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HOW REPUTATIONAL NONDISCLOSURE AGREEMENTS FAIL (OR, IN PRAISE OF BREACH)

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Investigative reporters and the #MeToo movement exposed the widespread use of non-disclosure agreements intended to maintain confidentiality about one or both contracting parties' embarrassing acts. These reputational NDAs (RNDAs) have been widely condemned and addressed in the past half-decade by legislators, activists, and academics. Their exposure, often via victims' breaches, revealed a curious and distinct dilemma for the non-breaching party whose reputation is vulnerable to disclosure. In most contracts, non-breaching parties might choose to forgo enforcement because of the cost and uncertain success of litigation and the availability of other pathways to a satisfactory resolution. Parties to a RNDA, by contrast, often decide to forgo enforcement when doing so would increase the very harm the contract sought to limit, and when victory would bring limited relief. It is unsurprising, then, that RNDAs are often underenforced, or enforced sporadically and with limited success. In such instances, the RNDAs have failed to meet their goals while they worsened the reputational harm of the embarrassing acts themselves.

This Article describes RNDAs' instances of failure and considers the consequences of these failures for parties to the contracts, the legal profession, and those who are troubled by their extensive use. It also considers the reasons behind those failures and their significance for understanding secrecy, disclosure, and contract law: secrecy is always vulnerable to defection; information's intangibility allows it to move freely, costlessly, and immediately; RNDAs purport to resolve a dispute fraught with hurt, emotion, and trauma through a one-shot financial transaction; and reputation is ethereal,

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susceptible to the vicissitudes of public opinion, and shaped by fact and rumor alike. RNDAs' vulnerability to breach constitutes an alternative means to hold their abusive use in check beyond the well-worn paths of traditional legal reforms established through legislation and common law reform. Breach appears to be the best means not only to help victims but to discourage the use of RNDAs to silence victims, as well as to force attorneys and their clients to reconsider how they use contract law to protect secrets.

There is no telling how many other claims Trump has settled with six-figure payments papered over with nondisclosure agreements.[1]

1. JAMES D. ZIRIN, PLAINTIFF IN CHIEF: A PORTRAIT OF DONALD TRUMP IN 3500 LAWSUITS 158 (2019).

I. INTRODUCTION

Non-disclosure agreements (NDAs) promise to control the flow of specified information. They commit one or both parties to silence about certain facts in exchange for various types of consideration: employment,[2] ongoing mutually beneficial activity under a commercial contract,[3] money,[4] and the like. The information that NDAs cover varies considerably in type and significance, from classified national security information[5] to commercial trade secrets and information with value to competitors,[6] extending in some cases to facts that would damage one or both parties' reputations.[7] They constitute a legal tool of contract law, binding the parties to promises that create duties of performance designed to protect the deepest, most important government secrets as well as the narrowest but most meaningful personal confidences.

Contracts of all sorts are breached, and NDAs are no different. But the breach of NDAs intended or used primarily to protect one or both parties' reputation (reputational NDAs or RNDAs) poses a distinct dilemma for the non-breaching party whose reputation is vulnerable to disclosure.[8] In most

2. *See* RESTATEMENT OF EMPLOYMENT LAW § 8.07 cmt. b (AM. L. INST. 2015) (noting employers' legitimate interest in protecting their valuable confidential information via non-disclosure agreements with employees that allow an employer to seek damages or injunctive relief in the case of an employee's breach).

3. *See* ALAN S. GUTTERMAN, BUSINESS TRANSACTIONS SOLUTIONS § 200:1, Westlaw (database updated Dec. 2023) (describing NDAs as "essential to a company's efforts to preserve its rights in trade secrets and other confidential information that must be disclosed in its relationships with consultants, vendors, customers, licensees, and other strategic partners").

4. *See, e.g.*, Jordan v. Knafel, 823 N.E.2d 1113, 1120 (Ill. App. Ct. 2005) (holding that a good-faith agreement to make a lump-sum payment in exchange for a promise to remain silent about a paternity claim is enforceable).

5. *See generally* Oona Hathaway, *Secrecy's End*, 106 MINN. L. REV. 691, 741–44 (2021) (discussing CIA's pre-publication review requirement under its employment agreements); *see also, e.g.*, Snepp v. United States, 444 U.S. 507, 507–08 (1980) (upholding pre-publication review under First Amendment).

6. *See* Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 282 (1998); Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 318 (2008).

7. *See infra* Part II (defining reputational NDAs).

8. Reputation is "[t]he condition, quality, or fact of being highly regarded or esteemed; credit, fame, distinction; respectability, good report." *Reputation*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/163228 [https://perma.cc/P3SC-3HR9] (Dec. 2023). As a concept and in practice, reputation proves subjective, contextual, and constantly subject to change. *See* Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1342 (2011) ("[R]eputation is a social creation dependent on intergroup communication."). In this Article, I

contracts, non-breaching parties might choose to forgo enforcement for a variety of reasons: perhaps they can more easily mitigate damages by seeking performance from someone else; the expected costs of enforcement might outweigh their expected benefits; any remedies they gain would take too long to receive; or the non-breaching party might have a means besides enforcement to receive compensation from the breaching party.[9] Parties to a RNDA, by contrast, often decide to forgo enforcement when doing so would increase the very harm the contract sought to limit without any certainty about the remedy they would receive. If the party enforces the contract, whether by seeking to enjoin further disclosure or demanding damages, they risk bringing more attention to the information they had initially hoped to keep confidential. Victory, should it come, would bring limited and uncertain relief. It is unsurprising, then, that RNDAs are often underenforced, or enforced sporadically and with limited success.

The plight of former Fox News host Bill O'Reilly is illustrative. In 2004, O'Reilly and his then-employer settled sexual harassment claims brought by Andrea Mackris, a producer at the network, whose original complaint, filed in state court, had received significant press coverage.[10] The settlement, which included a seven-figure payment to Mackris, sought to keep the allegations and the agreement itself confidential.[11] In 2017, however, Mackris's claims and

presume that if one or both parties formalize a legally enforceable agreement for valuable consideration to protect their reputation, their behavior and acts constitute a meaningful understanding of "reputation," whether they understand its meaning in financial, familial, or personal terms. I identify below those contracts that fall within the RNDA category and my exclusion from that universe of similar agreements intended to protect valuable commercial information as trade secrets. *See infra* text accompanying notes 23–34.

9. When faced with breach, parties tend to seek recourse, if at all, outside of legal enforcement: first, because contract law's remedies are difficult to prove and tend to undercompensate the non-breaching party, see Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 469–70, 475; and second, because litigation costs tend to outweigh whatever benefit these remedies tend to bring, see Stewart Macaulay, *Freedom from Contract: Solutions in Search of a Problem?*, 2004 WIS. L. REV. 777, 780–81.

10. *See* Bill Carter, *Accused of Harassment, Fox Star Sues and Is Sued*, N.Y. TIMES (Oct. 14, 2004), https://www.nytimes.com/2004/10/14/business/media/accused-of-harassment-fox-star-sues-and-is-sued.html [https://perma.cc/DKJ4-QM3L]; *O'Reilly Hit with Sex Suit*, SMOKING GUN (Oct. 13, 2004), http://www.thesmokinggun.com/file/oreilly-hit-sex-harass-suit [https://perma.cc/BZH7-LAPM].

11. *See* Plaintiffs' Memorandum of Law in Opposition re: First Motion to Dismiss pursuant to FRCP 12(b)(6), Exhibit B: Confidential Settlement Agreement at 6, Bernstein v. O'Reilly, No. 1:17-cv-09483 (S.D.N.Y. Apr. 4, 2018) (Doc. No. 58-3), https://static01.nyt.com/files/2018/business/58-3.pdf [https://perma.cc/6UGX-ZXMB] [hereinafter O'Reilly-Mackris NDA] (referring to "[s]trict and complete confidentiality" as the "essence of this agreement").

their settlement resurfaced following the disclosure of Fox News CEO Roger Ailes's pattern of sexual abuse and harassment.[12] Relying in part on information gleaned from Mackris and other victims in breach of their confidentiality agreements, the *New York Times* chronicled O'Reilly's pattern of settling sexual harassment lawsuits with RNDAs.[13] The resulting publicity prompted Fox to fire him.[14] O'Reilly lost his employment and standing due to the public disclosure of both his behavior and his and his employer's contracts to keep that behavior secret.

O'Reilly's struggle to control information did not end there, however. In 2021, more than fifteen years after he and Mackris signed their agreement, four years after the rush of publicity surrounding exposure of the agreement's existence, three years after the agreement was unsealed during related litigation between O'Reilly and Mackris (along with two other women whose settlements with O'Reilly included RNDAs),[15] and a week after Mackris brazenly breached the RNDA in an extensive interview with *The Daily Beast*,[16] O'Reilly persuaded a New York state court to enforce the RNDA and enjoin Mackris from appearing on the popular daytime television talk-show, *The View*, to discuss her experiences with him.[17] Although O'Reilly had successfully enforced the RNDA, he could not undo the damage that the contract was intended to protect against by his relegation from his vaunted Fox News perch

12. Emily Steel & Michael S. Schmidt, *Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES (Apr. 1, 2017), https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html [https://perma.cc/4N9Q-XYVV].

13. *Id.*

14. Emily Steel & Michael S. Schmidt, *Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract*, N.Y. TIMES (Oct. 21, 2017), https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html [https://perma.cc/UE74-EGLS].

15. *See generally* Bernsten v. O'Reilly, 307 F. Supp. 3d 161 (S.D.N.Y. 2018) (finding that O'Reilly failed to meet presumptions against sealing or partially redacting documents in ongoing litigation); Tom Kludt, *Terms of Bill O'Reilly Settlements Revealed for First Time*, CNN BUS. (Apr. 4, 2018, 7:55 PM), https://money.cnn.com/2018/04/04/media/bill-oreilly-defamation-suit-denied-settlement-under-seal/index.html [https://perma.cc/7B8Z-LW6P].

16. Diana Falzone & Lloyd Grove, *Bill O'Reilly's Accuser Finally Breaks Her Silence*, DAILY BEAST (July 13, 2021, 10:58 PM), https://www.thedailybeast.com/bill-oreilly-accuser-andrea-mackris-finally-breaks-her-silence [https://perma.cc/H6ZR-2JZR].

17. Diana Falzone, *O'Reilly Silences Accuser Again, Blocks 'View' Appearance*, DAILY BEAST (July 21, 2021, 4:55 PM), https://www.thedailybeast.com/bill-oreilly-gets-restraining-order-against-andrea-mackris-appearance-on-the-view [https://perma.cc/64P7-R4Z5].

to lesser outlets.[18] After initially succeeding in suppressing information about his actions by contract, O'Reilly's RNDAs had failed not only to keep his behavior secret but also his failed efforts in keeping his behavior secret, both of which became widely known in media accounts.

O'Reilly's experience is characteristic of what this Article will identify as the specific dynamics of breached RNDAs. His long-term contract temporarily succeeded in suppressing information about his actions; news of the contract's existence reached third-parties who sought to publicize both the secrets the contract kept and the contract itself; the contract served as a clue to the non-parties and disclosure of its existence suggested a behavioral pattern rather than an isolated instance; after the breach, he did not immediately seek enforcement, while his later effort to do so compounded the reputational harm the contract was intended to protect; and the RNDA harmed not only his reputation but that of the company which employed him. In sum, RNDAs might succeed in keeping information secret, but when they fail, they do so spectacularly. Former President Donald Trump, whose promiscuous use of confidentiality agreements I discuss in detail below, constitutes the exception that proves the rule. As the chronicler of Donald Trump's litigation history noted in this Article's epigraph, there may be "no telling" how many non-disclosure agreements of all sorts keep secret his actions and settlement agreements (the reasons for which the parties agreed not to tell).[19] But such agreements are susceptible to breach, and their failure can lead the public to draw several inferences about the public figures and institutions that use RNDAs to protect their reputations against embarrassing disclosures.[20] The fact that such inferences may not have harmed former President Trump's reputation (and, perversely, may have even burnished it) is further evidence of his uniqueness in U.S. culture and politics.[21]

This Article describes RNDAs' instances of failure and considers the consequences of these failures for the legal profession, clients, and those who

18. As of early 2023, O'Reilly's only television venue appears to be via subscription, but he syndicates audio commentaries to talk radio and continues to publish best-selling, coauthored popular history books. *See Folks Keep Asking Where to Find Me. Here's the Rundown*, BILLOREILLY.COM, https://www.billoreilly.com/findbill [https://perma.cc/43CB-K724].

19. *See supra* note 1 and accompanying text.

20. Trump is exemplary in this regard. *See* Roger Sollenberger & Asawin Suebsaeng, *Trump's Sprawling Use of NDAs Now Threatens to Humiliate Him*, DAILY BEAST (Oct. 4, 2021, 9:16 AM), https://www.thedailybeast.com/donald-trumps-sprawling-use-of-ndas-now-threatens-to-humiliate-him-non-disclosure-agreement-omarosa [https://perma.cc/Q7HF-A2VR].

21. *See* CARLOS LOZADA, WHAT WERE WE THINKING: A BRIEF INTELLECTUAL HISTORY OF THE TRUMP ERA 148–49 (2020).

are troubled by their extensive use. It also inquires into the reasons behind the failures and their significance for understanding secrecy, disclosure, and contract law. Although primarily descriptive, the Article's goal is to spotlight RNDAs' vulnerability to breach as an alternative means to hold their abusive use in check beyond the well-worn paths of traditional legal reforms established through legislation and common law reform.[22] Breach may be difficult and courageous, I argue, but encouraging and assisting victims to break their agreements has proven to be the best means not only to help them but to discourage the use of RNDAs to silence victims and to force attorneys and their clients to rethink how they use contract law to protect secrets.

This Article begins in Part II by briefly defining and describing reputational NDAs and then by identifying the justification for their development and use as well as the specific harms that abusive ones can create. Part III summarizes recent and proposed reforms that attempt to prescribe how courts, legislatures, and the legal profession might best correct or limit those harms. Though persuasive and in some instances already adopted, these reforms are likely to provide marginal and uneven improvements, may extend too far and limit the parties' autonomy to form a mutually beneficial contract, and may not benefit those with insufficient resources to hire legal counsel to protect themselves. Part IV details and analyzes how breach has both revealed the abusive use of RNDAs and made RNDAs less attractive by undermining the contract's enforceability, stigmatizing their use, and damaging the reputation of those individuals and organizations that use them. Part V explains how and why breach works in individual cases and can check abusive RNDAs. In the process, it identifies what breach can teach us about contract law, information, and

22. The legal academic literature on RNDAs, which criticizes the abusive use of the contract form and proposes traditional legal reforms, has understandably proliferated in the past five years. *See* Scott Altman, *Selling Silence: The Morality of Sexual Harassment NDAs*, 39 J. APP. PHIL. 698, 711 (2022); Rachel Arnow-Richman, Gretchen Carlson, Orly Lobel, Julie Roginsky, Jodi Short & Evan Starr, *Supporting Market Accountability, Workplace Equity, and Fair Competition by Reining in Non-Disclosure Agreements*, FED'N OF AM. SCIENTISTS: DAY ONE PROJECT (Jan. 31, 2022), https://fas.org/publication/supporting-market-accountability-workplace-equity-and-fair-competition-by-reining-in-non-disclosure-agreements/ [https://perma.cc/78GY-BGEV]; Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 87 (2018); Gilat Juli Bachar, *The Psychology of Secret Settl*ements, 73 HASTINGS L.J. 1, 1 (2022); David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 170 (2019); Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases,* 103 CORNELL L. REV. 311, 317 (2018); Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change [https://perma.cc/5N74-HDAT]; Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 57 MINN. L. REV. 229, 235–36 (2018).

reputation. Ultimately, the Article maintains, breach offers an important means to contain the misuse of RNDAs and as such is worthy of further study and cautious praise.

II. REPUTATIONAL NDAS

NDAs have become a staple of contracting in the U.S.,[23] especially in employment contracts[24] and particularly in technology-related industries.[25] This Article focuses on a subset of NDAs and non-disparagement agreements (which I refer to collectively as RNDAs) whose main purpose, whether at the time of drafting or enforcement, is to protect the reputation of one or both parties. According to a study of newspaper databases, the use of NDAs to limit reputational harm expanded in the 1980s to cover employees who might report corporate misconduct to outsiders and has since expanded further to cover personal reputation,[26] perhaps in part because networked digital

23. *See, e.g.*, Gerald Sauer, *The Nondisclosure Agreement: Time to Revamp?*, BLOOMBERG LAW (Nov. 19, 2020, 4:00 AM), https://news.bloomberglaw.com/us-law-week/the-nondisclosure-agreement-time-to-revamp [https://perma.cc/YR49-QWPP] ("The nondisclosure agreement is as American as apple pie. Lawyers can recite Nondisclosure Agreement (NDA) terms in their sleep, and nobody would, until recently, have done anything of substance without one.").

24. Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 48 (2015); Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 156–57 (1998).

25. *See* Cat Zakrzewski, *As California Moves to Protect Workers Calling Out Discrimination, Advocates Look to Take Their Movement Global*, WASH. POST (Sept. 9, 2021, 11:53 AM), https://www.washingtonpost.com/technology/2021/09/09/silenced-no-more-act-goes-global/ [https://perma.cc/4HLH-M4RF].

26. *See* Michelle Dean, *Contracts of Silence*, COLUM. JOURNALISM REV. (Winter 2018), https://www.cjr.org/special_report/nda-agreement.php [https://perma.cc/U5LH-4RVT]; *see also* Orly Lobel, *Trump's Extreme NDAs*, THE ATL. (Mar. 4, 2019), https://www.theatlantic.com/ideas/archive/2019/03/trumps-use-ndas-unprecedented/583984/ [https://perma.cc/A6YA-X6RX] ("Since the 1980s, NDAs have expanded beyond the[] legitimate goal [of protecting trade secrets]."). These sources are conjectural rather than historical, and careful research on the development of NDAs is non-existent, made more difficult—outside the context of boilerplate employment contracts—by the relatively bespoke nature of settlement agreements. *See* Brendon Ishikawa, *Preparing for a Successful Settlement Agreement*, AM. BAR ASS'N (Mar. 13, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2018/03/settlement/ [https://perma.cc/QJ7U-QQ4S] (advising attorneys to engage in thorough preparation to handle the "many issues" involved in mediation and settlement agreement negotiations, including a confidentiality clause). The RNDAs collected and described in this Article, for example, vary widely in their structure and language. *See* discussion *infra* Section II.A. For a model attempting to explain the context-specific ways that contract types and terms develop, diffuse, and evolve over time, which

communication, with its capacity to move vast amounts of information quickly and at reduced cost, has expanded reputation's importance while lessening the privacy that individuals formerly used to protect theirs.[27] RNDAs can be included as part of separation agreements ending employment relationships,[28] settlement agreements ending existing or threatened litigation,[29] agreements executed at the start of employment,[30] or stand-alone agreements that are signed

includes an account of how M&A agreements reacted to the Harvey Weinstein scandal and #MeToo, see Matthew Jennejohn, Julian Nyarko & Eric L. Talley, *Contractual Evolution*, 89 U. CHI. L. REV. 901, 950–54 (2022); Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277, 1279–80 (2019) (describing how contractual terms and types "creep" from sophisticated, bespoke forms devised for sophisticated parties to boilerplate and back again); John F. Coyle & Joseph M. Green, *Contractual Innovation in Venture Capital*, 66 HASTINGS L.J. 133 (2014) (using interviews of attorneys to study innovation in contracts used by venture capital firms). I hope to research the evolution of this contract form in a future project.

27. *See* Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1670–71 (2008) (describing the emergence of a "reputation revolution" affecting everyone from large corporations to small commercial vendors and private individuals).

28. *See, e.g.*, *Sexual Harassment in the Workplace Inquiry: Supplementary Written Evidence from Zelda Perkins (SHW0058)*, UK PARLIAMENT: WOMEN & EQUALITIES COMM. (2018), https://www.parliament.uk/globalassets/documents/commons-committees/women-and-equalities/Correspondence/Zelda-Perkins-SHW0058.pdf [https://perma.cc/M3K7-JE9D] [hereinafter Weinstein-Perkins NDA] (excerpt of Miramax Company and Zelda Perkins's separation agreement). For background on the agreement, see Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES (Oct. 23, 2017), https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589 [https://perma.cc/PS5U-MB9F].

29. *See, e.g.*, O'Reilly-Mackris NDA, *supra* note 11, at 5–6 (settling litigation between Fox News host Bill O'Reilly and two sexual harassment claimants); *Read: Two Settlements That Harvey Weinstein Reached with His Accusers*, NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/sections/news/read-the-settlements-that-harvey-weinstein-used-to-silence-accusers [https://perma.cc/MGB7-ZZ9J] (including Rose McGowan's release of claims agreement). The practice is common in the resolution of harassment suits. *See, e.g.*, Stephen Rodrick, *Accusers Speak Out: "How Many Women Were Abused to Make That Tesla?"*, ROLLING STONE (Sept. 19, 2022, 8:00 PM), https://www.rollingstone.com/culture/culture-features/tesla-sexual-harassment-lawsuit-investigation-elon-musk-1234590697/ [https://perma.cc/XS36-J2NT] (reporting on litigation by victims of alleged pervasive sexual harassment at Tesla and noting that "a common tactic in these types of cases is [for the employer] to delay until the complainant goes away, or [the plaintiff] accepts a settlement and signs an NDA").

30. *See* Matt Drange, *"A Gag Order for Life": How Tech Giants Use Secretive Legal Contracts for Their Employees to Create a Culture of Silence in Silicon Valley*, BUS. INSIDER (July 27, 2021, 4:00 AM), https://www.businessinsider.com/silicon-valley-tech-workers-nda-culture-silence-2021-7 [https://perma.cc/DS42-5UAL].

typically after,[31] but sometimes before,[32] the acts that are to remain confidential. Such contracts differ, at least in intent, from agreements that guard more narrowly against the illegal or tortious appropriation of valuable trade secrets or intellectual property.[33] But given the breadth of language and scope in many contemporary employment agreements, NDAs initially intended to protect a firm's valuable commercial information from disclosure that may later be enforced to protect its reputation.[34]

A. Typical RNDA Terms

Though they may differ in form and structure, most RNDAs share certain standard terms.[35] Whether part of an employment or settlement agreement or as

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31. *See, e.g.*, Complaint for Declaratory Relief, Exhibit 1: Confidential Settlement Agreement and Mutual Release; Assignment of Copyright and Non-Disparagement Agreement, Clifford v. Trump, No. BC696568 (Cal. Super. Ct. Mar. 6, 2018), https://www.wsj.com/public/resources/documents/stormysuit.pdf [https://perma.cc/NHC2-8XRM] [hereinafter Trump-Clifford NDA] (nondisclosure agreement between Donald Trump and Stephanie Clifford [a/k/a Stormy Daniels]).

