, *supra* note 9, at 118 (criticizing secret settlements in cases involving public health and safety).

24. *See* Laleh Ispahani, Note, *The Soul of Discretion: The Use and Abuse of Confidential Settlements*, 6 GEO. J. LEGAL ETHICS 111, 119–21 (1992).

25. *See* Barry Meier, *Deadly Secrets: System Thwarts Sharing Data on Unsafe Products*, NEWSDAY (N.Y.), Apr. 24, 1988, at 21; Barry Meier, *Legal Merry-Go-Round: Case Highlights Lack of Data Sharing*, NEWSDAY (N.Y.), June 5, 1988, at 24; Elsa Walsh & Ben Weiser, *Public Courts, Private Justice* (pts. 1–4), WASH. POST, Oct. 23–26, 1988, at A1.

for corrective justice; that is, to enlarge the bargaining area in order to increase the chances of settlement.[26] According to this argument, settlement often can only occur if the parties agree to hold its terms (and very existence) silent. Because compromise can be the only practical recourse for private parties, making nondisclosure clauses enforceable may be necessary to remedy harms.[27] As David Hoffman and Eric Lampmann note with regard to sexual harassment settlements:

> [P]roponents 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 viable, the real question is whether such settlements could exist without enforceable confidentiality clauses.[28]

Specifically, some argue that the secrecy of a settlement can be of great value to a company and should that benefit be removed from the negotiation, settlement may become less attractive from that company's perspective.[29] In extreme instances, a company's inability to negotiate for secrecy may result in the decision not to offer a settlement at all, rendering trial as the only avenue for victims to seek recourse.[30]

Indeed, victim compensation alone might justify the current regime. Wealth transfers to victims as part of confidential settlements are not trivial.[31]

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26. *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, Essay, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 79 (2018) (arguing NDAs should be enforceable only if they meet certain formalities).

27. *See, e.g.*, Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 959, 1009 (1988) (discussing the importance of confidentiality agreements as a negotiating tool).

28. Hoffman & Lampmann, *supra* note 1, at 182. As they further note, "The defenders of hush contracts take significant comfort from the status quo, where hush contracts are both enforceable and nearly omnipresent." *Id.*

29. Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 267 (2018). According to Lisa Klerman, a clinical professor of law and director of the Mediation Clinic at the USC Gould School of Law, "In my private mediation practice, I have already seen this new law (SB 820) make a difference in people's bargaining positions when negotiating settlements," and as a result of the STAND Act in California, "employers may not be willing to pay as much for resolving these claims, given that they are now receiving less in the way of a benefit compared with the prior state of the law that allowed for more 'airtight' nondisclosure agreements concerning sexual harassment and sex discrimination allegations." Jeff Daniels, *New State Laws: From Workplace Harassment Protections to Mandating Women on Boards*, CNBC (Dec. 28, 2018, 9:36 AM), https://www.cnbc.com/2018/12/28/new-state-laws-incalifornia-elsewhere-inspired-by-metoo-movement.html; *see also* David Rocklin, *Secret No More: Confidential Settlements and Sexual Harassment Claims*, WOODRUFF SAWYER: INSIGHTS (Oct. 23, 2018), https://woodruffsawyer.com/do-notebook/confidential-settlements-sexual-harassment-claims (explaining that for many employers confidentiality clauses are "more a matter of business common sense" than malevolence); Moss, *supra* note 9, at 878 (arguing that confidentiality of settlements makes defendants more likely to settle due to "liability costs of lawsuits" which can include both monetary costs and reputational harms).

30. *See* Tippett, *supra* note 29, at 267; Brazil, *supra* note 27, at 1009.

31. Lynn Parramore, *$MeToo: The Economic Cost of Sexual Harassment* (Inst. for New Econ. Thinking, Working Paper, 2018), https://www.ineteconomics.org/research/research-papers/metoo-the-economic-cost-of-sexual-harassment.

Survivors of sexual misconduct can sometimes recoup significant compensatory awards, which can give them a sense of closure as well as tangible gains.[32] According to the U.S. Equal Employment Opportunity Commission (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."[33] 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."[34]

But even when it comes to lower payments than what will be available to plaintiffs in court, victims' financial need may be a key reason to justify the current regime. While the publicity of sexual misconduct—the result of reduced use of NDAs—may be beneficial to society overall, some victims, especially those of lower socio-economic status, may prefer to remain silent and thereby obtain faster, guaranteed compensation. Indeed, the mistreatment of blue-collar and working-class women[35] and of women from marginalized groups[36] has attracted significantly less public attention than did high profile stories of harassment and abuse. Yet, 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 service industries especially vulnerable."[37] In those low-wage industries, women file 300% more claims than in professional fields.[38] This rate suggests that the individuals filing

32. Hoffman & Lampmann, *supra* note 1, at 184.

33. 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 18 (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace.

34. *Id.* at 19; HISCOX, EMPLOYEE CHARGE TRENDS ACROSS THE UNITED STATES 6 (2015), https://www.hiscox.com/documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf.

35. *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; *see also 700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017, 11:11 AM), https://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault.

36. 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 (noting that "[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); *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.

37. Parramore, *supra* note 31. 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." Chai R. Feldblum & Victoria A. Lipnic, *Breaking the Silence*, HARV. BUS. REV. (Jan. 26, 2018), https://hbr.org/2018/01/breaking-the-silence (describing the relevancy of the EEOC's 2016 report to the debate on sexual harassment spurred by the #MeToo movement). This rate includes women from all walks of society, not only affluent professionals.

38. *See* Feldblum & Lipnic, *supra* note 37.

most often are likely those that need the payouts most, which may lead them to prefer an immediate confidential settlement over a lengthy, uncertain battle in court.[39]

Related to victims' interest in an efficient compensation regime is their desire for confidentiality itself. As plaintiffs' lawyer Debra Katz has observed, "[f]or some victims, the promise of confidentiality is actually alluring."[40] Furthermore, according to Katz, 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."[41] NDAs might also shield plaintiffs from the still prevalent phenomenon of "victim blaming."[42] Such victims may also view anti-NDA legislation as a second imposition on their autonomy. From this perspective, victims of sexual misconduct should not be tasked with the burden of speaking out to end the practice. Rather, the burden should lie with the perpetrators.[43]

A final argument for confidentiality is Arthur Miller's freedom of contract point, that enforcing confidential settlements respects the private wishes of the parties involved without impeding the efficient resolution of disputes by the

39. Elsewhere, I discuss the importance of compensation itself as motivation for brining civil lawsuits, especially when plaintiffs experience financial hardships. *See* Gilat J. Bachar, *Collateral Damages: Domestic Monetary Compensation for Civilians in Asymmetric Conflict*, 19 CHI. J. INT'L L. 375, 409–10 (2019).

40. Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment Settlements*, NATION (Jan. 12, 2018), https://www.thenation.com/article/archive/how-to-end-the-silence-around-sexual-harassment-settlements; *see also* Areva Martin, *How NDAs Help Some Victims Come Forward Against Abuse*, TIME (Nov. 28, 2017, 11:39 AM), https://time.com/5039246/sexual-harassment-nda (discussing reasons victims may want to keep settlements confidential including unwanted attention, fear of retaliation, shame, and financial restitution).

41. Russell-Kraft, *supra* note 40. Relatedly, proponents of confidentiality argue that plaintiffs' lawyers have an ethical duty to maximize their clients' recovery and, therefore, are bound to use secrecy as a bargaining chip. *See* Miller, *supra* note 23, at 489–90.

42. *See generally* Shadd Maruna & Brunilda Pali, *From Victim Blaming to Reintegrative Shaming: The Continuing Relevance of Crime, Shame and Reintegration in the Era of #MeToo*, 3 INT'L J. RESTORATIVE JUST. 38 (2020).

43. This is similar to past accusations that attempted to shift the blame of sexual assault to women based on their perceived flirtatiousness or the manner in which they dressed. *See* Olabisi Adurasola Alabi, *Sexual Violence Laws Redefined in the "MeToo" Era: Affirmative Consent & Statutes of Limitations*, 25 WIDENER L. REV. 69, 76 (2019); *see also* Debra S. Katz & Lisa J. Banks, Opinion, *The Call to Ban NDAs is Well-Intentioned. But It Puts the Burden on Victims*, WASH. POST (Dec. 10, 2019), https://www.washingtonpost.com/opinions/banning-confidentiality-agreements-wont-solve-sexual-harassment/2019/12/10/13edbeba-1b74-11ea-8d58-5ac3600967a1_story.html (arguing that NDAs can provide victims with "adequate compensation and [] closure after a traumatic experience" and that the task of speaking out about sexual harassment should not be the victims'); Paulina Cachero, *Mike Bloomberg Promised to Release 3 Women from their NDAs — But Many More Accusers May Still be Legally-Bound to Remain Quiet*, BUS. INSIDER (Mar. 22, 2020, 6:43 AM), https://www.businessinsider.com/legal-experts-say-mike-bloomberg-accusers-misconduct-silenced-ndas-2020-2 (quoting the response by Gillian Thomas—a senior staff attorney with the ACLU's Women's Rights Project—to Bloomberg, Inc.'s statement that it would allow women who were bound by NDAs to be released from them if they contacted the company: "It struck me as odd that even in this glimpse of transparency that the onus was put on the person who had the complaint in the first place, as opposed to reaching out to them and saying, 'I welcome you telling your story,'" Thomas said. "I think he missed the mark if he was trying to appear really eager to have their allegations aired").

courts.[44] According to Miller, confidentiality protects both parties from vexatious claims: plaintiffs are not harassed by long-lost relatives, and defendants are shielded from claimants with meritless actions, looking for a deep pocket.[45] For Miller, NDAs thus represent a mutually beneficial pay-for-silence deal that facilitates settlement, serves judicial economy, and prevents frivolous copycat lawsuits. Miller argues further that the justice system recognizes a variety of instances—including discovery, settlement negotiations, and jury deliberations—in which 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. Since the primary aim "of the judicial system is to resolve private disputes, not to generate information for the public," Miller continues, we must favor privacy over transparency whenever they are in tension.[46]

In contrast, public access advocates tout the public's right to know as a core argument against confidentiality, emphasizing that secret settlements are particularly dangerous when they endanger public health and safety,[47] as is arguably the case when it comes to sexual harassment. Furthermore, secret settlements might reduce the deterrent effect of litigation, which, along with compensation, is a key goal of the tort system.[48] Such diminished deterrence may result especially if secret settlements, by reducing the ability of victims to coordinate, lead to fewer complaints.[49] Responding to arguments made by Miller and other confidentiality advocates, proponents of public access argue, first, that there is no empirical evidence demonstrating that settlement rates decrease without guaranteed confidentiality or that public settlements encourage frivolous claims.[50] Second, contractual terms that violate public policy are never

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44. Miller, *supra* note 23, at 464.

45. *Id*. at 485.

46. *Id.* at 441. Miller acknowledges that in rare instances, some public access to information may be appropriate, but even in those cases, according to his view, there is never a reason to make public the amount of a settlement: "It is difficult to imagine why the general public would have anything more than idle curiosity in the dollar value of a settlement . . ." *Id.* at 484–86. In the context of sexual harassment, this raises a related point about the degree to which the public's interest may be affected by a degree a voyeurism or interest in gossip, rather than a desire for accountability.

47. *See generally* Zitrin, *supra* note 9, at 119–21 (discussing several cases where secret settlement agreements kept information about dangerous products from the public).

48. Zitrin, *supra* note 9, at 118. In this context, it is interesting to consider any deleterious effects of preserving sex offenders' reputation in an attempt to prevent shaming. *See, e.g.*, Colleen M. Berryessa & Chaz Lively, *When a Sex Offender Wins the Lottery: Social and Legal Punitiveness Toward Sex Offenders in an Instance of Perceived Injustice*, 25 PSYCH. PUB. POL. & L. 181, 182 (2019) (suggesting that it may be the "mark" or stigma of criminality, rather than the sex offender stigma specifically, that leads to punitive sentiments in reaction to "bad" individuals experiencing a random fortune).

49. However, secret settlements might also result in more reports since victims can avoid publicity and can secure a settlement with minimal investment.

