

NONDISCLOSURE AGREEMENTS AND THE UNLIKELY CONVERGENCE OF SEXUAL HARASSMENT AND FRACKING TOXIC TORT CLAIMS

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INTRODUCTION

Although the issue of sexual harassment in the workplace is nothing new, its pervasiveness had managed to remain severely underreported when in October 2017, a Twitter post encouraged women to reply “me too” if they had been subject to sexual assault or harassment.¹ Within 24 hours, the #metoo had been used millions of times on social media, igniting what has since been dubbed the “#MeToo movement.”² The Twitter post came in the wake of a New York Times article exposing allegations of sexual assault made against media mogul, Harvey Weinstein.³

In the following weeks, additional allegations were made against Weinstein, and against other powerful men in entertainment, politics and other industries.⁴ As the allegations mounted, it came to light that Weinstein had entered into a number of nondisclosure agreements (“NDAs”) with his accusers that prevented them from speaking out about the alleged behavior.⁵ Similar agreements were used to prevent details of sexual misconduct allegations leveled against Bill O’Reilly from being publicized.⁶ The media coverage of allegations made against these and other powerful men, along with the initial flood of posts on social media, encouraged more women to speak up about the sexual misconduct to which they have been subjected, and raised questions about how this kind of behavior has continued to be unexposed. This increased scrutiny on how companies⁷ respond to sexual harassment allegations has had a cognizable impact in a relatively short period of time. In the past two years, companies have

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1. L. Camille Hébert, *Is “MeToo” Only a Social Movement or a Legal Movement Too?*, 22 EMP. RIGHTS & EMP. POL’Y J. 321, 321–22 (2018).

2. *See id.*, at 321 (noting that the post had been shared over 500,000 times on Twitter and over 12 million times on Facebook).

3. Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 230–31 (2018).

4. *Id.* at 231–33.

5. *Id.* at 234.

6. *See* Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. FORUM 121, 133–34 (2018) (describing how the cost of O’Reilly’s various settlement agreements paled in comparison to the revenue he generated for Fox News).

7. This Article uses the term “company” as a general label referring to all organizations, public or private, for-profit or otherwise.

had to grapple with a new reality in which a failure to adequately respond to allegations of sexual harassment invites negative publicity, as well as potentially serious reputational damage.

A few years earlier, in another corner of the legal world, the media began reporting that a natural gas company had stated that it would enforce an NDA, which had been included as part of a settlement related to hydraulic fracturing (“fracking”), against the minor children whose parents had brought the suit.⁸ Not surprisingly, the idea of a natural gas company enforcing a gag order on children under ten brought notoriety to the case and drew attention to the use of NDAs in the context of fracking. However, despite the media coverage of this unusual situation, it does not appear to have diminished the use of NDAs in this context, nor did it prompt a significant backlash against the industry. Although the use of fracking⁹ to stimulate wells has taken place since the 1940s, combining it with horizontal drilling techniques in the late 1990s revolutionized the energy extraction industry.¹⁰ Vast unconventional shale reserves, which had previously been considered economically unfeasible for extraction, are now accessible.¹¹ Consequently, the United States has seen a considerable increase in natural gas production since the early 2000s.¹² However, this development has not been without controversy. A vocal anti-fracking movement has emerged, arguing that fracking poses a serious threat to human health and the environment.¹³ Critics cite a myriad of concerns including air pollution, surface and groundwater pollution, dangerous truck traffic, road damage, noise, and earthquakes.¹⁴ Proponents of fracking conversely argue that many of these claims are anecdotal and that studies definitively connecting fracking activities to water

8. Don Hopey, *Hallowich Children Not Part of Marcellus Shale Gag Order Agreement*, PITT. POST-GAZETTE (Aug. 7, 2013, 4:00 AM), <https://www.post-gazette.com/local/washington/2013/08/07/Hallowich-children-not-part-of-Marcellus-Shale-gag-order-agreement/stories/201308070133>.

9. The term “fracking” is used to refer to all activities associated with unconventional shale gas development – from drilling to well plugging – and not merely the injection of fluids underground at high pressures to stimulate wells.

10. Adam Garnezy, *Balancing Hydraulic Fracturing’s Environmental and Economic Impacts: The Need for a Comprehensive Federal Baseline and the Provision of Local Rights*, 23 DUKE ENV’T L. & POL’Y F. 405 (2013).

11. *Id.*

12. *Id.* at 405–06.

13. John R. Nolon & Steven E. Gavin, *Hydrofracking: State Preemption, Local Power, and Cooperative Governance*, 63 CASE W. RES. L. REV. 995, 998 (2013).

14. *Id.*

contamination, for example, are lacking.¹⁵ Nevertheless, a number of lawsuits have been filed, alleging, among other things, negligence, nuisance, trespass, and strict liability, arising out of claims of bodily injury or property damage.¹⁶

Although fracking has become a household word thanks to the documentary “Gasland,” the movie “Promised Land,” and the involvement of celebrities, such as Mark Ruffalo,¹⁷ the issues remain relatively unpublicized. This may be due to the fact that fracking’s impacts are inherently local. On the contrary, sexual harassment would seem ubiquitous. The #MeToo movement not only cast light on how pervasive sexual misconduct is in the workplace,¹⁸ but also drew attention to the legal, cultural, and psychological mechanisms that conspire to keep that pervasiveness hidden. Scholars who have analyzed the settlement of sexual harassment claims have articulated a number of negative repercussions arising from the widespread use of NDAs in these circumstances, including shielding illegal behavior and externalizing harm to third parties.¹⁹ This Article uses interview data to demonstrate that systematic inclusion of NDAs in fracking settlements similarly obscures public awareness of a threat to public health and safety and renders the tort system unable to properly serve its goals of deterrence and compensation. It goes on to propose that NDAs in the context of fracking should only be enforceable subject to a partial disclosure requirement to ensure safety-related information regarding the harm at issue is made available to the public, while keeping the parties’ identities private.

These interviews were taken in July and August 2018, with individuals who live in Pennsylvania communities in which fracking

15. See David B. Spence, *Responsible Shale Gas Production: Moral Outrage vs. Cool Analysis*, 25 FORDHAM ENV'T L. REV. 141, 145 (2013) (saying that in response to environmental concerns, proponents of fracking “point to the paucity of hard data supporting opponents’ claims, dispute the anecdotal evidence opponents cite, and respond with their own exaggerated claims”).

16. Megan S. Haines, *Hydraulic Fracturing and Related Activities as Giving Rise to Classic Tort Claims in Pennsylvania*, 87 PA. BAR ASS’N. Q. 103, 103–04 (2016).

17. Lauren Pagel, *Hollywood Comes to Washington to Talk Fracking*, EARTHWORKS (Feb. 18, 2011), https://earthworks.org/blog/hollywood_comes_to_washington_to_talk_fracking/.

18. This Article focuses on sexual harassment in the workplace and uses the terms “sexual harassment” and “sexual misconduct” interchangeably with the intent of being comprehensive.

19. See Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 700 (1999) (discussing examples where nondisclosure prevented whistleblowing which could have “avoided serious danger and considerable harm to product users, bystanders, and the general public”); David A. Hoffman & Eric Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 214–15 (2019) (stating that nondisclosure agreements in sexual harassment settlements should not be legally enforceable, simply as a matter of public policy).

activities have taken or are still taking place.²⁰ The interviews were structured with the intent to gather information about individuals' perceptions of the legal system as a means to compensate injuries allegedly caused by fracking. It was only towards the end of the interview collection process, and particularly during the transcript analysis, that parallels to the #MeToo movement became apparent.

Widespread use of NDAs to settle claims related to sexual harassment and fracking has managed to frustrate important legal principles in surprisingly similar ways. Although NDAs are commonly used as part of settlements in other areas of law, this Article focuses on sexual harassment and fracking in particular because both contexts are divisive and politicized, and those who make allegations often face retaliation or social ostracization for doing so. Such concerns are less prevalent in other contexts, such as products liability and medical malpractice. Furthermore, shedding light on how such similar consequences can arise in these two dissimilar contexts illustrates a fundamental problem with allowing contracts of silence to restrict the availability of information vital to public health and safety.

Part II of this Article briefly summarizes how courts have treated sexual harassment claims pursuant to Title VII of the 1964 Civil Rights Act. It then provides an outline of the legal landscape governing fracking, before discussing the contract law principles that apply to the enforceability of nondisclosure agreements. In Part III, the repercussions of using NDAs to suppress information regarding sexual misconduct allegations are juxtaposed with interview data discussing NDA use in the fracking context. Part IV of the Article then analyzes solutions that have been proposed to address the negative repercussions of NDA use in the sexual harassment context and provides recommendations for the fracking context based on this analysis. Finally, Part V concludes this Article by considering how these recommendations might apply to NDAs in other contexts.

I. Relevant Law and Policy

A. Information as a Regulatory Tool

Citizens being empowered to make informed decisions is a bedrock principle of democracy.²¹ The right to receive information

20. Interviewees agreed to participate on the condition of anonymity. Each has been assigned a unique ID number, and all additional personal information has been excluded.

21. See Elizabeth A. Aronson, *The First Amendment and Regulatory Responses to Workplace Sexual Misconduct: Clarifying the Treatment of Compelled Disclosure Regimes*, 93

further several important interests.²² For example, the Supreme Court recognized the public's right to commercial information that helps them make choices affecting their health and enjoyment of life.²³ Along similar lines, public policy favors protecting individuals against unknown risks and ensuring that they have sufficient information to make risk-based decisions.²⁴ Assumption of the risk theories in tort law reflect this principle, recognizing that visitors to a landowner's property who are unaware of any potentially hazardous conditions are not necessarily able to prepare for them.²⁵ Similarly, when the public has limited access to relevant information, environmental hazards will tend to escape detection, risking harm to human health that might otherwise have been avoided.²⁶

Mandating the disclosure of information about risks to human health or the environment thus furthers the individual liberty interests inherent in being able to make informed decisions about one's own wellbeing and risk tolerance.²⁷ At the same time, information disclosure laws have begun to emerge as a favored regulatory tool in areas as diverse as corporate finance, nutrition labeling, and environmental law.²⁸ This increased transparency leaves the disclosing entities vulnerable to reputational damage for perceived negative behavior, thus incentivizing positive behavior without the inefficiencies inherent in command-and-control schemes. Allowing market forces and public opinion to complement or displace government regulation eases the burden on both the government and the regulated entities.²⁹

N.Y.U. L. REV. 1201, 1204 (2018) (arguing that “because disclosure improves the ability of citizens to make informed decisions, it may help to ensure a healthy, functioning democracy, a key interest underlying the First Amendment”).

22. See Shannon M. Roesler, *The Nature of the Environmental Right to Know*, 39 ECOLOGY L. Q. 989, 1007 (2012) (saying that a “right to know information regarding the environment may also further important liberty interests”).

23. See *Virginia State Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762–63 (1976) (discussing how society's value in the free flow of commercial information relating to prescription drug prices is related to “the alleviation of physical pain or the enjoyment of basic necessities”).

24. Roesler, *supra* note 22, at 1009.

25. Keith N. Hylton, *Tort Duties of Landowners: A Positive Theory*, 44 WAKE FOREST L. REV. 1049, 1055 (2009).

26. Sarah Lamdan, *Beyond FOIA: Improving Access to Environmental Information in the United States*, 29 GEO. ENV'T L. REV. 481, 483 (2017).