32. *See, e.g.*, Hallie Lieberman, *Want To Have Sex With A Celeb? Sign An NDA*, BUZZFEED NEWS (June 7, 2021, 11:34 AM), https://www.buzzfeednews.com/article/hallielieberman/celebrity-gossip-sex-scandal-ndas [https://perma.cc/BM8E-WF4D]. The Kardashian-Jenner family reportedly requires "ironclad" RNDAs of those who become their "friends" to protect against the future disclosure of embarrassing information. *See* Callie Ahlgrim, *Jordyn Woods Reportedly Signed an 'Ironclad' Non-Disclosure Agreement with the Kardashians that Would Bar Her from Discussing the Tristan Thompson Scandal in Depth*, INSIDER (Feb. 27, 2019, 12:30 PM), https://www.insider.com/jordyn-woods-reported-nda-with-kardashians-red-table-talk-2019-2 [https://perma.cc/4TB9-9GNM]. Elon Musk has required those who attend social events he organizes to sign NDAs. *See* Joseph Bernstein, *Elon Musk Has the World's Strangest Social Calendar*, N.Y. TIMES (Oct. 11, 2022), https://www.nytimes.com/2022/10/11/style/elon-musk-social-calendar.html. And at least as of 2015, Charlie Sheen required NDAs of anyone who wanted the "opportunity to spend time and associate with [him]." *See* Carly Sitzer, *See the Non-Disclosure Agreement Charlie Sheen Had Women Sign Before Sex*, INTOUCH (Nov. 17, 2015, 5:38 PM) [hereinafter Sheen NDA], https://www.intouchweekly.com/posts/charlie-sheen-non-disclosure-documents-77821/ [https://perma.cc/UJ9U-F2K3].

33. *See* Arnow-Richman, Carlson, Lobel, Roginsky, Short & Starr, *supra* note 22 (distinguishing between appropriate uses of NDAs and those that are over-broad in substantive scope and length).

34. *See generally* Jason Sockin, Aaron Sojourner & Evan Starr, *Non-Disclosure Agreements and Externalities from Silence* (Upjohn Inst., Working Paper 22-360, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3900285 [https://perma.cc/J476-2UT8] (revealing how employers use broad NDAs to preserve their reputations by silencing workers).

35. The discussion below relies on the following NDAs that are publicly available: *Bloomberg 2020 Campaign Non-Disclosure Agreement (NDA)*, SCRIBD [hereinafter Bloomberg 2020 Campaign NDA], https://www.scribd.com/document/447840375/Bloomberg-2020-campaign-non-disclosure-

a stand-alone contract, a typical RNDA defines the type of information the parties agree to keep confidential[36] and requires the surrender of enumerated types of documents and digital files relating to the incident or incidents that prompted the agreement.[37] The contracts have no fixed terms and appear either explicitly or implicitly to extend their promises of confidentiality indefinitely.[38] Some RNDAs also include what I will call a "meta-confidentiality clause" that prohibits discussion not only of the content about which the contract is primarily concerned but also about the formal agreement to keep that content confidential.[39] It can also include a broad non-disparagement clause that prohibits any statement critical of the other party.[40]

An RNDA typically details the consequences of breach. It may stipulate to the availability of an injunction to prevent any disclosures or further disclosure by a party.[41] It can also provide in advance for an agreed amount of damages,

agreement-NDA [https://perma.cc/83QS-DUCX]; Mike Isabella Concepts NDA (on file with author) [hereinafter Isabella NDA]; Defendant's Memorandum in Opposition to Plaintiff's Motion to use Prior Depositions, Exhibit A: Stipulated Judgment of Dissolution of Marriage ¶ 20, at 52, Depp v. Heard, No. CL-2019-0002911 (Va. Cir. Ct. Dec. 6, 2019) [hereinafter Heard-Depp Divorce Confidentiality Clause], https://www.fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdf/high-profile/depp%20v%20heard/cl-2019-2911-def-memo-in-opp-to-plaintiffs-mot-to-use-prior-depositions-12-6-2019.pdf [https://perma.cc/4A4J-DT3H]; Bill O'Reilly-Rebecca Diamond Confidential Settlement and Mutual Release Agreement (Aug. 10, 2011) (on file with author) [hereinafter O'Reilly-Diamond NDA]; O'Reilly-Mackris NDA, *supra* note 11; *Trump Organization Standard Non-Disclosure Agreement*, SANTA CLARA L. DIGIT. COMMONS (Jan. 2018) [hereinafter Trump Organization NDA], https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2685&context=historical [https://perma.cc/D6NA-WKZY]; Trump-Clifford NDA, *supra* note 31; Sheen NDA, *supra* note 32 (including non-disclosure agreement used by Charlie Sheen and his sexual partners).

36. *See, e.g.*, Trump Organization NDA, *supra* note 35, at 3; Heard-Depp Divorce Confidentiality Clause, *supra* note 35, at 52.

37. *See, e.g.*, Trump-Clifford NDA, *supra* note 31, at 14–15; O'Reilly-Mackris NDA, *supra* note 11, at 3–5.

38. *See, e.g.*, Trump Organization NDA, *supra* note 35, at 1; O'Reilly-Diamond NDA, *supra* note 35.

39. *See, e.g.*, O'Reilly-Mackris NDA, *supra* note 11, at 6; Trump-Clifford NDA, *supra* note 31, at 18.

40. *See, e.g.*, Trump Organization NDA, *supra* note 35, at 2; O'Reilly-Mackris NDA, *supra* note 11, at 7 ("No party will disparage, denigrate or defame any other party and/or persons related to the other parties, or any of their business products or services."); Trump-Clifford NDA, *supra* note 31, at 18.

41. *See, e.g.*, Isabella NDA, *supra* note 35, at 1; Trump Organization NDA, *supra* note 35, at 3–4.

whether in total or for each individual breach,[42] and can allow the award of attorney fees and costs to the non-breaching party incurred from enforcement of the contract.[43] And the RNDA can offer the non-breaching party the right to demand arbitration rather than judicial resolution of a future dispute.[44] Although now prohibited in certain circumstances by federal and state laws, inclusion of a mandatory arbitration clause would help prevent exposure of the contracted secrets, the dispute, the outcome, and any documents filed with the arbitrator.[45]

B. Evaluating RNDAs

Some RNDAs are uncontroversial and create no legal or ethical issues that should concern outsiders to the agreement. Parties with roughly equal financial and social endowments and competent legal representation may agree to make reciprocal promises of confidentiality that both parties covet. The resulting contracts can cover embarrassing information about behaviors that are neither illegal nor otherwise require reporting and that harm no one else.

RNDAs can also benefit the victims of wrongdoing, as attorneys who negotiate them emphasize,[46] especially when criminal or civil liability may be difficult or painful to prove.[47] If the parties agree to settle an existing or potential dispute over wrongdoing, an RNDA allows a victim to be compensated for their suffering with an additional financial payment that

42. *See, e.g.*, Trump-Clifford NDA, *supra* note 31, at 19–20; Isabella NDA, *supra* note 35, at 1; Sheen NDA, *supra* note 35, § 3.1.

43. *See, e.g.*, Heard-Depp Divorce Confidentiality Clause, *supra* note 35, at 52; Trump Organization NDA, *supra* note 35, at 4.

44. *See, e.g.*, Trump Organization NDA, *supra* note 35, at 4; O'Reilly-Mackris NDA, *supra* note 11, at 9; Sheen NDA, *supra* note 35, § 4.

45. *See* Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. F. 121, 134–35 (June 18, 2018), https://www.yalelawjournal.org/forum/sexual-harassment-law-after-metoo [https://perma.cc/BVM6-PRR4].

46. *See, e.g.*, Gloria Allred, *Assault Victims Have Every Right to Keep Their Trauma and Their Settlements Private*, L.A. TIMES (Sept. 24, 2019, 3:00 AM), https://www.latimes.com/opinion/story/2019-09-23/metoo-sexual-abuse-victims-confidential-settlements-lawsuits [https://perma.cc/9S5C-EXR3]; Emily Haigh & David Wirtz, *#MeToo: In Defense of Nondisclosure Agreements*, LITTLER MENDELSON P.C. (Feb. 26, 2020), https://www.littler.com/publication-press/publication/metoo-defense-nondisclosure-agreements [https://perma.cc/B6F2-55DG].

47. *See generally* Bachar, *supra* note 22, at 10–15.

reflects the value to the wrongdoer of keeping the matter private.[48] Financial compensation can also impose disincentives against further wrongdoing by the alleged perpetrator, potentially protecting future victims from similar misconduct.[49] The privacy that the agreement promises can provide relief for both parties, as the victim might also prefer the matter remain confidential.[50] The agreement process itself thereby could constitute a meaningful and effective dispute resolution mechanism as well as a form of corrective justice that furthers democratic values of "consent, participation, empowerment, dignity, respect, [and] empathy."[51]

But a change to one or more of the facts presumed about RNDAs' benefits can cause the contract to be, or at least appear to be, more legally or at least ethically suspect. For example, the behavior that the RNDA is intended to keep secret could create civil or criminal liability for one party, or even both, rendering the contract's enforceability more doubtful and the victim more likely to harbor ill-will towards a perpetrator and regret about the agreement to keep the matter secret.[52] A wealthier or more powerful party might take advantage

48. *See* Ayres, *supra* note 22, at 77; Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 878–80 (2007). *But see* Altman, *supra* note 22, at 705–06 (casting doubt on the premium that NDAs add to settlement agreements and arguing that limitations on NDAs may not depress compensation levels in settlements).

49. Levmore & Fagan, *supra* note 22, at 318.

50. *See* Catherine Fisk, *Nondisclosure Agreements and Sexual Harassment: #MeToo and the Change in American Law of Hush Contracts*, *in* NONDISCLOSURE AGREEMENTS AND SEXUAL HARASSMENT: #METOO AND THE CHANGE IN AMERICAN LAW OF HUSH CONTRACTS IN GLOBALIZATION OF THE METOO MOVEMENT 475, 479 (David Oppenheimer and Ann Noel, eds., 2020); Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment Settlements*, NATION (Jan. 12, 2018), https://www.thenation.com/article/how-to-end-the-silence-around-sexual-harassment-settlements/ [https://perma.cc/FE6K-YX4E].

51. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement*, 83 GEO. L.J. 2663, 2669–70 (1995); *see also* Ayres, *supra* note 22, at 77; Moss, *supra* note 48, at 879–80.

52. For a famous example of an RNDA struck to cover sexual assault, see Constance Grady*, One of R. Kelly's Alleged Victims Just Broke Her Nondisclosure Agreement to Speak Out*, VOX (Aug. 22, 2017, 3:00 PM), https://www.vox.com/culture/2017/8/22/16184542/r-kelly-abuse-victim-nondisclosure-agreement-jerhonda-pace [https://perma.cc/5BFG-3NFV]. For examples of RNDAs struck to cover employment discrimination, sexual harassment, and sexual assault in the tech industry, see Drange, *supra* note 30; Shira Ovide, *An Obsession With Secrets*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/2021/07/27/technology/nondisclosure-agreements-tech-companies.html. [https://perma.cc/K67R-PE6Q].

of the process by which the contract was formed,[53] especially if the victim is a member of a historically marginalized group.[54] That party may also lie about the act or acts that the parties have agreed to keep confidential or continue to engage in them with others.[55] The circumstances under which many of Harvey Weinstein's victims agreed to their confidentiality agreements, as well as those under which the adult film star Stormy Daniels assented to her agreement with Donald Trump, are illustrative: one party faced significantly greater personal and professional jeopardy from disclosure than the other, had significantly more resources—capital as well as influence—than the other, offered valuable consideration for the promise to keep his behavior secret, assigned his existing legal representative to draft and negotiate the contract, and later threatened the other party about the potential consequences of breaching.[56] These dynamics might not have made the contracts unenforceable (though the original behavior, in many of Weinstein's assaults, likely did), but they rendered the contracts ethically and morally suspect and, as it turned out, helped encourage the other party to breach.

Such circumstances can lead one party to feel pressured into agreeing to what David Hoffman and Erik Lampmann have called "hushing contracts": "nondisclosure agreements covering sexual misconduct" that can include nonconsensual and potentially unlawful actions as well as "consensual sexual

53. *See, e.g.*, Diana Falzone & Lloyd Grove, *Bill O'Reilly's Accuser Finally Breaks Her Silence*, DAILY BEAST (July 13, 2021, 10:58 PM), https://www.thedailybeast.com/bill-oreilly-accuser-andrea-mackris-finally-breaks-her-silence [https://perma.cc/QHH4-GHQ7]; Rebecca R. Ruiz, *Stormy Daniels Sues, Saying Michael Cohen Colluded With Her Former Lawyer*, N.Y. TIMES (June 6, 2018), https://www.nytimes.com/2018/06/06/us/politics/stormy-daniels-lawsuit.html [https://perma.cc/8T7H-6X9L].

54. *See* Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 105–08 (2019).

55. *See, e.g.*, *Ex-Harvey Weinstein Assistant Attacks "Immoral" Non-Disclosure Agreements*, BBC (Mar. 28, 2018, 6:15 AM), https://www.bbc.com/news/entertainment-arts-43568059 [https://perma.cc/3SMP-Y2A9].

56. On the Trump-Clifford incident, see STORMY DANIELS WITH KEVIN CARR O'LEARY, FULL DISCLOSURE 109–48, 194–227 (2018); Alan Feuer, *What We Know About Trump's $130,000 Payment to Stormy Daniels*, N.Y. TIMES (Aug. 27, 2018), https://www.nytimes.com/2018/08/27/nyregion/stormy-daniels-trump-payment.html [https://perma.cc/DDU7-RJD9]; Judd Legum, *The Dirty History of Trump and Cohen's Third Man*, THINK PROGRESS (June 12, 2018, 12:05 PM), https://thinkprogress.org/the-dirty-history-of-trump-and-cohens-third-man-keith-davidson-406de6ba70b6/ [https://perma.cc/VQ6P-4SKN]. On Weinstein, see generally discussion *infra* Section IV.B (describing Weinstein RNDAs and the process of their negotiation); RONAN FARROW, CATCH AND KILL (2019); JODI KANTOR & MEGAN TWOHEY, SHE SAID (2019).

acts found objectionable for other reasons."[57] Sex is not the only behavior that motivates a party to hush the other party. Other non-sexual sources of embarrassment include actions and statements that are or could be construed as racist,[58] that constitute an employer's abusive exercise of power,[59] or that would reveal egregious commercial behavior.[60] Between the behavior kept secret and the inequitable processes by which such contracts were formed, abusive RNDAs harm victims who believe that their consent was less than freely given. Although the secrets they agree to keep could make both parties vulnerable to disclosure, RNDAs thus arise and operate within inequitable, sometimes oppressive, social structures, including especially imbalances created by sex, race, and class that act as both symptoms and causes of numerous individual and social harms. The less wealthy and powerful party could, of course, coerce the formation of an agreement through blackmail or extortion (although for that reason it would be voidable by the blackmail victim[61]) or outright lies,[62]

57. Hoffman & Lampmann, *supra* note 22, at 167–68 n.9.

58. *See, e.g.*, Brooke Pryor, *Brian Flores Says He Declined to Sign Miami Dolphins' Separation Agreement in Order to Speak Out on Treatment by Team*, ESPN (Feb. 22, 2022, 4:44 PM), https://www.espn.com/nfl/story/_/id/33349141/brian-flores-says-declined-sign-miami-dolphins-nda-order-speak-racial-discrimination [https://perma.cc/GVB9-2BWX]; Christian Spencer, *Woman Who Bravely Spoke Out Against Tech Firm Sponsors Bill to Help Others Do It Too*, THE HILL (May 10, 2021), https://thehill.com/changing-america/respect/equality/552667-woman-who-bravely-spoke-out-against-tech-firm-sponsors-bill [https://perma.cc/4RQL-Q829].

59. *See* Matt Drange, *A Gag Order for Life - How Nondisclosure Agreements Silence and Control Workers in Silicon Valley*, BUS. INSIDER, https://www.businessinsider.com/silicon-valley-tech-workers-nda-culture-silence-2021-7 [https://perma.cc/D8B9-7DTM] (Sept. 24, 2021); Chloe Melas, *Exclusive: Kanye West Has a Disturbing History of Admiring Hitler, Sources Tell CNN*, CNN ENT. (Oct. 27, 2022, 3:31 PM), https://www.cnn.com/2022/10/27/entertainment/kanye-west-hitler-album/index.html [https://perma.cc/2X37-HA3W]; Tatiana Siegel, *Shielding Scott Rudin: How the Super-Producer Avoided Answering for Abusive Behavior for Decades*, HOLLYWOOD REP. (June 23, 2021), https://www.hollywoodreporter.com/movies/movie-features/scott-rudin-abusive-behavior-1234972177/ [https://perma.cc/3EFM-99VV].

60. *See, e.g.*, James Pilcher, Liz Dufour, Sarah Taddeo & Matthew Prensky, *Dream Home Nightmares: Ryan Homes Buyers Face Delays, Hassles as Repairs Lag*, CINCINNATI ENQUIRER, https://www.cincinnati.com/in-depth/news/2019/10/31/ryan-homes-construction-building-warranty-claims/3929496002/ [https://perma.cc/8LV2-VLZ7] (Dec. 15, 2019, 12:28 PM).

61. *See* JOSEPH M. PERILLO & JOHN E. MURRAY, JR., 1 CORBIN ON CONTRACTS § 1.6 (2015).

62. The distinction between blackmail, to which criminal liability applies, and legally enforceable NDAs is explicable in theory based on the coercive nature of blackmail but ultimately creates what commentators have described as a paradox: Why is it acceptable for one party to "willingly" pay for silence while the same transaction becomes criminal when the recipient instead demands it? Exploring this paradox is beyond the scope of this paper, but insightful consideration of the issue appears in Sidney W. DeLong, *Blackmailers, Bribe-Takers, and the Second Paradox*, 141 U.

especially in the wake of the #MeToo movement and the excoriation and shame that appear to spring from reputation-harming accusations.[63] And at any time either party can unilaterally decide not to enforce an RNDA in response to a breach and, further, can release the other party from its contractual obligations.[64] But the detailed accounting of failed RNDAs in Part IV demonstrates that in numerous circumstances, the financially and socially vulnerable parties can, and frequently do, breach contracts proposed by the wealthier and more powerful ones despite their fear, often well-founded, that the contracts would be enforced against them.[65] Concern for such victims has led advocates, legislatures, and academics to consider and propose the various legal reforms that Part III describes.

III. LEGAL SOLUTIONS TO REPUTATIONAL NDAS

In the late 2010s, public exposure of RNDAs that had covered up recurring harmful behavior prompted widespread public condemnation.[66] As the first Section of this Part documents, various federal and state legislative reforms

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PENN. L. REV. 1663 (1993); Stephen Galoob, *Coercion, Fraud, and What is Wrong with Blackmail*, 22 LEGAL THEORY 22 (2016).

63. *See generally* Emily A. Vogels, Monica Anderson, Margaret Porteus, Chris Baronavski, Sara Atske, Colleen McClain, Brooke Auxier, Andrew Perrin & Meera Ramshankar, *Americans and 'Cancel Culture': Where Some See Calls for Accountability, Others See Censorship, Punishment*, PEW RSCH. CTR. (May 19, 2021), https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment/ [https://perma.cc/6SUC-RPJ4].

64. *See, e.g.*, Rachel Abrams, *CBS Inquiry Into What Went Wrong in Les Moonves Era Hits Snags as It Advances*, N.Y. TIMES (Oct. 26, 2018), https://www.nytimes.com/2018/10/26/business/media/les-moonves-investigation-cbs.html [https://perma.cc/J7M9-U5QZ]; Michael McCann, *Suns Lift NDA Limits on Ex-Employees While NFL Witnesses Stay Mum*, SPORTICO (Dec. 13, 2021, 12:01 AM), https://www.sportico.com/law/analysis/2021/olokh-sarver-investigation-1234650260/340 [https://perma.cc/MNQ8-M7WB].

65. It is possible, and even likely, that parties have used NDAs in agreements to settle disputes based on knowingly false allegations of wrongdoing. But there are good reasons to believe that such lies are not a regular occurrence. *See* Altman, *supra* note 22, at 711. Studies have shown that sexual violence allegations, for example, are false in approximately 5% of cases. *See* Andre W.E.A. De Zutter, Robert Horselenberg & Peter J. van Koppen, *The Prevalence of False Allegations of Rape in the United States from 2006-2010*, J. FORENSIC PSYCH. 2:119, Mar. 20, 2017, at 4; Philip Rumney & Kieran McCartan, *Purported False Allegations of Rape, Child Abuse and Non-Sexual Violence: Nature, Characteristics and Implications*, 81 J. CRIM. L. 497, 505 (2017); Claire E. Ferguson & John M. Malouff, *Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates*, 45 ARCHIVES SEXUAL BEHAV. 1185, 1189 (2016).

66. *See* Tippett, *supra* note 22, at 230–34.

followed these revelations in relatively quick succession, typically with bipartisan support. The second Section summarizes the concerns of commentators who have argued that legislatures can only accomplish so much and may even inhibit mutually beneficial contracting; instead, they argue, courts should expand common law contract doctrine to refuse enforcement of certain NDAs against parties who breach. The final Section identifies contractual terms that would discourage the abuse that certain agreements have allowed if not encouraged. Each improvement, whether enacted or proposed, can chip away at abusive RNDAs, but none can solve the problems such contracts create.

A. Legislative Reforms

Federal and state legislatures began to enact statutes to address the problem of abusive RNDAs in the aftermath of the successive revelations that sparked and then were uncovered by the #MeToo movement. Congress enacted two major federal statutes in 2022, both with bipartisan support. On November 15, a week after the 2022 election, Congress passed the Speak Out Act, which prohibits judicial enforcement of a "nondisclosure clause or non-disparagement clause agreed to before a [sexual assault or harassment] dispute arises."[67] It applies to employment agreements that included NDAs signed before any claims arise, but does not affect NDAs signed to settle disputes or that arose after the alleged abuses occurred—depending on the meaning of "before the dispute arises" and the scope of the term "dispute."[68] The statute may in fact only cover agreements that some courts could have refused to enforce under the common law public policy exception to enforcement and will not prevent most of the abusive NDAs considered in this Article.[69]

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67. Speak Out Act, Pub. L. 117-224, § 4(a), 136 Stat. 2290, 2291 (2022) (codified at 42 U.S.C. §§ 19401–19404). On the law's enactment, see Kim Elsesser, *Congress Passes Law Restoring Victims' Voices, Banning NDAs In Sexual Harassment Cases*, FORBES (Nov. 16, 2022, 4:18 PM), https://www.forbes.com/sites/kimelsesser/2022/11/16/congress-passes-law-restoring-victims-voices-banning-ndas-in-sexual-harassment-cases/amp/ [https://perma.cc/D2RC-WQL4]; on the background against which Congress enacted the Speak Out Act, see Terry Morehead Dworkin & Cindy A. Schipani, *The Times They Are a-Changin'?: #MeToo and Our Movement Forward*, 55 U. MICH. J.L. REFORM 365, 393–96 (2022).