50. *See, e.g.*, David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1225 (2003) (noting that "there is no evidence that these differences among jurisdictions have translated into differences in settlement timing and/or settlement rates"); Zitrin, *supra* note 9, at 118 (noting that even where states have enacted restrictions on secret settlements, there was "no indication of a resulting court logjam, or even that settlement rates have gone down"). While no studies have been done in those states with sunshine legislation, ATLA asserts that the volume of litigation has

enforceable,[51] nor are lawyers free to increase a settlement figure by allowing clients to enter into agreements that would require the client to commit illegal acts.[52]

Part of the problem academics are facing in this debate is that limiting secret settlements may have various, at times contradicting, effects which are difficult to disentangle. According to Scott Moss, confidentiality might, by increasing the bargaining range, improve the likelihood of settlement.[53] That is, confidentiality can be priced, and parties can extract value for that concession.[54] 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 secret settlements) might reduce the likelihood of settlement post-filing, and consequently reduce the present value of claims and deterrence. Yet, 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.[55] As Moss notes, confidentiality bans may also generate more settlement data, thus decreasing litigation uncertainty, and reveal unlawful practices, hence preventing over-avoidance.[56] This analysis is further complicated by lawyer networks, which make even confidential settlements semi-public.[57]

decreased since Florida enacted its version of the law. *See* Dana & Koniak, *supra* note 50, at 1225 n.18. The authors further note that "[t]he complete absence of any reports of studies suggesting a decrease in settlement rates following the enactment of restrictions on secret settlements is notable given the substantial resources of those interest groups that favor secret settlements, and their ability to fund research." *Id.* In contrast, the economic models of settlement generally maintain that having another term over which to bargain should increase the likelihood of settlement. *See generally* Moss, *supra* note 9.

51. *See* Dana & Koniak, *supra* note 50, at 1221; Hoffman & Lampmann, *supra* note 1, at 182.

52. *See* Dana & Koniak, *supra* note 50, at 1220. Yet, public access proponents acknowledge that under current rules of ethics, for a lawyer to reject an advantageous settlement that the client wishes to accept because the defendant insists on secrecy would constitute an ethical violation. Heather Waldbeser & Heather DeGrave, Current Development, *A Plaintiffs Lawyer's Dilemma*, 16 GEO. J. LEGAL ETHICS 815, 820–26 (2003) (finding no option for an attorney who opposes a confidential settlement, except perhaps to withdraw). Professional responsibility scholars have proposed Rule amendments as a remedial measure, yet it was rejected by the ABA on the grounds that the issue was more appropriate for a legislative solution. *See* Dana & Koniak, *supra* note 50, at 1217 n.1 (reporting that the ABA Ethics 2000 Commission rejected a proposed rule change on secret agreements and that grounds for rejection included belief that state legislative action would be more appropriate); Zitrin, *supra* note 9, at 115–17 (proposing amendment of ABA Model Rules of Professional Conduct); Richard A. Zitrin, *The Laudable South Carolina Court Rules Must Be Broadened*, 55 S.C. L. REV. 883, 904–06 (2004) (discussing Zitrin's proposed rule change for South Carolina); Kevin Livingston, *Open Secrets*, RECORDER, May 8, 2001, at 1 (discussing Zitrin's proposal to the ABA 2000 Ethics Commission and its rejection); Richard A. Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?* 32 HOFSTRA L. REV. 1565, 1594 (2004) (detailing proposed amendment).

53. Moss, *supra* note 9, at 878.

54. Levmore & Fagan, *supra* note 26, at 314.

55. Moss, *supra* note 9, at 891; *see also* Zitrin, *supra* note 9, at 118.

56. Moss, *supra* note 9, at 881–82.

57. 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). There is no easy way to disentangle those competing

B. Should All Sexual Harassment NDAs Be Banned?

This unresolved debate over the propriety of secret settlements thus begs the question: should we ban or limit all secret settlements concealing sexual misconduct? Or should we simply let the market run its course? Are there any circumstances under which such settlements are more objectionable than others? Seeking to find a middle ground between the public access and confidentiality camps, Ian Ayres argues that rather than banning all sexual harassment NDAs, we should focus on secret settlements that enable repeat misconduct.[58] How? Ayers suggests using an "information escrow" to be released if another complaint is brought against the same offender.[59] In a similar vein, trying to keep NDAs alive while eliminating some of their negative consequences, Saul Levmore and Frank Fagan suggest that disclosing the substance of the settlement but not the magnitude of monetary payments should be required by law in extraordinary circumstances.[60] Such circumstances may include sexual misconduct cases, Levmore and Fagan note, where victims may compromise "too quickly and cheaply" to serve the deterrence goal of settlements, because offenders know that victims often value privacy too.[61] Furthermore, offenders in such cases are often in a better position to know whether there is a pattern of abuse, giving rise to information asymmetry.[62] Yet we should not ban NDAs

effects and empirical support for their net effect remains unclear. The lack of empirical data is related at least in part to the difficulty of studying secret settlements. *First*, it is near impossible to review the "seventy percent of civil cases that terminate neither by motion nor by trial but by stipulated dismissal to determine how many contain the actual terms of, or at least some reference to, settlement." *See* Kotkin, *supra* note 9, at 945. *Second*, such an undertaking would only count the type of secret settlement in which "the court record would indicate that the action is dismissed pursuant to a private settlement contract, or that it was resolved by a private settlement contract known as a stipulation of settlement under seal." *Id.* The more common type of secret settlements—those in which "all that the court record indicates is a stipulation of discontinuance or dismissal"—will remain invisible. *Id.* at 945–46. For a rare example of a study that did examine the prevalence of sealed settlements, see Robert Timothy Reagan, Shannon R. Wheatman, Marie Leary, Natacha Blain, Steven S. Gensler, George Cort & Dean Miletich, Sealed Settlement Agreements in Federal District Court 1 (Fed. Judicial Ctr. 2004), https://www.uscourts.gov/sites/default/files/sealset3_1.pdf. The Federal Judicial Center looked at 288,846 civil cases in a mostly random sample of fifty-two districts. *Id.* at 3. One in 227 cases had sealed settlement agreements, or 1,270 total cases. *Id.* In 97% of these cases, the complaint is not sealed. *Id.* at 6. Twenty-seven percent of the cases with sealed settlement agreements are employment cases. *Id.* at 5. Another 10% are other civil rights cases. *Id.*

58. Ayres, *supra* note 26, at 76.

59. *Id.* (arguing that "NDAs should be enforceable only if they meet certain formalities," including "if they explicitly disclose the rights which the survivor retains to report the perpetrator's behavior to the Equal Employment Opportunity Commission (EEOC) . . ."); *see also* Ian Ayres & Cait Unkovic, *Information Escrows*, 111 Mich. L. Rev. 145, 145 (2012) (considering the concept of information escrows as trusted intermediaries in whom individuals could confide and who would disclose that sensitive information only under specified circumstances).

60. Levmore & Fagan, *supra* note 26, at 311; *see also id.* at 342 (arguing that under certain circumstances, attorneys could be required under professional responsibility rules to report NDAs to authorities or vulnerable third parties; courts could refuse to enforce such agreements; or jurisdictions could impose mandatory disclosure requirements as to some or all information concerning these agreements).

61. *Id.* at 334.

62. *Id.* at 333.

altogether, as, among other reasons, victims may hesitate to bring claims if they know they cannot withdraw them from adjudication.[63]

Closer to the public access end of the continuum, David Hoffman and Eric Lampmann focus on "those instances where parties contract to conceal misconduct of a sexual nature whose nondisclosure carries a steep cost to the public,"[64] arguing that courts ought to generally refuse to enforce such NDAs by using the public policy doctrine.[65] Advocating for public access as well, though from a different angle, Minna Kotkin argues that lawyers ought to play a role in preventing secret settlements in labor discrimination cases, including sex discrimination.[66] Specifically, according to Kotkin, civil rights lawyers should take a stand against confidentiality clauses and request client agreement to avoid them in advance of representation.[67] But which cases carry the steepest cost in the eyes of the public? To answer this question, this Article identifies at least two factors that shape the public's moral judgment on this issue, as explained below. In the next Part, I survey the legislative and other action that has been taken thus far to address secret settlements in the context of sexual misconduct. These actions expose the urgent need for empirical data to guide regulation efforts and ensure their efficacy, which this Article seeks to begin collecting.

63. *Id*. at 335.

64. Hoffman & Lampmann, *supra* note 1, at 168.

65. *Id.* Hoffman and Lampmann direct their critique primarily at NDAs created by organizations to keep sexual misconduct secret for three reasons: (1) the impact on employees resulting from repeated sexual misconduct; (2) greater turnover in organizations with repeated harassment; and (3) uncertainty for new employees when NDAs keep sexual misconduct secret. *Id.* at 177–78.

66. *See* Kotkin, *supra* note 9, at 927.

67. *Id.*

II. Sexual Harassment Secret Settlements: From Theory to Law and Policy

Much like academics, policymakers have also been debating whether and how to regulate sexual harassment NDAs.[68] In the wake of the #MeToo movement, legislatures have grappled with legislation that might better protect victims of sexual harassment in the workplace and beyond. In the three years that followed the viral spread of the #MeToo hashtag, over 230 bills have been introduced in state legislatures and 19 states have enacted new laws regarding sexual misconduct.[69] This Part surveys such legislative developments insofar as they pertain to NDAs and argues that such regulation is desperately missing an empirical perspective about the public's attitudes.

A. Legislative Action Regarding Sexual Harassment NDAs

As part of the broader legislative effort mentioned above, several important developments have occurred specifically with regard to sexual harassment NDAs. On the federal level, the Tax Cuts and Jobs Act, which became law in December 2017 under the Trump administration, contains a provision that eliminates the business deduction for any settlement of a sexual misconduct claim that includes an NDA.[70] On the state level, several states have clamped down on companies requiring employees to sign NDAs regarding acts of sexual harassment. Among states doing so were Maryland, Vermont, and Washington.[71] However, approaches to limiting NDAs have varied. For instance, some states, including New York and New Jersey, have sought to limit the enforceability of NDAs after the fact, rendering void and unenforceable clauses in NDAs requiring victims to stay silent about the sexual harassment they faced.[72] Still other states have chosen intermediate solutions, allowing

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68. It should be noted that legislative efforts regarding NDAs in recent years go well beyond the sexual harassment context, and touch upon a variety of other aspects in the workplace. *See* Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 550 (2020) (discussing legislative initiatives in the context of the wage market).

69. NWLC REPORT, *supra* note 10, at 2 (surveying state laws in the post-#MeToo era).

70. As of Dec. 22, 2017. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13307, 131 Stat. 2054, 2129 (2017) (codified at 26 U.S.C. § 162(q)). On some of the ambiguities in that provision, see Leandra Lederman, *Are Sexual Harassment Plaintiffs' Attorneys' Fees Inadvertently Disallowed by the Tax Cuts Bill?*, SURLY SUBGROUP (Dec. 19, 2017), https://surlysubgroup.com/2017/12/19/are-sexual-harassment-plaintiffs-attorneys-fees-inadvertently-disallowed-by-the-tax-cuts-bill. For a proposal to deny tax deductions for confidential sexual misconduct settlements that preceded the emergence of the Weinstein allegations and the Republican tax plan, see Levmore & Fagan, *supra* note 26, at 343–45.

71. *See* Daniels, *supra* note 29 (surveying state laws in the post-#MeToo era); NWLC REPORT, *supra* note 10, at 8–10. There have also been reports on racial discrimination NDAs changing as a result of the #MeToo shift. *See* Khadeeja Safdar, *Racial-Discrimination Settlements Usually Came With an NDA. That's Changing*, WALL ST. J. (Oct. 20, 2020, 11:36 AM), https://www-wsj-com.cdn.ampproject.org/c/s/www.wsj.com/amp/articles/racial-discrimination-settlements-usually-came-with-an-nda-thats-changing-11603208180.