27. See Roesler, *supra* note 22, at 1010.

28. ARCHON FUNG ET AL., *FULL DISCLOSURE* 75 (2007) (describing obstacles to effectiveness in information disclosure models from different industries).

29. David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 383 (2005).

So, although compelled speech is generally disfavored, mandatory disclosure of information relating to public safety risks has been embraced as part of larger regulatory schemes.³⁰

B. Title VII and Sexual Harassment

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against any individual because of race, color, religion, sex, or national origin.³¹ Because sexual harassment differs qualitatively from the kind of discrimination contemplated by Title VII, at least with respect to the other protected categories, it was not immediately clear whether sexual harassment fell within the purview of the Act.³² But in 1986, the Supreme Court held that “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”³³ Relying on the language used in Title VII, the Court thus established the requirement that the harassment must have been “because of sex” in order to fall within the purview of the Act.³⁴ The Court went on to state that for harassment to be actionable, it must be sufficiently severe and pervasive to alter the conditions of the plaintiff’s employment, creating a hostile or abusive work environment.³⁵

In a subsequent ruling, the Court further clarified that to be actionable under Title VII, the harassment needs to be both objectively and subjectively severe.³⁶ That is, it must be “an environment that a reasonable person would consider hostile or abusive,” and the victim must have subjectively perceived it to be so.³⁷ The Court would revisit the “because of sex” requirement in *Oncala v. Sundowner Offshore*

30. See Aronson, *supra* note 21, at 1210–12 (discussing mandated disclosure of sexual misconduct information within a regulatory framework).

31. 42 U.S.C. § 2000e-2(a)(1) (2018).

32. See Tippet, *supra* note 3, at 237 (saying that although Title VII of the Civil Rights Act of 1964 “contains no explicit reference to harassment,” the Supreme Court would go on to recognize “harassment as a form of discrimination” in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986)).

33. *Vinson*, 477 U.S. at 64.

34. *Id.*

35. *Id.* at 66–67.

36. See *Harris v. Forklift Sys.*, 510 U.S. 17, 21–22 (1993) (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.”).

37. *Id.*

Services, Inc.,³⁸ holding that while the conduct need not be motivated by sexual desire, the victim does need to demonstrate that it amounts to discrimination because of sex.³⁹ The Court was clear in *Oncale*, however, that Title VII was not to be interpreted as a code for workplace civility.⁴⁰ Harassment between men and women does not automatically implicate Title VII, even if the words have sexual connotations.⁴¹ There must be discrimination because of sex, as the text of Title VII makes plain.⁴²

The Court has further clarified that employer liability pursuant to Title VII varies and depends on whether the harasser is a supervisor or a co-worker.⁴³ “If the harassing employee is the victim’s co-worker, the employer is liable only if it was negligent in controlling working conditions.”⁴⁴ Negligence in this context can be established by showing that the employer failed to provide a means for filing complaints, failed to respond to those complaints, or discouraged employees from filing complaints.⁴⁵ On the other hand, if the harassing employee is the victim’s supervisor, the employer is strictly liable if the harassment culminated in a tangible employment action.⁴⁶ A tangible employment action includes things “such as discharge, demotion, or undesirable reassignment.”⁴⁷ In such instances, an employer is liable regardless of what steps it took to prevent the conduct or whether it had any knowledge of the misconduct. If no tangible employment action is taken, an employer is still presumed liable. The employer, however, may avail itself of an affirmative defense, sometimes referred to as the *Faragher/Ellerth* defense, “that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.”⁴⁸

38. 523 U.S. 75 (1998).

39. *Id.* at 80–81.

40. *See id.* at 80 (emphasizing that the statute “does not prohibit all verbal or physical harassment in the workplace. . .” instead foreclosing harassment on the basis of sex).

41. *Id.*

42. *Id.*

43. *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).

44. *Id.*

45. *See id.* at 448–49 (saying that these actions would be relevant to a determination of negligence in such a case).

46. *Id.* at 424.

47. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

48. *Vance*, 570 U.S. at 424; *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (applying the same elements of the affirmative defense). It is also worth noting that empirical research into sexual harassment reporting suggested that the *Faragher* and *Burlington* opinions

Scholars have criticized sexual harassment jurisprudence on a number of grounds, including the degree to which the Supreme Court standard for what constitutes harassment is open to interpretation by lower courts.⁴⁹ Another concern is that the *Faragher/Ellerth* affirmative defense is functionally reactive, rather than preventative, and allows employers to be shielded from liability arising from an initial harassment complaint.⁵⁰ Similarly, as has come to light through the #MeToo movement, a significant number of instances of harassment can be attributed to serial harassers.⁵¹ Thus, courts likely need to reconsider what constitutes reasonable employer efforts to correct harassing behavior.⁵² Furthermore, from a plaintiff's perspective, the second prong of the *Faragher/Ellerth* defense fails to account for the difficult circumstances that give rise to the myriad of reasons some victims fail to make a claim promptly.⁵³

C. Fracking-Related Lawsuits

Plaintiffs have brought dozens of common law tort claims in response to injuries allegedly sustained due to fracking operations.⁵⁴ Most of the claims arise out of the contamination of groundwater.⁵⁵ Plaintiffs in these suits typically rely on private wells for drinking water and allege that those wells became contaminated shortly after defendants' drilling operations began.⁵⁶ Although many causes of action have been alleged as part of water contamination suits, prominent among them are private nuisance, trespass, and negligence.⁵⁷ Some plaintiffs have also brought strict liability claims, asserting that fracking constitutes an abnormally dangerous activity,

overestimate how straightforward a reasonableness analysis would be. See Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCH. 230, 237 (2002) (finding that reporting can lead to retaliation, "lowered job satisfaction and greater psychological distress," leading some to decide not to report).

49. Tippett, *supra* note 3, at 239–40.

50. *Id.* at 240–41.

51. Hébert, *supra* note 1, at 332; see generally Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 3 UTAH L.J. 671 (2018) (examining the issue of serial harassment in the university setting).

52. Hébert, *supra* note 1, at 332.

53. *Id.*

54. Michael Goldman, *A Survey of Typical Claims and Key Defenses Asserted in Recent Hydraulic Fracturing Litigation*, 1 TEX. A&M L. REV. 305, 306–07 (2013).

55. *Id.* at 308.

56. *Id.*

57. See *id.* at 310–15.

one in which liability may arise even when a defendant has exercised the utmost care.⁵⁸ Although these common law tort claims have yielded predictably mixed results, the difficulty of proving causation has emerged as a common theme.⁵⁹

A number of factors combine to make causation difficult to prove in toxic tort cases, including difficulties identifying a specific harmful agent, identifying its source, determining exposure and dose, and doing so after a potentially long latency period.⁶⁰ In fracking tort cases, plaintiffs must also wrestle with the fact that some substances, such as methane, are naturally occurring in the water near drilling. Reliable, adequate baseline testing is not always conducted prior to drilling.⁶¹ This situation makes it difficult for plaintiffs to establish that the methane had not been present prior to drilling.⁶²

D. Use of Nondisclosure Agreements to Settle Claims

1. Torts and Settlement

Generally speaking, damages in tort are awarded to serve two primary goals: (1) making the injured party whole by returning the party to the state it was in prior to the tortious conduct; (2) and deterring that tortious conduct by penalizing it.⁶³ In theory, these goals should work hand in hand and can be achieved through jury verdict or settlement. Public policy favors settlement as it tends to increase efficiency, reduce cost, and speed resolution.⁶⁴ This principle is woven

58. See, e.g., *Berish v. Southwestern Energy Prod. Co.*, 763 F. Supp. 2d 702 (M.D. Pa. 2011).

59. See Monika Ehrman, *The Next Great Compromise: A Comprehensive Response to Opposition Against Shale Gas Development Using Hydraulic Fracturing in the United States*, 46 TEX. TECH. L. REV. 423, 436–37 (2014) (stating that causation was, in 2014, difficult to prove).

60. See Kellie Fisher, *Communities in the Dark: The Use of State Sunshine Laws to Shed Light on the Fracking Industry*, 42 B.C. ENV'T AFF. L. REV. 99, 113 (2015) (“Causation in a toxic tort case can be difficult to prove because of latency periods between exposure to the substance and the onset of illness, identifying the source of contamination, and identifying the specific toxin.”).

61. *Id.* at 114.

62. Chemists can distinguish, however, between the surface level methane that naturally appears in well water and the methane from deep underground that is brought to the surface as part of the gas extraction process. See Stephen G. Osborn et al., *Methane Contamination of Drinking Water Accompanying Gas-Well Drilling and Hydraulic Fracturing*, 20 PROC. NAT'L ACAD. SCI. 8172, 8172 (2011).

63. *C.f.* Ross E. Cheit, *Tort Litigation, Transparency, and the Public Interest*, 13 ROGER WILLIAMS U. L. REV. 232 (2008) (“Genuine tort reform, then, seeks to make the tort system better at accomplishing its existing goals, particularly deterrence and compensation.”).

64. R. Kyle Alagood, *Settlement Confidentiality: A “Fracking” Disaster for Public Health and Safety*, 45 ENV'T L. REP. NEWS & ANALYSIS 10459, 10463 (2015).

into the Federal Rules of Civil Procedure, which encourage settlement at various points of litigation proceedings.⁶⁵

There has been an increasing trend towards settlement, or perhaps any resolution other than a trial.⁶⁶ Although there is some debate about the precise rate of settlement, research confirms that the majority of cases do settle, and tort actions have the highest rate of settlement.⁶⁷ Given the time, expense, and risk of trial, it is not surprising that parties prefer to resolve the matter before it reaches that point. Furthermore, settlements allow for more flexibility in their outcomes, increasing the chances that parties will resolve disputes in a manner that is acceptable to each side.⁶⁸ These negotiations often factor in interests that go beyond the litigated issues, and are not necessarily limited to binary, zero sum outcomes.⁶⁹

2. *Contracts and Secrecy*

A settlement is a legally enforceable contract between two private parties. Freedom to contract is a foundational principle of American law, and it allows individuals to voluntarily enter into agreements with the expectation that the government will not sanction them for doing so and courts will enforce the terms of those agreements.⁷⁰ Thus, while settlement is subject to the laws and public policy considerations that govern contracts, courts will generally refrain from interfering, provided the agreement meets the requirements of a legally enforceable contract.⁷¹ Therefore, nondisclosure agreements (“NDAs”), in which one party offers consideration in exchange for

65. *Id.*; see also Laurie Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 289 (1999) (“In short, civil process in this country is increasingly diverting time and resources away from trial and adjudication toward pretrial activities and settlement.”).

66. See Dore, *supra* note 65, at 288 (“In federal court alone, the proportion of filed to tried cases has declined by four-fifths over the last fifty years . . .”).

67. Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 145–46 (2009).

68. See Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2672–73 (1995) (emphasizing the benefits of settlements and negotiated compromises).

69. *Id.*

70. See Mark Pettit, Jr., *Freedom, Freedom to Contract, and the “Rise and Fall,”* 79 B.U. L. REV. 263, 287 (1999) (explaining the relationship between the traditional view of freedom and freedom of contract).

71. Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2513–14 (2018) (emphasizing that courts only decline to enforce contracts in limited circumstances).

another party's silence, are permissible exercises of the freedom to contract.⁷²

Settlement agreements often contain nondisclosure provisions that restrict parties from disclosing the terms, amount, or even existence of a settlement.⁷³ Courts are willing to enforce such provisions under the theory that one or both parties' interest in privacy will aid in resolving the dispute more quickly.⁷⁴ Furthermore, plaintiffs in a position to offer silence in settlement negotiations can end up with a better outcome.⁷⁵ That bargaining chip can induce defendants to settle more quickly and for higher amounts to avoid reputational harm. Likewise, some scholars argue that allowing parties to settle their disputes privately is in the interests of justice: defendants should not have to abandon their privacy rights, and be forced to disclose damaging information, simply because they have been pulled into litigation.⁷⁶ In fact, this principle can apply to both parties, particularly in the context of sexual misconduct, where a plaintiff may desire privacy to avoid the stigma and negative publicity that can accompany that type of allegation.⁷⁷ Plaintiffs' desire for privacy in this context has been highlighted by recent litigation tactics employed by universities to force sexual assault claimants to abandon their anonymity for their lawsuits to proceed.⁷⁸

3. *Nondisclosure Agreements to Settle Fracking and Sexual Harassment Claims*

Tort suits arising from injuries allegedly caused by oil and gas activities are usually settled outside of court, and those settlements almost always contain an NDA.⁷⁹ In fact, the general understanding is that oil and gas companies will refuse to settle without plaintiffs signing

72. *Id.*

73. Dore, *supra* note 65, at 386.

74. Tippet, *supra* note 3, at 253–54.

75. See Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. STUDY LEGAL ETHICS 115, 118 (1999) (“It makes intuitive sense that it will be more difficult for a plaintiff to settle a case with a defendant if the defendant knows that it is no longer allowed to protect the dangerous practice it engages in behind a secret veil.”).

76. *Id.* at 117–18.

77. Prasad, *supra* note 71, at 2516.

78. Anemona Hartocollis, *Colleges Challenge a Common Protection in Sexual Assault Lawsuits: Anonymity*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/2019/05/29/us/college-sexual-assault-anonymous.html>.

79. See Tyler White, *A “Minor” Problem with Oil and Gas Company Settlement Agreements*, 5 LSU J. OF ENERGY L. & RES. 209, 212 (2017) (stating that settlements of these types of cases typically contain confidentiality clauses).

extensive NDAs that not only prohibit discussion of the settlement terms, but also discussion of fracking in general.⁸⁰ NDAs may also be a condition of any kind of financial compensation paid to landowners complaining directly to gas companies, even if a suit is never filed.⁸¹ These NDAs usually bar the plaintiff from discussing the terms of the settlement, as well as the conditions or complaint that led to it.⁸² In the Hallowich case referenced in the Introduction, as part of the out of court settlement for injuries allegedly resulting from noxious air emissions and water contamination, the Hallowich family agreed “to a joint statement of confidentiality, whereby they will not make any statements or comments, directly or indirectly, to any third party regarding the well operators, oil and gas development, fracking, their experience with any of the well operators or oil and gas companies, natural gas drilling or other operations, or Marcellus Shale activity.”⁸³ Of course, the inability to discuss the terms of the settlements makes it difficult to determine whether such an expansive NDA is typical or an aberration.

Similarly, many settlements resolving sexual harassment claims also contain NDAs,⁸⁴ which can serve to protect both the reputation of the company, and also that of the harasser.⁸⁵ Widespread use of NDAs prevents women who have been harassed from coming forward, allowing perpetrators to continue engaging in sexual harassment.⁸⁶ More importantly, NDAs not only make it difficult to identify the pervasiveness of harassment by a particular individual or at a particular company, they also cloud the extent of harassment across the board. That is, NDAs serve to depress the statistics on sexual harassment, making it more difficult to galvanize support for policy changes.⁸⁷ For those individuals who do avail themselves of the legal system to respond to sexual harassment, the systematic use of NDAs diminishes their ability to recover in court. Proving claims in court has shown to

80. See Fisher, *supra* note 60, at 119.

81. See *id.* at 116 (stating that settlement agreements need not be filed with a court and are generally sealed).

82. *Id.* at 119.

83. *Id.* at 118.

84. Margaret Ryznar, #MeToo & Tax, 75 WASH. & LEE L. REV. ONLINE 53, 54 (2018).

85. Mizrahi, *supra* note 6, at 134.

86. See *id.* (emphasizing that victims will have less information and be less able to find corroborative witnesses to support their claims).

87. Ryznar, *supra* note 84, at 55–56 (discussing a case where the U.S. Equal Employment Opportunity Commission pursued an injunction against NDAs that were impeding on the Commission’s ability to gather information).

be difficult in sexual misconduct cases. For a woman to successfully do so, being able to identify other women who have had similar experiences can be crucial.⁸⁸ Without such corroboration, a victim may face a he-said-she-said situation in which she is unlikely to prevail.⁸⁹

4. *Enforceability of Nondisclosure Agreements*

The potentially harmful repercussions of using NDAs to restrict information dissemination have raised questions about their enforceability. Because NDAs are contract provisions, their enforcement is subject to the same public policy exception as any other contract provision. Although courts may be loath to interfere with private parties' freedom to contract and its accompanying expectations, they have recognized public policy exceptions that can render some contracts or their provisions unenforceable.⁹⁰ Section 178 of the Second Restatement of Contracts states that term of a contract is unenforceable on policy grounds if "the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."⁹¹

The Restatement thus establishes a balancing test in which courts are to weigh (1) the preservation of the parties' justified expectations, (2) forfeiture that would result, and (3) any special public interest in enforcing the term against (a) the strength of the policy pursuant to legislation and judicial decisions, (b) the likelihood that non-enforcement will further that policy, (c) the seriousness and deliberateness of any misconduct involved, and (d) the connection between the misconduct and the term in question.⁹² Section 179 of the Restatement further clarifies that public policy may be derived from legislation or the need to protect the public welfare.⁹³ Thus, the determination hinges not on the benefit to the party seeking the determination, but rather based on whether enforcement of the provision would be detrimental to the public welfare.⁹⁴

Courts, however, must proceed cautiously, and exercise this power to void contract provisions only in cases that are clear and free from

88. Mizrahi, *supra* note 6, at 134.

89. *Id.*

90. *McCracken v. Progressive Direct Ins. Co.*, 896 F.3d 1166, 1172 (10th Cir. 2018).

91. Restatement (Second) of Contracts § 178 (AM. LAW INST. 1981).

92. *Id.*

93. *Id.* § 179.

94. *McCracken*, 896 F.3d at 1172.

doubt.⁹⁵ That is, the public policy at issue must clearly outweigh the general policy interest in favor of enforcing contract terms.⁹⁶ Few situations are as clear as when a statute specifies that a provision or contract is void under certain circumstances.⁹⁷ Florida's Sunshine in Litigation Act, for example, voids as a matter of policy any agreement that conceals a public hazard.⁹⁸ Arkansas has a similar rule, which states that "[a]ny provision of a contract or agreement entered into to settle a lawsuit which purports to restrict any person's right to disclose the existence or harmfulness of an environmental hazard is declared to be against the public policy of the State of Arkansas and therefore void."⁹⁹ These statutes plainly establish public policy exceptions to the freedom to contract.

This kind of clear legislative mandate is rare, however, and courts can look to the Restatement balancing test as a guide for what may qualify as a public policy exception to enforceability.¹⁰⁰ This balancing test leaves some room for interpretation and will vary somewhat based on each state's contract law and public policy concerns. Further complicating the analysis is the ever-changing nature of the values that inform public policy.¹⁰¹ Although one court may interpret this inherent variability as inviting judges to bring to bear their own interpretation of what constitutes relevant public policy, another may see it as reason to exercise restraint under such circumstances.¹⁰²

Despite this potential divergence of opinion, there have been certain categories of public policy concerns that have prompted courts to exercise their power to invalidate a contract provision on the basis of public policy. More specifically, courts have been increasingly willing to scrutinize NDAs, the enforcement of which could put public health and safety at risk. For example, a Connecticut court identified the importance of patients' interests in hospitals having access to full

95. *Combs v. Shelter Mut. Ins. Co.*, 551 F.3d 991, 996 (10th Cir. 2008).

96. *McCracken*, 896 F.3d at 1172.

97. Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 296 (1998).

98. FLA. STAT. ANN. § 69.081(4) (LexisNexis 2020).

99. ARK. CODE ANN. § 16-55-122(a) (LexisNexis 2020).

100. Garfield, *supra* note 97, at 296.

101. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 94–95 (N.J. 1960) (stating that "[a] contract, or a particular provision therein, valid in one era may be wholly opposed to the public policy of another").

102. *See Maryland-Nat'l Capital Park and Planning Comm'n v. Washington Nat'l Arena*, 386 A.2d 1216 (Md. 1978) (resolving a contract dispute after "[h]aving examined each of appellee's public policy contentions in some detail" and "balanc[ing] these policy considerations against those weighing in favor of enforcing [the contract]").

information when hiring nurses or other medical personnel.¹⁰³ Similarly, an Ohio court of appeals determined that “an employment separation agreement clause purporting to prohibit a school district from disclosing pedophilia on the part of a teacher to a school district that subsequently employs him is void as against public policy.”¹⁰⁴ Finally, in the products liability arena, courts have tended to permit employees to testify against their employers, despite being subject to NDAs.¹⁰⁵ Products liability settlements have often been sealed or subject to protective orders which, predictably, masks the extent of problems with a given product.¹⁰⁶

Some scholars have argued that NDAs preventing the disclosure of environmental risks to public health and safety should be void as being against public policy.¹⁰⁷ The reasoning is similar to that in other types of litigation: while an NDA might be in the best interests of the litigating parties, it does not take into account other members of the public whose ignorance of the environmental hazard at issue may ultimately lead to additional injuries.¹⁰⁸ However, some have pointed out that the other branches of the government are tasked with protecting the public from environmental hazards, and therefore courts should not set about doing so by upending contractual expectations.¹⁰⁹ But that argument fails to consider that agencies and legislatures need accurate information to craft laws and regulations, and allowing private parties to stifle the flow of information via contract subverts public policy.¹¹⁰ In fact, to fulfill its stated mission of protecting human health and the environment, EPA works to ensure that “[a]ll parts of society -- communities, individuals, businesses, and state, local and tribal governments -- have access to accurate information sufficient to effectively participate in managing human

103. *Giannecchini v. Hosp. of St. Raphael*, 780 A.2d 1006 (Conn. Super. 2000). Although the court ultimately did not void the NDAs in question, that holding was in deference to state statutes that spoke to the issue. *Id.*

104. *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663, 666 (Ohio Ct. App. 1988).

105. Jodi L. Short, *Killing the Messenger: The Use of Nondisclosure Agreements to Silence Whistleblowers*, 60 U. PITT. L. REV. 1207, 1215 (1999).

106. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2650 (1995).

107. *See Alagood, supra* note 64 (arguing against the use of confidentiality agreements and for a presumption of “openness”).

108. *See Dore, supra* note 65, at 369 (“[T]oxic torts involving damage to the environment or hazardous substances affect a class of individuals broader than the immediate litigants.”).