68. *See* Paige Smith, *Uber Fighting Bill That Would Nix #MeToo Nondisclosure Pacts*, BLOOMBERG LAW (Sept. 29, 2022, 5:52 PM), https://news.bloomberglaw.com/daily-labor-report/uber-fighting-bill-that-would-nix-metoo-nondisclosure-pacts [https://perma.cc/2XV4-XB83].

69. On the limits of the public policy doctrine, see discussion *infra* Section III.B. One commentator has already questioned Congress's constitutional authority to enact the statute. *See*

The federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA),[70] signed into law in March 2022 after enactment with strong bipartisan support,[71] allows a court to find a "predispute" mandatory arbitration clause in a contract that settles a sexual assault or harassment claim invalid and unenforceable.[72] Mandatory arbitration keeps disputes private and thereby helps an NDA remain out of public view; litigation, by contrast, provides public access to filings and the possibility of a public trial.[73] The EFAA still allows arbitration if both parties assent to it *after* the contract is formed, enabling a victim to forgo traditional litigation to settle a dispute when they might have better representation and better understand the stakes of the decision to arbitrate.[74] Although it narrowly focuses only on arbitration and offers no prohibition against the RDNAs themselves, the statute protects against certain provisions in some abusive agreements.[75] But it might not provide as much protection as initially promised because of its interaction with state laws that more expansively favor arbitration than federal law.[76]

Stephen E. Sachs, *Is the "Speak Out Act" Constitutional?*, VOLOKH CONSPIRACY (Dec. 9, 2022, 2:30 PM), https://reason.com/volokh/2022/12/09/is-the-speak-out-act-constitutional/ [https://perma.cc/N3MK-SXGC].

70. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified as amended in scattered sections of 9 U.S.C.).

71. Morgan Chalfant, *Biden Signs Bill Banning Forced Arbitration in Sexual Misconduct Cases*, THE HILL (Mar. 3, 2022, 6:26 PM), https://thehill.com/homenews/administration/596815-biden-signs-bill- ending-forced-arbitration-in-sexual-misconduct-cases [https://perma.cc/4WJK-HAWR].

72. *See* 9 U.S.C. § 402(a)–(b).

73. *See* Michelle Chen, *How Forced Arbitration and Non-Disclosure Agreements Can Perpetuate Hostile Work Environments*, THE NATION (Nov. 30, 2017), https://www.thenation.com/article/archive/how-forced-arbitration-and-non-disclosure-agreements-can-perpetuate-hostile-work-environments/ [https://perma.cc/YT5E-JRUP].

74. *See* 9 U.S.C. § 401(1)–(2).

75. Recently enacted federal tax legislation more securely imposes a narrow cost to RNDAs in a provision enacted in response to #MeToo that bars employers from deducting payments or attorneys' fees related to sexual harassment or abuse settlements that contain nondisclosure agreements. 26 U.S.C. § 162(q)(1); *see generally* Marianne Levine, *Why Congress is Moving Against Sexual Harassment, 4 Years After #MeToo*, POLITICO (Feb. 10, 2022, 4:41 AM), https://www.politico.com/news/2022/02/10/congress-sexual-harassment-metoo-00007493 [https://perma.cc/3NBX-MW6K]. Although it will make some RNDAs marginally less attractive, it too will not end the abusive use of such contracts.

76. The arbitration scholar David Horton has identified loopholes in the Ending Forced Arbitration Act created by its incorporation into the Federal Arbitration Act (FAA) that may limit its protection due to recent Supreme Court decisions, confusing precedent regarding the scope of the FAA, and pro-arbitration state laws which would apply if the Ending Forced Arbitration Act does not. *See*

Prior to Congress's 2022 interventions, a diverse array of states, most but not all controlled by Democratic majorities, had more directly curbed certain RNDAs in some contexts with statutes that cut at the margins of the practice.[77] Among the strongest is California's 2018 law that broadly invalidates any NDA that is part of an agreement to settle sexual harassment or assault claims.[78] California's legislature has continued to strengthen the ban on such NDAs in more recent sessions[79] and has included other forms of discrimination besides sex to its limitations on NDAs.[80] Its law does not, however, prohibit contracts agreed to before the filing of a lawsuit or administrative action.[81] Also enacted in 2018, New York's law also invalidates NDAs incorporated within the settlement of sexual harassment allegations, but it allows enforcement of those in which the victim has requested confidentiality.[82]

Some states have enacted narrower laws that, while better than nothing, offer little protection. Tennessee's recently enacted statute prohibits employers from requiring employees or prospective employees to enter into an NDA with respect to sexual harassment as a condition of employment, but allows NDAs

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generally David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J.F. 1 (2022), https://www.yalelawjournal.org/pdf/F7.HortonFinalDraftWEB_qjbrt1ar.pdf [https://perma.cc/9ERU-CBET].

77. For a summary of state legislative developments, see Dworkin & Schipani, *supra* note 67, at 384–93; Andrea Johnson, Ramya Sekaran & Sasha Gombar, *2020 Progress Update: #MeToo Workplace Reforms in the States*, NAT'L WOMEN'S LAW CTR., Sept. 2020, at 8–12, https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020States_Report-MM-edits-11.11.pdf [https://perma.cc/TKP8-M37C] (summarizing state legislation enacted between 2018 and 2020 regulating disclosure of information by contract). For analysis of the developments, see Natalie Dugan, Note, *#TimesUp On Individual Litigation Reform: Combatting Sexual Harassment Through Employee-Driven Action and Private Regulation*, 53 COLUM. J.L. & SOC. PROBS. 247, 252–54 (2020); Emily Otte, *Toxic Secrecy: Non-Disclosure Agreements and #MeToo*, 69 KAN. L. REV. 545, 554–57 (2021); Vasundhara Prasad, Note, *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, 2520–22 (2018); D. Andrew Rondeau, Comment, *Opening Closed Doors: How the Current Law Surrounding Nondisclosure Agreements Serves the Interests of Victims of Sexual Harassment, and the Best Avenues for Its Reform*, 2019 U. CHI. LEGAL F. 583, 606–08 (2019).

78. *See* CAL. CIV. PROC. CODE §§ 1001, 1002 (West 2023). On the background story of California's law and its potential as a model for other states, see Mizrahi, *supra* note 45, at 140–141.

79. *See* Chris Micheli & Ashley Hoffman, *How California Lawmakers Responded Legislatively to the #MeToo Movement*, 53 U. PAC. L. REV. 724, 725 (2022).

80. *See* SB 331, 2021 Leg., 2021-2022 Sess. (Cal. 2021) (amending section 1001 of the Code of Civil Procedure); CAL. CIV. PROC. CODE § 1001 (West 2023).

81. *See* Hoffman & Lampmann, *supra* note 22, at 188–89.

82. *See* N.Y. GEN. OBLIGATIONS LAW § 5-336(1)(a) (McKinney 2020).

as part of agreements settling sexual harassment claims.[83] Virginia's statute prohibits only employment agreements that have the "purpose or effect of concealing the details relating to a claim of sexual assault" but does not cover sexual harassment claims and specifically exempts settlement agreements concerning sexual assault claims.[84] Washington's law prohibits employers from conditioning employment on an NDA but does not prohibit NDAs as part of settlement agreements.[85]

Although legislative reform offers the possibility of broad, prophylactic protections against abusive contract terms,[86] the patchwork of newly enacted federal and state laws has not eliminated the problems that RNDAs have created.[87] Nor is legislation likely to constitute a well-calibrated fix to the complex social issues in which RNDAs work and the further problems they create. The political and popular will might support prohibitions on enforcement in some circumstances or based on some factors—such as victims' financial circumstances and the relative severity of the wrongdoing.[88] But a broad statute prohibiting or strictly regulating RNDAs would remove victims' autonomy and eliminate the value to both parties of resolving the dispute without litigation while keeping its basis confidential.[89] Recent enactments may not do enough, but broader ones could prevent or limit the value that a fair agreement might create in some instances and for some parties.

B. Common Law Reforms

Courts could, at least in theory, provide case-by-case adjudication of demands for post-breach enforcement of contractual agreements that would constitute a fairer fix for abusive RNDAs than broad legislation. The most promising vehicle for judicial intervention is the longstanding doctrine that allows courts to refuse to enforce contracts which conflict with the aims of

83. *See* TENN. CODE ANN. § 50-1-108 (2021); WASH. REV. CODE ANN. § 49.44.210(1) (2021).

84. *See* VA. CODE ANN. § 40.1-28.01 (2021).

85. *See* WASH. REV. CODE ANN. § 49.44.210(1) (2021).

86. *See* Jingxi Zhai, Note, *Breaking the Silent Treatment: The Contractual Enforceability of Non-Disclosure Agreements for Workplace Sexual Harassment Settlements*, 2020 COLUM. BUS. L. REV. 396, 447 (2020).

87. *See* Hoffman & Lampmann, *supra* note 22, at 168–69.

88. *See* Bachar, *supra* note 22, at 39–40.

89. *See* Ayres, *supra* note 22, at 77–78; Hoffman & Lampmann, *supra* note 22, at 215–16.

"public policy."[90] The doctrine traditionally balances the harm such agreements would cause to innocent, unknowing non-parties and to the public if enforced against whatever private benefit they provide to the contracts' parties.[91] While the case law is thin, some courts have applied the doctrine's balancing test and ruled in favor of defendants who had breached their NDAs.[92] When a breaching party invokes the doctrine as part of their defense, courts have focused on the type of information that an NDA suppresses and whether the party otherwise bore a legal duty to disclose.[93] Instances when courts have denied enforcement

90. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. L. INST. 1981); *see also* Hoffman & Lampmann, *supra* note 22, at 189. An alternative means for courts to refuse enforcement is via the doctrine of unconscionability. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981) ("If a contract or a term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract or may enforce the remainder of the contract without the unconscionable term . . . ."); Otte, *supra* note 77, at 571–73 (advocating for the application of unconscionability to NDAs); Prasad, *supra* note 77, at 2525–28 (same). As Hoffman and Lampmann argue, unconscionability is less likely to provide programmatic relief from abusive RNDAs than the public policy doctrine for two reasons: first, because "public policy does not require courts to make explicit findings about the party's bargaining deficits before ruling for her claims," allowing a broader declaration about the kinds of contracts that are unenforceable; and, second, because the public policy doctrine makes no consideration of a party's consent and focuses instead on the substantive reasons for the court's refusal to enforce, thereby keeping intact the conception, core to liberal contract doctrine, that consent is sufficient for contractual validity and enforcement by relying instead on social welfare as a justification for non-enforcement. *See* Hoffman & Lampmann, *supra* note 22, at 201, 210. Ultimately, too, a finding of substantive "unconscionability," which inevitably must consider the context and consequences of the bargain and its enforcement, would overlap considerably with a court's decision that a contract violated public policy.

91. A balancing test is at the core of the Restatement's presentation of the doctrine. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. L. INST. 1981).

92. *See generally* Hoffman & Lampmann, *supra* note 22, at 189–98. Consider, for example, a recent Fourth Circuit decision that applied a balancing test to a First Amendment challenge to an NDA. Overbey v. Mayor of Baltimore, 930 F.3d 215, 228 (4th Cir. 2019). The court distinguished between a party's speaking publicly about police abuse notwithstanding the confidentiality agreement she signed, against which the court refused to enforce the NDA, and other individuals also subject to the NDA who had spoken to a media outlet, against whom the court enforced the NDA. *Id.* at 226–29. *Overbey*'s use of a common law balancing test under the First Amendment is consistent with the argument that courts should include constitutional free speech considerations in striking a balance under the public policy doctrine. *See* Jeffrey Steven Gordon, *Silence for Sale*, 71 ALA. L. REV. 1109, 1117 (2020); *cf.* Rachael L. Jones & Virginia Hamrick, *Reporting on NDAs and #MeToo: How the Press May Obtain Standing to Challenge NDAs*, 35 COMMC'NS LAW. 7, 10 (2019) (arguing in favor of enabling the press's right to intervene in cases involving NDAs that involve the public interest).

93. *See* Rondeau, *supra* note 77, at 587–89. For discussions of how the doctrine could be extended to NDAs, see Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 315 (1998); Ryan M. Philip, Comment, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL L. REV. 845, 849 (2003).

include agreements that would prevent a party from communicating information to law enforcement,[94] relevant oversight agencies,[95] or courts,[96] and that would require a party to refuse to participate in a deposition in ongoing litigation[97] or to ignore a duty to disclose.[98] In such cases, the potential value of the information to the general public and to specific third-parties outweighs the value that the agreed-to silence brings to the parties.[99]

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94. *See* Cosby v. Am. Media, Inc., 197 F. Supp. 3d 735, 742–43 (E.D. Pa. 2016); Fomby–Denson v. Dep't of Army, 247 F.3d 1366, 1375, 1377–78 (Fed. Cir. 2001). The doctrine has historically applied to non-disclosure agreements that would bar reporting criminal activity. *See generally* Branzburg v. Hayes, 408 U.S. 665, 696–97 (1972) ("[A]greements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy."); Baker v. Citizens Bank of Guntersville, 208 So. 2d 601, 606 (Ala. 1968) ("[A] contract based upon a promise or agreement to conceal or keep secret a crime which has been committed is opposed to public policy and offensive to the law."); Garfield, *supra* note 93, at 306–12. The Federal Circuit, for example, has refused to interpret a settlement agreement to bar the United States from making criminal referrals of a federal employee's conduct on the grounds that it would contravene public policy. *See Fomby–Denson*, 247 F.3d at 1368.

95. *See* E.E.O.C. v. Astra U.S.A., Inc., 94 F.3d 738, 745 (1st Cir. 1996) (enjoining enforcement of a nondisclosure agreement as it would apply to sexual harassment claimants and witnesses under the EEOC's statutory enforcement responsibilities established in 42 U.S.C. § 2000e–5(a) on the grounds that any such provisions would violate public policy).

96. *See* Lana C. v. Cameron P., 108 P.3d 896, 902 (Alaska 2005) (refusing to enforce an agreement that would stop reporting of domestic violence incidents as part of a petition for a protective order).

97. *See* Kalinauskas v. Wong, 151 F.R.D. 363, 367 (D. Nev. 1993); Wendt v. Walden Univ. Inc., No. CIV. 4-95-467, 1996 WL 84668, at *1 (D. Minn. Jan. 16, 1996).

98. *See, e.g.*, Picton v. Anderson Union High Sch. Dist., 57 Cal. Rptr. 2d 829, 832–33 (Ct. App. 1996) (holding that because the school district was under a legal duty to notify the state Commission on Teacher Credentialing of the teacher's resignation because of sexual assault and rape, an NDA that served as part of a settlement agreement with a teacher was illegal as a matter of public policy and therefore unenforceable); Bowman v. Parma Bd. of Educ., 542 N.E.2d 663, 667 (Ohio Ct. App. 1988) (holding an NDA was void as against public policy when it prohibited the school from disclosing a former teacher's pedophilia and information concerning commission of a felony to a school district that subsequently employed the teacher). A California appellate court, applying the state's Public Records Act to a media organization's request for documents covered by an NDA between a school district and a school superintendent, utilized an analogous balancing test to the common law public policy exemption, finding that the public interest in disclosure outweighed the personal privacy interests protected by the contract. *See* BRV, Inc. v. Superior Ct., 49 Cal. Rptr. 3d 519, 527–28 (Ct. App. 2006); *see also* State *ex rel.* Findlay Publ'g Co. v. Hancock Cty. Bd. of Comm'rs., 684 N.E.2d 1222, 1226 (Ohio 1997) (granting a writ of mandamus sought by a publisher under a public request statute for the terms of a settlement agreement notwithstanding the agreement's confidentiality provision).

99. *See generally* Lauren Rogal, *Secrets, Lies, and Lessons from the Theranos Scandal*, 72 HASTINGS L.J. 1663, 1690–93 (2021) (regarding efforts to enforce NDAs against whistleblowers).

Wondrously flexible—or notoriously so, depending upon one's perspective[100]—the public policy doctrine is available for attorneys who seek judicial relief for their clients from private agreements whose enforcement would inflict societal costs.[101] Advocates of using the doctrine to limit RNDA enforcement argue that its focus on third-party harm provides an incremental, grounded, and certain judicial inquiry which affects only those contracts whose external harms outweigh the private value they generate for the individual parties.[102] Relying upon it, a court could refuse to enforce a settlement agreement that would bar disclosure of a non-criminal act by a serial predator who injures or might possibly later injure individuals and entities who played no part in the agreement's formation and may not even know of its existence.[103] Third parties include potential future victims, survivors' families and confidantes, and organizations that employ the abuser (and perhaps the victim) which suffer harm to their reputation and their ability to recruit and maintain employees as a result of harassment and abuse.[104] An expansive public policy doctrine would require courts to at least consider the broader public welfare in a dispute over the contract's enforcement.

As part of a balancing test, however, the doctrine assigns courts a difficult task in adjudicating disputes over the enforcement of RNDAs. To properly balance harms, courts must on the one hand consider the unquantifiable private goods that privacy, confidentiality, and contractual autonomy can provide, as well the abstract idea that settlement can offer corrective justice to harms that an individual breach might undermine. They must then balance those factors against the social harms that illegal, immoral, or shameful acts might cause or have caused to hypothetical or identifiable non-parties.[105] Presumptions and

100. *See* Richardson v. Mellish (1824) 130 Eng. Rep. 294, 303 (KB) (Burrough, J.) (characterizing the public policy doctrine in contract law as "a very unruly horse, and when once you get astride it you never know where it will carry you"); Walter Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679, 682 (1935) (noting that courts take speculative, divergent approaches to the public policy doctrine). *But see* David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U.L. REV. 563, 566 (2012) (empirical study of reported cases applying public policy doctrine finding that some categories of policy are more orderly than others).

101. *See generally* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 431, 442 (1993).

102. Hoffman & Lampmann, *supra* note 22, at 203; *see also* Altman, *supra* note 22, at 704–05 (offering a related argument that courts should not enforce contracts which require a breach of duty or failure to perform a supererogatory [morally good but not technically required] act).

103. Hoffman & Lampmann, *supra* note 22, at 198–203.

104. *Id.* at 177–79; Fisk, *supra* note 50, at 480.

105. Hoffman & Lampmann, *supra* note 22, at 182–87.

counterfactuals loom large in the calculation. To determine the interest in enforcement, a court must consider the cost of disclosure to the non-breaching party. It must also estimate the additional increment of the payment to the breaching party that confidentiality constituted beyond settlement of the dispute. And it must ponder the harm that a refusal to enforce might have on as-yet-unknown future parties who may enjoy less contractual autonomy because the potential that a later court will also refuse to enforce an agreement will lead a wrongdoer to offer less consideration for a contract that may not prove enforceable. To weigh the other side of the balance, a court must estimate the harms to others had breach not occurred, as well as the value of preventing future harms by a broad declaration that these agreements violate public policy. In difficult cases, the public policy doctrine is an invitation to ponder rather than an algorithm or even an agreed-upon and bounded method for inquiry. Some courts could give more weight to the concerns of third parties and sympathize with the breaching party; others might favor the enforcement of contractual rights and duties.[106]

The public policy test's uncertainty creates an additional problem that makes it difficult to apply. Defendants will find raising its balancing test's indeterminacy burdensome, even if it might sometimes tilt in their favor. Consider the plight of a sexual assault victim who has agreed to an RNDA as part of a settlement agreement and is approached by a reporter because her assailant attacked others, but who then experiences the threat of legal action from the wrongdoer and their representatives.[107] Victims have already faced a bewildering, isolating contracting process that left them frustrated and worried,[108] and have signed a formal agreement written in language that they cannot understand but to which they are intimately and utterly bound, no matter

106. Such was the nature of the disagreement between the *Overbey* majority, which refused to enforce the agreement against the breaching party, see *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 223–26 (4th Cir. 2019), and the *Overbey* dissent, which found the balance favored contract enforcement, see *Overbey*, 930 F.3d at 232–34 (Quattlebaum, J. dissenting) (stressing the government's interest both in settling legal claims filed against it and in the certainty that a settlement agreement would be enforceable).

107. *See, e.g.*, BBC, *supra* note 55; Rebecca Keegan, *The Secret Sources for 'Bombshell': Why Ex-Fox News Staffers Broke Their NDAs for Filmmakers*, HOLLYWOOD REP. (Oct. 29, 2019, 6:45 AM), https://www.hollywoodreporter.com/news/general-news/secret-sources-bombshell-why-fox-news-staffers-broke-ndas-filmmakers-1250668/ [https://perma.cc/TCT4-EUBL].

108. *See, e.g.*, Emilia Gentleman & Holly Watt, *"It Was Like Tending to a Disgusting Baby": Life as a Harvey Weinstein Employee*, THE GUARDIAN (Sept. 29, 2018, 2:00 PM), https://www.theguardian.com/film/2018/sep/29/harvey-weinstein-three-former-employees-on-working-for-him [https://perma.cc/8J8F-K8LD].

how unfair it seems.[109] If they divulge secrets covered by an RNDA or threaten to do so, they would view receipt of a service of process noticing a formal legal complaint or a demand letter printed on an attorney's letterhead as a nightmare rather than an opportunity to pursue the righteous ends of the public policy doctrine. Threatened with having to return the money they received under the RNDA as well as any damage award for their breach,[110] while having no claim for damages from which an attorney could draw a contingency fee, the best defendants can win from a favorable decision under the public policy doctrine is to restore the pre-disclosure status quo ante. But a breaching party's risk can be even greater than simply having to cover their own costs. Due to a clause common to RNDAs, defendants face the risk of covering the non-breaching party's legal fees should they lose.[111] After breaching an RNDA, then, a disclosing party hoping to defend themselves in litigation will need the resources and wherewithal to raise a defense against a plaintiff who, given the dynamics of a settlement agreement itself that sought to protect the wrongdoer's reputation, will be wealthier, more powerful, and enjoy easier access to legal representation. The victims who nevertheless decide to breach do so because of their affirmative desire and commitment to expose the wrongdoing they suffered rather than because of the availability of a doctrinal defense to enforcement—even if the defense ultimately proves helpful should litigation ensue.

Litigation under the public policy doctrine, in sum, is a daunting and risky pathway for someone who perceives themselves a victim bound by an RNDA intended to protect the reputation of the more powerful perceived wrongdoer.

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109. For a discussion of the psychological effects of unfair contractual terms on their victims, see Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503, 510 (2020); Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. ECON. ORGAN. 633 (2020); Roseanna Sommers, *Contract Schemas*, 17 ANN. REV. L. & SOC. SCI. 293, 296–97 (2021). These effects are particularly profound for women, who tend to perceive contractual obligations as more binding than men. *See* David A. Hoffman & Zev J. Eigen, *Contract Consideration and Behavior*, 85 GEO. WASH. L. REV. 351, 394 (2017).

110. The wrongdoer can also credibly threaten extra-legal means to harm the breaching party's career prospects and reputation. *See, e.g.*, Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES (Oct. 23, 2017), https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589 [https://perma.cc/FSJ4-RYR4].