72. NWLC REPORT, *supra* note 10, at 9–10 (noting Nevada and Tennessee have passed similar laws).

NDAs as a condition of employment as long as certain requirements are met.[73] California has taken the most aggressive approach. As of 2019, California's Stand Together Against Non-Disclosure (STAND) Act effectively made it unlawful for an employer to create a non-disclosure 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.[74] The California act thus permits some secret settlements (those entered post-demand letter but pre-suit).[75] It also explicitly provides that victims can request nondisclosure of personally identifying facts, and that parties can agree to keep the amount of the settlement—but not the underlying facts of the case—secret.[76] But, overall, the California statute represents a significant strike against secret settlements, based on the understanding that they engender third-party harm and consequently require public responses.[77] The law's author, California State Senator Connie M. Leyva, explained that, by banning secret settlements, perpetrators of assault will be without a major tool to "silence [] and deny [victims] justice."[78]

However important and well-intentioned, these regulation efforts have proceeded without a clear prediction of how they might affect claiming and settlement behavior. As noted, some argue that these new laws will likely result

73. *Id.* at 8–10. For example, New Mexico's law only prohibits private employers from requiring employees to sign an NDA in settlement agreements related to sexual misconduct. *Id*. at 8. Other states with similar legislation include Virginia, Oregon, and Hawaii. *Id*. at 8–9.

74. Stand Together Against Non-Disclosure Act, CIV. PROC. § 1001 (West 2018). It should be noted that § 1001 addresses non-criminal or less serious criminal acts, when they form the basis of an action that has been filed in court or with an administrative agency. *Id.* Those NDAs are void going back to 2019. *Id.* In contrast, § 1002 addresses the most serious criminal offenses, even if they are dealt with (and settled) without any court or administrative filings. *See* CAL. CIV. PROC. CODE § 1002 (West 2018). Those NDAs are void going back to 2017. *Id.* In terms of professional responsibility repercussions, both the defense attorney and plaintiff's attorney would be subject to discipline. *Id.*

75. CIV. PROC. § 1001(a). This point has been noted by practitioners. *See California Employers to Face Raft of New #MeToo Laws*, FISHER PHILLIPS (Oct. 1, 2018), https://www.fisherphillips.com/news-insights/california-employers-to-face-raft-of-new-metoo-laws.html ("Therefore, there may be a narrow set of circumstances in which such clauses may still be utilized in sexual harassment and other similar cases.").

76. CIV. PROC. § 1001(c), (e).

77. Senate Rules Committee, S. Floor Analysis, S.B. 820, S. 2018 Reg. Sess. 6 (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB820 ("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.").

78. *Legislature Approves Leyva Bill Banning Secret Settlements in Sexual Assault and Harassment Cases*, SENATOR CONNIE M. LEYVA (Aug. 24, 2018), https://sd20.senate.ca.gov/news/2018-08-24-legislature-approves-leyva-bill-banning-secret-settlements-sexual-assault-and. However, California's law was also met with opposition. A coalition of businesses, including California's Chamber of Commerce wrote in opposition that the bill "will interfere with the settlement of claims alleging sexual harassment or assault, by forcing companies to trial in order to preserve their public image/brand." Senate Rules Committee, S. Floor Analysis, S.B. 820, S. 2018 Reg. Sess. 8 (Cal. 2018). The coalition noted that settlements are often a business decision, reflecting companies' cost-benefit analyses disfavoring potentially lengthy trial. *Id.* Since allegations in a complaint are usually disputed and must be decided by a trier of fact, the coalition explained, there is a significant risk to both parties by going to trial. *Id.*

in lower payouts for victims of sexual misconduct because when the significant benefit of secrecy is removed from negotiations, settlement may become less attractive to the company.[79] According to this argument, sunshine laws fail to properly consider the interests of victims from marginalized or lower socio-economic groups. While the publicity of sexual misconduct—the result of reduced use of NDAs—may be beneficial to society overall, victims may prefer to remain silent and thereby obtain faster compensation and closure than they would by going to court.[80] Sunshine laws that ignore these implications may end up being disregarded or bypassed. Therefore, one key goal of this paper is to examine the extent to which lay people actually prefer confidentiality when it benefits a financially unstable victim, and the extent to which this tendency is associated with the severity of the misconduct involved.

B. Why Do Lay Attitudes Matter for Regulating Sexual Harassment NDAs?

To date, the debate about sexual harassment NDAs, despite its high visibility and important policy implications, has been largely theoretical. Yet in order to regulate the public's right to know, we need data on what people want to know and under what circumstances they consider limiting their right to know to be most harmful. While typically the terms of settlement agreements between private parties do not involve the public interest, situations which implicate social problems like sexual harassment justify taking into account the appropriate scope of the public's right to know. Indeed, the backbone of the argument against confidentiality is the public's right to know.[81] This argument is reflected in the history of secret settlement regulation in the United States. As noted, over the years, many have criticized settlement confidentiality for harming third parties by concealing serious misdeeds. Such criticisms have traditionally focused on issues such as defective manufacturing and public hazards. As a result of media reports revealing that secret settlements were concealing information about hazardous products and environmental dangers in the 1980s,[82] a public outcry led a number of state legislatures to enact sunshine laws, which generally required judges to consider public health and safety concerns before sealing court records.[83] This history highlights the inseparable

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79. Tippett, *supra* note 29, at 267.

80. *See* Alabi, *supra* note 43, at 76 (identifying the burden of speaking out about sexual assault).

81. For a discussion on the public's right to know in other contexts, see generally Craig D. Feiser, *Protecting the Public's Right to Know: The Debate Over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L REV. 825 (2000); Fred H. Cate, D. Annette Fields & James K. McBain, *The Right to Privacy and the Public's Right to Know: The Central Purpose of the Freedom of Information Act*, 46 ADMIN. L. REV. 41 (1994); George K. Yin, *Reforming (and Saving) the IRS by Respecting the Public's Right to Know*, 100 VA. L. REV. 1115 (2014).

82. *See* Meier, *Deadly Secrets*, *supra* note 25, at 21; Meier, *Legal Merry-Go-Round*, *supra* note 25, at 24; Walsh & Weiser, *supra* note 25, at A1.

83. *See, e.g.*, FLA. STAT. § 69.081 (2004); TEX. R. CIV. P. ANN. 76a (West 2003). Florida's Act and Louisiana's virtually identical rule are the two broadest of the few state laws restricting private confidentiality.

link between the *public's right to know* and *what the public actually wants (and doesn't want) to know*. Had it not been for the public outcry regarding the public health implications of secret settlements, legislative action likely would not have resulted. A similar process is occurring with the current wave of sunshine laws resulting from the #MeToo movement. Yet, to ensure the scope of sunshine laws governing sexual harassment claims tracks the public interest, we need empirical data. Such data are currently in incredibly short supply. To begin closing this gap, this Article asks: what is shaping the public's attitudes on the propriety of concealing acts of sexual harassment, and under which circumstances do lay people seek public information about such cases?[84]

Furthermore, data on lay attitudes towards sexual harassment NDAs can help pass legislation which regulates such agreements, by providing evidence regarding political will and the scope of the intervention needed. Given the binary interest group politics surrounding the debate on NDAs, with the plaintiffs' bar and corporations supporting them and feminist groups rejecting them, information on lay attitudes can help nuance the discourse and better inform policymakers who are currently operating based on hunches when considering sunshine laws. Such data might also encourage policymakers to adopt regulation that need not be "all-or-nothing" but instead strives for intermediate solutions. For example, if the public tends to endorse secret settlements when they serve an individual victim's financial need, policymakers should explore ways to ensure a confidentiality ban regime still allows disadvantaged employees to choose a settlement over litigation.

Finally, lay attitudes towards legal issues matter if we aspire to change behavior through regulation, thereby reducing the need to monitor regulated players.[85] Why? Because even the most carefully drafted legislation may end up being subject to manipulation, especially by sophisticated players. To ensure the public buys into the new legislation and practices it without constant monitoring

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See Zitrin, *supra* note 9, at 891–95 (compiling state laws addressing sealed settlement agreements, including Louisiana's). However, even Florida's law covers only settlements "concealing . . . information concerning a public hazard" and "that has caused and is likely to cause injury." FLA. STAT. § 69.081(2), (4) (2004). Moreover, this language limits the law to (1) only hazards that have *already* caused *and are still likely* to cause injuries and (2) only "health and safety" hazards, not harms like financial fraud. *See* State Farm Fire & Cas. Co. v. Sosnowski, 830 So. 2d 886, 887–88 (Fla. Dist. Ct. App. 2002). The Association of Trial Lawyers of America ("ATLA") took the position that lawyers and the courts should resist secrecy agreements, citing danger to the public. *See* Philip H. Corboy, *Secret Settlements: The Challenges Remain*, TRIAL, June 1993, at 122. Of course, secret settlements also had the effect of inhibiting lawyers from publicizing their successes to attract new clients.

84. For more on the growing field of experimental jurisprudence, which borrows empirical techniques from the social sciences to clarify core concepts in the law, and on the importance of gathering data on lay attitudes, see Roseanna Sommers, *Experimental jurisprudence*, 373 SCIENCE 394 (2021).

85. *See* Bilz & Nadler, *supra* note 17, at 241 (arguing that legal regulation can change behavior more efficiently by changing attitudes, especially those regarding the underlying morality of the regulated behaviors, because this may drastically reduce the need for enforcement); *see also* Sunstein, *supra* note 16, at 121–22 (arguing that people's beliefs about fairness and justice are the core antecedent of the willingness to cooperate voluntarily and stand behind laws and policies); Acemoglu & Jackson, *supra* note 16 ("show[ing] that laws that are in strong conflict with prevailing social norms may backfire, while gradual tightening of laws can be more effective in influencing social norms and behavior.").

and enforcement (which would be challenging to achieve), we need to obtain data on what the public's preferences currently are. Indeed, banning secret settlements will make some parties worse off, prompting them to try to evade the regulation. The benefits, in contrast, will be much more dispersed among the public. Litigants thus have an incentive to collude. If the public is on board with the legislation, it can serve as a check on parties' incentive to evade sunshine laws. Identifying lay people's moral intuitions regarding NDAs therefore can help minimize unintended consequences and make regulation efforts more effective.[86] In this sense, we should care about what the public wants both because it will help get sunshine laws through the legislature *and* because it will make enforcement easier with fewer enemies than if regulation banned secret settlements where both the parties and the public object to it.

This Article thus begins a series of experimental studies aimed at creating a body of knowledge regarding what the public wishes to know about sexual harassment. This Article does so by exploring the effect of at least two factors identified in the literature as potentially important in shaping the discourse around secret settlements: severity of misconduct and victims' financial need.

The following Part draws on psychological theories to lay the groundwork for this study's hypotheses as to some of the factors driving lay attitudes towards secret settlements.

III. The Psychology of Secret Settlements

Perspectives that have been sorely missed in the discussion over the legitimacy of secret settlements are a social psychology lens and a behavioral law and economics perspective. This Part examines three theories that may shed light on the public's moral intuitions regarding secret settlements: taboo tradeoffs, deliberate ignorance, and theories derived from jury decision-making regarding punitive damages. The competing hypotheses which flow from these theories further highlight the crucial need for an empirical investigation.

A. Taboo Tradeoffs

Secret settlements highlight the discomfort people tend to experience in the face of difficult tradeoffs, such as exchanging money for harm resulting from wrongdoing. "Taboo tradeoffs," a theory articulated by Alan Page Fiske and Philip Tetlock, provides a psychological account of this discomfort.[87] The authors contend that relations in all societies are governed by various combinations of four fundamental psychological models.[88] We categorize

86. Put another way, the public's current preferences as identified in Acemoglu and Jackson's study might be explained by the current system, which needs to be disrupted in order to change these preferences.

87. Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-Offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCH. 255, 256 (1997); *see also* Robert J. MacCoun, *The Costs and Benefits of Letting Juries Punish Corporations: Comment on Viscusi*, 52 STAN. L. REV. 1821, 1825–27 (2000).