109. *Id.*

110. *Alagood, supra* note 64, at 10465.

health and environmental risks.”¹¹¹ Similarly, Congress, through the enactment of numerous environmental laws, has demonstrated that protecting public health and safety from environmental risks is its responsibility, and NDAs that interfere with that responsibility should be scrutinized and are potentially unenforceable as against public policy.¹¹²

With regard to Pennsylvania law, the Third Circuit held that a court should not automatically seal settlements merely because the parties so request it.¹¹³ Instead, a court should only do so if the parties demonstrate good cause, by establishing with specificity a clearly defined injury that failure to seal will inflict on one or both parties.¹¹⁴ Although the court was deciding whether to seal a settlement agreement, rather than enforce the terms of a private settlement, it did acknowledge in a footnote that provisions of silence in private agreements may be unenforceable if they violate public policy.¹¹⁵ Nevertheless, the Third Circuit recently appeared to take a more cautious approach when considering the exception to contract enforcement: “[p]ublic policy is . . . ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest.”¹¹⁶

This interpretation seems more in line with the traditional view of the public policy exception, namely that such a policy should be derived from statute or case law. However, Article I, Section 27 of the Pennsylvania Constitution states that “[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” The Supreme Court of Pennsylvania explained that “[t]his clause places a limitation on the state’s power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.”¹¹⁷ That the right to clean air and water is enshrined in Pennsylvania’s constitution suggests that there is

111. *Our Mission and What We Do*, U.S. ENV’T. PROT. AGENCY, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Mar. 29, 2021).

112. Amie Sloane, *Secret Settlements and Protecting Public Health and Safety: How Can We Disclose with Our Mouths Shut?*, 3 APPALACHIAN J.L. 61, 70 (2004).

113. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994).

114. *Id.*

115. *Id.* at 788 n.21.

116. *Lupu v. Loan City, LLC*, 903 F.3d 382, 393–94 (3d Cir. 2018) (citing *Hall v. Amica Mut. Ins. Co.*, 648 A.2d 755, 760 (1994)).

117. *Pennsylvania Env’t Def. Found. v. Commonwealth*, 161 A.3d 911, 931 (Pa. 2017).

an argument for courts voiding contract provisions that, were they to be enforced, pose a threat to these constitutional rights.

Scholars have also argued that NDAs that restrict the flow of information about sexual misconduct should be void as against public policy.¹¹⁸ The reasoning is similar to that in the environmental context: NDAs allow additional parties to be injured, investigations are undermined by the reduced availability of witnesses, and policymakers have diminished ability to develop policies to protect the public. Although enforceability of NDAs has not been extensively litigated,¹¹⁹ several states, including California, New York, and Pennsylvania, have considered or passed legislation to address the issue in the sexual harassment context.¹²⁰ In fact, California has largely rendered unenforceable most NDAs related to sexual harassment claims filed in court or in an administrative proceeding.¹²¹

II. *Convergence of Sexual Harassment and Fracking Claims*

Some scholars have conceptualized the use of NDAs as a situation in which the parties enter into bargains that internalize the benefits and externalize the costs.¹²² That is, one party ends up with money, the other with reputation-saving silence, but third parties remain at risk for the harm that gave rise to the settlement in the first place. In both the sexual harassment and fracking contexts, information about harm is suppressed by a variety of legal, cultural, and psychological mechanisms. Without this information being made available, it is difficult, if not impossible, to identify and punish repeat offenders, leaving them free to continue harming others. Furthermore, unless policymakers are aware of the extent and severity of these issues, they cannot enact the kind of policies that would better deter bad behavior or compensate those who have been harmed. As the following discussion demonstrates, the negative repercussions that arise from limiting public access to risk information, particularly through the systematic use of NDAs, are not merely theoretical, but very real.

Another means of ensuring that information about sexual harassment claims does not become public, alongside NDAs, is the use of mandatory arbitration clauses.¹²³ Since 2000, organizations have

118. *E.g.*, Prasad, *supra* note 71, at 2509.

119. Garfield, *supra* note 97, at 263.

120. Tippett, *supra* note 3, at 255.

121. Hoffman & Lampmann, *supra* note 19, at 188.

122. *Id.* at 199.

123. Prasad, *supra* note 71, at 2508 n.5.

increasingly conditioned employment on employees signing forced arbitration clauses, which forces sexual harassment victims to take their claims to arbitration, rather than allowing them to litigate them.¹²⁴ Use of this kind of private forum diminishes claimants' abilities to identify witnesses who might lend credibility to their claims, which can tilt the arbitration outcome in favor of the employer.¹²⁵ Thus, claimants not only struggle to prevail on their claims, but the proceedings do not become part of the public record, which shields harassers from more significant consequences.¹²⁶ Forced arbitration clauses also appear in leases that landowners sign with gas companies. “[W]ell, that’s one of the things that the early contracts had that any dispute had to be arbitrated. So you could not sue.”¹²⁷ Use of arbitration agreements in this context serves the same purposes of maintaining secrecy and stacking the deck in favor of the gas company.

A. Economic Discrepancies Between Parties

Research suggests that victims of sexual harassment are disproportionately the most economically vulnerable employees.¹²⁸ This means people who cannot afford to lose their jobs or face retaliation are less likely to speak up and are more likely to be subject to prolonged harassment.¹²⁹ Similarly, those who have alleged water contamination issues arising from fracking activities are often disproportionately economically disadvantaged individuals living in rural areas.¹³⁰

Although topography and the location of extractable gas certainly play a role, those with less income have stronger economic incentives to lease their land and are less able to effectively mobilize opposition

124. See generally ALEXANDER J. S. COLVIN, ECON. POL’Y INST., THE GROWING USE OF MANDATORY ARBITRATION (2017) (discussing survey results which show a drastic increase in forced arbitration clauses).

125. Mizrahi, *supra* note 6, at 135.

126. See *id.* (asserting that companies use mandatory arbitration agreements to prevent lawsuits from entering the public record and to shelter known harassers).

127. Interview with study participant 1101 in Pa. (Summer, 2018).

128. See Mizrahi, *supra* note 6, at 139–40 (claiming that those who are more frequently targeted for harassment have “an intense reliance on their wages and a foreboding sense that they cannot afford to lose their job.”).

129. *Id.*

130. Cf. Emeka Duruigbo, *Fracking and the NIMBY Syndrome*, 26 N.Y.U. ENV’T L.J. 227, 249–50 (2018) (“[O]pposed projects. . . are moved from affluent neighborhoods to low income, less politically sophisticated and vulnerable communities who then face all the negative consequences of these projects.”).

to fracking in their community if they are concerned about its risks.¹³¹ Therefore, the burdens of fracking are disproportionately borne by the rural poor, despite the fact that not everyone in a community benefits directly from these activities. Many people in these communities do feel as though they are treated differently due to their social economic status. “And that clearly meant they did not care about public opinion in this area. We are not real people, we are Appalachians, we are boneheads or whatever, we are backwoods -- which is ironic because even though Pittsburgh with CMU and all these high-class institutions, anywhere outside here, we’re just part of that northern Appalachian culture. I mean it seems like that’s the assumption. That’s what I’m feeling.”¹³²

Because many of the people who can afford to pay for silence are wealthy, powerful individuals who can also afford prolonged litigation,¹³³ many sexual harassment victims feel their only recourse is to accept a settlement that includes an NDA.¹³⁴ Residents in rural Pennsylvania are similarly well aware of the dilemma created by the power asymmetry between the gas companies and the landowners. “Well, this is hardscrabble stuff -- these are people who couldn’t afford to retain a lawyer to help an individual or even a group. And so they feel like they’re stuck. They don’t have the resources to stand up against the drillers, and the drillers say the only chance you’ve got to get anything from us is to sign this non-disclosure agreement.”¹³⁵ One farmer, who brought suit against a gas company after animals on her farm began dying shortly after drilling commenced both on and adjacent to her property, lamented that it took years before her neighbors admitted to losing livestock at the same time she did. When asked why they took so long to say anything, she replied that the mentality of many farmers was simply to accept the losses and refuse to discuss it. She speculated that they did not want to risk the consequences of complaining “[b]ecause of the gas company. You can’t fight the gas company, it’s like fighting the phone company. I mean, seriously.”¹³⁶ Awareness of the power asymmetry discourages

131. *Id.*

132. Interview with study participant 1014 in Pa. (Summer, 2018).

133. Mimi A. Akel, *The Good, the Bad, and the Evils of the #MeToo Movement’s Sexual Harassment Allegations in Today’s Society: A Cautionary Tale Regarding the Cost of These Claims to the Victims, the Accused, and Beyond*, 49 CAL. W. INT’L L.J. 103, 111 (2018).

134. See Prasad, *supra* note 71, at 2539 (discussing why some victims may feel they have no bargaining power and thus no choice when presented with an NDA).

135. Interview with study participant 1701 in Pa. (Summer, 2018).

136. Interview with study participant 1104 in Pa. (Summer, 2018).

many of those harmed from considering litigation a realistic option. As a result, they are often willing to accept unsatisfying settlements, provided they decide it is worth bringing a claim in the first place.

B. Privacy Concerns

As noted above, one of the arguments in favor of allowing settling parties to contract for secrecy is that, in certain contexts, both parties value privacy.¹³⁷ In the sexual harassment context, the accused have a clear motivation to avoid having their reputations damaged by the allegations, but accusers often prefer to have potentially embarrassing and traumatic details of their treatment kept private, as well.¹³⁸ They may also wish to avoid the stigma that can come with being victimized, as well as the fear that future employers might view them as litigious.¹³⁹ Although people who allege water contamination issues might have less powerful incentives for wishing to keep settlements secret, the divisiveness of the fracking issue does motivate some people to prefer to keep these issues to themselves. For many who live in rural communities, fracking has brought much needed income, and they respond negatively to those who complain about it or bring lawsuits.

The whole thing with people who lease, it's like they're not the enemy to me. I mean, I'm the enemy to them, I understand that. . . . [T]hey don't want me messing with their source of income. I understand that, you know, it's like if they had experienced the health impacts --¹⁴⁰

Even those who, out of concern for their neighbors' safety, alert them of problematic water test results, run the risk of being ostracized.

[W]hen we were told by the health department, 'look, you've got arsenic in your water, you really need to contact your neighbors around you and tell them you have arsenic in your water maybe they'll get there water tested too.' Okay. I called the neighbors. Guess what. I would have been better off to have leprosy. Because from then on, it was like none of them wanted to talk to you. Didn't want to hear it. Don't talk about your water.¹⁴¹

137. See Prasad, *supra* note 71, at 2516 (discussing the benefits of NDAs not only to perpetrators, but also to victims of sexual abuse).

138. *Id.*

139. *Id.*

140. Interview with study participant 1437-A in Pa. (Summer, 2018).

141. Interview with study participant 1104 in Pa. (Summer, 2018).

Given how contentious the fracking issue has become in these communities, being able to settle without any publicity might be preferable for many residents.

But even to the extent that some plaintiffs might benefit from being able to keep details about the settlement, or even its very existence, from being publicized, NDAs usually bestow disproportionate benefits on the more powerful party by allowing them to limit their liability for misconduct.¹⁴² Plaintiffs in these situations give up the right to speak about their experiences, while defendant companies save themselves any economic damage that might flow from subsequent harm to their reputations.