111. *See What Relief is Available for Breach of a Non-Disclosure or Confidentiality Agreement?*, MOLOLAMKEN LLP, https://www.mololamken.com/knowledge-what-relief-is-available-for-breach-of-a-non?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration [https://perma.cc/59FX-D3US].

Indeed, courts have carefully and sparingly applied the doctrine to NDAs generally, especially when the defendant fails to identify either a duty to disclose or information that reveals a clear legal or moral wrong.[112] A stronger public policy doctrine can, in principle, defend against enforcement of an abusive NDA that would harm outsiders, but its indeterminacy and the burden of raising it will limit its individualized, adjudicated protection. A clearer doctrine would not solve the problem of abusive RNDAs, although it could provide an occasional but useful corrective.

C. Transactional Reforms

Even beyond the legislative reforms that have narrowed RNDAs' enforceability, the #MeToo movement has changed contracting, at least to an extent.[113] To curb abusive RNDAs, academic commentators have offered surgical, creative reforms to the contracts themselves. Saul Levmore and Frank Fagan, for example, propose semi-confidential agreements that disclose the subject matter but not the amount given to settle litigation alleging wrongdoing; such "translucent" NDAs, they argue, would protect the parties' privacy and obtain some measure of relief for the victim and penalty for the alleged wrongdoer while alerting third-parties about the nature of the dispute being settled.[114] Focusing more narrowly on RNDAs, Ian Ayres advocates contractual terms that more effectively protect against abuse of the agreement by making their enforcement conditional on the truthfulness of the alleged wrongdoer's past or future representations about their behavior, and by establishing informational escrow agents to publicly disclose information if a contractual condition to an NDA is breached.[115] Such proposals attempt to address the problems NDAs create and exacerbate by countering the sources of their abuse

112. *See, e.g.*, Pierce v. St. Vrain Valley Sch. Dist. RE-1J, 981 P.2d 600, 602 (Colo. 1999) (en banc) (enforcing an NDA as part of a settlement agreement between a school district and an outgoing school superintendent who faced sexual harassment allegations that had not been adjudicated or proven, notwithstanding possible harm to outsiders to the agreement); Sanchez v. Cnty. of San Bernardino, 98 Cal. Rptr. 3d 96, 104–07 (Ct. App. 2009) (enforcing a county's agreement to keep secret a conflict of interest created by a former employee's romantic relationship in the absence of a legal requirement to disclose relevant documents).

113. *See, e.g.*, Rachel Arnow-Richman, James Hicks & Steven Davidoff Solomon, *Do Social Movements Spur Corporate Change? The Rise of "MeToo Termination Rights" in CEO Contracts*, 98 IND. L.J. 125, 133 (2022) (providing an empirical study finding that the Weinstein revelations persuaded some corporate boards of directors to change their CEO employment contracts to allow them to fire high-level executives who engage in sexual assault and harassment).

114. Levmore & Fagan, *supra* note 22, at 340–41.

115. Ayres, *supra* note 22, at 81–87.

with contractual terms that either increase transparency or allow the parties to continue to hold each other accountable. In Part V, I suggest how attorneys and parties might achieve a fairer, more stable relationship to protect against the abusive use of RNDAs and limit the likelihood of breach, but I also cast doubt on any resolution if the parties' mutual dislike and lack of trust impedes performance.

IV. HOW BREACHES OCCUR AND THEIR CONSEQUENCES

The reforms and proposals Part III described may make abusive RNDAs more difficult to craft and enforce, but they have not and likely will not solve the problems that RNDAs create or exacerbate. They cannot stop the kinds of behaviors that could, if disclosed, harm reputations and cause shame, nor can they resolve the difficult issues of what constitutes the extent of criminal and civil legal liability for those behaviors—the very conditions that can lead parties to settle their disputes privately and to agree to keep the matter confidential. Nor can such reforms diminish the various and intersecting demographic, social, and economic structures that endow some with greater access to power, wealth, and effective legal services and that establish the grounds for contract negotiation. The very actions that the parties agree to keep confidential, as well as the social conditions that enabled those actions, may motivate a party to later decide to stop their performance, whether because they view the contract as unfair or they consider the precipitating events too painful or immoral to keep confidential. RNDAs might be over-enforced—given that some of them might be unenforceable and victims are reluctant to breach—until such time as they are not enforced at all, even after breach. The apparent legal force that gave them power suddenly evaporates, allowing the victim to speak and keep the other party from seeking remedy.

This Part identifies the distinct role that breach has played in disrupting and undermining abusive RNDAs. Breaches occur when a party discloses to anyone to whom the breaching party is either prohibited from disclosing or to whom the breaching party is not otherwise allowed to disclose. Most such breaches are intentional[116] and are "efficient," in the law and economics sense of the

116. A possible exception occurs when the contract identifies a specified non-party who knows the secret and, post-formation, the non-party discloses without the consent or even knowledge of either party. RNDAs often stipulate that such disclosures constitute breach, making the party responsible for any such disclosures. *See, e.g.*, O'Reilly-Diamond NDA, *supra* note 35, § 4.1; Weinstein-Perkins NDA, *supra* note 28, at 5.

term,[117] though only to the extent that the breaching party has engaged in some form of cost-benefit calculus that prices the relief that the breaching party expects disclosure to provide against the financial risks that contract enforcement might impose.[118] Informing someone who would publicly report the disclosure, such as a reporter, would clearly constitute breach,[119] as would telling a friend whom they know might inform a reporter.[120] Each breach is uniquely the result of a party's personal decision and can inspire similarly situated others to breach, thereby collectively limiting the value of abusive RNDAs for wrongdoers. An account of how breaches arise, their aftermath, and the effects they cause offers insight into how to disrupt existing abusive RNDAs and obstruct their future formation.

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117. Efficient breach occurs when "the breaching party anticipates that paying compensation and allocating his resources to alternative uses will make him 'better off' than performing his obligation." Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 558 (1977).

118. It would be reductive to view the breaching party as precisely weighing financial risks against incommensurable emotional benefits, but a party is likely to at least consider the perils and potential gains of breaching before doing so. Indeed, the inclusion of liquidated damage clauses in RNDAs suggests that the parties—or at least the sophisticated one whose attorney drafts the clause—have established an option price at which a party can breach. *See* Robert E. Scott, *Contract Design and the Shading Problem*, 99 MARQ. L. REV. 1, 11 (2015); *cf. infra* notes 354–60 and accompanying text (noting, however, that the liquidated damages awards in RNDAs are often excessive and even punitive). A full consideration of the efficient breach model's applicability to RNDAs is beyond the scope of this Article. But it is sufficient to say that for the non-breaching party, the decision to breach by disclosure is by no means "efficient," see Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939, 1948–49 (2011) (defining payment of expectation damages, whether by contract or remedy, as a form of performance and arguing that a "true breach" of non-performance *and* non-payment, "contradicts the promisee's actual expectation . . . and thus reduces agents' incentives to organize their economic affairs under contracts."), while contracts whose performance demands silence about events invested with emotional harm where the motivation for breach will also be emotional do not easily lend themselves to the kind of analysis for which the efficient breach theory was initially developed.

119. *See generally* discussion *infra* Section 0.B (discussing the role of investigative reporters in breaches of Harvey Weinstein RNDAs).

120. *See, e.g.*, Rich McHugh, *A SpaceX Flight Attendant Said Elon Musk Exposed Himself and Propositioned Her for Sex, Documents Show. The Company Paid $250,000 For Her Silence*, BUS. INSIDER (May 19, 2022, 6:17 AM), https://www.businessinsider.com/spacex-paid-250000-to-a-flight-attendant-who-accused-elon-musk-of-sexual-misconduct-2022-5?r=US&IR=T [https://perma.cc/6DSZ-ND4A].

This Part organizes consideration of dozens of breaches around four characteristics that reveal how breach occurs and its consequences.[121] The first Section illustrates RNDAs' vulnerability to breach by describing Donald Trump's programmatic use of them to protect against disclosure of information about his family, businesses, and political career. Trump found less success in keeping secrets when he attempted to export his contracting practice into his political campaign and presidency. The second Section uses Harvey Weinstein's RNDAs to demonstrate the process by which secrets move gradually into public view, leading ultimately to breach. Rumors of Weinstein's agreements served as clues for investigative reporters to find victims, encourage their breach, and ultimately report on Weinstein's behavior. The final two Sections illustrate RDNAs' unforeseen consequences for parties and non-parties. The third Section describes two contenders during the 2020 Democratic Party presidential primaries whose RNDAs, signed in their earlier private careers, appeared to tarnish their reputations, while the fourth Section describes breach's effects on religious institutions that used RNDAs to prevent the exposure of scandalous behavior by their leaders and members. Both sets of examples demonstrate not only how RNDAs failed but the separate damage the agreements caused the parties once their existence was revealed.

A. How RNDAs Fail (1): Breaching Donald Trump's Contracts

Donald Trump and the Trump Organization have extensively used NDAs and non-disparagement clauses in employment, commercial, and personal contracts.[122] Coupled with their reputation as aggressive litigators,[123] Trump

121. This Part identifies a large number with characteristic patterns of performance, breach, and consequences, all of which suggest that breach is not rare and has recently become more visible.

122. *See* Josh Dawsey & Ashley Parker, *'Everyone Signed One': Trump is Aggressive in His Use of Nondisclosure Agreements, Even in Government*, WASH. POST (Aug. 13, 2018, 8:43 PM), https://www.washingtonpost.com/politics/everyone-signed-one-trump-is-aggressive-in-his-use-of-nondisclosure-agreements-even-in-government/2018/08/13/9d0315ba-9f15-11e8-93e3-24d1703d2a7a_story.html [https://perma.cc/JT7K-45NY]; Michael Kranish, *Trump Long Has Relied on Nondisclosure Deals to Prevent Criticism. That Strategy May be Unraveling*, WASH. POST (Aug. 7, 2020, 6:00 AM), https://www.washingtonpost.com/politics/trump-nda-jessica-denson-lawsuit/2020/08/06/ 202fed1c-d5ad-11ea-b9b2-1ea733b97910_story.html [https://perma.cc/U7UQ-TVC5]; Julie Pace & Chad Day, *For Many Trump Employees, Keeping Quiet is Legally Required*, A.P. NEWS (June 21, 2016), https://apnews.com/14542a6687a3452d8c9918e2f0bf16e6/many-trump-employees-keeping-quiet-legally-required [https://perma.cc/K3UX-EFER]; Sollenberger & Suebsaeng, *supra* note 20.

123. On Trump's strategy to threaten litigation first and only occasionally file suit, as well as his spotty record in litigation, see ZIRIN, *supra* note 1, at 112–22.

and his businesses have used NDAs to stop disclosures and criticism by those with whom they interacted.[124] But the NDAs have not always worked. In the 2000s, real estate executive Barbara Corcoran successfully defended herself against a claim that she had made disparaging remarks about Trump in breach of a contract,[125] and more recently, a New York state court refused to enforce a confidentiality clause included in an agreement settling a dispute over Trump's parents' estate that he attempted to use to enjoin publication of a book by his niece, Mary Trump, that was critical of him.[126] Untold numbers of former employees, associates, and confidantes may remain contractually obligated to keep silent about Trump and his family, of course, but prior to his election as President, Trump's RNDAs had occasionally failed.

Upon his entry into politics, Donald Trump's penchant for nondisclosure agreements collided with the set of laws and norms that limit how and to what extent candidates for public office and elected officials can control information.[127] Trump's use of NDAs became widely known during his

124. For example, Trump and his organization successfully enforced an NDA against a Miss Universe contest participant who revealed how he groped women backstage and rigged the Trump Organization-owned contest's results. *See* Colleen Long, *Former Miss USA Has to Pay $5 Million For Defaming Donald Trump's Pageant*, BUS. INSIDER (July 5, 2013, 1:14 PM), https://www.businessinsider.com/former-miss-usa-has-to-pay-5-million-for-defaming-donald-trumps-beauty-pageant-2013-7 [https://perma.cc/FN22-XMUY]; Tessa Stuart, *A Timeline of Donald Trump's Creepiness While He Owned Miss Universe*, ROLLING STONE, https://www.rollingstone.com/politics/politics-features/a-timeline-of-donald-trumps-creepiness-while-he-owned-miss-universe-191860/ [https://perma.cc/J7S9-ZLTF] (Oct. 13, 2016). Within his family, Trump successfully enforced the confidentiality clause in the divorce settlement from his first wife, Ivana Trump, by preventing her discussion of allegations that she had previously made about his domestic abuse. *See* Trump v. Trump, 582 N.Y.S.2d 1008 (App. Div. 1992) (describing written promise by Ivana not to speak about their marriage or his personal, business or financial affairs and concluding that it was part of their divorce agreement); *see also* Rachel Stockman, *Donald Trump Even Made His Ex-Wife Ivana Sign Confidentiality Agreement*, LAW & CRIME (June 30, 2016), https://lawandcrime.com/high-profile/donald-trump-even-made-his-ex-wife-ivana-sign-confidentiality-agreement/ [https://perma.cc/YB45-CHGL] (describing NDA clause from divorce agreement).

125. Pace & Day, *supra* note 122.

126. *See* Trump v. Trump, 128 N.Y.S.3d 801, 814 (Sup. Ct. 2020). Trump's brother Robert was the named plaintiff, but then-President Trump was widely viewed as the litigation's principal. *See* Michael Kranish, *New York Court Sides with Publisher of Explosive Book by President Trump's Niece*, WASH. POST (July 1, 2020, 9:16 PM), https://www.washingtonpost.com/politics/new-york-court-sides-with-publisher-of-explosive-book-by-president-trumps-niece/2020/07/01/2eec8a7e-bbf7-11ea-86d5-3b9b3863273b_story.html [https://perma.cc/53L9-XDRL].

127. Erik Lampmann, Comment, *President Trump's Contracts for Silence*, 5 U. PA. J. L. & PUB. AFFS. 379, 382 (2020); Tyler Valeska, Michael Mills, Melissa Muse & Anna Whistler, *Nondisclosure*

presidency when news leaked of his earlier sexual liaison with the adult film star Stormy Daniels (whose given name was Stephanie Clifford).[128] Just before the 2016 election, his legal "fixer," Michael Cohen, had negotiated, drafted, and executed an agreement with Daniels to prevent her from discussing her relationship with Trump from several years prior.[129] The agreement included a meta-confidentiality clause to keep the agreement secret as well as a liquidated damages clause that would have imposed an award of $1 million per breach.[130] But it failed spectacularly when the agreement and Trump's dalliance with Daniels became public and, soon thereafter, when Daniels openly breached on *60 Minutes*.[131] After Cohen sought to enforce the contract in arbitration,[132]

Agreements in the Trump White House, N.Y.U. J. LEG. & PUB. POL'Y (Jan. 28, 2021), https://nyujlpp.org/quorum/nondisclosure-agreements-trump-white-house/ [https://perma.cc/ZLT8-FSAQ]. Trump's use of NDAs in his political and administrative operations is symptomatic of his view while in office that "the federal government and the political apparatus operating in his name [was] an extension of his private real estate company." Maggie Haberman, *Another Trump Mystery: Why Did He Resist Returning the Government's Documents?*, N.Y. TIMES, https://www.nytimes.com/2022/08/18/us/politics/trump-fbi-classified-documents.html [https://perma.cc/N2YF-EULT] (Aug. 26, 2022).

128. Alan Feuer, *What We Know About Trump's $130,000 Payment to Stormy Daniels*, N.Y. TIMES (Aug. 27, 2018), https://www.nytimes.com/2018/08/27/nyregion/stormy-daniels-trump-payment.html [https://perma.cc/CD5J-L6GL].

129. Christal Hayes, *Stormy Daniels Files New Lawsuit, Alleging Old Lawyer 'Colluded' With Michael Cohen*, USA TODAY, https://www.usatoday.com/story/news/politics/2018/06/06/stormy-daniels-lawsuit-keith-davidson-puppet-cohen-trump/677993002/ [https://perma.cc/MW39-3WS7] (June 6, 2018, 5:23 PM); Rebecca R. Ruiz, *Stormy Daniels Sues, Saying Michael Cohen Colluded With Her Former Lawyer*, N.Y. TIMES (June 6, 2018), https://www.nytimes.com/2018/06/06/us/politics/stormy-daniels-lawsuit.html?auth=login-email&login=email&module=inline [https://perma.cc/ZQ75-ZFAZ]; Legum, *supra* note 55; Ronn Blitzer, *Lawyer Behind Stormy Daniels Hush Agreement Reveals What He Thinks Pushed Cohen to Pay Up*, LAW & CRIME (Mar. 11, 2019, 8:37 AM), https://lawandcrime.com/high-profile/lawyer-behind-stormy-daniels-hush-agreement-reveals-what-he-thinks-pushed-cohen-to-pay-up/ [https://perma.cc/9RHD-XP7B].

130. *See* Trump-Clifford NDA, *supra* note 31, at 10.

131. Miles Parks, *Stormy Daniels Shares Graphic Details About Alleged Affair with Trump*, NPR (Mar. 25, 2018, 8:49 PM), https://www.npr.org/2018/03/25/596868354/stormy-daniels-shares-graphic-details-about-alleged-affair-with-trump [https://perma.cc/KNB8-DSTA]; Michael Rothfeld & Joe Palazzolo, *Trump Lawyer Arranged $130,000 Payment for Adult-Film Star's Silence*, WALL ST. J. (Jan. 12, 2018), https://www.wsj.com/articles/trump-lawyer-arranged-130-000-payment-for-adult-film-stars-silence-1515787678 [https://perma.cc/HDF3-86UA]. For a full account, see JOE PALAZZOLO & MICHAEL ROTHFELD, THE FIXERS: THE BOTTOM FEEDERS, CROOKED LAWYERS, GOSSIPMAKERS, AND PORN STARS WHO CREATED THE 45TH PRESIDENT 229–56 (2020) (ebook).

132. *See* Complaint for Declaratory Relief at 5, Clifford v. Trump, No. BC696568 (Cal. Super. Ct. Mar. 6, 2018), http://www.documentcloud.org/documents/4403880-Stormy-Daniels-complaint.html [https://perma.cc/K9TH-6DFE].

Daniels filed suit in state court seeking declaratory relief.[133] Several months later, after its removal to federal court on Cohen's motion[134] and long after the press had broadcast the details about the affair, Cohen issued a "Covenant Not to Sue," ending the contract and controversy.[135] The disclosure of the secrets and the agreement to keep them secret ultimately left the contract powerless—a laughing-stock worthy of little more than abandonment.

Exposure of the contract's existence and Cohen's comically unsuccessful efforts to enforce it foreshadowed President Trump's further challenges. His 2016 presidential campaign had required staff, including volunteers, to sign employment contracts that mimicked Trump Organization NDAs by including non-disclosure and non-disparagement clauses.[136] The NDAs broadly forbade campaign employees from disclosing any information "of a private, proprietary or confidential nature or that Mr. Trump insists remain private or confidential" relating to any member of the Trump family.[137] Other presidential campaigns had used employment contracts to limit disclosure, but Trump's appeared to use them more extensively to cover a broader array of subject matters and personnel.[138] As private entities, campaigns avoid constitutional limitations on

133. *See id.* at 3, 7–10.

134. Notice of Removal of Action Under 28 U.S.C. § 1441(b) Diversity by Defendant Essential Consultants, LLC, at 1, Clifford v. Trump, No. 2:18-cv-02217-SJO-FFM (C.D. Cal. 2018), https://www.courtlistener.com/recap/gov.uscourts.cacd.704250/gov.uscourts.cacd.704250.1.0_2.pdf [https://perma.cc/6YGU-NSG3].

135. Order Granting Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction and Remanding Case to Los Angeles Superior Court at 14, Clifford v. Trump, No. 2:18-cv-02217-SJO (C.D. Cal. 2019), https://www.courtlistener.com/recap/gov.uscourts.cacd.704250/gov.uscourts.cacd.704250.109.0_1.pdf [https://perma.cc/7CKB-8R3C]. For a concise summary of this and related litigation, see Ruthann Robson, *Sexing the Mueller Report*, 50 STETSON L. REV. 143, 169–72 (2020).

136. Dawsey & Parker, *supra* note 122; Pace & Day, *supra* note 122.

137. *2016 Trump Campaign Nondisclosure Agreement*, CNN: POL., https://www.cnn.com/2018/08/14/politics/trump-campaign-nda-omarosa/index.html [https://perma.cc/VMX6-DWNQ] (Aug. 14, 2018, 4:37 PM).

138. *See* Julie H. Davis, Maggie Haberman, Michael D. Shear & Katie Rogers, *White House Job Requirement: Signing a Nondisclosure Agreement*, N.Y. TIMES (Mar. 21, 2018), https://www.nytimes.com/2018/03/21/us/politics/trump-nondisclosure-agreement.html [https://perma.cc/SG57-U38T]; Dawsey & Parker, *supra* note 122; Jessica Levinson, *Can Trump Use NDAs to Prevent White House Staffers Like Omarosa from Criticizing Him?*, NBC NEWS (Aug. 14, 2018, 4:49 PM), https://www.nbcnews.com/think/opinion/can-trump-use-ndas-stop-white-house-staffers-omarosa-criticizing-ncna900706 [https://perma.cc/R8V6-9XES]. Candidates for lower office have used them, too. *See, e.g.*, Ted Sherman, *Why Murphy Campaign Workers Still Must Keep Their Mouths Shut*, NJ, https://www.nj.com/news/2019/02/joining-a-political-campaign-these-days-often-means-agreeing-to-keep-your-mouth-shut.html [https://perma.cc/D2TY-ECW5] (Feb. 15, 2019, 2:28 PM).

prior restraint of speech.[139] The constitutional analysis changes, however, when the government contracts with its employees.[140] Nevertheless, soon after his inauguration, Trump ordered his Chief of Staff to prepare and require an NDA for White House employees, a draft of which reportedly included a $10 million per-breach liquidated damages clause.[141] Though wary of the difficulty that enforcing an NDA against public employees would raise, White House Counsel Donald McGahn nevertheless oversaw its drafting in order to placate the President.[142]

The broad Trump NDAs' dubious enforceability did not stop his administration from pressing staff into signing them, nor did it stop him from threatening to enforce them. Nevertheless, former campaign and administration staff members breached or threatened to breach their agreements numerous times, and at least three of them successfully defended themselves in the face of litigation. The most consequential alleged breach was by former campaign staff member Jessica Denson, who had filed suit against the Trump campaign alleging sexual discrimination and harassment.[143] In response, the campaign filed a $1.5 million arbitration demand claiming she violated her non-disclosure and non-disparagement obligations by publishing confidential information as part of her lawsuit.[144] While a state trial court ruled that the NDA did not prevent Denson from bringing her sexual harassment claims,[145] a federal district court ruled that the campaign's employment contract required an arbitrator to

139. Levinson, *supra* note 138.

140. The complicated doctrine defining the speech rights of government employees lies beyond the scope of this Article. *See generally* Heidi Kitrosser, *Public Employee Speech and Magarian's Dynamic Diversity*, 95 WASH. U. L. REV. 1405 (2018); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 4 (2009).