88. Fiske & Tetlock, *supra* note 87, at 258.

individuals and treat category members identically (communal sharing); treat individuals by their rank within a group (authority ranking); keep score of outcomes and strive to equalize them (equality matching); or value outcomes on an absolute metric and make tradeoffs among them (market pricing).[89] Each template has its own rules of appropriate conduct, its own norms of distributive fairness, and most crucially, its own consensually agreed upon domains of operation in a community's life.[90]

As a result of these different templates, Fiske and Tetlock argue that "cost-benefit analysis ignores and usually does violence to normative distinctions that people value as ends in themselves."[91] They recognize the normative value of formal cost-benefit analysis and that "taboo tradeoffs are unavoidable . . . . In practice, there is a limit to the dollars we will spend to enhance our own personal safety at the workplace or in cars or airplanes, and we will certainly spend less for the safety of others."[92] But they argue that attempts to apply market pricing to the domain of human life and suffering will inevitably encounter resistance. In their words: "It is gauche, embarrassing, or offensive to make explicit trade-offs among the concurrently operative relational modes."[93] This suggests that explicitness can discourage tradeoffs that we might otherwise want or need to make. It may also create discomfort among observers of such tradeoffs, that is, the public at large. In other words, one outcome of this phenomenon might be that people would prefer to have certain types of exchanges—such as trading money for human injury or suffering—kept under wraps, in order to avoid the discomfort that they may experience as a result of bringing them to light. This may be especially true when it comes to sexual misconduct, where the exchange of money for abuse may be particularly hard for people to stomach. Of course, the opposite may be true as well, as people may wish to be exposed to cases of sexual harassment due to a degree of voyeurism or for their titillating value. As detailed below, while the data cannot conclusively answer this question, they provide an initial point of reference for future research exploring the mechanisms driving the observed effects.

B. Deliberate Ignorance

Might people prefer to remain in the dark regarding sexual harassment even at the cost of accountability for such wrongdoing? According to Ralph Hertwig and Christoph Engel's theory, they might. This conscious choice not to seek or use knowledge or information has been dubbed "deliberate ignorance."[94]

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89. *Id.* at 259.
90. *Id.* at 260.
91. *Id.* at 294.
92. *Id.* at 290.
93. *Id.* at 273.
94. *See generally* Ralph Hertwig & Christoph Engel, *Homo Ignorans: Deliberately Choosing Not to Know*, 11 PERSPS. ON PSYCH. SCI. 359 (2016).

Specifically, deliberate ignorance can be an emotion regulation device, extending to social and moral emotions like anger and disgust.[95] But it can also serve as a strategic device, allowing people to eschew responsibility for their own actions by avoiding knowledge about how those actions and their outcomes affect others.[96] Applying this theory to sexual harassment may help explain a preference to keep settlements private from both the general public's and the employer's perspective. The general public may prefer to remain in the dark regarding settlements of sexual harassment claims, even at the cost of public accountability for sexual misconduct, as an emotion regulation device which seeks to limit exposure to incidents that stir anger and disgust. Employers and others who bear some level of responsibility for incidents of sexual harassment may choose to remain ignorant about settlements of sexual harassment claims as a strategic device aimed at avoiding knowledge of the impact such incidents have on victims.

C. Jury Research on Punitive Damages

Another key element in secret settlements is the compensation typically retained by the victim/plaintiff as part of the settlement. Social psychological research can help us predict how the public might perceive monetary compensation conferred to victims through secret settlements. Research conducted in the context of public funds recipients suggests that the public may be suspicious of such compensation.[97] As Michele Dauber notes in connection with the 9/11 compensation fund that conferred monetary relief to victims of the attack, "[b]eing deserving of aid demands a moral innocence born of blameless victimization; yet anticipating or receiving compensation implies a moral stain, a self-regard that properly requires policing and skepticism."[98] Applying a similar line of reasoning to tort lawsuits, Michelle Chernikoff Anderson and Robert MacCoun predicted that jurors would be reluctant to award punitive damages when plaintiffs themselves receive the award, as, they reasoned, "a punitive award of the magnitude necessary to meet jurors' defendant-focused goals (retribution and/or deterrence) would provide the plaintiff with an unjust

95. *Id.* at 361; *see also* Cendri A. Hutcherson & James J. Gross, *The Moral Emotions: A Social-Functionalist Account of Anger, Disgust, and Contempt*, 100 J. PERS. SOC. PSYCHOL. 719, 733–34 (2011) (discussing the important role of emotion in moral judgment and decision making and the need to distinguish between specific moral emotions).

96. Hertwig & Engel, *supra* note 94, at 362–63; Linda Thunström, Klaas van't Veld, Jason F. Shogren & Jonas Nordström, *On Strategic Ignorance of Environmental Harm and Social Norms*, 124 REVUE D'ECONOMIE POLITIQUE 195, 196–97 (2014).

97. Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 291–92 (2003).

98. *Id.* at 291; *see also* DAVID M. ENGEL, THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON'T SUE 12–14 (2016) (discussing Americans' ambivalent view of tort law, due to placing price-tags on human injuries).

'windfall profit,' especially considering that the jurors would have already attempted to make the plaintiff whole via compensatory damages."[99]

And yet Anderson and MacCoun's findings show little evidence of concern about a plaintiff windfall. Rather, their subjects actually preferred awarding punitive damages when they believed that the plaintiff would be the recipient of the funds.[100] According to their analysis, this result may indicate that lay people "intended the award to serve a *restitutive* or *restorative function*, rather than (or in addition to) purely deterrent or retributive functions."[101] In this sense, their findings join those arguing that people feel that fair punishment for wrongdoing requires acts of restitution for restorative, rather than compensatory, purposes.[102] According to this view, the offender has torn the social fabric, and public acts of restitution serve to repair that damage.

Taken together, these bodies of theory and research from the realm of psychology help form hypotheses for the current research. Indeed, a key goal of this study is to begin answering the question: to what extent, and under what circumstances, do lay people endorse sexual harassment NDAs? While psychological theories such as taboo tradeoffs and deliberate ignorance may drive us to assume that people will generally favor secret settlements, especially when it comes to sensitive issues such as sexual misconduct, jury research on punitive damages encourages a more nuanced view accounting for restorative or restitutive goals focusing on victims. As explained in the next Part, such a nuanced view may apply, among other factors, to the severity of sexual misconduct involved and to the victim's financial status. Building on this interdisciplinary knowledge, I designed an experiment that tests the effect of these two variables on lay attitudes towards sexual harassment secret settlements. The following Parts describe the methods used in this study, its main findings, and their implications.

IV. METHODS

To begin closing the knowledge gap regarding lay attitudes towards NDAs, I employed a survey experiment administered to a representative sample of Americans, asking about their endorsement or rejection of secret settlements (the dependent variable, DV). Using a 2X2 factorial design, the study focuses on two independent variables (IVs) identified in the literature as potentially crucial to the endorsement of secret settlements: (1) the *severity of the wrongdoer's*

99. Michelle Chernikoff Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 L. & HUM. BEHAV. 313, 316 (1999).

100. *Id.* at 326.

101. *Id.*

102. *See*, *e.g.*, Gordon Bazemore & Mark Umbreit, *Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime*, 41 CRIME & DELINQ. 296, 297 (1995); Mark Umbreit, *Crime Victims Seeking Fairness, Not Revenge: Toward Restorative Justice*, 53 FED. PROB. 52, 52 (1989) (arguing that this restorative function is not limited to offenses that occur in preexisting relationships and documenting the importance of restoration in crimes involving strangers).

misconduct (severe/ minor) and (2) the *victim's financial status* (high/ low). Additionally, the study tests whether attitudes towards NDAs are associated with participants' preexisting opinions on NDAs or sexual harassment, their political affiliation, and/or demographic characteristics.

A. Hypotheses and Experimental Design

In designing the experiment, I hypothesized, first, that participants will reject the secret settlement when the severity of the wrongdoer's act is high (H1). Severity of harassment was defined in accordance with a scale created by previous research, which found lay people identified certain acts of harassment—such as sexual jokes or remarks—as less severe than others involving unwanted touch or exposure ("flashing").[103] Previous studies have shown that lay people tend to associate more severe harassment with greater harm to victims.[104] Based on such studies, as well as the jury research described above, I hypothesized that participants will register objection to the concealment of acts that generate greater harm to victims, due to a restorative or restitutive perspective.[105] Furthermore, previous research in the criminal justice context has proved that greater severity is associated with greater moral outrage.[106] Therefore, I predicted that more severe harassment will also trigger rejection of a secret settlement because in such cases lay people will be more outraged by the act from a punitive perspective, thus seeking public condemnation. In contrast, I suspected that minor acts of harassment perceived as less damaging and outrageous will trigger approval of the settlement, since lay people will view such exchanges as the parties' prerogative rather than part of the public's right to know.

Second, I hypothesized that participants will approve the secret settlement when the victim was financially unstable (H2). As noted above, H2 was based on findings regarding jury decision-making in punitive damages cases, showing jurors' preference to have the plaintiff receive the award money.[107] Such

103. *See* Stacie A. Cass, Lora M. Levett & Margaret Bull Kovera, *The Effects of Harassment Severity and Organizational Behavior on Damage Awards in a Hostile Work Environment Sexual Harassment Case*, 28 Behav. Scis. & L. 303, 305–07 (2010); David E. Terpstra & Douglas D. Baker, *A Hierarchy of Sexual Harassment*, 121 J. of Psych. 599, 602 (1987); Douglas D. Baker, David E. Terpstra & Bob D. Cutler, *Perceptions of Sexual Harassment: A Re-examination of Gender Differences*, 124 J. of Psych. 409, 411 (1990). That said, there might not be a uniform reaction among participants to various forms of harassment (some of which may also be considered criminal behavior, which may elicit a different reaction). This caveat should be kept when considering the findings.

104. Cass et al., *supra* note 103, at 305–07.

105. In contrast, in line with the theory of taboo tradeoffs, one could argue that "money for silence" is more of a taboo when it comes to severe misconduct, and thus we should expect the public to be more accepting of NDAs in severe cases of sexual harassment based on that theory. Relatedly, if very harmful activity is especially difficult for a victim to report (e.g., rape), a social planner who cared about maximizing welfare may want to allow secret settlements in this space rather than ban them, in order to ensure there was reporting.

106. Carlsmith & Darley, *supra* note 17, at 199–200.

107. *See, e.g.*, Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 L. & Hum. Behav. 445, 448 (1999);

research indicated that lay people seek victim restoration and are not as worried about a victim/plaintiff windfall. People may also perceive poor victims as more eligible for restoration than richer victims, given an assumption that gender power dynamics are more at play in the case of financially struggling victims. Furthermore, H2 stemmed from research showing that jurors tend to sympathize with poorer plaintiffs, a phenomenon described as "the underdog factor,"[108] which is contrary to the common belief that people tend to be suspicious of poor people.[109] Based on these two threads of studies, I predicted that financially unstable victims will trigger greater approval of a secret settlement compared to victims who are financially stable, as in such cases, lay people will be more concerned about the victim's interest in closure and restoration than they will be with the public's right to know.

Third, with regard to the interaction effect between the two main independent variables, I hypothesized that the victim's financial status will matter less when the act of harassment was severe than when it was minor (H3). That is, the prediction was that participants' reaction to a victim's financial status will depend on harassment severity only when severity is low, such that participants in that condition will tend to approve the secret settlement when victim financial status is low and reject it when victim financial status is high. This aspect of the study was exploratory, and the hypothesis stemmed primarily from the assumption that the severity concern will trump the financial concern among participants. That is, I assumed that lay people will be more concerned about a poor victim's interest in closure and restoration than they would be about a richer victim's parallel interest as long the harassment act was minor, thus avoiding a potential conflict with the public's desire to know about severe acts of sexual harassment.

Fourth and finally, given that gender stereotypes tend to affect evaluations of sexual misconduct, I hypothesized that they may serve as a moderator for the effects on NDA approval (H4). In other words, I assumed that the effect of severity and/or financial status may interact with participants' beliefs in sexual harassment myths. This hypothesis was based on previous research which showed the key role of acceptance of sexual harassment myths in determining lay attitudes towards issues related to sexual harassment.[110]

Anderson & MacCoun, *supra* note 99, at 326 (describing their findings that jurors preferred to have punitive damages awarded to plaintiffs than given to charity).

108. William R. Darden, James B. DeConinck, Barry J. Babin, & Mitch Griffin, *The Role of Consumer Sympathy in Product Liability Suits: An Experimental Investigation of Loose Coupling*, 22 J. BUS. RSCH. 65, 68–69 (1991) (finding a negative relationship between plaintiff financial situation and extent of verdict, which was mediated by consumer-juror sympathy); Peter J. Van Koppen & Jan Ten Kate, *Individual Differences in Judicial Behavior: Personal Characteristics and Private Law Decision-Making*, 18 L. & SOC. REV. 225, 228–29 (1984) (identifying and discussing the so-called "underdog factor").

109. *See* Dauber, *supra* note 97, at 291–92.