Prior to the #MeToo movement, companies considered settlement of harassment claims to be just another cost of doing business,¹⁴³ and it was worth paying out more money in a settlement in exchange for an NDA if they viewed the employee accused of sexual harassment to be sufficiently valuable.¹⁴⁴ But doing so weakens any internal disciplinary measures because an economically valuable executive might opt to leave for a competitor, rather than endure any kind of discipline.¹⁴⁵ Thus, knowing that the company would not want to risk the publicity that would come with disclosing the behavior to that competitor, a sufficiently powerful harasser might escape any serious repercussions. However, as the #MeToo movement has brought so much publicity to the problem of sexual harassment in the workplace, companies have been forced to consider whether the public relations backlash from keeping a known perpetrator on staff is worth whatever economic value he might add.¹⁴⁶

In the fracking context, many residents feel as though the gas companies are making a similar calculation. That is, they feel as though gas companies are using NDAs to avoid the negative publicity that would come with litigation, and to keep the extent of the water contamination issues from being discovered. “[T]hey want to be portrayed as a good neighbor. They don’t want their crap being out on ‘60 Minutes’ every hour, or the news station: ‘oh, this company

142. Ryznar, *supra* note 84, at 56.

143. Tippett, *supra* note 3, at 272.

144. See Hébert, *supra* note 1, at 324 (asserting that companies chose to ignore harassment because they “saw the harms caused by sexual harassment as not sufficient to counterbalance the benefits to those companies provided by the harassers”).

145. Tippett, *supra* note 3, at 279.

146. Hébert, *supra* note 1, at 324–25.

poisoned this residence down here.’ They don’t want that.”¹⁴⁷ But just as companies might see NDAs as a means of limiting negative publicity should a landowner’s water be contaminated, the media backlash generated by their application to minor children in the Hallowich case surely serves as a cautionary tale.¹⁴⁸

C. Enabling Future Harm

Regardless of whether one views NDAs as something nefarious or simply pragmatic, their systematic inclusion in settlements arising from sexual harassment and fracking claims inevitably restricts the flow of important information, giving rise to some of the policy concerns Section 178 of the Restatement contemplates. “It’s a way of controlling the information that could get out about harm and so you know, how do you find out about nondisclosure agreements? How do you, unless somebody is gonna in confidence say, ‘here’s what I had to sign’? But they have legal repercussions if they violate that. That’s a pretty good system, isn’t it?”¹⁴⁹ One of the clear drawbacks of the use of NDAs in sexual harassment settlements is that by preventing accusers from speaking out about the alleged conduct, it is difficult to establish patterns, and thus perpetrators are able to continue engaging in this behavior with minimal external consequences.¹⁵⁰ NDAs thus function as a shield that protects perpetrators from the kinds of investigations that might reveal repeated misconduct.¹⁵¹ Many landowners living near fracking operations voiced similar concerns about the potential for more injured parties. “I feel like it’s wrong -- it gives gas companies an out. It shuts people up, and then they can just keep doing what they’re doing. And the story never gets out. So more people are going to be harmed because of the people who have been harmed not being able to tell their story. So I don’t even think they should be allowed to get away with that.”¹⁵² NDAs prevent external accountability, allowing similarly injurious behavior to continue.

Unsurprisingly, the potential for additional parties to be harmed is the primary criticism of the systematic use of NDAs in these types of

147. Interview with study participant 1104 in Pa. (Summer, 2018).

148. See Hopey, *supra* note 8 (discussing the decision made by shale gas companies to retroactively remove minor children from an NDA after experiencing PR issues as a result).

149. Interview with study participant 1005 in Pa. (Summer, 2018).

150. Ryznar, *supra* note 84, at 54–55.

151. Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 77 (2018).

152. Interview with study participant 1014 in Pa. (Summer, 2018).

settlements.¹⁵³ Even in a situation where both parties sincerely value the privacy afforded by including a nondisclosure provision in the settlement agreement, those privacy interests do not take into account the potential impact on third parties. That is, while public policy does favor the freedom to contract, there is a countervailing policy argument against contracts of silence that suppress information about threats to public health and safety.¹⁵⁴ So, for example, the parties to a sexual harassment settlement might benefit from agreeing to remain silent, but that silence does not take into account the interests of any potential future victims who might then be at risk of being similarly victimized.

While many victims of sexual harassment have very compelling reasons for preferring to avoid publicity, others wish to speak about their experiences for the benefit of others.¹⁵⁵ The same can be said of those harmed by fracking operations.

Do you think, I mean seriously, do you think that company has enough money for me to keep my mouth shut? It will not happen. If I could prove them wrong, ... our attorney was talking about nondisclosure agreement, keep your mouth shut. But I was like, 'you better start adding friggin' zeros and we'll talk about it, but until then no.' Why should other people suffer?¹⁵⁶

While the victims of sexual harassment might be cognizant that an NDA could enable a perpetrator to harm other employees, the offending conduct can feel intensely personal. As a result, they might not necessarily assume that the perpetrator inevitably poses a risk of future harm to others. In the fracking context, on the other hand, contaminated water is not personal, nor is it subject to social or behavioral constraints. Thus, it is easier for a landowner to assume that the substances that contaminated her well also pose a direct threat to others nearby.

So the next people, they're signing a lease and they don't know that maybe the guy next to them or two blocks away got sick, and can't tell them because they're under non-disclosure -- so you don't get the

153. See generally Ayres, *supra* note 151. (asserting that NDAs protect repeat offenders and thus future victims are not adequately warned).

154. Bast, *supra* note 19, at 700.

155. See Taishi Duchicela, *Rethinking Nondisclosure Agreements in Sexual Misconduct Cases*, 20 LOY. J. PUB. INT. L 53, 65 (2018) (detailing the potential repercussions that victims of sexual assault may face for speaking out, but how speaking out can help protect the public from their harassers in the future).

156. Interview with study participant 1104 in Pa. (Summer, 2018).

benefit of what your neighbors experienced. So, basically, I think the system's very bad to allow that.¹⁵⁷

D. Discouraging Claims

In addition to enabling future harm to third parties, using NDAs to reduce information availability can ultimately discourage injured parties from engaging with the legal system to seek redress. Awareness that others have suffered similar sexual harassment encourages victims to take steps to address it.¹⁵⁸ Sexual harassment is a circumstance that lends itself to a first-mover disadvantage, in that the first accuser faces a he-said-she-said credibility contest that can be stacked in favor of the accused.¹⁵⁹ A first line of defense against an accusation of sexual harassment is to dismiss the accuser as “vindictive” or “crazy,” and then ignore the accusation entirely.¹⁶⁰ Such a response halts the proceeding, and can even cause victims to doubt whether the misconduct they suffered was, in fact, harassment.¹⁶¹ An expectation of being dismissed and demonized discourages victims from coming forth unless they know there will be other victims to corroborate their claim.¹⁶² Thus, because NDAs prevent victims from being aware of the experiences of others, they are less likely to avail themselves of the institutions that have been put in place to address this type of misconduct.

Several interviewees reported having their concerns bluntly dismissed when they called gas companies about the problems fracking operations were causing, and more than one spoke of combative representatives answering helpline calls. They suspected that this behavior was a calculated first hurdle intended to discourage residents from continuing to seek assistance. Being dismissed in this way can, and does, undermine individuals' confidence in their own experiences. One resident, who had dealt with a litany of issues arising from a wellpad on an adjacent property, sincerely asked at the conclusion of her interview whether she was the only one experiencing the types of problems she had described.

157. Interview with study participant 1014 in Pa. (Summer, 2018).

158. See Ian Ayers & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 160–61 (2012) (explaining why victims of sexual assault often feel more comfortable bringing claims if others do so at the same time).

159. *Id.*

160. Hébert, *supra* note 1, at 323.

161. Ayers & Unkovic, *supra* note 158, at 161.

162. *Id.* at 160–61; Hébert, *supra* note 1, at 329; Akel, *supra* note 133, at 113.

Not knowing that others are experiencing similar issues discourages injured parties from engaging with the legal system to seek remedies, in part because they cannot learn from others' experiences. Some residents openly acknowledged that they did not know what steps they could take if they suspected that their water had been contaminated, and one complained that NDAs kept people from realizing that they might consider consulting an attorney and filing suit. She went on to say that "the fact that there's settlement means they're admitting to something but they're not taking responsibility totally. And then it discourages others from suing or doing whatever they need to do."¹⁶³

E. Reducing Public Awareness of the Issue's Pervasiveness

Another consequence of the widespread use of NDAs is that they impact statistics in a way that makes these issues seem less pervasive than they really are.¹⁶⁴ Without accurate reporting on the frequency of a particular occurrence, policymakers are less likely to understand its severity, and the need to take steps to address it. One outcome of the #MeToo movement was to shed light, not only on the pervasiveness and severity of sexual harassment, but also on the failure of the state to protect its citizens. The subsequent legislative response, in which several states proposed bills to curtail the negative repercussions of NDAs,¹⁶⁵ demonstrates that politicians will respond to pressure from constituents. But enough constituents need to be aware of a problem to demand governmental action. Even then, some remain skeptical about government action, regardless of context. "The only good thing about having city water, I think, is if a lot of people's water is affected, then you might be able to get more action than if just a single well was affected. However, I don't know if the people in Flint would agree."¹⁶⁶

With NDAs contributing to artificially lowered sexual harassment statistics, at least a certain portion of the population was unaware of the ubiquity of the problem. However, once stories of harassment began to spread on social media, ignorance of the issue could no longer justify a failure to address it. NDAs have, in all likelihood, similarly depressed statistics on water contamination issues that have arisen from fracking. Without information on claims and settlements, industry supporters continue to claim that there have been no proven

163. Interview with study participant 5_1143 in Pa. (Summer, 2018).

164. Ryznar, *supra* note 84, at 55.

165. *Id.* at 56; Tippett, *supra* note 3, at 255.

166. Interview with study participant 1003-A in Pa. (Summer, 2018).

incidents of fracking causing water contamination.¹⁶⁷ Yet several interviewees made reference to gas company employees casually referencing their culpability in contaminating water wells. One interviewee had reached out to a gas company representative about her water concerns after drilling began, “and the guy said, ‘oh you know what, I’ve only ever known five water wells going bad because of us.’ Like, that’s enough. That’s enough. I mean that’s enough. He’s like, ‘oh you’ll be fine.’”¹⁶⁸

Not surprisingly, some residents in Pennsylvania feel as though the use of NDAs is part of a larger, aggressive effort to minimize public awareness of the harms of fracking.