141. Ruth Marcus, *Trump Has Senior Staff Sign Nondisclosure Agreements. They're Supposed to Last Beyond His Presidency*, WASH. POST (Mar. 18, 2018, 3:56 PM), https://www.washingtonpost.com/opinions/trumps-nondisclosure-agreements-came-with-him-to-the-white-house/2018/03/18/226f4522-29ee-11e8-b79d-f3d931db7f68_story.html [https://perma.cc/SGF3-D6P8].

142. *Id.*

143. Lynne Bernabei & Devin Wrigley, *A Course Correction*, TRIAL, Sept. 2021, at 36–37; Darunorro Clark, *Trump Campaign Staffer Jessica Denson Sues to Void Nondisclosure Agreement*, NBC NEWS (Apr. 2, 2018), https://www.nbcnews.com/politics/white-house/third-woman-sues-void-non-disclosure-agreement-linked-trump-n862086 [https://perma.cc/D7UQ-WBXB].

144. Bernabei & Wrigley, *supra* note 143 at 36.

145. Denson v. Donald J. Trump for President, Inc., 101616/2017, slip op. at 5 (N.Y. Sup. Ct. Sept. 7, 2018).

determine the validity of the NDA.[146] The campaign won a damage award of just under $60,000 after the arbitrator upheld and enforced the NDA,[147] but a state appellate court affirmed a trial court's decision overruling the arbitration result because the campaign's attempt to enforce it interfered with Denson's right to pursue her sexual harassment claims and to make statements about the litigation.[148] Denson then filed a class action suit on behalf of all campaign employees challenging the NDA and non-disparagement clauses under New York law as excessively vague and indefinite.[149] She prevailed.[150] The campaign released everyone who had signed the NDA from their obligations and paid Denson a financial settlement.[151]

Denson's success soon helped two other former Trump aides. The Trump campaign had earlier sought to use arbitration to enjoin publication of a memoir by former White House staff member Omarosa Manigault Newman, claiming that the book breached the NDA and non-disparagement agreement she had signed at the start of her employment.[152] Citing the district court's decision in *Denson*, an arbitrator refused Trump's request because of the NDA's vagueness and overbreadth.[153] To add insult, the arbitrator's ruling was leaked to the press,

146. Denson v. Donald J. Trump for President, Inc., No. 18-CV-2690, 2018 U.S. Dist. LEXIS 148395, at *3 (S.D.N.Y. Aug. 30, 2018).

147. Bernabei & Wrigley, *supra* note 143; Eriq Gardner, *Donald Trump Fights to Keep Arbitration Win Against Former Campaign Staffer*, HOLLYWOOD REP. (Jan. 29, 2019, 7:42 AM), https://www.hollywoodreporter.com/business/business-news/donald-trump-fights-keep-arbitration-win-campaign-staffer-1180565/ [https://perma.cc/KUL4-V2WQ].

148. Denson v. Donald J. Trump for President, Inc., 116 N.Y.S.3d 267, 275–76 (App. Div. 2020).

149. The class included approximately 422 members. *See* Zoe Tillman, *Trump's 2016 Campaign Settles Nondisclosure-Agreement Fight*, BLOOMBERG (Jan. 13, 2023), https://www.bloomberg.com/news/articles/2023-01-13/trump-s-2016-campaign-settles-nondisclosure-agreement-fight [https://perma.cc/7AQS-HVWW].

150. Denson v. Donald J. Trump for President, Inc., 530 F. Supp. 3d 412, 433–34 (S.D.N.Y. 2021).

151. *See* Joint Letter Motion to Approve Settlement at 1–2, Denson v. Donald J. Trump for President, Inc., No. 1:20-cv-04737 (S.D.N.Y. Jan. 13, 2023), https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rT3TEebt3xY4/v0 [https://perma.cc/54P8-J3LL]; Tillman, *supra* note 149.

152. Paul Bedard, *Exclusive: Trump Campaign Seeks 'Millions' Against Omarosa for Violating Nondisclosure*, WASH. EXAM'R (Aug. 14, 2018, 10:47 AM), https://www.washingtonexaminer.com/news/exclusive-trump-campaign-seeks-millions-against-omarosa-for-violating-nondisclosure [https://perma.cc/72NU-A7QE].

153. Donald J. Trump for President, Inc. v. Omarosa Manigault Newman, AAA-Case No.: 01-18-0003-0751 (2021) (Brown, Arb.), https://floridajustice.com/wp-content/uploads/2021/11/2021-09-24-Summary-Judgment-Decision.pdf [https://perma.cc/MN6F-H34Y].

making public the private ruling that she need not abide by the Trump campaign's contract.[154] In another case, Trump had countersued for breach of the campaign's non-disparagement agreement after Alva Johnson, a former campaign staff member, filed suit claiming battery for an unwanted kiss from Trump.[155] Trump continued to pursue his breach claim after a federal district court dismissed Johnson's tort suit, but an arbitrator, following the decision in *Denson*, ruled against him and ultimately required him to pay her legal fees as required under the contract to the prevailing party.[156] The arbitrator's decision, which criticized the campaign's efforts to enforce the contract in order to "silenc[e] other employees that were terminated or had somehow criticized the Candidate in other ways," itself received significant press coverage.[157]

President Trump was not the only party who sought to enforce his RNDAs. In 2020, the Department of Justice filed suit in federal court against Stephanie Winston Wolkoff, a former unpaid adviser to First Lady Melania Trump, claiming that her book about the end of her friendship with the First Lady violated the NDA between Wolkoff and the White House.[158] The complaint asserted that federal jurisdiction followed from the "national nature of the interests and operations related to the [First Lady]" and the fact that the contract concerned services memorialized on official White House stationery.[159] Less than four months later and soon after President Biden's inauguration, the Department of Justice dismissed the suit without comment and without the

154. *See* Maggie Haberman, *Trump Loses Case to Enforce Omarosa Manigault Newman's N.D.A.*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/2021/09/28/us/politics/trump-omarosa-nda-suit.html [https://perma.cc/2HFS-R2B6]; *see also* John Phillips, *The President v. Omarosa: Winning at Arbitration, Against the Odds*, 108 A.B.A. J. 24, 24–26 (2022).

155. *See* Veronica Stracqualursi, *Former Trump Campaign Staffer Drops Lawsuit but Stands by Claims He Forcibly Kissed Her*, CNN (Sept. 8, 2019, 11:27 AM), https://www.cnn.com/2019/09/05/politics/alva-johnson-trump-lawsuit-sexual-assault-allegations/index.html [https://perma.cc/93ER-8DXQ].

156. *See* Maria Cramer, *Trump Campaign Owes $300,000 in Legal Fees After Another Failed NDA Case*, N.Y. TIMES (Mar. 8, 2022), https://www.nytimes.com/2022/03/18/us/politics/alva-johnson-donald-trump-arbitrator-ruling.html [https://perma.cc/NH9H-PST2].

157. *See* Donald J. Trump for President, Inc. v. Alva Johnson, AAA-Case No.: 01-19-0003-0216 at 13 (2021) (Bianchini, Arb.), https://www.tzlegal.com/wp-content/uploads/2022/03/2022-03-10-Final-Decision.pdf [https://perma.cc/MUQ6-37FV].

158. Spencer S. Hsu, *Justice Dept. Sues to Seize Profits of Tell-All Melania Trump Book, Citing White House Nondisclosure Pact*, WASH. POST (Oct. 14, 2020, 4:44 PM), https://www.washingtonpost.com/local/legal-issues/melania-book-lawsuit/2020/10/13/a06398f8-0d98-11eb-8a35-237ef1eb2ef7_story.html [https://perma.cc/6556-YCPM].

159. *Id.*

complaint having stopped or delayed the book's publication—although the suit provided the memoir additional free publicity.[160]

Trump's failed RNDAs did not exact the political cost one might expect for an elected official and public figure. Rather, they fell into the pattern set throughout his meteoric political rise in which his misbehavior has not harmed his popularity among supporters.[161] Nor have all former campaign and White House staff challenged or overcome enforcement threats.[162] But Trump's exceptional reliance on RNDAs as a private and public figure exemplifies both the contemporary use of contract law to stop the flow of information and his contracts' serial failure to protect his reputation from what would be bad publicity for most people. Parties ranging from his niece and paramour to his political staff have breached the RNDAs they signed, publicized the very actions they promised to keep secret, and prevailed over Trump's efforts to stop them.

160. Spencer S. Hsu, *Justice Department Drops Lawsuit Against Melania Trump's Ex-Aide for Tell-All Book*, WASH. POST (Feb. 8, 2021, 9:38 PM), https://www.washingtonpost.com/local/legal-issues/stephanie-wolkoff-melania-trump-book-lawsuit-dropped/2021/02/08/86ce5784-6a63-11eb-9ead-673168d5b874_story.html [https://perma.cc/EA5H-UPA2].

161. Nicholas Goldberg, *Despite Accusations of Rape and Other Crimes, Trump's Up in the Polls: How Can That Be?*, L.A. TIMES (May 4, 2023, 3:15 AM), https://www.latimes.com/opinion/story/2023-05-04/e-jean-carroll-donald-trump-rape-hush-money-stormy-daniels [https://perma.cc/SVE4-8344].

162. Sam Nunberg, a campaign consultant, settled with the Trump campaign after it sought $10 million in damages for leaking information about the relationship between two high-ranking members of the campaign, although no terms of the settlement were released. Rose Gray, Chris Geidner & Mary Ann Georgantopoulos, *Donald Trump Is Seeking $10 Million From A Former Campaign Consultant*, BUZZFEED NEWS, https://www.buzzfeednews.com/article/rosiegray/trump-and-nunberg#.jyNRJEWDpv [https://perma.cc/5LBM-UPC7] (July 13, 2016, 6:32 PM); Chad Day & Jake Pearson, *Trump, Former Campaign Aide Settle Confidentiality Suit*, THE ASSOCIATED PRESS (Aug. 12, 2016, 11:50 AM), https://apnews.com/9caa6e179c9b45e3b44009ea9a8309e9/trump-former-campaign-aide-settle-confidentiality-dispute [https://perma.cc/UPU9-5WJL]; Zoe Tillman, *A Former Trump Staffer Filed A Class Action To Invalidate All Of The Campaign's Nondisclosure Agreements*, BUZZFEED NEWS (Feb. 20, 2019, 2:13 PM), https://www.buzzfeednews.com/article/zoetillman/trump-campaign-nondisclosure-agreements-class-action-lawsuit [https://perma.cc/E33R-ASTT]. Another aide, Cliff Sims, preemptively filed suit under the First Amendment before publishing a book about his experiences in the Trump White House in anticipation of a legal challenge under the NDA from the Trump administration, but quietly withdrew the suit after reconciling with Trump. *See* Daniel Lippman, *Cliff Sims, Who Wrote Tell-All White House Memoir, Joins Spy Office*, POLITICO (Oct. 2, 2020, 6:29 PM), https://www.politico.com/news/2020/10/02/cliff-sims-white-house-odni-425579 [https://perma.cc/E8SN-MHD4].

B. How RNDAs Fail (2): On the Trail of Harvey Weinstein

NDAs may attempt to suppress information, but to non-parties who learn of their existence, RNDAs *are* information about at least one party's desire and effort to keep secrets. Rumors about settlement agreements with NDAs proved valuable for investigative journalists attempting to track down and confirm details about the "open secret" in the entertainment industry that Harvey Weinstein had for decades used his success as a film producer and executive to assault actresses and young female employees of the companies he ran.[163] If his victims complained about his actions, Weinstein or his company would offer them financial settlements that included non-disclosure clauses,[164] and he would silence victims by threatening their careers.[165] The *New York Times*'s Jodi Kantor and Megan Towhey and Ronan Farrow in the *New Yorker* received Pulitzer Prizes for their reporting in 2017 that finally exposed the scandal.[166] Following clues that Weinstein and his enablers had left exposed, their investigations helped bring down the NDAs and other robust informational walls that his legal and corporate agents, including private intelligence services, had constructed to protect him.[167]

As one victim told Kantor and Twohey about other victims, "Almost everyone has an NDA."[168] Learning from *New York Times* colleagues who had reported on Bill O'Reilly's sexual abuse scandal, Kantor and Twohey came to view settlement agreements as tangible documentary evidence that could serve

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163. Megan Garber, *In the Valley of the Open Secret*, THE ATL. (Oct. 11, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/harvey-weinstein-latest-allegations/542508/ [https://perma.cc/2PD6-WRSF]. Journalists had for years tried to document the story. FARROW, *supra* note 56, at 82–84; KANTOR & TWOHEY, *supra* note 56, at 91–95.

164. *See* Otte, *supra* note 77, at 545–46; Zhai, *supra* note 86, at 441–42.

165. *See* FARROW, *supra* note 56, at 303–04. Weinstein also pressured journalists and hired an intelligence firm to threaten those who were investigating him. *See id.* at 328–29.

166. Lisa Ryan, *The Reporters Who Uncovered Harvey Weinstein Sexual Abuse Just Won the Pulitzer Prize*, THE CUT (Apr. 16, 2018), https://www.thecut.com/2018/04/pulitzer-prize-2018-weinstein-investigation-reporters.html [https://perma.cc/XY3W-M86S].

167. Scott Raynor, *How Harvey Weinstein's 'Secret Weapon' Led to a Nationwide Re-evaluation of the Non-disclosure Agreement*, EVERFI, https://everfi.com/blog/workplace-training/harvey-weinstein-sexual-harassment-secret-weapon-non-disclosure-agreement [https://perma.cc/ZWX7-AXFK].

168. KANTOR & TWOHEY, *supra* note 56, at 12; FARROW, *supra* note 56, at 35. McGowan herself was not bound by an NDA, see Susan Dominus, *Refusing Weinstein's Hush Money, Rose McGowan Calls Out Hollywood*, N.Y. TIMES (Oct. 28, 2017), https://www.nytimes.com/2017/10/28/us/rose-mcgowan-harvey-weinstein.html [https://perma.cc/4JEV-5MSR], but otherwise faced pressure from Weinstein and other Hollywood studios not to discuss his sexual assault of her. *See* FARROW, *supra* note 56, at 92, 114–16.

not only as part of the scandal but as a means for them to uncover it.[169] Sealed by confidentiality clauses, the agreements may have impeded the reporters' investigations but the contracts in turn became objects for them to seek—brick walls whose components could be examined closely for the clues they contained about victims, witnesses, and the roles that attorneys played in the negotiation. The reporters thus prioritized finding the very tools intended to keep hidden the matters they were investigating.[170] Farrow too had heard rumors of RNDAs. A male marketing executive told him of women who were "paid off"; a female Miramax producer told him, "I saw things. And then they paid me off and I signed a piece of paper";[171] an attorney for one of Weinstein's victims said, "I'm not at liberty to talk about [my client]," which Farrow reasonably understood as an allusion to an RNDA;[172] and another Miramax producer told him of "documents out there . . . [w]here he's never admitting guilt, but large sums of money are paid," and offered to help Farrow if he found them.[173] Although, as a legal matter, confidentiality clauses are "not evidence of anything,"[174] they clearly signify *something* to those who learn of their existence, especially dogged journalists.

The reporters developed several ways to use Weinstein's confidential settlement agreements in pursuing the story. Learning of their existence corroborated accounts that his actions constituted a pattern.[175] The RNDAs helped identify third-party sources, including lawyers and witnesses, even if the victims were barred from speaking directly to the reporters.[176] They constituted a "reportable" fact that could in turn help persuade victims to breach;[177] and, once located, the victims seemed prepared to defect, surprised only that it took

169. KANTOR & TWOHEY, *supra* note 56, at 13, 24, 52. For an example of the *New York Times*'s reporting on O'Reilly, see Emily Steel, *How Bill O'Reilly Silenced His Accusers*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/business/media/how-bill-oreilly-silenced-his-accusers.html [https://perma.cc/Y3FV-QRHP].

170. KANTOR & TWOHEY, *supra* note 56, at 57–58.

171. FARROW, *supra* note 56, at 39.

172. *Id.* at 54.

173. *Id.* at 93.

174. *See* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://perma.cc/YYY3-BBYT] (quoting Weinstein attorney Charles Harder).

175. *See* KANTOR & TWOHEY, *supra* note 56, at 68.

176. *See id* at 66; FARROW, *supra* note 56, at 110.

177. FARROW, *supra* note 56, at 124, 134.

so long for someone to find them.[178] The concession from Weinstein attorneys that the agreements in fact existed ultimately confirmed Kantor's and Twohey's suspicions and affirmed their investigative strategy of focusing on the RNDAs.[179] They became part of what Kantor and Twohey identified as the "overwhelming body of evidence" of legal and financial records they used to document Weinstein's behavior beyond the victims' breaches.[180] The contracts made visible the larger security infrastructure upon which Weinstein relied, which included eminent attorneys like David Boies,[181] Lisa Bloom,[182] and Lanny Davis,[183] the private intelligence company Black Cube which had pursued and threatened Ronan Farrow,[184] as well as American Media Inc., which owned *National Enquirer* and engaged in "catch and kill" schemes to purchase exclusive rights to victims' stories and then not publish them.[185] The reporting ultimately damaged the reputations of the prominent attorneys whom Weinstein had hired to craft the legal tools to protect his own reputation.[186]

The success of Weinstein's RDNAs, in some instances spanning decades, was thus impermanent. Many of the victims ultimately spoke either to the press or public, especially after the journalists began to unravel and report Weinstein's campaign.[187] The victims overestimated the contracts' scope and enforceability,[188] but they breached in such numbers, the reporting of Weinstein's actions proved so powerful, and the public outrage was so great that Weinstein ultimately did not seek enforcement, despite his and his team's

178. *Id.* at 160, 167, 221.

179. *See* KANTOR & TWOHEY, *supra* note 56, at 85, 158.

180. *See id.* at 3.

181. *See* FARROW, *supra* note 56, at 316–17; KANTOR & TWOHEY, *supra* note 56, at 87.

182. *See* FARROW, *supra* note 56, at 234–37; KANTOR & TWOHEY, *supra* note 56, at 95–104.

183. *See* FARROW, *supra* note 56, at 221–22; KANTOR & TWOHEY, *supra* note 56, at 82–87.

184. *See* FARROW, *supra* note 56, at 310–21; KANTOR & TWOHEY, *supra* note 56, at 91–95.

185. *See* FARROW, *supra* note 56, at 18–19, 346–47.

186. *See* Maureen A. Weston, *Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 507, 539–41.

187. *See* Ronan Farrow, *Weighing the Costs of Speaking Out About Harvey Weinstein*, THE NEW YORKER (Oct. 27, 2017), https://www.newyorker.com/news/news-desk/weighing-the-costs-of-speaking-out-about-harvey-weinstein [https://perma.cc/C5XT-HQH3].

188. As noted above, by requiring silence about criminal acts, Weinstein's NDAs were likely unenforceable anyway. *See supra* text accompanying notes 94–98. But those who had signed them told the reporters they thought the contracts would be enforceable. *See e.g.*, KANTOR & TWOHEY, *supra* note 56, at 67; Gentleman & Watt, *supra* note 108; Emily Maitlis & Lucinda Day, *Harvey Weinstein: Ex-Assistant Criticises Gagging Orders*, BBC (Dec. 19, 2017), https://www.bbc.com/news/entertainment-arts-42417655 [https://perma.cc/MBP9-VNQR].

repeated threats to do so.[189] Breach had prevailed, ultimately rendering the contracts a liability and further proof of Weinstein's villainy rather than either a protective shield or intimidating sword. Prior to disclosure, the RNDAs had served as clues of impropriety that outsiders could use to find and imply wrongdoing and to induce or support breach; after breach, they compounded the wrongdoing's reputational cost to all involved in creating and enforcing them. And, as the next Section explains, Trump and Weinstein's RNDAs so tarnished the contract's reputation as a legal tool that they exacted a cost on others who used them.

C. RNDAs' Reputational Costs: The 2020 Democratic Party Presidential Primary

After the revelations about Weinstein's and Trump's use of RNDAs, the practice of relying upon them to keep business dealings confidential and to protect one's reputation became an issue in the 2020 Democratic presidential primaries. In mid-December 2019, as his underdog primary bid appeared to gather momentum, Mayor Pete Buttigieg faced criticism about his earlier work for the prestigious consulting firm McKinsey.[190] Buttigieg had long used his affiliation with McKinsey as evidence of his meritocratic accomplishment, alongside his Harvard undergraduate degree and Rhodes scholarship at Oxford, and as a sign of his political centrism.[191] Recently published news stories had revealed ethical, political, and legal issues arising out of the firm's work for clients with disturbing reputations, including autocratic foreign governments and opioid manufacturers, which led reporters and primary voters to press Buttigieg for details about his assignments at McKinsey.[192] But Buttigieg's

189. *See* Michelle Kaminsky, *The Harvey Weinstein Effect: The End of Nondisclosure Agreements in Sexual Assault Cases?*, FORBES (Oct. 26, 2017, 1:00 PM), https://www.forbes.com/sites/michellefabio/2017/10/26/the-harvey-weinstein-effect-the-end-of-nondisclosure-agreements-in-sexual-assault-cases/?sh=d06c4f92c11c [https://perma.cc/C6H8-9C4N].

190. *See* Emily Stewart & Ella Nilsen, *Pete Buttigieg's McKinsey Problem, Explained*, VOX (Dec. 7, 2019, 11:28 AM), https://www.vox.com/policy-and-politics/2019/12/6/20998972/pete-buttigieg-mckinsey-fundraisers-elizabeth-warren [https://perma.cc/5A3U-R7UD].

191. *See, e.g.*, Zack Beauchamp, *Pete Buttigieg's 2020 Presidential Campaign and Policies, Explained*, VOX (June 27, 2019, 5:30 PM), https://www.vox.com/policy-and-politics/2019/4/3/18282638/pete-buttigieg-2020-presidential-campaign-policies [https://perma.cc/55SH-RNRP].

192. *See generally* Ian MacDougall, *McKinsey's Rules: When Consultants Work for Governments*, PROPUBLICA, https://www.propublica.org/series/mckinseys-rules [https://perma.cc/2JSY-RJHC] (collecting stories revealing the firm's troubling work for federal and

employment agreement with the firm precluded him from publicly discussing his work.[193] His silence about a distinguishing feature of his biography suddenly left him vulnerable in a contentious primary in which some of his leading competitors, including especially Elizabeth Warren and Bernie Sanders, channeled populist anger against multinational corporations and global elites whose wealth and power McKinsey helped expand.[194]

The NDA had created a predicament for both parties to the contract. If McKinsey's consulting work was so valuable to its clients, why did the firm prevent disclosure about it? Why did Buttigieg's work, performed more than a decade earlier, still require confidentiality? Was this not further evidence of the firm's perfidy?[195] Meanwhile, every general denial of wrongdoing Buttigieg issued fueled demands for details, and his refusal to provide them suggested that troubling facts lurked beneath the lines of his stellar resumé.[196] McKinsey offered a rational, defensible response: disclosure would be unethical and likely a breach of its contracts with clients as well as its duty to protect their proprietary information.[197] If Buttigieg breached his employment contract and disclosed his assignments to the press, McKinsey could in turn sue him; indeed,

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state agencies); Walt Bogdanich & Michael Forsythe, *How McKinsey has Helped Raise the Stature of Authoritarian Governments*, N.Y. TIMES (Dec. 15, 2018), https://www.nytimes.com/2018/12/15/world/asia/mckinsey-china-russia.html [https://perma.cc/2VU4-7C7H] (concerning the firm's work for China and Russia); Walt Bogdanich & Michael Forsythe, *How McKinsey Lost Its Way in South Africa*, N.Y. TIMES (June 26, 2018), https://www.nytimes.com/2018/06/26/world/africa/mckinsey-south-africa-eskom.html [https://perma.cc/XMZ9-WMJD]; Walt Bogdanich & Michael Forsythe, *McKinsey Proposed Paying Pharmacy Companies Rebates for OxyContin Overdoses*, N.Y. TIMES (Nov. 5, 2021), https://www.nytimes.com/2020/11/27/business/mckinsey-purdue-oxycontin-opioids.html [https://perma.cc/7K5U-JYQF].