110. *See, e.g.*, Netta Barak-Corren & Daphna Lewinsohn-Zamir, *What's in a Name? The Disparate Effects of Identifiability on Offenders and Victims of Sexual Harassment*, 16 J. EMPIRICAL LEG. STUDS. 955, 964 (2019) (using a series of vignette-based experiments to study the identifiability effect in sexual harassment, and

Participants were divided into four groups and each group was randomly assigned to one of four conditions,[111] which represented combinations of the two independent variables:

- Sexual joke (low severity) + financially struggling victim (low financial status)
- Sexual joke (low severity) + financially stable victim (high financial status)
- Exposing genitalia (high severity) + financially struggling victim (low financial status)
- Exposing genitalia (high severity) + financially stable victim (high financial status)

In all conditions, participants read the scenario below, depicting a sexual harassment complaint submitted by a female employee against her male manager. Participants were subsequently asked to answer a question regarding their approval or rejection of a confidential settlement under the circumstances of the scenario (a binary should sign/should not sign question).[112] The scenario and question are reproduced below in full (alternative treatments are bracketed).

> John is a supervisor in a private security company.[113] [John directs a sexual joke at one of his employees, Laura.[114]] [John exposes his genitalia to one of his employees, Laura.][115] Laura files a complaint for sexual harassment against John with the company.

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including an indicator of "rape myth" acceptance); Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCH. 217, 218–19 (1980) (using a similar indicator in the context of rape myths and analyzing hypotheses founded in social psychological and feminist theory purporting that the acceptance of rape myths can be predicted from attitudes such as sex role stereotyping, adversarial sexual beliefs, and sexual conservatism).

111. As explained below, there were no statistically significant differences across the covariates in the four treatment groups.

112. A vignette design is a good fit for this study despite its known limitations, including limited external validity and potential unknown confounds. Generally, vignettes have been found more effective than opinion surveys in eliciting candid responses, especially when gathering data on awareness and attitudes. *See, e.g.*, Nancy E. Schoenberg & Hege Ravdal, *Using Vignettes in Awareness and Attitudinal Research*, 3 INT'L J. SOC. RSCH. METHODOLOGY 63, 64 (2000) (describing benefits of vignette-based research, including depersonalization that encourages an informant to think beyond his or her own circumstances, an important feature for sensitive topics).

113. The type of company is indicated for two reasons. First, to control for participants' speculations about industry norms and the setting they envision while reading the vignette. Second, as noted, given the media's tendency to focus on high-profile cases, it is important to highlight the experience of blue-collar populations, such as workers in the security sector.

114. The names "John" and "Laura"—highly common "white" names—were intentionally chosen to hold constant what participants are imagining in terms of the race of the offender and the victim. *See* Daniel M. Butler & Jonathan Homola, *An Empirical Justification for the Use of Racially Distinctive Names to Signal Race in Experiments*, 25 POL. ANALYSIS 122, 122 (2017).

115. These specific harassment treatments were chosen based on ranking of perceived severity developed by David E. Terpstra and Douglas D. Baker. *See* Terpstra & Baker, *supra* note 103. Their ranking was later used with a non-student population by Baker et al., *supra* note 103.

In response to Laura's complaint, the security company conducts an internal investigation, in which the complaint is substantiated.[116] The company[117] then offers Laura a "take-it-or-leave-it" settlement: Laura will receive an undisclosed amount of money,[118] will waive all future claims against the company (that is, she will not be able to sue the company in court), and will sign a non-disclosure agreement, which requires her to never speak about the incident again.

Should Laura decline the settlement offer, she can file a lawsuit against the security company. The court record will be available to the public, but Laura can choose to have her personal information removed from the record.

Laura has changed jobs and no longer works for the company. [She is struggling financially.] [She is financially stable.]

Assume that you are a neutral consultant requested to give an opinion about this incident.[119] In your opinion, what should happen next?

- Laura and the security company **sign** the settlement agreement. Laura receives the settlement money. She cannot discuss the incident nor sue the company.
- Laura and the security company **do not sign** the settlement agreement. Laura does not receive the settlement money. She can discuss the incident and can file a lawsuit against the company.

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116. This sentence denotes an attempt to hold constant any concerns of false accusations. Scholars and commentators are often preoccupied with the question of false accusations in sexual misconduct cases, 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 26, at 344 ("Mandatory transparency, as required by some sunshine laws, likely goes too far because news of [a plaintiff's] claim[s] will bring forth claimants who erroneously, irrationally, or strategically believe [the tortfeasor] injured them"); *see also* Ian Ayres, *supra* note 26, 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"); *see also* Bret Stephens, Opinion, *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 ("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 often overstate the frequency of unsubstantiated allegations. *See* Katie Heaney, *Almost No One is Falsely Accused of Rape*, THE CUT (Oct. 5, 2018), https://www.thecut.com/article/false-rape-accusations.html (explaining that, since only 8 to 10% of rapes are reported and about 5% of reports may be unsubstantiated, false accusations account for around 0.5% of reported rapes).

117. It should be noted that the settlement agreement offered in the scenario is between Laura and the company rather than the offender, John. This is a significantly more common scenario than a settlement between individuals, allowing the study to yield implications for employers. While there was indication that this distinction registered with pretest participants, it would be interesting to explore in future research whether manipulating the identity of the party offering the settlement affects the level of NDA approval.

118. The amount is left undisclosed to control for any effects of the amount itself. Of course, it is possible that participants will assume different amounts under the different treatments. However, there is no reason to think that such assumptions will systematically affect the dependent variable, which is an issue left to be explored in future research.

119. The participants' position was chosen after several iterations in pretests indicated it was the clearest to participants. However, it is not without its difficulties. Participants may have interpreted their task in different ways; either indicating what people want from a public perspective or as advising the parties at hand. This aspect of the study should be pursued in future research.

As noted, I also included an indicator of "sexual harassment myths" acceptance.[120] Participants were asked to rank their level of agreement (on a 1-5 Likert scale) with a number of statements aimed at assessing their level of acceptance of sexual harassment myths related to victims' claiming behavior. For example, one of the statements read: "*False accusations of sexual harassment are a bigger problem than unreported harassment*" (see Appendix I for the full list of statements). The order of the opinion survey and the vignette were randomized between subjects, to counterbalance any order effects. Statements expressing a positive evaluation of victims were reverse-coded to align with statements expressing a negative evaluation.

Participants were also asked about their general views regarding NDAs using positive and negative statements which were aligned through reverse-coding to create a 1-5 pro-NDA score for each participant. For instance, one of the statements read: "*It is better for society if lawsuits are settled confidentially*." The goal of these questions was twofold. *First*, similar to the acceptance of sexual harassment myths score, these questions were meant to assess the potential role of preexisting views about secret settlements as a moderator of the independent variables' effect. *Second*, these questions were meant to ensure the internal validity of the study; in other words, to guarantee that the experiment is testing approval of secret settlements and not some other construct. A positive correlation between the answers to the general questions about NDAs and the question asked in the experiment proves that this is the case. As explained below, such a correlation was indeed found. That said, the fact that the correlation was weak indicates that participants were sensitive to the specifics of the scenario presented to them rather than guided only by their preexisting opinions.[121]

Finally, as part of the exploratory section of the survey, participants were also asked to rate the level of importance that additional items of information about the harassment scenario would have for their decision on whether to endorse the secret settlement. This matrix question, aimed primarily at assessing directions for future research, included a total of eight information items: (1) costs of litigating the case in court; (2) whether the wrongdoer has a pattern of sexually harassing his colleagues; (3) whether the victim was represented by a lawyer; (4) whether the wrongdoer agrees to go to therapy as part of the settlement agreement; (5) the victim's likelihood of winning a lawsuit against the company in court; (6) the amount of money the victim will likely win if her lawsuit against the company is successful; (7) whether the wrongdoer was terminated from the company as a result of his behavior; and (8) the amount of money the company agreed to pay as part of the settlement agreement.

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120. *Cf.* Burt, *supra* note 110, at 117.

121. With regard to both the sexual harassment myths and the NDA views analyses, I used Cronbach's Alpha to ensure that averaging items in these indicators is justified, because all items were indeed related to the same construct. *See generally* Klaas Sijtsma, *On the Use, the Misuse, and the Very Limited Usefulness of Cronbach's Alpha*, 74 PSYCHOMETRIKA 107 (2009).

B. SAMPLE

A power analysis indicated that a sample of approximately 350 participants is needed to have 80% power to detect the hypothesized effect, assuming an approximate effect size (Cohen's d) of 0.3.[122] However, based on size of population measures, the recommended sample size was at least 385 participants. As a result, a representative sample of 414 American adults (51% women, M_{age}=45.3 years old, SD=16.3 years) was recruited to participate in an online study through the "Prolific" survey company, in keeping with the U.S. census race, age, and gender quotas.[123] The company provided basic demographic data on the participants. In addition, participants were also asked about their education, household income, party affiliation, and U.S. state of residence. As for party affiliation, 53.6% of participants identified as Democrats, 18.2% said they leaned Republican, 28.2% identified as Independents, and the rest either did not reply or mentioned they were "something else."[124] The goal of asking participants about their state of residence was to control for any effect that recently enacted sunshine laws limiting the use of sexual harassment NDAs in some states have had on participants' responses to the vignette. As explained below, I did not identify such an effect of participants' state of residence on their attitudes.

TABLE 1: COMPOSITION OF SAMPLE

	Mean/ %
Female	51%
Age	45.3
Race	
White	70.46%
Black	13.8%
Asian	7.5%
Mixed	4.6%

122. Power analysis was based on a common 80% power, alpha=0.05 and a small effect size of 0.3 (this effect is smaller than the common effect size in psychological research - Cohen's d=0.4; *see* Marc Brysbaert, *How Many Participants Do We Have to Include in Properly Powered Experiments? A Tutorial of Power Analysis with Reference Tables*, 2 J. COGNITION 1, 1–2 (2019). Using a small effect size for the power analysis guarantees that even a small effect would be detected. It should be noted that the effect size found in the pretest was not used to determine the sample size given the now established norm indicating that pilot studies are next to worthless to estimate effect size. *See id.* at 5–7.

123. As part of the analysis, I opted for not using attention checks to monitor meaningful completion of the survey due to concerns about introducing a selection bias. *See* Darden et al., *supra* note 108, at 78–79. In lieu of attention checks, I eliminated responses which recorded a response time of under two standard deviations below the mean (the mean was approximately six minutes).

124. In this sense, the sample is not representative of the 2020 electorate, which is largely equally divided between the three major parties: 34% identify as independents, 33% identify as Democrats and 29% identify as Republicans. *See* John Gramlich, *What the 2020 Electorate Looks Like by Party, Race and Ethnicity, Age, Education and Religion*, PEW RSCH. CTR. (Oct. 26, 2020), https://www.pewresearch.org/fact-tank/2020/10/26/what-the-2020-electorate-looks-like-by-party-race-and-ethnicity-age-education-and-religion. An over-representation of Democrats is highly common in online survey research. *See generally* Jelke Bethlehem, *Selection Bias in Web Surveys*, 78 INT'L STAT. REV. 161 (2010) (discussing various methodological issues in online surveys, including the underrepresentation of certain portions of the population).

Other	3.63%
Party Affiliation	
Democrat	53.6%
Republican	18.2%
Independent	28.2%
Residence in a U.S. State which Prohibits or Limits NDAs	25.4%
Education	
Less than high school	0.5%
High school graduate	12.1%
Some college	32.4%
Bachelor's degree	34.8%
Master's/ Professional Degree	17.4%
Doctorate	2.9%
Household Income	
Less than $25,000	20.3%
$25,000 - $49,999	23.9%
$50,000 - $99,999	32.1%
$100,000 - $199,999 or more	23.7%

Note: N=414; N (Party Affiliation) =390. As noted, the remaining participants either chose not to reply to this question or mentioned they were "something else." There were no statistically significant differences across the covariates in the four treatment groups.