No, no, they’re not really going to court, they’re being paid off and then forced to sign non-disclosure agreements. The gas industry knows full well that they’re contaminating these wells, and when they do, people come to them and they say “here, we’ll mitigate the issue, we’ll give you a bunch of money, but you can’t talk about it now. Because if you do, we’re gonna sue the hell out of you. We have millions of dollars’ worth of lawyers that we will stick on you, and it’ll be awful.” They’re threatening, they’re violent, they’re vicious, it’s nasty.¹⁶⁹

This reaction is common among interviewees who have either made a complaint to a gas company, or know others who have. “I think it’s just a cover-up. I don’t think it should be allowed, I feel like there’s probably so much we don’t know and they’re shutting people up.”¹⁷⁰ But even to the extent that gas companies include NDAs only in an attempt to stave off a flood of spurious claims by opportunistic landowners, rumors that companies are paying for silence will inevitably arouse suspicion and concern. “Yeah, I’ve often wondered how many people in Butler County have litigated. I often wondered that when I’m driving through the countryside, like okay how many of these people have had their wells contaminated, and no one is ever gonna know?”¹⁷¹

167. See, e.g., Susan Owen, *Rick Perry says there’s no proven instance of groundwater polluted by fracking*, POLITIFACT, <https://www.politifact.com/texas/statements/2012/feb/29/rick-perry/rick-perry-says-theres-no-proven-instance-groundwa/> (examining a politician’s statement that there was not a single proven case of groundwater being polluted by hydraulic fracking).

168. Interview with study participant 1233 in Pa. (Summer, 2018).

169. Interview with study participant 1519 in Pa. (Summer, 2018).

170. Interview with study participant 1233 in Pa. (Summer, 2018).

171. Interview with study participant 1437-A in Pa. (Summer, 2018).

F. Controlling Narratives

Without reliable information on the frequency or severity of harm, the more powerful party can seize control of the narrative in a way that maintains the status quo. In the sexual harassment context, incidents that come to light involving repeat offenders can still be characterized as one-off issues if the other victims are contractually bound to silence. Likewise, the difficulty victims have in recovering in court can be touted as evidence that the claims were spurious. Statistics that significantly underreport the frequency of harassment incidents can be wielded as evidence that the problem is insignificant or under control. Finally, individual accusers can be dismissed as crazy, vindictive, or overly sensitive, as they have no one to corroborate their claims.¹⁷² Each of these narratives either undermines an accuser's credibility, or suggests that these incidents are few and far between, which allows a harasser or the company for which he works to retain a (relatively) unblemished reputation. The #MeToo movement exposed the perfidiousness of this narrative, galvanizing both the public and policymakers as a result.¹⁷³

Narratives play a similarly important role in shaping the fracking debate, some of which bear strong resemblance to those used in the sexual misconduct context. For example, some residents in Pennsylvania feel as though NDAs are deliberately used to minimize the publicity surrounding water contamination issues, which in turn preserves the gas companies' ability to dismiss these issues as exceptions to otherwise sterling records of safety.

Well that way nothing can get out of the bag that the industry does or continues to do to people. And if people aren't allowed to talk about it then everyone thinks that everything is fine. Or what's worse yet is if you know people who have gag orders, people say 'oh well that's just one person,' or 'that's just a handful of people who have gag orders.'¹⁷⁴

Conveniently, NDAs ensure that no one knows how many NDAs are in effect, nor the extent to which that impacts residents' views on the issue. Several interviewees did, in fact, believe that the gas industry had a good record of safety, and was only responsible for a few water contamination incidents. "Now there could be one off the wall thing where something happened and you could complain about it, but

172. See Hébert, *supra* note 1, at 329 (detailing ways that the character of an individual accuser may be maligned).

173. See *id.* at 329–30 (describing how the experiences shared in the #MeToo movement are contrary to the narrative that accusers are themselves blameworthy).

174. Interview with study participant 1556 in Pa. (Summer, 2018).

there's always 1, 2, 3% of somebody that's never gonna be happy no matter what."¹⁷⁵ It goes without saying that the absence of information leaves individuals to draw their own conclusions, which some would argue is the point of NDAs in this context.

Furthermore, pro-fracking interviewees consistently characterized complaints about degraded water quality as cynical attempts by landowners to exploit the deep pockets of the gas companies. "Yeah, the methane's been there the whole time. They just -- now they can blame it on somebody. Now they can say 'hey, it's your fault.' No, you could always light that water on fire. You could always do it -- it wasn't because of them."¹⁷⁶ "But here comes these big oil and gas companies, and they've got cash. And a lot of people are thinking this is a cash cow, and I'm gonna get some of it. And they fabricate stories."¹⁷⁷ Similar accusations arise in the sexual harassment context as well, with victims' attempts at seeking justice being dismissively characterized as cynical schemes to make money.¹⁷⁸

Another opinion that pro-fracking, anti-regulation interviewees all had in common was that no matter the activity, there will always be people who find something wrong with it. "So you're always gonna have somebody that they could repave the road and one guy would say 'well, there's bumps there' or something. You know -- you know what I mean? You're always gonna have somebody that's not gonna agree with it, but if it enriches 95% of the people instead of 5% of the people, wouldn't that be better?"¹⁷⁹ "Everybody -- anybody that doesn't understand the whole dynamic can pick out a little piece here and there and say this is not good."¹⁸⁰ The narrative here is that despite fracking being a safe, beneficial activity, if one looks hard enough, one can find something to complain about. Once again, the narrative allows pro-fracking residents to simplify and dismiss contaminated water allegations made by others.¹⁸¹

175. Interview with study participant 1321 in Pa. (Summer, 2018).

176. *Id.*

177. Interview with study participant 1212 in Pa. (Summer, 2018).

178. See Dvora Meyers, *President of Gymnastics' Athletes' Commission Says Abuse Survivors Are In It For The Money*, DEADSPIN (March 3, 2019, 1:30 PM), <https://deadspin.com/president-of-gymnastics-athletes-commission-says-abuse-1832990508> (reporting on various accusations that victims were making complaints in the hope of financial gain).

179. Interview with study participant 1321 in Pa. (Summer, 2018).

180. Interview with study participant 1212 in Pa. (Summer, 2018).

181. This is not to suggest that many of the anti-fracking interviewees did not embrace shared narratives that tended to characterize and oversimplify.

Regardless of whether there have been only a handful of instances in which fracking activities actually led to water contamination, or whether there have been “thousands and thousands and thousands of other lives that they’ve affected,”¹⁸² the use of NDAs contributes to an atmosphere of uncertainty that allows dueling narratives to further muddy the waters.

G. Retaliation and Other Disincentives to Filing Claims

In addition to NDAs, the spread of information about sexual harassment is hindered by well-grounded concerns about retaliation, along with a lack of faith in the institutions meant to help victims. Many of those who have been subject to the kind of misconduct that sexual harassment laws and policies are meant to redress, elect not to avail themselves of those remedies for fear of other negative consequences that often result from doing so. Although electing not to speak up about harassment allows serial harassers to persist in their behavior, one can hardly blame victims for remaining silent about what they have experienced.

The fear of retaliation is a particularly powerful motivation to maintain silence, and one that is very rational.¹⁸³ While lawmakers have created protections against retaliatory terminations in these situations,¹⁸⁴ the retaliation a victim may face after speaking up can manifest in many other ways.¹⁸⁵ Diminished support from management and social ostracization, for example, might arise in response to a sexual harassment claim.¹⁸⁶ But such subtle behaviors would likely be difficult, if not impossible, to prove as part of a retaliation claim, rendering legal protection against retaliation of little value.¹⁸⁷

Although the emotional and psychological impacts people experience when harmed by fracking differ significantly from those experienced by sexual misconduct victims, the factors dissuading them from complaining or pursuing legal remedies bear some resemblance. One resident, for example, spoke of retaliation she experienced for complaining about noise, and subsequently, for speaking to the media. She said her initial complaints were ignored by the company and the township, but she was finally able to get a DEP representative to speak

182. Interview with study participant 1014 in Pa. (Summer, 2018).

183. See Mizrahi, *supra* note 6, at 137 (listing the many forms retaliation may take).

184. See *id.* at 137–38 (describing how a retaliatory termination can be challenged).

185. *Id.* at 137.

186. *Id.*

187. *Id.* at 137–38.

to the well operators on her behalf. “He went over there and talked to them and said, ‘you know what, can you at least let the people sleep a little bit, can you knock it off at around like 7 o’clock?’ That night, it was so loud, it seemed like it was worse.”¹⁸⁸ Because the situation had not improved, and her husband, who was recovering from a heart attack and a stroke, could not get sufficient rest, she went to the local news with her story.

Shortly thereafter, the well operator provided her with numbers to call if she had any further complaints.

They’ve said, ‘if you have problems call us’ because I called the media the last time. I don’t know if you found me on WXPI, it’s on there somewhere with me complaining about it. And you also see all the gas well trolls writing nasty things about me underneath – ‘she’s probably just a welfare chick,’ ... ‘looney tune will do anything for attention’ -- like I really wanted to have attention.¹⁸⁹

She noted that her daughter had actually tried to dissuade her from going on the news for fear of having the company or pro-fracking community members retaliate.

Another resident, who experienced a variety of issues associated with a well on an adjacent property, also spoke of retaliation he faced in response to his complaints.

You become a nuisance because you’re interfering with their activity, their production. So you become the bad guy. And then that’s when it all hits the fan. You start out -- you’re a good guy if you leave them alone and don’t say nothing but wave, you’re a good neighbor. But soon as you have an issue with the dust, the traffic, getting run off the road, whatever it might be, spills, odors, dust, noise -- you’re now bad. Then you’re labeled, then it starts: the bad guy, the terrorist, have me arrested, harassment -- they throw everything at you.¹⁹⁰

Alongside concerns about retaliation, some victims of sexual harassment might refrain from seeking redress because sexual harassment is so common that it is simply something they ultimately accept as part of life.¹⁹¹ That is, because women experience harassment in one form or another so frequently, it is not always clear what constitutes the kind of behavior that arises to the level of an actionable complaint. Therefore, outside of the most egregious situations, many

188. Interview with study participant 1233 in Pa. (Summer, 2018).

189. Interview with study participant 1233 in Pa. (Summer, 2018).

190. Interview with study participant 1402-B in Pa. (Summer, 2018).

191. Akel, *supra* note 133, at 112.

targets of harassment simply accept that it is part of life, and endure. A similar mentality can be seen in how some residents in southwest Pennsylvania accept pollution as a given. “The problem with this area is we’ve had industrialization, we’ve had the steel mills and the coal mines, and we’ve had this going on for years, and oil was discovered up in Tionesta or Titusville, wherever – and so people are kind of like, ‘well, that’s just how things are.’”¹⁹² “[W]e kept running into that attitude: ‘oh you should have seen what it used to be like.’ And again, it’s not everybody but it was kind of like, you mention it to your neighbor, ‘hey you smell this?’ ‘Smell what?’ ‘The sulfur! In the air.’”¹⁹³

Another reason that sexual harassment victims sometimes elect not to file a complaint comes from doubts about whether their claims will be believed.¹⁹⁴ Because such allegations have often been treated with various degrees of skepticism, coming forward carries with it the potential for retaliation and other negative consequences, but without assurance that the offending behavior will be addressed.¹⁹⁵ Therefore, if a victim questions whether her claim will be believed, or worries that the process will devolve into a he-said-she-said credibility contest, it reduces the incentive to speak up in the first place. Likewise, not having their claims believed was a common theme amongst residents who had called gas company helplines to report issues. One resident spoke of an incident in which he walked outside into a cloud of gas on his street, which immediately triggered a severe respiratory episode. When he got back inside and called the gas company, the representative “busted out laughing on the phone.”¹⁹⁶ The representative then told him that because he had not gotten a call from the well site, what he experienced simply could not have happened. This resident was one of several interviewees to claim that representatives who answered the helplines summarily dismissed any concerns as impossible.