193. Lucia Graves, *Pete Buttigieg and McKinsey: Why a Background in Business Raises Doubts*, THE GUARDIAN (Dec. 5, 2019, 3:00 AM), https://www.theguardian.com/us-news/2019/dec/05/pete-buttigieg-mckinsey-business-democratic-2020 [https://perma.cc/9T39-WYR8].

194. *See, e.g.*, Roge Karma, *The Millennial Left's Case Against Pete Buttigieg, Explained*, VOX (Feb. 11, 2020, 10:10 AM), https://www.vox.com/2020/2/11/21129665/pete-buttigieg-2020-democratic-primary-millennials [https://perma.cc/AHN7-8HBU].

195. *See, e.g.*, Graves, *supra* note 193; *see generally* DUFF MCDONALD, THE FIRM: THE STORY OF MCKINSEY AND ITS SECRET INFLUENCE ON AMERICAN BUSINESS (2013).

196. *See* Sydney Ember, Reid J. Epstein & Trip Gabriel, *Buttigieg Struggles to Square Transparency with Nondisclosure Agreement*, N.Y. TIMES (Dec. 10, 2019), https://www.nytimes.com/2019/12/07/us/politics/Buttigieg-McKinsey-Disclosure.html [https://perma.cc/5H7S-TESS].

197. *See* Stephen L. Carter, *Leave Pete Buttigieg's McKinsey NDA Alone*, BNN BLOOMBERG (Dec. 7, 2019, 7:15 AM), https://www.bnnbloomberg.ca/leave-pete-buttigieg-s-mckinsey-nda-alone-1.1359067 [https://perma.cc/63J5-GC7K].

the firm might feel pressured to enforce the contract to appease its clients as well as to prevent disclosure by current and other past employees.[198] Breach might also have harmed Buttigieg's image as a rule-following, reasonable centrist fighting a gaggle of populist competitors on his left flank.[199] And yet, in the midst of this silence the contract itself seemed to speak poorly of the candidate: Why work for a powerful but apparently dodgy firm that requires silence of its associates? Why should voters trust a candidate who prizes a contractual duty of confidentiality over his responsibility to explain a potentially troubling past? NDAs might have been acceptable for Donald Trump but not for Democrats aspiring to defeat him in 2020.

The kerfuffle receded within a few days after McKinsey received permission from its clients to allow Buttigieg to provide a broad sketch of the work he had performed—which was neither controversial nor, it seems, even interesting.[200] But it presaged and perhaps helped prompt a call for all of the candidates to condemn non-disclosure agreements[201] after a news website revealed that Michael Bloomberg's company included confidentiality clauses within agreements to settle multiple sexual harassment lawsuits with former employees.[202] In a primary debate two months later, Senator Elizabeth Warren initiated an attack on Bloomberg for his company's harassment of female employees as well as for the NDAs included in their settlement agreements, an attack that Joe Biden and then Buttigieg joined.[203] Backed by an applauding live audience, Warren called on Bloomberg to release the women from their

198. *See* Derek Thompson, *Just Break the NDA, Pete*, THE ATL. (Dec. 6, 2019), https://www.theatlantic.com/ideas/archive/2019/12/just-break-nda-pete/603226/ [https://perma.cc/R9AB-HTYW].

199. *See* Carter, *supra* note 197.

200. *See* Edward-Isaac Dovere, *What Pete Buttigieg Says He Did at McKinsey*, THE ATL. (Dec. 10, 2019), https://www.theatlantic.com/politics/archive/2019/12/pete-buttigieg-mckinsey/603421/ [https://perma.cc/DWE7-3S49]; Ainsley Harris, *The Miseducation of Pete Buttigieg, the McKinsey Candidate*, FAST CO. (Dec. 19, 2019), https://www.fastcompany.com/90442587/the-miseducation-of-pete-buttigieg-the-mckinsey-candidate [https://perma.cc/Z68M-95EA].

201. Nick Corasaniti, *2020 Candidates Are Asked to Condemn Nondisclosure Agreements*, N.Y. TIMES (Dec. 18, 2019), https://www.nytimes.com/2019/12/18/us/politics/2020-Democrats-Fox-News-NDAs.html [https://perma.cc/7CSQ-DLTP].

202. Becky Peterson, Nicole Einbinder & J.K. Trotter, *Michael Bloomberg Built a $54 Billion Company. For 2 Decades, Women Who Worked There Have Called It a Toxic, Sexually Charged Nightmare*, BUS. INSIDER (Nov. 26, 2019, 3:56 PM), https://www.businessinsider.com/bloomberg-built-a-toxic-sexually-charged-nightmare-for-women-2019-11 [https://perma.cc/BA2T-2MKM].

203. *See Full Transcript: Ninth Democratic Debate in Las Vegas*, NBC NEWS (Feb. 19, 2020, 11:08 PM), https://www.nbcnews.com/politics/2020-election/full-transcript-ninth-democratic-debate-las-vegas-n1139546 [https://perma.cc/VUW9-3QTS].

contractual duties.[204] After ineffectual attempts to defend himself during the debate and immediately thereafter, Bloomberg announced that he would grant a limited release from the NDA to three women to whom he had made sexist comments in the past, which his opponents immediately attacked as insufficient.[205]

The substantive issues kept secret by Buttigieg's and Bloomberg's private NDAs may have raised concerns for Democratic voters, but the NDAs themselves constituted distinct political liabilities. By signing and then hiding behind them—one as an employee and the other as an employer—the candidates appeared to be using Donald Trump's favored strategy to hide unethical and possibly immoral and illegal acts.[206] The substantive information kept secret was contested: prior to Buttigieg's permitted disclosures, the press and public knew nothing of his specific work for McKinsey but drew negative inferences from the contracts' existence, while Bloomberg disputed the claims that he and his company were sexist.[207] McKinsey's and Bloomberg's use of NDAs led many to assume that they used a legal tool to enforce silence and protect their reputations.[208] Although neither McKinsey's nor Bloomberg's NDAs were breached, both candidates' presidential campaigns paid short-term costs exacted by previous breaches that had stigmatized their use.[209]

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204. *See id.*

205. Nick Corasaniti & Michael M. Grynbaum, *Bloomberg, in Reversal, Says He'll Release 3 Women from Nondisclosure Agreements*, N.Y. TIMES, https://www.nytimes.com/2020/02/21/us/politics/michael-bloomberg-nda.html [https://perma.cc/8VRB-DZ9N] (Feb. 25, 2020). The releases extended only to former employees who complained about statements Bloomberg himself made; left out of the release were NDAs and non-disparagement agreements in severance agreements with departing employees, including some who alleged pervasive workplace sexism and racism. *See* Jessica Silver-Greenberg & Natalie Kitroeff, *How Bloomberg Buys the Silence of Unhappy Employees*, N.Y. TIMES, https://www.nytimes.com/2020/03/02/business/michael-bloomberg-nda.html [https://perma.cc/7TNZ-D4F8] (Mar. 4, 2020).

206. *See* Dovere, *supra* note 200; Silver-Greenberg & Kitroeff, *supra* note 205.

207. *See Full Transcript: Ninth Democratic Debate in Las Vegas*, *supra* note 203; Graves, *supra* note 193.

208. *See Non-disclosure Agreements and Government Accountability Don't Mix, Governor*, DET. FREE PRESS (Mar. 4, 2021, 7:01 AM), https://www.freep.com/story/opinion/editorials/2021/03/04/governor-gretchen-whitmer-ndas-transparency-gordon-gray/6906763002/ [https://perma.cc/8YWU-9MQZ] (discussing why politicians using confidentiality agreements leads to sinister speculation).

209. *See* Graves, *supra* note 193; Corasaniti & Grynbaum, *supra* note 205.

D. RNDAs' Institutional Costs: When Religious Organizations Use NDAs

Religious organizations have also increasingly relied on RNDAs; some of these too have been breached. Critics from outside and even within faith communities have condemned the contracts as distinct wrongs separate from the content that they failed to keep secret. The criticism has inflicted further reputational harms on the institutions that used them and has damaged their members' faith in the institutions' integrity and adherence to the spiritual and moral principles they espouse.

Most infamously, the Catholic Church included confidentiality clauses in individualized settlement agreements with victims and their families to help contain information about many of its priests' sexual abuse of minors.[210] Earlier scandals that erupted beginning in the mid-1980s had revealed instances of abuse,[211] but both the behavior and the coverups continued into the next decade.[212] A 2018 Pennsylvania grand jury investigation found settlement agreements executed by the church dating back to 1989 that included confidentiality clauses specifically barring communication with news outlets,[213] a practice that continued throughout the next decade.[214] The agreements hid not only the abuse but the names of the perpetrators, enabling the miscreant priests

210. MATT CARROLL, KEVIN CULLEN, THOMAS FARRAGHER, STEPHEN KURKJIAN, MICHAEL PAULSON, SACHA PFEIFFER, MICHAEL REZENDES & WALTER V. ROBINSON, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH 47–50, 100–03 (2002); ELINOR BURKETT & FRANK BRUNI, A GOSPEL OF SHAME: CHILDREN, SEXUAL ABUSE, AND THE CATHOLIC CHURCH 260–61 (1993); PATRICIA EWICK & MARC W. STEINBERG, BEYOND BETRAYAL: THE PRIEST SEX ABUSE CRISIS, THE VOICE OF THE FAITHFUL, AND THE PROCESS OF COLLECTIVE IDENTITY 7 (2019); Rev. Raymond C. O'Brien, *Clergy, Sex and the American Way,* 31 PEPP. L. REV. 363, 437–39 (2004); Philip, *supra* note 93, at 845–46.

211. *See* PHILIP JENKINS, PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS 3–4 (1996).

212. *See* BURKETT & BRUNI, *supra* note 210, at 256–60.

213. *See* OFF. OF THE ATT'Y GEN., COMMONWEALTH OF PA., REPORT I OF THE 40TH STATEWIDE INVESTIGATING GRAND JURY 293 (2018); *id.* at 168.

214. The *Boston Globe* reported that between 1997 and 2001, one archdiocese had settled approximately fifty sexual abuse claims, many of which contained nondisclosure agreements. *See* Michael Rezendes, *Church Allowed Abuse by Priest for Years*, BOS. GLOBE (Jan. 6, 2002, 5:50 PM), https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html [https://perma.cc/H5PR-JWA5]; *see also* CARROLL, CULLEN, FARRAGHER, KURKJIAN, PAULSON, PFEIFFER, REZENDES & ROBINSON, *supra* note 210, at 47.

to continue serving their parishes or elsewhere while preventing information about the abuse and settlements from spreading to parishioners.[215]

Early in their investigation into rumors of the abuse within the Boston archdiocese, *Boston Globe* reporters, whose newspaper was viewed by the church hierarchy and parishioners as biased against Catholics,[216] learned about the confidentiality clauses within victims' settlement agreements.[217] But informal agreements that church officials made with local Boston law enforcement and the victims' attorneys prevented details and confirmation from reaching the journalists,[218] and interviews with victims could not reveal the entirety of the scandal.[219] While the RNDAs delayed widescale reporting on the priests and their victims until 2002, the abuse and cover-up left traces that the contracts could not contain. With limited access to the victims, *Boston Globe* reporters created a database of clergy from the church's annual directories, allowing them to track the reassignments of priests throughout the country.[220] They unraveled the secrecy with the directory information, court documents, evidence from prior cases that was public or had leaked, and interviews with anonymous sources including some of the attorneys who represented victims.[221]

Despite their early, temporary success, the RNDAs hurt those victims whose abuse might not have occurred had the scandal become public earlier. They also damaged the church itself. The RNDAs' seeming invincibility had engendered confidence among the hierarchy and clergy that the church risked no responsibility, enabling the abuse to spread and thereby to increase the

215. *See* Rezendes, *supra* note 214; Laurie Goodstein, *Albany Diocese Settled Abuse Case for Almost $1 Million,* N.Y. TIMES (June 27, 2002), https://www.nytimes.com/2002/06/27/nyregion/albany-diocese-settled-abuse-case-for-almost-1-million.html [https://perma.cc/W632-HYM5].

216. CARROLL, CULLEN, FARRAGHER, KURKJIAN, PAULSON, PFEIFFER, REZENDES & ROBINSON, *supra* note 210, at 7–8; JAMES CARROLL, PRACTICING CATHOLIC 286 (2009).

217. CARROLL, CULLEN, FARRAGHER, KURKJIAN, PAULSON, PFEIFFER, REZENDES & ROBINSON, *supra* note 210, at x–xi.

218. *Id.*; EWICK & STEINBERG, *supra* note 210, at 7.

219. Joseph P. Kahn & Mike Damiano, '*They Knew and They Let it Happen': Uncovering Child Abuse in the Catholic Church*, BOS. GLOBE (Sept. 22, 2021, 11:51 PM), https://www.bostonglobe.com/2021/09/22/magazine/they-knew-they-let-it-happen-uncovering-child-abuse-catholic-church/ [https://perma.cc/337W-S4QA].

220. CARROLL, CULLEN, FARRAGHER, KURKJIAN, PAULSON, PFEIFFER, REZENDES & ROBINSON, *supra* note 210, at xi–xii.

221. Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases*, BOS. GLOBE (Jan. 31, 2002), https://www.bostonglobe.com/news/special-reports/2002/01/31/scores-priests-involved-sex-abuse-cases/kmRm7JtqBdEZ8UF0ucR16L/story.html [https://perma.cc/96NA-NK83].

difficulty of keeping it secret.[222] After the disclosure of their existence, the RNDAs in turn contributed to parishioners' anger, worsening the harm inflicted both on victims and on the church as an institution.[223] Notably, after the *Boston Globe* revelations, the U.S. Conference of Catholic Bishops established a Charter for the Protection of Children and Young People in 2002[224] that requires dioceses to publicly report instances of abuse[225] and prevents them from entering "into settlements which bind the parties to confidentiality, unless the victim/survivor requests confidentiality."[226]

Some Evangelical Protestant institutions have also used RNDAs to protect their institutions' reputation before facing greater condemnation from critics who denounced not only the acts kept secret but the secrecy mechanisms themselves. Liberty University, one of the largest evangelical educational institutions in the world,[227] along with its former president, Jerry Falwell, Jr., relied on RNDAs to keep secret improprieties about his and his wife's sexual affairs and personal businesses.[228] As scandals mounted at Liberty, disaffected former employees reported the university's widespread use of RNDAs in its employment and settlement agreements.[229] RNDAs prevented even university board members and student journalists working for the campus newspaper from

222. CARROLL, CULLEN, FARRAGHER, KURKJIAN, PAULSON, PFEIFFER, REZENDES & ROBINSON, *supra* note 210, at 47–48; BURKETT & BRUNI, *supra* note 210, at 262.

223. *See generally* EWICK & STEINBERG, *supra* note 210, at 41–44.

224. U.S. CONF. OF CATH. BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE 3 (2018), https://www.usccb.org/resources/Charter-for-the-Protection-of-Children-and-Young-People-2018-final%281%29.pdf [https://perma.cc/7TPT-WQAL].

225. *Id.* at 10.

226. *Id.*

227. *See* Hannah Dreyfus, *"The Liberty Way": How Liberty University Discourages and Dismisses Students' Reports of Sexual Assaults*, PROPUBLICA (Oct. 24, 2021, 7:22 PM), https://www.propublica.org/article/the-liberty-way-how-liberty-university-discourages-and-dismisses-students-reports-of-sexual-assaults [https://perma.cc/7XTM-MSHY].

228. Brandon Ambrosino, *'Someone's Gotta Tell the Freakin' Truth': Jerry Falwell's Aides Break Their Silence*, POLITICO (Sept. 9, 2019), https://www.politico.com/magazine/story/2019/09/09/jerry-falwell-liberty-university-loans-227914 [https://perma.cc/BD8Y-8M46]; Bob Moser, *Sin and Scandal at Liberty University*, ROLLING STONE (Oct. 18, 2020, 9:00 AM), https://www.rollingstone.com/culture/culture-features/jerry-fallwell-jr-becki-giancarlo-granda-scandal-liberty-university-1075672 [https://perma.cc/7T4A-FSEV].

229. Cynthia Beasley, *Former Liberty University VP: Investigative Firm Did Not Interview Sexual Assault Accusers*, ABC 13 NEWS (Oct. 27, 2021, 4:32 PM), https://wset.com/news/abc13-investigates/former-liberty-university-vp-investigative-firm-did-not-interview-sexual-assault-accusers-jane-doe-scott-lamb-title-ix-lawsuit [https://perma.cc/98SY-XNBT].

discussing Falwell's actions and their experiences at Liberty.[230] Falwell was not alone among evangelical leaders in his use of RNDAs. Public scandals in recent years involving evangelical institutions and leaders who utilized RNDAs,[231] including a prominent summer camp where children were sexually abused,[232] have led members to call out not only the formerly secret, scandalous behavior but the secrecy surrounding it,[233] and has inspired the start of an organization to advocate against NDAs' use in churches.[234] The problem is not unique to

230. Will E. Young, *Inside Liberty University's 'Culture of Fear'*, WASH. POST (July 24, 2019), https://www.washingtonpost.com/outlook/2019/07/24/inside-liberty-universitys-culture-fear-how-jerry-falwell-jr-silences-students-professors-who-reject-his-pro-trump-politics/ [https://perma.cc/X8Y6-DLQM]; Rick Seltzer, *Cuts at Liberty Hit Divinity*, INSIDE HIGHER ED (June 16, 2019), https://www.insidehighered.com/news/2019/06/17/liberty-university-cuts-divinity-faculty [https://perma.cc/BXP6-84C8].

231. *See, e.g.*, Daniel Silliman & Kate Shellnut, *Ravi Zacharias Hid Hundreds of Pictures of Women, Abuse During Massages, and a Rape Allegation*, CHRISTIANITY TODAY (Feb. 11, 2021, 4:29 PM), https://www.christianitytoday.com/news/2021/february/ravi-zacharias-rzim-investigation-sexual-abuse-sexting-rape.html?utm_medium=widgetemail [https://perma.cc/SM8R-LVQ9]; *see generally* Daniel Silliman, *NDAs Kept These Christians Silent. Now They're Speaking Out Against Them*, CHRISTIANITY TODAY (July 7, 2021, 2:00 PM), https://www.christianitytoday.com/news/2021/july/ndafree-campaign-confidentiality-nondisclosure-abuse.html [https://perma.cc/NJ7D-R7LE].

232. For decades, several counselors at Kanakuk Kamps in Branson, Missouri, had abused campers, and the camp and its insurance company had included confidentiality clauses in its settlement agreements with victims. *See* Nancy French, *Survivors, Ex-employees Say Unreported Abuse at Kanakuk Camps in Branson Spans Decades*, SPRINGFIELD NEWS LEADER (May 28, 2022, 4:00 PM), https://www.news-leader.com/story/news/local/ozarks/2022/05/26/kanakuk-kamps-abuse-unreported-decades-victims-say-missouri-pete-newman/9803409002/ [https://perma.cc/275D-N3P5]. The camp allegedly wielded non-disparagement clauses as weapons during settlement negotiations with victims. *See* David French, *Kanakuk Kamps Tried to Punish a Victim's Family for Refusing to Sign a Non-Disparagement Agreement*, DISPATCH (Apr. 6, 2021), https://frenchpress.thedispatch.com/p/kanakuk-kamps-tried-to-punish-a-victims?s=r [https://perma.cc/65YH-KRTR].

233. *See, e.g.*, Emily Belz, *Silence of the Sheep*, WORLD NEWS GRP. (Oct. 26, 2019), https://wng.org/articles/silence-of-the-sheep-1617298243 [https://perma.cc/6JJZ-TLMU]; Joe Carter, *Should Christians Sign Non-Disclosure Agreements?*, GOSPEL COAL. (May 28, 2020), https://www.thegospelcoalition.org/article/should-christians-sign-non-disclosure-agreements/ [https://perma.cc/7FNB-CQ7E]; Morgan Lee, *When Christian Ministries Ask Their Ex-Employees Not to Talk*, CHRISTIANITY TODAY (Nov. 6, 2019), https://www.christianitytoday.com/ct/podcasts/quick-to-listen/christian-ministries-non-disclosure-agreements-non-competes.html [https://perma.cc/ES9U-LKFJ]; Silliman, *supra* note 231.

234. *See* Silliman, *supra* note 231.

Evangelical Churches; some mainline Protestant denominations have also utilized RNDAs and have in turn faced similar criticism.[235]

Unsurprisingly, RNDAs have also proven attractive to non-mainstream and fringe religious organizations that bind members to the group and defend against the circulation of their beliefs and practices to outsiders. The Church of Scientology has deployed NDAs[236] alongside its infamously aggressive tactics in copyright litigation to protect against disclosure of its secrets.[237] Although the church's efforts have frightened former members and reporters into keeping Scientology's deepest secrets, the contracts have ultimately failed to prevent substantive disclosures that have harmed its reputation.[238] The NXIVM cult relied on confidentiality agreements to keep secret its practices and repeatedly attempted to enforce its contractual and intellectual property rights to keep its beliefs secret.[239] It found only limited success before collapsing in the wake of defections, breaches, and criminal prosecution.[240] The same occurred in a much

235. These include the Church of England, see Madeleine Davies, *The Church and NDAs: When Silence is Enforced*, CHURCH TIMES, (Sept. 3, 2021), https://www.churchtimes.co.uk/articles/2021/3-september/features/features/the-church-and-ndas-when-silence-is-enforced [https://perma.cc/FP6C-BFDC]; *Justin Welby Tells Church of England to Stop Using NDAs amid Racism Claims*, BBC NEWS (April 20, 2021), https://www.bbc.com/news/uk-56817048 [https://perma.cc/9S3D-D5HS], and the Christian Reformed Church, see Gayla R. Postma, *Committee for Preventing Abuse Wraps Up*, BANNER (June 16, 2021), https://www.thebanner.org/news/2021/06/committee-for-preventing-abuse-wraps-up [https://perma.cc/T55J-D3X3].