The limitations of experimental methods center on their external validity, meaning the degree to which results are generalizable to broader phenomena of interest. Experiments also reduce scenarios to a few core variables, often implemented over a short period, compared with the complex and "messy" nature of everyday life situations. This is specifically true for survey experiments that are limited in simulating scenarios and their consequential emotional responses. In this case, the experiment cannot recreate the exact emotional reaction prompted by workplace sexual harassment. However, the limited emotional response is also a positive feature of the design, allowing researchers to produce more useful information. Furthermore, to mitigate some of these concerns, I conducted the survey using a nationally representative sample and provided vignettes that closely mimic real-life scenarios. I also reran my experiments several times, as pretests on smaller groups of participants, to demonstrate the reliability of the results. Results remained largely consistent.

I report my findings from the experiments by fitting a linear probability model. To assess the robustness of the OLS regression results, I performed several sensitivity checks. Importantly, I conducted an analysis of the data using logistic regressions (logit) and those yielded similar results.[125] In the next Parts, I elaborate the findings of the study and discuss their implications.

125. For more on the choice between linear and logit regression, see Paul Von Hippel, *Linear vs. Logistic Probability Models: Which is Better, and When?*, STAT. HORIZONS (July 5, 2015), https://statisticalhorizons.com/linear-vs-logistic. It should also be noted that I chose to use a regression analysis rather than ANOVA which is typical in 2X2 factorial designs because the linear probability model allows the

V. FINDINGS

A. GENERAL APPROVAL OF A SECRET SETTLEMENT ACROSS CONDITIONS

The first question of interest was the extent to which participants across all four experimental conditions tended to approve or reject the secret settlement. An analysis of the data revealed that across the four conditions, a larger percentage of participants (58.21%) rejected the secret settlement (M=0.417; SE=0.02, coded as 0=rejection; 1=endorsement).[126] That is, participants generally tended to reject a secret settlement more than they did to endorse it.

B. EFFECT OF SEVERITY OF MISCONDUCT AND VICTIM FINANCIAL STATUS

The next question was the extent to which the two main independent variables had an effect on the dependent variable, secret settlement approval. In accordance with H1 and H2, and as shown in Figure 1 below, both severity of misconduct and victim's financial status had a statistically significant negative effect on secret settlement approval. Low severity decreased the probability of participants' rejection of the secret settlement compared to high severity (β=-0.14; *p*=0.003; R2=0.0562; F(2,411)=12.9). A victim's low financial status also decreased the probability of participants' rejection of the secret settlement compared to a high financial status (β=-0.18; *p*<0.001; R2=0.0562; F(2,411)=12.9).[127] In other words, low victim financial status increased the mean approval in both the low severity and the high severity conditions. Similarly, low severity increased the mean approval in both the low financial status and high financial status conditions (see Figure 1 below).[128] However, contrary to H3, the interaction term between the two independent variables—severity and financial status—was not statistically significant (*p*>0.1), meaning that severity and victim's financial status affect people's attitudes independently.[129]

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inclusion of additional control variables in the model, including age, gender, education and the like, thus providing a more nuanced picture of the results. Further, regression coefficients also provide a direct point estimate of the effects, unlike the results of an ANOVA.

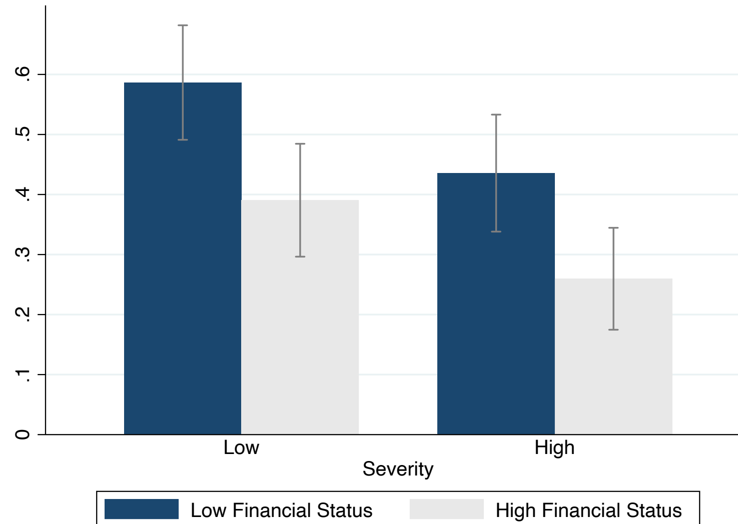
126. I used a difference in proportion test (z test) to determine whether the difference between the number of participants that approved the secret settlement and the number of participants that rejected it was significant between conditions. Differences were statistically significant (*p*<0.005).

127. The effect size (Cohen's d) for victim's financial status was 0.38 and for severity of misconduct 0.29, which are considered between small and medium effects. According to the Cohen's convention, *d* = 0.2 is considered a "small" effect size, 0.5 represents a "medium" effect size and 0.8 a "large" effect size. *See* JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES 473–81 (2d ed. 1988).

128. $M_{LSev;LFS}$=0.586, SD=0.49, N=104; $M_{HSev;HFS}$=0.39, SD=0.49, N=105; $M_{HSev;LFS}$=0.435, SD=0.5, N=101; $M_{HSev;HFS}$=0.26, SD=0.44, N=104.

129. In terms of direction, though, the interaction term indicated that severity might decrease the effect of financial status (β=0.05).

FIGURE 1: APPROVAL OF SECRET SETTLEMENT BY SEVERITY OF MISCONDUCT AND VICTIM FINANCIAL STATUS



Note: N=414

C. EFFECT OF OTHER VARIABLES

To further probe these effects, alongside testing the effect of the two main independent variables, the OLS regression analysis allowed for a more nuanced understanding of the findings, testing the effect of other control variables. In order to ensure the accuracy of the regression models, and to test H4, I first examined the correlation coefficients between several key variables, which I suspected might be associated (see Table 2 below). Positive correlation was indeed found between acceptance of sexual harassment myths and approval of the secret settlement presented in the vignette (r=0.16, p<0.001), as well as between generally favorable views of NDAs and approval of the secret settlement (r=0.22; p<0.001). I also found a positive correlation between party affiliation and approval of the secret settlement (r=0.2, p<0.01, N=390), indicating that the more participants leaned Republican or Independent in their party affiliation, the more they tended to approve the secret settlement. The correlation between party affiliation and acceptance of sexual harassment myths was also positive (r=0.2, p<0.001).

While these correlation coefficients were positive, they were relatively weak.[130] In contrast, stronger correlation was found between acceptance of sexual harassment myths and pro-NDA views (r=0.46; p<0.001). Due to this moderate correlation, I included these variables separately in the regression models below (see Model 2 and Model 3 in Table 3).

TABLE 2. CORRELATION MATRIX FOR KEY CONTROL VARIABLES

	Secret Settlement Approval	Party Affiliation	Favorable Views of NDAs	Acceptance of Sexual Harassment Myths	Residence in State that Limits NDAs
Secret Settlement Approval	1.0				
Party Affiliation	0.1277**	1.0			
Favorable Views of NDAs	0.2226***	0.1284**	1.0		
Acceptance of Sexual Harassment Myths	0.1575***	0.2043***	0.4566***	1.0	
Residence in State that Limits NDAs	0.0126	-0.1030*	-0.0521	-0.0152	1.0

*** p<0.001, ** p<0.01, * p<0.05

As shown in Table 3 below, some of the demographic controls proved statistically significant. Age had a positive effect on secret settlement approval, such that increase in age increased approval of a secret settlement (β=0.005; r=0.18; p<0.001).[131] Similarly, in one of the models, household income also had a positive effect on approval (β=0.05; p=0.03). Party affiliation had a positive effect on approval as well, meaning that a Republican or Independent affiliation increased approval of a secret settlement compared to a Democratic affiliation (β=0.06; p=0.04; N=390). In contrast, and counterintuitively, neither gender nor level of education had a statistically significant effect on approval.[132]

130. Generally, a correlation between two variables is considered strong if the absolute value of r is greater than 0.75. However, the definition of a "strong" correlation can vary from one field to the next and is context dependent. *See* Marcin Kozak, *What is Strong Correlation*?, 31 TEACHING STAT. 85, 85 (2009).

131. The small effect observed in the OLS regression might be a result of age being a continuous variable (not standardized). Pearson's Correlation is often a better index for effect size of continuous variables, which is why it was included as well.

132. Gender: p>0.1, Education: p>0.1. Given the possibility that gender might be correlated with other indicators, it was examined in several different regression models, including by itself. However, gender was not found to be statistically significant in any of the tested models.

Furthermore, both acceptance of sexual harassment myths and favorable views of NDAs had a statistically significant positive effect on secret settlement approval (β=0.095; *p*=0.007; β=0.125; *p*<0.001, respectively). However, in contrast to H4, neither of these indicators acted as a moderator between the independent and the dependent variables. That said, when both indicators were added to the regression model, acceptance of sexual harassment myths was no longer significant (see Table 3). As noted, this was likely due to the moderate positive correlation between the two indicators.

TABLE 3. OLS REGRESSION OF APPROVAL OF A SECRET SETTLEMENT

VARIABLES	Model 1	Model 2	Model 3
Severity of Misconduct	-0.141**	-0.136**	-0.121**
	(0.0473)	(0.0474)	(0.0470)
Victim's Financial Status	-0.186***	-0.206***	-0.220***
	(0.0473)	(0.0471)	(0.0464)
Party Affiliation (Dem/Rep/In)		0.0593*	0.0579*
		(0.0285)	(0.0274)
Residence in State that Limits NDAs		-0.00551	7.07e-05
		(0.0543)	(0.0545)
Level of Education		-0.0124	-0.0206
		(0.0267)	(0.0256)
Gender		-0.00245	0.0318
		(0.0497)	(0.0473)
Household Income		0.0470	0.0533*
		(0.0248)	(0.0246)
Age		0.00572***	0.00560***
		(0.00145)	(0.00145)
Acceptance of Sexual Harassment Myths		0.0955**	
		(0.0353)	
Favorable Views of NDAs			0.125***
			(0.0288)
Constant	0.582***	-0.0177	-0.125
	(0.0416)	(0.132)	(0.134)
Observations	414	390	390
R-squared	0.056	0.148	0.170

Robust standard errors in parentheses
*** p<0.001, ** p<0.01, * p<0.05

Note: N=414 for Model 1; N=390 for Model 2 and Model 3 due to fewer observations for party affiliation variable (the remaining participants either chose not to reply to this question or mentioned they were "something else.") This table shows OLS regression results. Model 1 includes only the two main independent variables. As noted, due to moderate positive correlation between acceptance of sexual harassment myths and favorable views of NDAs, these were included in separate regression models (Model 2 and Model 3).

In addition to these controls, as noted, participants were also asked about their U.S. state of residence, in order to test whether residence in a state that limits sexual harassment NDAs affected participants' reaction to the treatment. An analysis of the responses indicated that state of residence did not have a statistically significant effect on approval of the secret settlement ($p>0.1$).[133] This meant that at least at the time the survey was conducted, residence in a state that passed sunshine laws in the context of sexual harassment claims did not have a statistically significant effect on approval of a secret settlement.[134]

Two additional exploratory findings merit attention. *First*, the interaction effect between a victim's financial status and a participant's household income was statistically significant ($\beta=-0.3$; $p=0.04$, see Table 4 in Appendix II). This finding indicates that participants' reaction to a victim's financial status depended on their own level of income, such that a one-unit increase in income increased the negative effect of a victim's financial status on approval of a secret settlement by -0.3. Simply put, higher income participants were even more inclined to approve the secret settlement when the victim was struggling financially. While a dependent relationship between a variable such as victim financial status and participants' household income seems intuitive, the direction of the relationship—increasing the negative effect of financial status on approval—is counterintuitive. This finding, which should be validated in follow-up research, may reflect a stronger intuition among financially stable individuals that information about sexual harassment should be public, as long as it pertains to those of similarly financially stable background.

Second, the interaction term between severity of misconduct and party affiliation was also statistically significant ($\beta=-0.27$; $p=0.04$, see Table 5 in Appendix II). Thus, participants' reaction to the severity of the harassment incident depended on their party affiliation, such that a shift from a Democrat to a Republican affiliation further decreased the probability that participants will approve a secret settlement when the harassment act was severe.[135] As discussed below, this finding may suggest a potential common ground for legislative action in this area, at least when it comes to severe acts of harassment. However, given its exploratory nature, further research is needed to substantiate this finding.