Given the myriad disincentives outlined above, it is not surprising that researchers estimate that only 6 – 13% of sexual harassment victims file a formal complaint.¹⁹⁷ This reluctance to engage with the

192. Interview with study participant 1005 in Pa. (Summer, 2018).

193. Interview with study participant 1014 in Pa. (Summer, 2018).

194. Akel, *supra* note 133, at 108.

195. Hébert, *supra* note 1, at 323.

196. Interview with study participant 1420 in Pa. (Summer, 2018).

197. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF CO-CHAIRS 11 (2016).

legal system or their companies' internal compliance programs demonstrates a lack of trust in the institutions ostensibly in place to provide assistance in these situations.¹⁹⁸ Studies have demonstrated the importance of trust in governments and institutions, and that the lack of trust can have significant negative repercussions.¹⁹⁹ Because perpetrators are often powerful, economically valuable members of a company, victims cannot be blamed for being wary about seeking help from that company's internal compliance program. It is well established that victims often face negative employment outcomes after lodging complaints, while economically high-value perpetrators are protected.²⁰⁰ Some victims might reasonably conclude that if the organization does not value them as highly, it will not protect them. Counterintuitively, one study into sexual harassment reporting found that complaints from high-ranking victims were actually less likely to trigger an organizational response than those from lower-ranking employees.²⁰¹ However, the researchers suspect that the reason for this is that high-ranking victims are necessarily harassed by even higher-ranking employees, whom the organization would be the most motivated to protect.²⁰²

H. Reduced Faith in Institutions

Any mistrust that victims of sexual misconduct might feel towards institutions meant to render justice or protect them from retaliation would appear to be well-founded. The failure of organizations to respond to sexual misconduct allegations has been demonstrated repeatedly in recent years. In one of the most notorious examples, the failures of USA Gymnastics and Michigan State University to respond to complaints by gymnasts allowed Larry Nassar to sexually abuse minors for decades.²⁰³ Another recent proceeding revealed that a culture of secrecy, fostered by corporate executives, eventually convinced employees at Wynn Resorts to conclude that filing

198. See Mizrahi, *supra* note 6, at 125–26 (describing the potential outcomes that may cause victims not to trust reporting procedures).

199. Anne Marie Warren et al., *Social Media Effects on Fostering Online Civic Engagement and Building Citizen Trust and Trust in Institutions*, 31 GOV'T INFO. Q. 291, 292 (2014).

200. Hébert, *supra* note 1, at 322–24.

201. Bergman, *supra* note 48, at 236.

202. *Id.*

203. Meyers, *supra* note 178.

complaints was pointless.²⁰⁴ Finally, court filings in a gender discrimination lawsuit filed against Microsoft revealed that out of 118 gender discrimination complaints filed over the course of six years, the company considered only one to be “founded.”²⁰⁵

That only one of the 118 gender discrimination complaints was taken seriously by Microsoft’s human resources department raises questions not unlike those raised by many residents in Pennsylvania, who allege that of the many water contamination complaints made to DEP, only a small percentage officially are ever linked to gas extraction activities. These residents have very little faith that the state’s environmental enforcement agency is making good faith efforts to determine whether fracking operations are affecting their water. “They were pretty good, they ought to be counselors. They feel for you, they’re going to do something about this, this is wrong, and report comes back, it’s always in favor of the industry. There’s never no findings, nothing conclusive. They’ve covered up.”²⁰⁶

“I just told you, they’ll come out to people’s houses and say it’s not caused by fracking . . . I mean, because they’ve got their criteria very narrowly constructed, that they can – I mean, I’m sure they have a protocol that they follow, but how good, is that really making a good determination?”²⁰⁷ “Anyway, the DEP had sort of two tests they used. One was a full battery that included – it would cost a lot of money, but it would test for the fracking chemicals, which is what we all wanted to know. They had another test which didn’t test for the fracking. But they were using the test that specifically left out fracking-culpable type of chemicals, and then coming in saying, ‘your water is fine.’”²⁰⁸ “It says it can’t be from the drilling; it actually says at the end ‘while we don’t think it was the driller, you have serious problems with your water, and you should probably look into that.’ That’s what it says. So [he]’s been in litigation for four years now.”²⁰⁹

204. Ray Sanchez and Sonia Moghe, *Wynn Resorts Executives Concealed Sexual Misconduct Accusations Against Steve Wynn, Gaming Regulators Say*, CNN (Apr. 3, 2019 7:44 PM), <https://www.cnn.com/2019/04/03/us/wynn-resorts-massachusetts-gaming-commission/index.html>.

205. Dan Levine, *Microsoft Women Filed 238 Discrimination and Harassment Complaints*, REUTERS (March 12, 2018 10:42 PM), <https://www.reuters.com/article/us-microsoft-women/microsoft-women-filed-238-discrimination-and-harassment-complaints-court-documents-idUSKCN1GP077>.

206. Interview with study participant 1402-B in Pa. (Summer, 2018).

207. Interview with study participant 0_1101 in Pa. (Summer, 2018).

208. Interview with study participant 1014 in Pa. (Summer, 2018).

209. Interview with study participant 1320 in Pa. (Summer, 2018).

In fact, many residents, even some who support fracking, believe that Pennsylvania's interest in generating revenue from gas extraction creates an incentive for the state to err on the side of gas companies when issues arise.

And you know, DEP is about the business of permitting, making sure the permits go through, and they fill out the forms out right – and I mean, I have to say, I was pretty I about government before I got involved in this. I thought the government would work for us – you know you get involved, you speak up, it'll work for you. And that's not been my experience at all. Especially when there's money to be made at the state level. And so the governors, all the governors I think, were wanting this. They wanted it here, they wanted the economic benefits of it.²¹⁰

A consistent conclusion among fracking opponents is that the government institutions in place to protect the citizens have failed to do so. “No way. Nobody, not the local, clean to the feds. There's no help there at all. None.”²¹¹ “The DEP permits the company down here taking waste in Masontown to completely dump the shit in there -- and issue another permit the next year. How? How? Please tell me. These people aren't here for us. They're not here for us.”²¹² Many residents' dissatisfaction with Pennsylvania state agencies arose as a result of their own experiences, and some are eager to derisively declare that DEP actually stands for “don't expect protection.” But while some residents feel that DEP's perceived shortcomings are the result of a lack of funding or manpower, others believe that they work to ensure that harms caused by the gas industry do not generate publicity: “people who notice that they've got water issues complain to DEP, and DEP, according to [investigative reporters],²¹³ bury those complaints so as to make the whole notion of water issues associated with drilling appear to be much smaller than it really is.”²¹⁴ Regardless of whether such allegations are true, many residents' faith in governmental institutions has eroded as a result of their experiences with fracking.

Even setting aside allegations that DEP is deliberately underreporting water contamination incidents in order to protect an

210. Interview with study participant 1005 in Pa. (Summer, 2018).

211. Interview with study participant 1402-B in Pa. (Summer, 2018).

212. Interview with study participant 1317 in Pa. (Summer, 2018).

213. TRIPLE DIVIDE (Bullfrog Films March 2013).

214. Interview with study participant 1701 in Pa. (Summer, 2018).

industry that is economically valuable to the state,²¹⁵ many residents feel as though the gas industry gets special treatment.

Like it's a fact that the industry in Pennsylvania has been fined over 3,000 times -- fined over 3,000 times -- that's just when they've been caught for infractions. Like, how many times have they got away with it? But back to the 3,000, it's hard to think of many other industries that that would be allowed -- that lawmakers would put up with those kinds of tallies. And yet they do, because the . . . money sustaining, creating that kind of power . . .²¹⁶

The feeling that the state government prioritized the tax revenue generated by fracking over the health of its citizens was common among interviewees.

I. Realities of Litigation

While internal reporting systems do not appeal to many sexual harassment victims for the reasons outlined above, the legal system does not necessarily offer a better option. Pursuing redress via the courts can be an expensive endeavor, and concerns about legal fees keep some victims from considering it as an option.²¹⁷ Furthermore, the prospect of getting into a he-said-she-said conflict might dissuade some attorneys from taking the case.²¹⁸ The same might be said for prosecutors considering criminal charges, as they may be wary of getting into a credibility contest.²¹⁹ Similar concerns about financial repercussions and lawyer availability also discourage some people who have been harmed by fracking activities from engaging with the legal system.

Many people near fracking operations in rural Pennsylvania live at the edge of poverty, and perceptions of legal fees are a powerful disincentive. "They think it will probably cost them more money than they can make because they need an attorney and all that kind of stuff."²²⁰ Hearing residents who have been harmed speak so pessimistically about their prospects of being made whole contrasts sharply with those who suggested that water contamination claims are

215. *See id.*

216. Interview with study participant 1902-A in Pa. (Summer, 2018).

217. Akel, *supra* note 133, at 108.

218. *See Mizrahi, supra* note 6, at 137–38 (noting that because plaintiff attorneys generally work on a contingency-fee basis they must be convinced that the case is a strong one).

219. Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. UNIV. L. REV. 825, 857–58 (2019).

220. Interview with study participant 5_1143 in Pa. (Summer, 2018).

cynical sue-and-settle schemes meant to defraud the gas companies. One landowner, who had actually filed a lawsuit, outlined his understanding of the financial situation:

Okay, so if you do get somebody that works on a contingency basis, it's 40%. Okay, so you take 40%. First of all, medical is out of the question. Trying to prove medical, this is still too new. Ain't happening, ain't happening. My opinion. So you go nuisance, you know what your tax bracket is on nuisance? You pay 35%. So if you sue for \$100,000, you're getting a lawyer 40, and 35 for the feds. You end up with \$25,000, and then in the end they want to sign everything away, all your rights for any kind of medical – it ain't happening. In nuisance, it's small money. It might sound good, say you're getting \$100,000, but you ain't getting 100, you're gonna get 25. So how's it even helping you? And now you gotta sign away that they can rape you again.²²¹

This interviewee still pursued a claim, not because he thought he would be financially better for it, or that his injuries would be compensated. Instead, he hoped to get his “day in court,” and to make what happened to him part of the public record. He was very critical of the use of NDAs to keep gas company reputations clean, and wanted more than anything to bring attention to the widespread harms for which he considered the industry responsible.

The expense of litigation, coupled with pessimism about what could actually be recovered via litigation, may explain, to an extent, why some landowners have been unable to secure representation for nuisance actions. One man who, based on the evidence he produced during the interview, appeared to have an actionable claim, also produced four letters from different attorneys or firms declining to represent him. Although these letters did not specify why they were declining to represent him, the high cost of litigating his case and the low probability of prevailing might have played a role. Other interviewees also claimed that landowners struggled to find attorneys to represent them, speculating that local attorneys are conflicted out due to industry ties. “So a lot of attorneys end up working for oil and gas. So then, if you're trying to say they are doing some wrongdoing to you, there are not many attorneys that have the capacity to take those new cases on, because they are already booked.”²²²

221. Interview with study participant 1402-B in Pa. (Summer, 2018).

222. Interview with study participant 1556 in Pa. (Summer, 2018).

Setting aside any financial concerns, many instances of sexual harassment would be difficult, if not impossible to prove in court.²²³ Many forms or instances of sexual harassment inherently leave little, if any, tangible evidence. Without such evidence, and without a corroborating witness, claimants struggle to prove their claims in court. Awareness of this difficulty dissuades some victims from seeking redress via the court. Similarly, the challenges in proving causation in a water contamination case have not been lost on many residents whose water has gone bad.