236. *See, e.g.*, *Another PR Crisis for Scientology*, ABC NEWS (Feb. 28, 2012, 9:53 PM), https://abcnews.go.com/US/pr-crisis-scientology-abc-news-exclusive/story?id=15813613 [https://perma.cc/E5P8-9NT7]; Tony Ortega, *Sunday Funnies: There's a New Contract for Scientology Staff Workers, and We Have a Copy*, UNDERGROUND BUNKER (Feb. 13, 2014), https://tonyortega.org/2014/02/23/sunday-funnies-theres-a-new-contract-for-scientology-staff-workers-and-we-have-a-copy/#more-13392 [https://perma.cc/ES6G-TJRE].

237. On the Church of Scientology's extensive and mixed record of protecting its secrets by claiming intellectual property rights, see Walter A. Effross, *Owning Enlightenment: Proprietary Spirituality in the "New Age" Marketplace*, 51 BUFF. L. REV. 483, 591–627 (2003).

238. *See, e.g.*, David S. Touretzky, *The Secrets of Scientology*, CARNEGIE MELLON U., https://www.cs.cmu.edu/~dst/Secrets/ [https://perma.cc/XV9H-LS6E]. For broader descriptions and examples of Scientology's secrets and its failed efforts to control them, see HUGH B. URBAN, THE CHURCH OF SCIENTOLOGY: A HISTORY OF A NEW RELIGION 178–99 (2011).

239. *See* Sarah Berman, *What It's Like to Be Surveilled and Sued by NXIVM*, VICE (June 13, 2019, 10:26 AM), https://www.vice.com/en/article/j5wk88/what-its-like-to-be-surveilled-and-sued-by-nxivm [https://perma.cc/LG4F-PNLR].

240. *See, e.g.*, NXIVM Corp. v. Ross Inst., 364 F.3d 471, 478–79 (2d Cir. 2004) (refusing to enjoin on copyright infringement grounds an anti-cult organization from publishing and criticizing NXIVM's written materials, rejecting an argument that defendant's bad faith in obtaining and then publishing materials precluded a fair use defense); NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 124

lower profile doomsday Christian sect in New Jersey.[241] These failed NDAs are not unique; as one commentator has noted, secretive religious sects have long suffered the disclosure of their secrets from former members.[242] Whether secured by contract or not, the breaches of those confidences have caused unwanted attention and made the apostates more sympathetic to outsiders and authorities.[243]

RNDAs do not always provide the information control they promise. Disaffected parties sometimes breach their contracts by disclosing the information they promised to keep secret; their breach sometimes initiates the revelation of secret information or sometimes the breach follows other disclosures, including news of the RNDA itself; and the breach sometimes occurs in response to the efforts of an outsider, typically a reporter, who encourages the breaching party to disclose. The RNDA itself can sometimes be a clue to the secret, and outsiders often perceive it as a wrong that enhances and sometimes even multiplies the iniquity that the RNDA sought to cover up. The RNDAs that this Part has described cover a broad swathe of potentially illegal or embarrassing conduct—extramarital sex, troubling and potentially illegal employment practices, and illegal or unethical acts perpetrated in or by leaders of business, political, and religious organizations. Breaches have diminished RNDAs' reputation as a legal tool,[244] highlighted the risk of their failure, and left the contracts either unenforceable as a matter of law or unenforced at the parties' discretion. At least in these instances, breach constituted a means to defeat abusive RNDAs and make the contract form less appealing to future individuals and institutions who hope to control information that might harm their reputation.

(N.D.N.Y. 2007) (refusing, with some limitations, NXIVM's efforts to keep information secret under various privileges).

241. Gonzalez v. World Mission Soc'y, Church of God, No. A-3389-10, 2022 WL 552543, at *6 (N.J. Super. Ct. App. Div. Feb. 24, 2022) (per curiam) (upholding the lower court's declaring of confidentiality agreement between Church and ex-member to be unconscionable and therefore invalid and unenforceable).

242. *See, e.g.*, Effross, *supra* note 237, at 555 ("The failure of oral or written agreements not to publish closely-held spiritual teachings predates by centuries the Arica Litigation.").

243. *See id.*

244. *See, e.g.*, Ariella Steinhorn & Vincent White, *NDAs Bear Blame for Some of the Worst Corporate Cover-ups. How that Should Change*, FORTUNE (Sept. 18, 2020, 3:00 AM), https://fortune.com/2020/09/18/nda-workplace-sexual-harassment-discrimination/ [https://perma.cc/LSX9-PHHC].

V. HOW AND WHY BREACH CONSTRAINS RNDAS

Referencing the breaches described above, this Part makes several claims: information is difficult to control and easy to distribute, making contracts to keep secrets vulnerable to breach; outsiders to the agreement continually threaten contractual performance; contracts framed as one-shot financial transactions cannot contain the trauma and resentment that the parties' previous dealings and future promise create; efforts to enforce RNDAs can exacerbate the reputational harm they were intended to prevent; and the remedies theoretically available to non-breaching parties can be difficult to obtain and insufficient to compensate for the risks and costs of enforcement. The opportunity and encouragement to disclose, along with the difficulties and risks of enforcement, make breach a viable option over the life of the contract.

To be clear, breach may be effective, but it is not a simple decision for a party to make, especially for a less wealthy and legally unsophisticated one. Laypeople often perceive intentional breach as dishonorable and even immoral,[245] while they view their own contractual obligations as indissoluble commitments that other parties will inevitably and successfully enforce.[246] Indeed, several of the victims who have breached RNDAs explained that such concerns delayed their disclosures by presuming the enforceability of their contracts while they lacked the resources necessary to challenge its legality.[247] This is not unique to RNDAs. Studies of mortgage foreclosures in the aftermath

245. *See e.g.*, Luigi Guiso, Paola Sapienza & Luigi Zingales, *The Determinants of Attitudes Toward Strategic Default on Mortgages*, 68 J. AM. FIN. ASS'N 1473, 1498–1502 (2013) (finding homeowners prefer not to default on underwater mortgages because of their moral obligation to perform on their contract). This understanding is not shared by attorneys, as commentators since Holmes have long noted. *See* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else."); Goetz & Scott, *supra* note 117 (defining "efficient breach"). Scholars, meanwhile, have extensively debated the morality of breach. *Compare* Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439, 441 (2006) (answering the titular question in the negative, at least with respect to breaches of incomplete contract terms), *with* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 709 (2007) (noting the distance between the moral condemnation for intentional breaches and contract law doctrine and remedies).

246. *See* STEPHEN A. SMITH, CONTRACT THEORY 418–20 (2004); Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 984; Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1162 (2009); *see also, e.g.*, Guiso, Sapienza & Zingales, *supra* note 245 (finding homeowners prefer not to default on underwater mortgages because of their moral obligation to perform on their contract).

247. *See, e.g.*, Abrams, *supra* note 64; Falzone & Grove, *supra* note 16; Garrahan, *supra* note 28.

of the 2007–2008 financial crisis found that the majority of homeowners who owed more under their mortgages than their homes' value—and who could therefore rationally default—did not do so.[248] Experimental psychology has confirmed that laypeople distinguish between more and less defensible breaches: they view broken contracts to avoid losses as defensible, while breaches made to enjoy greater profits appear more suspect;[249] and breaches to take advantage of the other party seem less acceptable than those motivated by a party having made a mistake in agreeing to a losing contract.[250] And even if a party overcomes their aversion to breaking their promise, breach bears significant financial risk. The non-breaching party may still decide to enforce the contract, notwithstanding the financial and reputational costs of doing so, and may succeed, leaving the party in breach responsible for damages and their own litigation costs, as well as the other party's costs if the contract so required.

RNDA breaches, in sum, may prove an effective means of checking abusive RNDAs, but the decision to breach is not a simple one, nor is it one the breaching party is likely to take solely for strategic reasons. Victims have continued to perform their NDAs after #MeToo and the disclosure of bad acts by their employers.[251] But as the last half-decade has demonstrated, it is possible to breach, many parties have done so, and breach is made easier when others have done so.

A. Information Is Difficult to Control

Secrets are difficult to keep while contracts to keep them are simple to breach.[252] Owners can secure physical property that is within their possession

248. *See* Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 971–72 (2010); Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 VAND. L. REV. 1545, 1559–62, 1579–82 (2011).

249. Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 405 (2009).

250. Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1001, 1033 (2010).

251. *See, e.g.*, Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, NEW YORKER (July 27, 2018), https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct [https://perma.cc/M6AN-3T9E].

252. I use the term "easy" to describe only the logistical aspects of disclosure. The metaphor embedded in the phrase "betraying a secret" works because the ease of divulging information can belie the costs it imposes on those who disclose. Whistleblowers, for example, often feel compelled to betray their organization's law—or norm-breaking secrets—but suffer broken professional and personal lives

behind walls and fences and inside of vaults.[253] Although their physical recording may take physical form, secrets, by contrast, also constitute intangible information that a holder can share with those outside the circle of confidence surreptitiously, by mistake, or even openly, whether through spoken or written communication.[254]

RNDAs are not the only legal tools of information control that face this vulnerability. The most powerful companies and the federal government must contend with the constant threat that their employees will disclose the secrets on which their businesses and national security depend. Holders of valuable, closely-held intangible assets can attempt to bind their employees to secrecy by formal contract or informal rules,[255] and can employ trade secret laws against those who disclose such assets to existing or potential competitors.[256] The constant threat of disclosure leads industries that depend on the control of valuable secrets for their competitive advantage—from software and data development to finance, and from pharmaceuticals to biotechnology—to regularly seek extensions of trade secret law's protective capacity.[257] Similarly, the federal government's classification system, which grew exponentially in the period after World War II, establishes internal processes both to identify the types of information that the government will protect and to keep certain types of information secret.[258] Some government employees who produce and handle such information agree by contract to controls over disclosure that prevent them

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because of their disclosures. *See, e.g.*, C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 1–2 (2001).

253. *Cf.* MARK FENSTER, THE TRANSPARENCY FIX 95–97 (2017) (discussing relationship between architecture and the flow of information).

254. *See generally* JANA COSTAS & CHRISTOPHER GREY, SECRECY AT WORK 116–25 (2016) (explaining the relationship between physical and organizational boundaries and the flow of information).

255. *See* Lobel, *supra* note 22.

256. Bone, *supra* note 6, at 297; Pamela Samuelson, *Privacy As Intellectual Property?*, 52 STAN. L. REV. 1125, 1152–53 (2000). To enjoy trade secret protection, companies must make reasonable efforts to keep information within their control and away from outsiders. *See* UNIFORM TRADE SECRETS ACT § 1(4) (NAT'L CONF. COMM'RS ON UNIF. STATE L. 1985); Reeves v. Hanlon, 95 P.3d 513, 522 (Cal. 2004).

257. *See* Amy Kapczynski, *The Public History of Trade Secrets*, 55 U.C. DAVIS L. REV. 1367, 1408–13 (2022).

258. *See* Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SEC. L. & POL'Y 409, 421–29 (2012).

from discussing classified and other information without prior government approval.[259]

But even contracts supported by robust protections provided in private and public law do not prevent disclosure. Companies face the imminent and often real threat that their trade secrets will be disclosed,[260] while even the most zealous parts of the federal government constitute a "Leaky Leviathan," as David Pozen has characterized it, whose polity is "saturated with, vexed by, and dependent upon leaks" of wondrous number and variety.[261] Though fearful of public or private surveillance, government whistleblowers and disgruntled employees pass classified information and trade secrets via anonymous networks or espionage-like tradecraft; parties to a contract, by contrast, need only tell a family member or friend or send an email to a reporter or meet her for coffee to breach their agreements. It is not surprising, therefore, that RNDA breaches occur.

The qualitative social science literature on secret-keeping helps explain how and why secrets can prove challenging to keep. In his classic, early twentieth century analysis of secrecy, the German sociologist Georg Simmel explained how the secret creates a "position of exception" for its holders, a status whose distinction carries with it the burden of protecting their exclusive possession of exceptional information.[262] In so doing, secrecy creates a figurative circle based on informational access. Bound by organizational loyalty, reciprocal trust in each other, and internal sanctions like formal banishment, the group keeps those excluded in ignorance.[263] But the combination of norms and sanctions does not always succeed in preventing

259. *See* Hathaway, *supra* note 5, at 741–44.

260. According to one study, the theft of trade secrets represents a loss of between one to three percent of GDP. *See* COMM'N ON THE THEFT OF AM. INTELL. PROP., NAT'L BUREAU OF ASIAN RSCH., UPDATE TO THE IP COMMISSION REPORT 2 (2017), https://www.nbr.org/wp-content/uploads/pdfs/publications/IP_Commission_Report_Update.pdf [https://perma.cc/5HCP-8ABX].

261. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 513 (2013); *see also* FENSTER, *supra* note 253, at 80–81.

262. GEORG SIMMEL, *Secrecy*, *in* THE SOCIOLOGY OF GEORG SIMMEL 330, 332–33 (Kurt H. Wolff ed. & trans. 1950).

263. *See* SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 45–46, 54 (1983); ERVIN GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 95 (1963); Daniel Ellsberg, *Secrecy and National Security Whistleblowing*, 77 SOC. RES. 773, 778 (2010).

disclosure. The temptation to spread secrets[264] and the ability to easily do so makes prohibitions and sanctions an essential element of securing confidentiality, as much an expression of a group's anxiety about likely and imminent defection as they are of the ties that bind it together.[265] As Simmel also noted: "The secret contains a tension that is dissolved in the moment of its revelation," and the formal or informal prohibition against disclosure reveals a knowing sense among the parties that the secret "*can* be betrayed; that one holds the power of surprises, [and] turns of fate, joy, destruction."[266] The boundaries that informational circles create prove permeable when members betray their group by leaking secrets to the outside.

Characterizing the effort to keep secrets as inherently "risky,"[267] Kim Lane Scheppele has identified several factors that contribute to defection-by-disclosure.[268] The extent of the secrets' initial distribution and the nature of relationships among those in the know, for example, affect the likelihood of someone either purposefully or accidentally defecting from their agreement to keep a secret.[269] This problem is both quantitative and qualitative: the smaller a group of secret-holders, the easier it will be to monitor each other;[270] and group members will be less likely to disclose information to an outsider if they trust each other and their relationship is close—whether via family ties, co-habitation, or shared membership in a social or religious group.[271] Time matters as well: keeping confidence is easier in the short-term than over a long period.[272] Finally, a group will find keeping secrets more difficult if others without knowledge are aware of the secret's existence and actively search for it.[273]

These risk factors—the number of those privy to the secret; the quality of their relationship; outsiders' interest in gaining access to the secret; and the

264. *See* SIMMEL, *supra* note 262, at 334 (noting that a barrier to the disclosure of secrets "creates the tempting challenge to break through it, by gossip or confession—and this challenge accompanies [secrecy's] psychology like a constant overtone").

265. *Id.* at 333–34.

266. *Id.*

267. KIM LANE SCHEPPELE, LEGAL SECRETS 49 (1988).

268. *See id*. at 49–50.

269. *Id.* at 49.

270. As Benjamin Franklin purportedly quipped, "Three may keep a secret, if two of them are dead." BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK 51 (Skyhorse Publ'g 2007).

271. SCHEPPELE, *supra* note 267, at 49–50.

272. *Id.* at 50.

273. *Id.*

extent of time the parties hope to keep it—affect a party's ability and willingness to use and later to enforce RNDAs, which combine the consent required to contract with the threat of formal sanction.[274] As the next two Sections discuss, however, the parties' resort to a formal, enforceable promise because the other risks of disclosure appear too great. The secrets they share concern emotionally fraught acts—affairs outside of marriage, alleged sexual assault, sexual and racial discrimination and harassment, a religion's deepest secrets about their beliefs and practices—that leave them mutually distrustful and resentful of each other. RNDAs falsely presume that an agreement and the enforcement power of contract law can overcome the collapse or non-existence of their relationship to bind them in reciprocated silence.[275] The following sections describe the conditions under which private law fails to contain the risks of disclosure.

B. Breach Agents

Non-parties to RNDAs have instigated, or at least encouraged, many RNDA breaches. Those who directly disrupt the parties' contractual relationship serve as "breach agents"—nonparties to the agreement who, for various self-interested or public-interested reasons, encourage a party to violate their RNDA.[276] Breach agents come from both inside and outside the parties' social circles and constitute a potentially enormous universe of those who might encourage and actively assist breach.

Investigative journalists are the most visible and prominent type of interfering non-parties and were at the center of the Weinstein and Catholic Church breaches.[277] Personal intimates (family members and friends) also encouraged recent breaches or leaked information to the press. For example, Brooke Nevils, one of former NBC News personality Matt Lauer's sexual assault victims, only came forward when her work colleagues encouraged her to speak up following the Weinstein revelations.[278] Attorneys too can encourage breach: those representing Jessica Denson, whose sexual harassment lawsuit against the 2016 Trump campaign ultimately led to a successful class action

274. *Id.* at 49; SIMMEL, *supra* note 262.

275. *Cf.* FENSTER, *supra* note 253, at 77–79 (noting the flawed presumptions about information's governability in the concept of transparency).

276. On the mixed motivations for disclosure, see Jessica M. Salerno & Michael L. Slepian, *Morality, Punishment, and Revealing Other People's Secrets*, 122 J. PERSONALITY & SOC. PSYCH. 606, 622–23 (2022).

277. *See supra* Sections III.B & III.D.

278. *See* FARROW, *supra* note 56, at 388.

suit to invalidate the campaign's NDA, initiated the litigation and public statements that caused the campaign to countersue Denson for breach.[279] A breach agent need not even be affiliated with a party. Chrissy Teigen, a model and social media influencer, offered to pay any damages incurred by the gymnast McKayla Maroney if she breached her RNDA with USA Gymnastics by providing a victim impact statement at the sentencing hearing of former team doctor Larry Nassar, who had sexually assaulted Maroney and other team members.[280] Notably, Teigen's offer led USA Gymnastics to issue a public statement disavowing any intent to enforce the contract against Maroney or any other Nassar victim.[281]

Those representing wrongdoers have two imperfect tools to deter or punish breach agents. First, they can include meta-confidentiality clauses in RNDAs to impede the start of a chain of events in which word of the contract's existence leads breach agents to encourage disclosure.[282] These clauses do not always work, however—indeed, both contracts described earlier that included them, O'Reilly-Mackris and Trump-Daniels, were ultimately disclosed and breached.[283] As the Weinstein revelations demonstrated,[284] even the hint of an NDA's existence can lead outsiders like investigative reporters to infer that the contract and its hidden information must be significant—surely parties would only contract to keep silent if the confidential subject matter is important or salacious.[285] Those who covet access to the secret for professional, personal, or ideological reasons perceive the effort to protect against disclosure as a barrier to overcome. They might correctly infer the secrets' content or, unbounded by

279. *See supra* text accompanying notes 143–51.

280. *See* Scott Gleeson, *Chrissy Teigen Offers to Pay $100,000 Fine for McKayla Maroney to Speak Out Against Nassar*, USA TODAY, (Jan. 18, 2018, 6:52 PM), https://www.usatoday.com/story/sports/olympics/2018/01/16/chrissy-teigen-offers-pay-100000-fine-mckayla-maroney-larry-nassar/1036339001/ [https://perma.cc/MBV6-BCSU].

281. *See* Des Bieler, *Chrissy Teigen Offers to Pay McKayla Maroney's Fine if She Speaks at Larry Nassar Sentencing*, WASH. POST (Jan. 16, 2018, 8:18 PM), https://www.washingtonpost.com/news/early-lead/wp/2018/01/16/chrissy-teigen-offers-to-pay-mckayla-maroneys-fine-if-she-speaks-at-larry-nassar-sentencing/ [https://perma.cc/4N57-KR8C].

282. *See supra* text accompanying note 39.

283. *See supra* notes 10–18, 130–35 and accompanying text.

284. *See supra* Section IV.B.

285. *See generally* COSTAS & GREY, *supra* note 254, at 9–10; *cf.* JODI DEAN, PUBLICITY'S SECRET 8, 10 (2002) (critiquing contemporary "technocultur[e]" that continually offers the revelation of secrets which hold an "irresistible aura" of mystery for a waiting public); SIMMEL, *supra* note 262, at 330 (describing secrets as offering "an immense enlargement of life" and "the possibility of a second world alongside the manifest world").

knowledge of the subject matter and hidden facts while drawing inferences by analogy to other cases, they might suspect the secrets are more damaging to one or both parties' reputations than the actual secrets covered by contract.[286] And as the prior Section explained, information can leak notwithstanding herculean efforts to prevent it, especially when parties' intimates and talented, inquisitive professionals pursue it.

Second, a non-breaching party could prevent or punish breach agents by claiming that their disclosure or assistance constitutes the tortious interference of a contractual relationship.[287] Liability would depend upon the extent of the agent's involvement in encouraging the party to breach. The Restatement (Second) of Torts provides that a defendant:

> [W]ho intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.[288]

The Restatement's comments describe "improper" interference as "predatory" actions and call for courts to consider whether the third party's interest, as well as the broader societal interest in interfering with the contract's performance, "are sufficient to outweigh the harm that his conduct is designed

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286. *See generally* UMBERTO ECO, RICHARD RORTY, JONATHAN CULLER & CHRISTINE BROOKE-ROSE, INTERPRETATION AND OVERINTERPRETATION 47 (1992) ("In a universe dominated by the logic of similarity . . . the interpreter has the right and the duty to suspect that what one believed to be the meaning of a sign is in fact the sign for a further meaning."). This occurred during the brief period before Pete Buttigieg's release from his employment NDA, when his opponents and reporters implied the worst from his and his former employer's silence. *See, e.g.*, *supra* text accompanying notes 190–94.

287. English courts first recognized the tortious interference with a contractual relationship in the employment context in the nineteenth century, see *Lumley v. Gye* (1853) 118 Eng. Rep. 749, 755–56, 758–59 (QB) (extending the tort of "enticement of services" to recognize a broader cause of action against a defendant who induced his competitor's employee to quit her job and work for him), and extended it to apply to all contracts decades later, see *Temperton v. Russell* [1893] 1 Q.B. 715 (Eng.). *See generally* John Danforth, Note, *Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 COLUM. L. REV. 1491, 1493–99 (1981) (describing the history of the tort).

288. RESTATEMENT (SECOND) OF TORTS § 766 (AM. L. INST. 1979). Potential damages for liability could be extensive and include not only loss of the contract's pecuniary benefits but consequential damages and emotional distress. *Id*. § 766A. The Third Restatement requires a contract to be "valid" and "exist[] between the plaintiff and a third party." RESTATEMENT (THIRD) OF TORTS § 17 (AM. L. INST. 2010).

to produce."[289] The latter standard thus resembles, both in vagueness and potential laxity, the public policy doctrine's limitation on enforcement of an NDA.[290] And reporters who otherwise face liability under the doctrine should enjoy some degree of protection under the First Amendment.[291] Neither the inclusion of a prophylactic clause making the contract itself secret nor the post hoc tort claim, then, provide a perfect or even effective means to protect against breach agents.