Finally, as noted, the survey also asked participants to rate the level of importance additional items of information about the harassment scenario will have for their decision to approve or reject the secret settlement. An analysis of these information items showed that the highest rated items were whether the wrongdoer has a pattern of sexually harassing his colleagues (Mean=2.99,

133. It should be noted that the analysis was conducted by creating a dummy dichotomous variable (0=states which did not prohibit/ limit NDAs; 1=states which prohibited/ limited NDAs). This variable did not have a statistically significant effect on level of approval.

134. That said, it should be noted that the sample was not representative in terms of state of residence, which should limit any broader inference drawn from this finding.

135. It should be noted that such an interaction effect was not statistically significant when it came to a shift to an independent affiliation.

SD=1.23)—with almost half of the participants (47%) rating it "very important"—and the victim's likelihood of winning a lawsuit against the company in court (Mean=2.97, SD=1.08)—with close to forty percent (39.5%) of participants rating it "very important."[136] Additional highly ranked information items included whether the victim was represented by a lawyer (Mean=2.8, SD=1.18), and whether the wrongdoer was terminated from the company as a result of his behavior (Mean=2.8, SD=1.19).[137] In contrast, one of the lowest rated items was whether the wrongdoer agrees to go to therapy as part of the settlement agreement (Mean=1.8, SD=1.4).[138]

VI. Discussion and Policy Implications

As detailed in the previous Part, the findings show a general tendency among participants to reject NDAs across the four experimental conditions. Furthermore, the findings reflect an effect of each of the two independent variables on NDA endorsement: the severity of misconduct and the victim's financial status. Finally, the findings suggest a host of other exploratory effects which ought to be pursued in future research. In this Part, I discuss these findings in light of the psychological research surveyed above, as well as the implications of these findings for regulating NDAs, highlighting directions for future research.

A key motivation for this study was to begin answering the question: to what extent, and under what circumstances, does the public want information about sexual harassment to be kept under wraps? To the extent that psychological phenomena such as taboo tradeoffs and deliberate ignorance are instructive in the context of sexual harassment NDAs,[139] one might assume that since uncomfortable tradeoffs—like exchanging money for physical or emotional injury—are difficult for people to morally stomach, they will prefer to remain in the dark regarding the existence of such exchanges, even at the cost of public accountability for sexual misconduct. The findings of this research may cast doubt on the extent to which these phenomena apply in this context, showing that participants were generally more inclined to reject a secret settlement than they were to approve it. This tendency may be a result of lay people's taste for accountability or for titillating gossip, and future research

136. A t-test showed that differences between these two variables—mean offender harassment pattern and mean victim court win—were not statistically significant ($p>0.1$).

137. T-tests showed that differences between these two variables—mean victim represented by lawyer and mean offender fired—and mean offender harassment pattern were statistically significant ($p=0.02$ and $p=0.015$, respectively).

138. Difference between this variable and mean offender harassment pattern was statistically significant ($p<0.005$).

139. *See supra* Part III (discussing the various theories which may help explain the psychology of secret settlements, including taboo tradeoffs and deliberate ignorance).

should explore these various motivations as potential drivers for attitudes regarding NDAs.[140]

That said, in line with the psychological research on jury decision-making described above, participants tended to endorse a secret settlement for workplace sexual harassment under certain circumstances. These findings provide insight into when the public thinks the societal cost of confidentiality is the steepest.[141] The findings thus support the theory that lay people may prefer secrecy over transparency in some cases, and that such tendency depends on at least two factors: the severity of the harassment incident itself and the victim's financial status. Specifically, as noted, both low severity and a financially struggling victim increased the probability of participants endorsing the secret settlement.

Focusing on these two independent variables, the findings help conceptualize how the public perceives monetary compensation conferred to victims of sexual harassment through secret settlements. With regard to a victim's financial status, the findings lend support to the phenomenon described by Van Koppen & Ten Kate as "the underdog factor."[142] While earlier research identified this phenomenon in jury decision-making, the findings show that in the context of workplace sexual harassment, lay people tend to sympathize with poorer would-be-plaintiffs even at the pre-lawsuit stage. This tendency was manifested in participants' inclination to approve a secret settlement when it provided compensation to a victim in financial need, which also aligns with lay people's preference, as shown in jury studies, to have the plaintiff receive the punitive award money rather than donating the award to charity.[143] Such inclination held across severity of misconduct conditions, as well as across demographic controls such as gender, age, level of education, and party affiliation. In particular, as noted, household income actually increased the effect of a victim's financial status on approving the secret settlement, meaning that the "underdog effect" was even more pronounced among higher income participants. This finding also reflects the unwillingness of higher income participants to accept confidentiality when it comes to financially stable victims, like themselves.

How should these findings regarding the effect of victims' financial status on secret settlement approval inform policymakers considering sexual harassment sunshine laws?[144] The findings highlight the importance lay people

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140. Lay people may also have an unrealistic view of what it takes to sue, how much it will cost, how long it will take, etc. These are all factors that should be pursued in future research as potentially affecting NDA approval.

141. I borrow Hoffman & Lampmann's language, arguing that NDAs carry the steepest cost when created by organizations. *See* Hoffman & Lampmann, *supra* note 1, at 168. As detailed below, further research is required to tease out the driving mechanism behind lay people's rejection or endorsement of NDAs in this context.

142. *See* Van Koppen & Ten Kate *supra* note 108, at 228–29.

143. *See* Anderson & MacCoun, *supra* note 99, at 326.

144. *Cf.* Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2237 (2020) (focusing on commonsense understandings of legal concepts like consent, Sommers argues that these ideas are relevant for

attribute to the distributive power of settlements;[145] that is, the ability of settlement agreements to provide a measure of closure and justice—in the form of monetary compensation—to victims of sexual harassment who are struggling financially. In this sense, the findings indicate that the public is willing to forgo its right to know about sexual harassment incidents for the benefit of ensuring compensation to a financially struggling victim. To the extent that confidentiality bans risk the side effect of limiting the availability of settlement or reducing its value for employers—thus reducing compensation for victims[146]—policymakers and victim advocates should consider ways to maintain victims' bargaining power in settlement negotiations and allow them to bargain for a settlement rather than opt for a court process if that choice is a better fit for their financial situation.[147] Acknowledging the role of silence as a bargaining chip for victims of sexual harassment should prompt activists and policymakers to ensure victims do not lose their already diminished power in the negotiation as a result of blanket confidentiality bans.

Furthermore, putting in place protections that allow victims to negotiate a settlement would help ensure confidentiality bans do not give rise to a chilling effect, discouraging victims who do not wish to speak out publicly from reporting the harassment they experienced.[148] Indeed, as the feminist critique on sunshine laws points out, such laws could become a second imposition on victims' autonomy, tasking them with the burden of speaking out to end the practice of sexual harassment, rather than placing such burden with the perpetrators.[149] This is especially crucial if the #MeToo movement seeks to promote inclusion and diversity. As Lesley Wexler, Jennifer Robbennolt, and

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constructing rules about primary behavior. Here, my focus is on "secondary behavior," namely how we ought to think about litigation and settlement and the extent to which litigation, run by professional lawyers, can bend human psychology in pursuit of optimal arrangements).

145. *See* Parramore, *supra* note 31.

146. Moss, *supra* note 9, at 891–92; *see also* Zitrin, *supra* note 9, at 118 (noting that on the other hand, confidentiality bans might increase the likelihood of parties settling pre-filing).

147. One way to maintain victims' bargaining power would be through unionizing in industries that are particularly prone to sexual harassment and negotiating in advance the terms of NDAs. For an analysis of the relationship between union membership and sexual harassment, and specifically the impact of union resources for dealing with harassment and union tolerance for harassment on antecedents and consequences of harassment, see Bulger, *supra* note 19, 727–28. Another potential path is submitting a class action to achieve more collective bargaining power. On factors that influence the decision to seek legal relief in the form of class action in response to sexual harassment, see Wright & Fitzgerald, *supra* note 19, 266.

148. Women may respond in a variety of different ways to sexual harassment. *See* Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 118–19 (1995) (providing a review of behavioral science research regarding responses to sexual harassment, including their links to outcomes and consequences); L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 712 (2007) (exploring the ways in which women typically respond to sexual harassment—other than by immediately filing a formal complaint—and providing explanations as to the reasonableness of their actions).

149. Alabi, *supra* note 43, at 76 (arguing that such shift is similar to past accusations that attempted to shift the blame of sexual assault to women based on their perceived flirtatiousness or the manner in which they dressed).

Colleen Murphy argue, it is vitally important for the movement to include and address the interests of marginalized groups within the larger movement to avoid duplicating injustice.[150] The findings of this study, along with the risks pointed out above, should thus give pause to policymakers contemplating blanket confidentiality bans and encourage them to come up with safeguards that protect victims'—especially marginalized victims'—interests in the aftermath of such laws' implementation.[151]

As noted, severity of misconduct also had a statistically significant negative effect on endorsing a secret settlement, such that low severity increased the probability of approving the settlement. This finding indicated that lay people tend to feel more comfortable about concealing an act of sexual harassment when it comes to more minor acts of harassment, such as directing a sexual joke at an employee. In such cases, participants may have viewed the harassment incident as a private matter to be settled by the parties rather than a matter of public importance and did not feel as strongly about wishing to know about it. Though the study cannot unequivocally attest to the reasons underlying this effect, it is possible that participants engaged in a cost-benefit analysis, comparing the costs which publicly exposing the harassment will have for the offender,[152] the victim,[153] or both, to the benefit to society as a result of exposing a relatively minor harassment act.

Indeed, previous studies have shown that lay people tend to associate more severe harassment with greater harm to the victim,[154] and with more blameworthiness assigned to the perpetrator.[155] Therefore, in the low severity

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150. Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 105–06 (2019).

151. It should be noted that the California STAND Act does allow victims to maintain their privacy by removing their personal information from any public records. *See* STAND Act, 2018 Cal. Legis. Serv. Ch. 953 (West) (codified at CIV. PROC. § 1001). That said, the task of bringing forward a claim still falls on the victim's shoulders.

152. As for the offender's reputational harm, the argument typically focuses on false accusations. *See* Levmore & Fagan, *supra* note 26, at 344 (noting that "[m]andatory transparency, as required by some sunshine laws, likely goes too far because news of [a plaintiff's] claim[s] will bring forth claimants who erroneously, irrationally, or strategically believe [the tortfeasor] injured them").

153. Unfortunately, society is still critical of sexual harassment victims nearly as much as (if not more than) it is of perpetrators. Victims often receive negative responses from their surroundings. *See, e.g.*, Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. CMTY. PSYCH. 263, 263 (2006) (considering the impact of negative reactions from support providers on rape survivors' willingness to disclose by qualitatively analyzing the narratives of eight rape survivors who initially disclosed information about their assault but then chose to cease further disclosure for a significant period of time). However, some progress may have been made as a result of the #MeToo movement raising awareness to the widespread nature of sexual misconduct. *See, e.g.*, Stephanie E.V. Brown & Jericka S. Battle, *Ostracizing Targets of Workplace Sexual Harassment Before and After the #MeToo Movement*, 39 EQUALITY, DIVERSITY & INCLUSION: INT'L J. 53, 54 (2019) (arguing that the birth of the #MeToo movement lessened the impact of ostracism—which historically prevented individuals from disclosing workplace abuse—empowering victims to report their abusers).

154. *See, e.g.*, Cass et al., *supra* note 103, at 316.

155. *See, e.g.*, Sara Landstrom, Leif A. Stromwall, & Helen Alfredsson, *Blame Attributions in Sexual Crimes: Effects of Belief in a Just World and Victim Behavior*, 68 NORDIC PSYCH. 2, 7 (2016) (finding

conditions, participants may have interpreted the sexual joke as causing little harm to the victim, which in turn may not justify the time and cost which a court process entails. Furthermore, previous research in the criminal justice context has proved that greater severity is often associated with greater moral outrage generated by the act.[156] Therefore, the more severe harassment act—the wrongdoer exposing his genitalia—may have triggered rejection of a secret settlement, as in such cases participants felt more morally outraged by the act and thus cared more about the public interest in knowing about such an incident. In this sense, this finding deviated from the prediction generated by the taboo tradeoffs and deliberate ignorance theories, indicating that lay people actually preferred public disclosure of what might be considered the most uncomfortable information. A desire for public condemnation and accountability was perhaps pulling participants in the other direction in the more severe harassment scenarios. This finding may also reflect the impact that the #MeToo movement has had in shaping legal attitudes,[157] at least when it comes to secret settlements concealing severe acts of harassment. However, as noted, it may also be the result of the public's interest in titillating gossip, which is more pronounced when it comes to severe acts of harassment.