“Based on DEP’s way of thinking at the time, there was no -- . . . and the legal way of thinking was since the water hadn’t been tested before, there was no proof it was because of the oil companies. The chemicals obviously didn’t come from anywhere else. These people lived there for a long time and never gotten sick, so it was ridiculous. It was just one of those legal loophole things.”²²⁴ “Well I’ve just seen it in other cases down in Washington County and another case here in Butler County. And, it’s just a very difficult thing to prove. You know, because we’re dealing with scientific and expert analysis, etcetera, etcetera. And I think the deck is stacked against the individual.”²²⁵ None of the residents interviewed for this study were attorneys,²²⁶ and their understandings of causation or burdens of proof were predictably varied. But nearly all were consistent in believing that proving a sufficient connection between contaminated water and a particular fracking well, so as to prevail in litigation, would be unlikely.

III. Possible Solutions In the Fracking Context

Despite the strange parallels that the systematic use of NDAs has helped create between sexual misconduct claims and water contamination claims, addressing each issue requires taking into account the nuances of each context. Scholars had previously analyzed the NDA problem, but the recent surge of attention to their use in sexual misconduct settlements has prompted more scholarship, and thus, more proposed solutions. Drawing on those proposals, this Article focuses on how similar solutions might alleviate some of the negative consequences of systematic use of NDAs in the fracking context.

223. See Mizrahi, *supra* note 6, at 139 (listing variables that may make it difficult to prove harassment in court).

224. Interview with study participant 1014 in Pa. (Summer, 2018).

225. Interview with study participant 1102 in Pa. (Summer, 2018).

226. One interviewee had worked as a paralegal in a Pittsburgh law firm.

A. Legislative Solutions

Because the #MeToo movement gained so much publicity, it galvanized legislators into passing or proposing legislation to minimize the harmful impacts of NDAs, something that has not happened in the fracking context. It makes sense, then, to first examine a sampling of those legislative efforts and analyze their likely effectiveness in each context. At the federal level, the Tax Cuts and Jobs Act of 2017 contains a provision that states: “[n]o deduction shall be allowed under this chapter for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney’s fees related to such a settlement or payment.”²²⁷ Although this new provision does not restrict or render unenforceable nondisclosure provisions in settlements, it does make them more expensive. The effect this provision will have on the number of settlements containing NDAs remains to be seen, but one study estimated that from 2010-2016, employers paid out almost \$700 million via the Equal Employment Opportunity Commission’s administrative enforcement prelitigation process, which would not account for settlements outside of that context.²²⁸

Another piece of federal legislation that has been introduced is the Sunlight in the Workplace Harassment Act (“Sunshine Act”),²²⁹ which would require publicly held companies to disclose the number of settlements and total amount paid to settle sexual misconduct claims.²³⁰ The Sunshine Act, as introduced, does not apply to privately held companies, such as the Weinstein Company, so its effectiveness would be limited.²³¹ But this type of mandatory disclosure legislation would improve, to an extent, the accuracy of statistics related to sexual misconduct in the workplace, and would draw attention to those companies with a particularly high frequency of complaints. However, it might not create enough of an incentive to avoid using NDAs when high-profile executives are involved.

Were the Sunshine Act to be passed, the information generated would still be valuable, and it could ultimately serve as a model for a similar disclosure bill addressing settlements arising from fracking claims. But in order to effectively address the nuances of the fracking

227. 26 U.S.C. § 162(q) (West 2018).

228. Hoffman & Lampmann, *supra* note 19, at 184.

229. Sunlight in Workplace Harassment Act, S. 2454, 115th Cong. (2018).

230. Aronson, *supra* note 21, at 1206–07.

231. *Id.* at 1208.

context, such a bill would need to break down the required disclosures into, for example, categories of alleged injury, such as water contamination, and geographical information, such as the number of claims made per county. Doing so would provide at least some information about those companies that have the worst track records in terms of the number and severity of incidents, which would be useful for landowners who are considering signing leases. At the same time, legislators and government agencies would gain a better understanding of the risks fracking poses to human health and the environment. Although companies sometimes prefer to dispose of claims through settlement, even when they are not at fault, the additional information generated by this kind of disclosure law would be of considerable value.

At the state level, as noted above, several bills have been proposed or passed that directly aim to limit or eliminate the use of NDAs in settlements arising out of sexual misconduct claims.²³² Scholars who have analyzed these bills have mixed opinions when forecasting their ultimate effectiveness. For example, although California's SB820 renders unenforceable those NDAs arising out of claims filed in court or in an administrative proceeding, it does not address pre-filing claims.²³³ Thus, those harassers who move quickly to reach an agreement before a claim is filed can still include an NDA that allows them to keep their conduct from being publicized.²³⁴ A similar bill passed in New York, which effectively prohibits NDAs that victims do not affirmatively agree to after a post-negotiation waiting period.²³⁵ But while the New York rule might mitigate the coercive bargaining tactics that lead many victims to agree reluctantly to NDAs, it does not protect third parties who might be similarly harmed by a harasser whose actions have been concealed.²³⁶

With regard to NDAs in the fracking context, some states currently have laws that render unenforceable any contract provision that conceals a public hazard or environmental hazard.²³⁷ Laws such as these would seem to offer a simple solution to the problem, provided they are carefully drafted to encompass settlements that implicate the

232. Tippet, *supra* note 3, at 255.

233. *Id.* at 267–68.

234. *Id.*

235. Hoffman & Lampmann, *supra* note 19, at 168.

236. *See id.* (giving the procedural details of the New York Rule).

237. *E.g.*, FLA. STAT. ANN. § 69.081(4) (LexisNexis 2020); ARK. CODE ANN. § 16-55-122(a) (LexisNexis 2020).

kinds of issues landowners have had with fracking operations. However, given the economic benefits fracking can bring to a state, it might prove politically infeasible to pass such legislation in fracking-heavy states. It seems unlikely, for example, that the Republican-controlled Pennsylvania legislature would pass a bill specifically tailored to keeping gas companies from being able to enforce NDAs.

Another concern with broadly rendering NDAs unenforceable by statute is that it may serve as a disincentive to settlement for the party most financially able to sustain prolonged litigation. Along similar lines, many defendants consider the privacy benefits of an NDA to be worth paying additional compensation to plaintiffs. Therefore, knowing that an NDA would be unenforceable will take away that privacy incentive, and lead to lower settlements for plaintiffs. In that sense, a solution that benefits third parties and society at large would lead to injured parties being compensated less. However, given the asymmetric bargaining power, as well as the value some claimants put on being able to discuss their experiences, it is not clear how much this balance would shift were NDAs not available as points of negotiation.

B. Judicial Solutions

Even without such legislation, courts could simply apply the Restatement balancing test, and find NDA provisions to be void as against public policy.²³⁸ The arguments for doing so, as discussed above, are compelling in each context.²³⁹ This approach allows the parties to contract as they wish, while still maintaining privacy and confidentiality if it is in their interests to do so. If, however, claimants subsequently decide to speak about their experiences, they will not be penalized for it. One advantage of this approach is that instead of requiring political action, courts would simply address these cases as they come.

But relying on courts to find NDAs unenforceable creates unpredictability for both parties. Defendants willing to pay extra for a promise of silence would not have sufficient assurances that this promise will be kept. On the other hand, claimants choosing to speak up in spite of an NDA would have to trust that a court reviewing the issue, and analyzing the public policy exception, would find in their favor. Furthermore, as is the case with the legislative approach, defendants who harbor doubts that an NDA will be enforced, might be

238. *See supra* Part II.D.3, II.D.4.

239. *See id.*

less inclined to settle in the first place. Furthermore, if claimants elect to honor the NDA, and remain silent about their experiences, third parties lose the benefit of information that might protect them from similar harm. Thus, claimants gain the right to express themselves if they so choose, but this solution does not necessarily address the third-party externality issue.²⁴⁰

C. Partial Disclosure Requirement

Instead of rendering NDAs unenforceable legislatively or judicially, states could condition their enforceability on the submission of reports detailing the underlying claims. These reports would contain details regarding the nature of the claim, as well as an approximate location, but would omit additional identifying details. Upon submission, a state department of environmental protection²⁴¹ would both publish the details of these reports on their website, and aggregate data from all such reports to be published in a user-friendly manner. Creation of this kind of database would respect parties' contractual expectations and preserve privacy, yet would not enable suppression of information regarding public health and environmental risks. Therefore, the goal of the public policy exception to contract enforcement – protecting the public from risk of harm – would be met without reducing the parties' incentive to settle or diminishing their privacy expectations.

D. Combining the Solutions

Given the myriad, and often conflicting, interests involved, the ideal path forward would be to adopt a combination of the solutions that have been presented above. This Article proposes adopting comprehensive federal and state sunshine laws for the fracking context, along with the establishment of incident information databases. This combination maximizes the information available to third parties, which addresses the most problematic repercussions of NDAs, while minimizing burdens on privacy and the freedom to contract.

Sunshine laws that require companies to report the number of claims and the amount of money paid to settle fracking-related claims, provided they were subject to an NDA, would serve the same purposes as other information disclosure laws. They would allow the public and

240. See Hoffman & Lampmann, *supra* note 19, at 200–202.

241. To combat concerns raised about agency capture, particularly when state tax revenue benefits from fracking activity, it may be necessary to appoint an ombudsman to monitor fracking-related matters.

market forces to exert pressure on companies, they would provide information to legislatures about the extent of these issues, and they would alert investigative authorities of those entities with particularly poor performance. Likewise, maintaining a database that details the nature of underlying claims would have similar effects, while also providing the kind of risk information that members of the general public would find most useful. Setting aside the political challenges involved in passing this kind of legislation, the fracking context has a particular need for increased information availability.

CONCLUSION

That such wildly dissimilar situations as sexual misconduct and fracking nevertheless have so much in common highlights the fundamental problem with using the freedom to contract to hide public hazards. But this Article does mean to suggest that all NDAs should be rendered unenforceable. The use of NDAs to protect intellectual property or trade secrets, for example, can be a perfectly valid exercise of the freedom to contract.²⁴² The concerns and remedies addressed here apply only to situations in which third parties might be harmed as a result of an NDA concealing information that implicates a public safety risk. For those arising out of medical malpractice, products liability, or other contexts where the potential for concealment of public safety risks is higher, it may also be possible to condition their enforceability on the establishment of information-forcing mechanisms like the one proposed above for fracking.

How such a mechanism would be tailored to fit those contexts is beyond the scope of this Article, but extending the notion of conditioning enforceability in this manner may be worth considering. By keeping in mind those who are not party to the contract, yet may be hurt by its enforcement, courts and policymakers can balance the freedom to contract with the importance of making available information relevant to public health and safety.

242. However, many residents felt strongly that fracking operators who avail themselves of trade secret protections to protect the precise composition of fracking fluids are doing so in a bad faith attempt to conceal the hazardous nature of these fluids.