How might policymakers aspiring to promote sunshine laws put the findings of this Article to use? *First*, policymakers struggling to "sell" their constituents on confidentiality bans may focus on more severe acts of harassment as an intermediate solution; that is, as a way to limit the impact such bans will have on employers and organizations, as well as on victims, while still embodying the public's right to know where the public actually wants to exercise it.[158] *Second*, the interesting finding that the effect of severity on endorsement of a secret settlement was moderated by political affiliation, such that a move from Democratic to Republican affiliation decreases the probability of endorsement when the harassment is severe, presents a potential opening for a bipartisan initiative to eliminate secret settlements that relate to such severe acts of harassment. The challenges would be, first, to define which acts are considered severe and which are considered minor and where precisely to draw the line, and second, to ensure that actors cannot easily game the system by

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participants attributed more blame to perpetrator and less blame to victim in the more severe crime scenario—a sexual assault vs. an online sexual harassment).

156. *Cf.* Carlsmith & Darley, *supra* note 17, at 199–200 (discussing the relationship between severity and moral outrage in the context of criminal behavior and punishment).

157. For a review of a host of legal implications prompted by the movement, including in the context of the practice of secret settlements, see Tippet, *supra* note 29, at 235.

158. Of course, a concern would then arise that actors would alter allegations in order to navigate around the ban. *Cf.* Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 8 (2005) (discussing the ways in which actors navigate around insurance restrictions when it comes to intentional tortious conduct).

altering allegations.[159] It may also be argued that even the so-called minor incidents can amount to a hostile work environment when there are reoccurring incidents.[160] As noted, Ian Ayers suggested focusing on repeat offenders as a compromise between blanket confidentiality bans and maintaining the status quo.[161] Further research is needed to determine the effect of reoccurring harassment incidents on secret settlement approval.

Furthermore, the positive yet relatively weak correlation coefficients found between approval of a secret settlement and general views on NDAs, acceptance of sexual harassment myths, and party affiliation indicate that participants were relatively sensitive to the specifics of the scenario presented in the vignette. This finding contrasts with the argument that lay views regarding social problems are shaped mainly by party affiliation.[162] It also deviates from studies in the sexual misconduct context which exhibited the central role of acceptance of rape myths as a predictor of participants' responses to fictional scenarios.[163] In this sense, the study shows that legislation in this area has the potential to make a difference in shaping lay behavior, as long as it considers the public's moral intuitions.

Finally, the study also provided directions for future research by highlighting a host of other potential variables which may influence lay approval of a secret settlement. For instance, the fact that participants viewed the wrongdoer's pattern of sexual harassment as a more important information item than any other item may indicate that the risk of harassment reoccurrence is of particular concern to lay people. If confirmed by future research, this finding may lend support to attempts to create a wrongdoer database or information escrow which will not allow "repeat offenders" to remain under the radar through secret settlements.[164] This finding also suggests a pathway towards future research to identify the mechanism driving lay intuitions on the approval of secret settlements, and the extent to which greater blameworthiness is assigned to repetitive acts or rather a concern about harm to the social fabric.

159. A starting point could be relying on the research used in this Article which created a scale of harassment severity. *See* Terpstra & Baker, *supra* note 103. Their ranking was later used with a non-student population by Baker et al., *supra* note 103. As for gaming, see Baker et al., *id.*, for some initial thoughts.

160. For more on the relationship between harassment severity and judgments in hostile work environment sexual harassment cases, *see* Cass et al., *supra* note 103, at 316.

161. *See* Ayres, *supra* note 26, at 84–85 (suggesting using an "information escrow" to be released if another complaint is brought against the same offender, as a way to target repeat offenders of sexual misconduct).

162. *See, e.g.*, Matthew T. Ballew, Seth A. Rosenthal, Matthew H. Goldberg, Abel Gustafson, John E. Kotcher, Edward W. Maibach & Anthony Leiserowitz, *Beliefs about Others' Global Warming Beliefs: The Role of Party Affiliation and Opinion Deviance*, 70 J. ENVTL. PSYCH. 1, 1 (2020) (discussing this phenomenon in the context of climate change but finding compared with partisans who align with the prototypical views of their ingroup—*i.e.*, political party, opinion-deviant partisans consistently perceive a narrower partisan divide across views).

163. *See e.g.*, Alder Vrij & Hannah R. Firmin, *Beautiful Thus Innocent? The Impact of Defendants' and Victims' Physical Attractiveness and Participants' Rape Beliefs on Impression Formation in Alleged Rape Cases*, 8 INT'L REV. VICTIMOLOGY 245, 246 (2001) (reporting that people who endorse "rape myths" demonstrated more favorable tendencies toward victims and defendants who were physically attractive in an alleged rape case scenario).

164. *See supra* note 163 and accompanying text.

Specifically, are lay people interested in seeing the wrongdoer "punished," rehabilitating the wrongdoer through therapy, or deterring others from committing similar acts? These alternative theories, which in many ways mirror theories of criminal punishment (retaliation, rehabilitation, and deterrence, respectively),[165] in turn trigger alternative ways to design provisions in secret settlements. The high importance rating this study's participants placed on whether the wrongdoer was fired from the company following his misconduct, and the relatively low importance rating they gave to whether the wrongdoer agreed to go to therapy, may help shape hypotheses towards such future research.[166]

Of course, we need to take into account the limitations of this study. First, while the survey experiment was administered to a nationally representative sample in terms of race, gender, and age, the sample was not representative in other respects, including party affiliation and state of residence. It is also subject to the general limitations of survey experiments, particularly those conducted online, in terms of external validity and thus needs to be replicated to ensure the robustness of the results. While much more research remains to be conducted, this Article was the first to embark on this path and to lay the groundwork for following studies.

CONCLUSION: WHERE DO WE GO FROM HERE?

NDAs are increasingly common in the modern workplace. New data show that over one-third of the U.S. workforce is bound by an NDA.[167] But NDAs are also known for their role in the current wave of revelations surfacing years of sexual harassment in a variety of industries. The #MeToo movement exposed the dark side of these agreements: their potential use as a tool to silence victims of sexual wrongdoing who raise their voice against their wrongdoers. Especially troubling is the concern that by concealing information about wrongdoing, NDAs serve to protect repeat offenders and put others at risk. As a result of such concerns, many policymakers have either considered or enacted sunshine laws aimed at banning NDAs in the context of sexual misconduct claims.

Acknowledging the link between the public's right to know and what the public is actually interested in knowing, this Article set out to provide sorely missed empirical support to such legislation efforts, by identifying circumstances under which lay people prefer to keep sexual harassment under wraps. The findings expose the effect of two key variables on such moral

165. *See generally* Carlsmith & Darley, *supra* note 17 (discussing the various theories of criminal punishment and surveying psychological research attempting to assess their respective impact on lay people's punitive intuitions).

166. The high importance placed by participants on firing offenders is interesting to contrast with accounts which discount the value of terminating individual harassers. *See* Vicki Shultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L. J. F. 22, 25–26 (2018).

167. 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.

attitudes: the severity of the wrongdoer's misconduct and the victim's financial status. The findings also demonstrate the importance of party affiliation, household income, and age in determining attitudes towards NDAs, as well as the relationship between acceptance of sexual harassment myths and attitudes towards NDAs. These findings should now inform policymakers contemplating confidentiality bans. Indeed, policy in this area could have a bigger impact—both in terms of the number of states adopting sunshine laws and in terms of these laws' impact on their audience—if it successfully addresses lay sentiments as to which secret settlements are the most reprehensible and which might be more acceptable. Such an approach will minimize attempts to bypass the legislation, which will decrease its impact. Importantly, to maintain its momentum and ensure its fairness, the #MeToo movement needs to be sure to take into account the interests of marginalized victims when advocating for sunshine laws, which may mean more carefully tailoring sunshine laws to reflect such victims' interests.

As noted, this Article is the first of a series of experiments aimed at empirically examining the psychology of secret settlements. As such, it lays the groundwork for further studies in this area. The next experiments will test other variables which might affect lay people's approval of a secret settlement, including victim and wrongdoer gender and race, the industry in question, the potential defendant—an individual or an organization, and various characteristics of the harassment incident and settlement offered, like the settlement amount and the victim's chances of winning in court. Furthermore, future experiments will vary the settlement clauses to include a sanction imposed on the wrongdoer or a commitment on the wrongdoer's part to undergo therapy, to test the extent to which these play into lay people's decision of whether to approve a secret settlement. Finally, future research will further explore the mechanism driving lay people's rejection of NDAs attempting to conceal severe acts of sexual harassment, to assess whether it is rooted in a desire for accountability, an aspiration to deter others from conducting similar acts, or other sentiments, such as an interest in titillating gossip. The role of a pattern of abuse versus an isolated incident in determining attitudes towards NDAs will also be explored in this context.

Another feature of secret settlements which merits further empirical attention is the role of lawyers in facilitating or inhibiting such agreements. While scholars have noted the potential role which lawyers assume in this context,[168] to date there has not been a systematic attempt to evaluate their perceptions and experiences, and the way these affect the practice of sexual harassment NDAs.[169]

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168. *See, e.g.*, Dana & Koniak, *supra* note 50, at 1225; Waldbeser & DeGrave, *supra* note 52, at 820–26.

169. *Cf.* Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 L. & SOC'Y REV. 275, 276 (2001) (reporting the results of a qualitative study of personal injury lawyers in Connecticut and discussing the implications of professional norms and practices that govern tort settlement behavior).

Building such body of research exploring the psychology of NDAs will not only benefit theory and policy in the context of sexual harassment NDAs.[170] It would also bear implications beyond the realm of sexual misconduct, for other domains in which NDAs are prevalent and impact social justice, such as police brutality.

170. For a recent discussion of the implications of NDAs beyond the realm of sexual harassment, see generally Orly Lobel, *Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth)*, 57 HOUS. L. REV. 781 (2020).

APPENDIX I

Attitude survey questions regarding acceptance of sexual harassment myths and general views regarding NDAs.

To what extent do you agree/disagree with the following statements? (answers on a 1–5 Likert scale, from Strongly Disagree to Strongly Agree)

- It is better for society if lawsuits are settled confidentially.
- In general, confidential settlement of lawsuits limits the public's right to know about important issues (reverse coded)
- Women report sexual harassment primarily to receive monetary compensation.
- There are more unreported cases of sexual harassment than there are false complaints (reverse coded).
- Women who complain about sexual harassment are primarily interested in holding their offenders to account and protecting others (reverse coded).
- False accusations of sexual harassment are a bigger problem than unreported harassment.

APPENDIX II

Interaction effect tables.

TABLE 4. INTERACTION EFFECT BETWEEN VICTIM FINANCIAL STATUS AND HOUSEHOLD INCOME

VARIABLES	Model 1
Victim Financial Status (FS)= 1	0.0714
	(0.104)
Household Income = 2	0.170
	(0.102)
Household Income = 3	0.303**
	(0.0953)
Household Income = 4	0.275**
	(0.0993)
1.FS_n#2.Household Income	-0.296*
	(0.141)
1.FS_n#3.Household Income	-0.360**
	(0.134)
1.FS_n#4.Household Income	-0.301*
	(0.144)
Constant	0.310***
	(0.0720)
Observations	414
R-squared	0.067

Robust standard errors in parentheses
*** p<0.001, ** p<0.01, * p<0.05

TABLE 5: INTERACTION EFFECT BETWEEN SEVERITY OF MISCONDUCT AND PARTY AFFILIATION

VARIABLES	Model 1
Severity of Misconduct = 1	-0.0482
	(0.0662)
Party Affiliation = 2 (Republican)	0.387***
	(0.0828)
Party Affiliation = 3 (Independent)	0.208*
	(0.0840)
1.Severity#2. Party Affiliation	-0.275*
	(0.131)
1.Severity#3. Party Affiliation	-0.167
	(0.115)
Constant	0.369***
	(0.0479)
Observations	390
R-squared	0.077

Robust standard errors in parentheses
*** p<0.001, ** p<0.01, * p<0.05