C. RNDAs Between Transactional and Relational Contracting

RNDAs must constrain a significant amount of tension between the parties over a long period of time both to encourage perpetual performance and to ward off disclosure and breach.[292] Most of the breaches described here occurred well after the contract's formation, sometimes in response to external events.[293] Victims who have breached express remorse for having agreed to silence themselves,[294] and some learn later that their suffering was not unique, the

289. RESTATEMENT (SECOND) OF TORTS § 766 cmt. c (AM. L. INST. 1979). The Restatement also excludes interference with contracts to engage in illegal activity or whose enforcement would be against public policy from liability. *See id*. § 774; McGrane v. Reader's Digest Ass'n, 822 F. Supp. 1044, 1045 (S.D.N.Y. 1993); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 17(1)(a) cmt. k (AM. L. INST. 2020) (requiring a contract to be "valid" in substance to allow a non-breaching party to seek redress from a third party for interference).

290. *See supra* Section II.B.

291. *See* Sandra S. Baron, Hilary Lane & David A. Schulz, *Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WM. & MARY BILL RTS. J. 1027, 1063 (1996); *cf.* Bartnicki v. Vopper, 532 U.S. 514 (2001).

292. The parties' performance of an RNDA typically has no end-date. *See supra* text accompanying note 38 (providing examples). The extended duration of an RNDA is not unique in this regard, and plenty of long-term contracts—especially between commercial firms—are vulnerable to breach by one or both parties and thereby create thorny legal issues, specifically in ascertaining damages. *See* Victor P. Goldberg, *Reckoning Contract Damages: Valuation of the Contract as an Asset*, 75 WASH. & LEE L. REV. 301, 325–28 (2018) (discussing the difficulties courts have faced in ascertaining damages for breaches of long-term contracts).

293. A general exception to this tendency is Donald Trump's RNDAs post-presidency, which parties have tended to breach relatively quickly: Stephanie Clifford first breached hers little more than a year after formation, and Trump's former campaign employees breached—or, at least, Trump claimed they breached—soon after they left the campaign's employ. *See supra* Section IV.A. Several factors were in play in these breaches: Trump's own celebrity, the controversies surrounding his presidency, his and his campaign's aggressive enforcement tactics, and the nature of the contracts.

294. *See, e.g.*, Emine Saner, *Zelda Perkins: "There Will Always Be Men Like Weinstein. All I Can Do is Try to Change the System that Enables Them*," THE GUARDIAN (Dec. 23, 2020, 7:00 AM), https://www.theguardian.com/world/2020/dec/23/zelda-perkins-there-will-always-be-men-like-

wrongdoer showed no remorse, suffered no consequences, victimized others, or formed additional contracts with those other victims.[295] Breach did not simply constitute a rejection of the agreement's terms. Breaching parties respond to the ongoing actions of the other party, their evolving understanding of the harm that they suffered,[296] their memories of the inequities of the contracting process, and their commitment to disclose to protect their mental and emotional health.[297] These developments, unconsidered in a contract that binds parties, creates an inevitable strain between victims' contractual obligations and their regret and anger for having agreed to perform them.

Despite the parties' mutual distrust and the long-term performance expected of them, RNDAs are usually drafted as discrete economic transactions.[298] A typical RNDA provides for financial payments to end or prevent litigation.[299] It does not require or even contemplate any ongoing relationship between the parties, such as efforts to process or treat any ill-will and trauma that result from the acts about which the parties agree to keep silent,

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weinstein-all-i-can-do-is-try-to-change-the-system-that-enables-them [https://perma.cc/MU4B-NTL7] (Weinstein victim).

295. *See, e.g.*, DANIELS WITH O'LEARY, *supra* note 56, at 213–16; Falzone & Grove, *supra* note 16.

296. Social psychologists have found that those who keep significant secrets constantly engage in thinking about them, especially when keeping secrets deprives them of helpful conversations they could have with family and friends. *See* Michael L. Slepian, Katharine H. Greenaway & E.J. Masicampo, *Thinking Through Secrets: Rethinking the Role of Thought Suppression in Secrecy*, 46 PERSONALITY & SOC. PSYCH. BULL. 1411, 1424 (2020); Michael L. Slepian & Edythe Moulton-Tetlock, *Confiding Secrets and Well-Being*, 10 SOC. PSYCH. & PERSONALITY SCI. 472, 472 (2019). On the importance of being able to remember and communicate about important past events, something denied to those bound by NDAs, see Johannes B. Mahr & Gergely Csibra, *Witnessing, Remembering, and Testifying: Why the Past Is Special for Human Beings*, 15 PERSPS. PSYCH. SCI. 428, 439 (2020).

297. *See* MICHAEL SLEPIAN, THE SECRET LIFE OF SECRETS 136 (2022).

298. *See, e.g.*, O'Reilly-Diamond NDA, *supra* note 35, § 1. Perpetual non-disclosure and non-disparagement clauses that are part of employment contracts treat their respective promises as simply part of the consideration between employer and employee or independent contract. *See, e.g.*, Bloomberg 2020 Campaign NDA, *supra* note 35.

299. Some contracts establish a long-term obligation for the wrongdoer, such as to provide positive references or career assistance in the future. *See, e.g.*, Weinstein-Perkins NDA, *supra* note 28, at 6; KANTOR & TWOHEY, *supra* note 56, at 77, 121 (describing similar promises in settlement with Ambra Battilana Guitierrez, another victim of Weinstein's). The formal inclusion of such promises does not appear to be typical, and it implies a threat to harm the victim's career if they breach. In Weinstein's and O'Reilly's cases, many of the victims left the entertainment and news industry following, or soon after, the agreements were formed. *See, e.g.*, Falzone & Grove, *supra* note 16 (noting O'Reilly victim left Fox News and ultimately news industry); Saner, *supra* note 294 (noting Weinstein victim left entertainment industry for years, never returning to film industry).

besides a narrow exception in some contracts that allows the victim to seek individualized, specified forms of psychological counseling while limiting what the victim can report to their therapist.[300] Nor does the typical RNDA require the wrongdoer to apologize or acknowledge responsibility; indeed, as non-disclosure provisions are often part of broader settlement agreements, the wrongdoer may explicitly disclaim criminal and civil responsibility in the contract.[301] Nor do RNDAs tend to provide for any process in case events occur that cause a party to consider breach,[302] besides those contracts that except from breach instances when a party is legally required to disclose.[303] Instead, parties who have suspected an imminent breach or complain of a minor breach have attempted to intimidate the other party through physical or financial threats,[304] or they have bargained to amend the existing contract to acknowledge the breach and reiterate their commitments to performance.[305]

Viewed within the classic binary described by relational contract theory,[306] the transactional form of an RNDA does not match the nature of the conflict that they are intended to resolve. RNDAs comprise a discrete financial transaction[307] to settle a dispute whose crux, especially to the victim of some

300. *See, e.g.*, Weinstein-Perkins NDA, *supra* note 28, at 4–5.

301. *See, e.g.*, O'Reilly-Diamond NDA, *supra* note 35, § 3.

302. *See* David V. Snyder, *Contracting for Process*, 85 L. & CONTEMP. PROBS. 255, 262 (2022) (arguing that contracts which provide for processes intended to settle potential disputes can help long-term contractual relationships to avoid breach that arise from mistrust and enforcement problems).

303. *See, e.g.*, Bloomberg 2020 Campaign NDA, *supra* note 35, §§ 1(a), 5(c).

304. On Trump's threats against Stormy Daniels, see DANIELS WITH O'LEARY, *supra* note 56, at 200–01; PALAZZOLO & ROTHFELD, *supra* note 131, at 269–70. On Weinstein's threats against his victims and journalists, see FARROW, *supra* note 56, at 303–04.

305. *See, e.g.*, Plaintiffs' Memorandum of Law in Opposition re: First Motion to Dismiss pursuant to FRCP 12(b)(6), Exhibit C: Amendment to Confidential Settlement Agreement at 18, Bernstein v. O'Reilly, No. 1:17-cv-09483 (S.D.N.Y. Apr. 4, 2018) (Doc. No. 58-3), https://static01.nyt.com/files/2018/business/58-3.pdf [https://perma.cc/6UGX-ZXMB]. Notably, the original contract between O'Reilly and Mackris required a party to submit a dispute to mediation prior to seeking arbitration or pursuing litigation. *See* O'Reilly-Mackris NDA, *supra* note 11, at 10. The pre-filing mediation requirement in the O'Reilly-Mackris agreement, which does not appear to be standard in RNDAs based on those I have collected, was not included in O'Reilly's substantively similar agreement with Rebecca Diamond, another former Fox News employee, formed seven years later. *See* O'Reilly-Diamond NDA, *supra* note 35.

306. The classic statement of relational contracting is by Stewart Macaulay. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 56 (1963).

307. *See* Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 816 (2000) (defining a transactional contract as one that involves "only an exchange, and not a

combination of sex, violence, or harassment, is emotional and traumatic.[308] The one-time exchange of money for silence prices the discussion of emotions and memory while it erases the past from public knowledge and confines reflection upon the events to the parties' memories. It intends that exchange to protect one or both parties' reputations—itself an inchoate quality rather than a commodity, even if a reputation can enhance or detract from a company's value or an individual's ability to market their work or endorsement.[309] Meanwhile, the valuable consideration that proved sufficient to support the contract's formation and necessary to the promise not to disclose can over time seem insufficient or even irrelevant to a victim, especially as their trust in the other party dissipates.

Perhaps, then, parties could frame and draft these contracts as relational contracts that recognize how the parties' promises of future silence create an ongoing relationship notwithstanding the antipathy they have towards each other over their shared past.[310] If successful, relational RNDAs could provide opportunities to downplay the short-term quid pro quo financial payment in favor of open-ended provisions that encourage, according to Ian Macneil, "whole person relations, relatively deep and extensive communication by a variety of modes, and significant elements of non-economic personal satisfaction."[311] The transactional model of contract law presumes self-interested, autonomous individuals who consent to establish liability to each other based on a set of promises.[312] Secrets create and require an interdependent social relationship based on the parties' mutual need for trust, responsibility,

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relationship" between the contracting parties); Victor P. Goldberg, *Toward an Expanded Economic Theory of Contract*, 10 J. ECON. ISSUES 45, 53 (1976) (defining the discrete transactional model of contracting as the attempt to capture at the time of formation the parties' long-run self-interest and restrict their future behavior for an indefinite period of time).

308. *See supra* notes 294–96 and accompanying text (describing the emotional toll of long-term silence on victims).

309. *See* Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 801 (1974) (characterizing a "pure transaction" as one in which the "ultimate goal of the parties . . . is to bring *everything* from the past and *everything* from the future into the immediate present").

310. *See* Eisenberg, *supra* note 307, at 816 (defining a relational contract as one that involves "not merely an exchange, but also a relationship, between the contracting parties").

311. *See* Macneil, *supra* note 309, at 723.

312. *See* D. Gordon Smith & Brayden G. King, *Contracts as Organizations*, 51 ARIZ. L. REV. 1, 5–7 (2009) (summarizing distinctions among classical and neo-classical contract law and concluding that both "rely heavily on a stylized image of exchange involving two roughly equal parties"); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 319 (offering a consent theory of contract that "views certain agreements as legally binding because the parties bring to the transaction certain rights and they manifest their assent to the transfer of these rights").

and connection.[313] If understood and framed as relational rather than contractual, RNDAs might thereby better sustain performance and withstand breach over the perpetual term that the drafter and parties contemplated at formation.

But the contractual forms that existing RNDAs take, as well as the circumstances of their formation, demonstrate how inappropriate the relational contract model is for these transactions. The formal terms of existing RNDAs—detailing the parties' knowing consent, the consideration provided, the remedies available for non-breaching parties and the means, including private arbitration, by which disputes would be resolved[314]—reveal the extent of the parties' initial mistrust and the adversarial nature of their relationship at the time of contract and for the foreseeable future. They are intended to hold the parties in place and to anticipate performance and breach while offering as little room for further dealings and association as possible.[315] Relational contracting in its strongest form decenters the role of formal law in defining the parties' arrangements,[316] embracing or at least acknowledging the incompleteness of their agreement over terms.[317] The precise and specified terms of RNDAs would be unnecessary if the parties foresaw their future ability to trust and collaborate with each other.[318]

In addition, the parties who enter into RNDAs often have unequal wealth, social standing, and institutional power. The relationships in breached RNDAs most typically pair an employer or high-ranking official with an employee, a priest and church with their parishioner, an older person with a younger one, a man with a woman, a white person or white-managed employer with a person

313. *See* Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 748 (2000).

314. *See supra* Section III.A.

315. *See* Eisenberg, *supra* note 307, at 816 (emphasizing the parties' continuing association in relational contracts).

316. *See* Simon Deakin, Christel Lane & Frank Wilkinson, *Contract Law, Trust Relations, and Incentives for Cooperation: A Comparative Study*, *in* CONTRACTS, COOPERATION, AND COMPETITION 105, 105 (Simon Deakin & Jonathan Michie eds., 1997); Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 573.

317. *See* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 271 (1992).

318. *See* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 426–30 (1990); George Dent, *Lawyers and Trust in Business Alliances*, 58 BUS. LAW. 45, 53–54 (2002); Macaulay, *supra* note 306, at 64.

of color.[319] Relational contracts may ideally encourage further negotiation and collaboration through the incompleteness of their terms and the presumed benefits of the parties' long-term commitment to each other. But those advantages are unlikely to be effective when the parties occupy different financial and institutional positions or, at minimum, when the features of relational contracting may produce unanticipated consequences that could harm or at least not benefit victims with unequal bargaining power.[320]

Nor are RNDAs in any way a means to "cultivate conscience" and to recognize and encourage prosocial, unselfish behavior, as Lynn Stout noted of relational contracts.[321] Both the acts precipitating RNDAs and the fact that at least one of the parties explicitly hopes to avoid public responsibility for those acts appear decidedly more antisocial than prosocial. The extra-legal sanctions on which relational contracts often rely upon to maintain the parties' performances are similarly irrelevant for RNDAs, as the parties do not typically share a social or professional network or reside in the same tight-knit community, and they are unlikely to form similar agreements with each other or third parties.[322] Besides their reciprocal silence, the parties' performances

319. *See* Lizzie Barmes, *Silencing at Work: Sexual Harassment, Workplace Misconduct and NDAs*, 52 INDUS. L.J. 68, 101 (2023); *see also, e.g.*, Zelda Perkins, *An NDA from Harvey Weinstein Cost Me My Career—At Last, Banning Them Feels Within Reach* (Dec. 15, 2022), https://www.theguardian.com/commentisfree/2022/dec/15/nda-harvey-weinstein-confidentiality-clause-abuse [https://perma.cc/2DT5-BXYG]; CARROLL, CULLEN, FARRAGHER, KURKJIAN, PAULSON, PFEIFFER, REZENDES, & ROBINSON, *supra* note 210, at 6.

320. *Cf.* Rachel Rebouché, *A Case Against Collaboration*, 76 MD. L. REV. 547, 552–53 (2017) (questioning the ideal model of collaborative divorce processes by raising issues about how relational negotiation might disfavor some women, lead to lower financial support for disadvantaged female spouses, and pressure individuals into forgiveness or continuing relationships with ex-spouses).

321. *See* LYNN STOUT, CULTIVATING CONSCIENCE 10, 100–13 (2011). Stout argues that relational contracts cultivate the willingness of the parties to show vulnerability to each other, something that the transactional aspects of RNDAs decidedly work against. *See id.* at 108.

322. *See generally* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999) (discussing the role of tight-knit communities in providing the context for non-legal enforcement of contracts); Scott Baker & Albert Choi, *Contract's Role in Relational Contract*, 101 VA. L. REV. 559, 561–62 (2015) (discussing extra-legal sanctions); Cathy Hwang, *Faux Contracts*, 105 VA. L. REV. 1025, 1030–32 (2019) (summarizing literature on the use of reputational sanctions in embedded networks that enable non-legal enforcement of contracts and nonbinding, "faux" contracts); *cf.* Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591, 1631 (2020) (comparing and contrasting surrogacy contracts to the relational contracting ideal, noting that the parties are very unlikely to be repeat players). Of course, some RNDA parties are ultimately repeat players: Weinstein and O'Reilly formed similar contracts with multiple victims, Trump regularly relied upon RNDAs to cover a broad spectrum

require an *absence of action*—disclosure—and *no ongoing cooperation*—no delivery of goods or services, not even ongoing communication. The privacy that RNDAs afford may not be essentially antisocial,[323] but their goal of concealing acts that might affect and interest others appears to be entirely selfish.[324]

RNDAs thus do not fall squarely within the purely transactional form they take nor the purely relational form to which they might ideally aspire. Their failure to fall into either category is not unique,[325] nor are the benefits of relational contracting—the building of mutual trust and the creation of a successful, long-term arrangement—impossible within more formal, transactional contracting.[326] Two related proposals for RNDA clauses that would improve upon the one-shot financial model might bridge the relational and transactional contracting divide: Ian Ayres's suggestion that "informational escrow [agents]" could independently monitor parties' performances, including of promises from wrongdoers not to offend again,[327] and David Hoffman and Erik Lampmann's suggestion that parties could draft contracts to require

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of relationships, and various parts of the Catholic Church directed the formation of multiple contracts with multiple priests. *See supra* notes 10–14, 135–38 and accompanying text. The question of whether the parties and their attorneys entered into each contract negotiation with the knowledge and plan that they would do so again is beyond the scope of this Article, but it is incredible to think that they did not, especially with the worst offenders.

323. *Compare* Anita L. Allen, *What Must We Hide: The Ethics of Privacy and the Ethos of Disclosure*, 25 ST. THOMAS L. REV. 1, 18 (2012) (arguing that although privacy may be antisocial, its offering of "a bit of sanctuary from judgment and for repose" can make it virtuous and even prosocial), *with* FRED H. CATE, PRIVACY IN THE INFORMATION AGE 30 (1997) (arguing that because it provides the individual the right to determine what information is revealed about themselves and thereby conflicts with other important values within society, "privacy may be seen as an antisocial construct").

324. *See* STOUT, *supra* note 321, at 12 (defining "prosocial" as benefitting others).

325. Academics have identified types of "braided," hybrid transactions in corporate and commercial contracting regimes that combine formal mechanisms, allowing legally enforceable constraints on promises with informal relations backed by the possibility of extra-legal sanctions—all of which enable more collaborative, transparent arrangements and long-term collaboration. *See* Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561, 562–63 (2015); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM L. REV. 1377, 1398–1403 (2010); Joan MacLeod Heminway, *The Potential Legal Value of Relational Contracts in a Time of Crisis or Uncertainty*, 85 L. & CONTEMP. PROBS. 131, 133–35 (2022); Matthew Jennejohn, *Braided Agreements and New Frontiers for Relational Contract Theory*, 45 J. CORP. L. 885, 887–88 (2020).

326. *See* Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1501–02, 1544 (2005).

327. *See* Ayres, *supra* note 22, at 85.

periodic or installment payments to victims.[328] One or a combination of both proposals could limit opportunistic behavior by the party worried about maintaining their reputation as well as the party receiving payment for their silence; it could also increase the parties' mutual trust by creating a long-term relationship of sorts with each other. But if the victim bases their decision to breach on the emotions evoked by past trauma and their desire to hold a wrongdoer publicly accountable, then contracts that merely shift RNDAs from one-shot to repeated financial transactions, without more than a neutral arbiter to decide when breach has occurred, would not significantly reduce the chances of breach.

The long-term strain that victims' festering distrust, injury, and regret cause to one-shot transactions helps explain why RNDAs fail, while the difficulty of imagining an alternative solution that can enforce silence while allowing a stable, long-term resolution to the parties' dispute helps explain why the project of eradicating abusive RNDAs seems impossible. Nevertheless, the demand for formalizing silence will not disappear. People will inevitably act in a manner that might harm their reputation, after which they will long to keep those actions secret, and some of them will turn to legal tools to assist them. Whether and how RNDAs could be drafted to increase trust rather than minimally suppress disclosure by payment is beyond the scope of this Article, but contracts that can construct a path between the transactional and relational are more likely to overcome their vulnerability to breach.

D. Enforcement Inhibitions

Trying his best to enforce the RNDA he arranged on behalf of his client, Michael Cohen successfully obtained an emergency restraining order from an arbitrator that barred adult film star Stormy Daniels from disclosing confidential information she had contracted to keep secret about her affair with his client, then-President Donald Trump.[329] The order didn't work; a week later,

328. *See* Hoffman & Lampmann, *supra* note 22, at 201 (citing Sarath Sanga, *Incomplete Contracts: An Empirical Approach*, 34 J.L. ECON. & ORG. 650, 676–77 (2018)) (suggesting that regular micropayments might force both the party worried about maintaining their reputation and the party receiving payment for their silence to limit opportunistic behavior and increase their trust in each other).

329. *See* Temporary Restraining Order, *In re* Arbitration Between EC, LLC v. Peggy Peterson, ADRS No. 18-1118-JC (Feb. 27, 2018), https://www.nytimes.com/files/stormy-Daniels-restraining-order.pdf [https://perma.cc/YA4D-JR9E]; *see generally* Jim Rutenberg & Peter Baker, *Trump Lawyer Obtained Restraining Order to Silence Stormy Daniels*, N.Y. TIMES (Mar. 7, 2018),

and quite publicly, Daniels filed a complaint in state court seeking to invalidate the RNDA.[330] The dispute and the liaison, which had already been reported on,[331] quickly became common knowledge—indeed, Cohen's efforts to use and enforce the RNDA badly backfired, increasing and prolonging publicity about the affair. Some version of this pattern persisted during #MeToo's ascendancy when, in Bill O'Reilly's case, enforcement efforts publicized or revived interest in the initial wrongdoing's profile[332] or, in Harvey Weinstein's case, the publicity of the disclosures and the extent of the wrongdoing made enforcement impractical or impossible.[333] And once the secrets and the RNDA become public, the non-breaching party could neither redraw a cloak over the secret information nor erase the adverse publicity that comes from having tried to do so.

This phenomenon is now commonly referred to as the "Streisand effect," after the star whose failed efforts to suppress a photograph of her hilltop estate merely brought more attention to it.[334] It is not unique to RNDA enforcement—efforts to threaten or file litigation to suppress deep fakes,[335] deception

https://www.nytimes.com/2018/03/07/us/politics/stormy-daniels-trump.html [https://perma.cc/4NG7-A7X4].

330. *See* Complaint for Declaratory Relief, *supra* note 132, at 1, 7–8; Rebecca R. Ruiz & Matt Stevens, *Stormy Daniels Sues, Saying Trump Never Signed "Hush Agreement"*, NY TIMES (Mar. 6, 2018), https://www.nytimes.com/2018/03/06/us/stormy-daniels-trump-lawsuit.html [https://perma.cc/G8EQ-QGRF].

331. *See* ROTHFELD & PALAZZOLO, *supra* note 131.

332. *See* Steel & Schmidt, *supra* note 12; *see also* Steel, *supra* note 169 (discussing Bill O'Reilly's settlement agreements becoming public amongst a defamation lawsuit brought by victims).

333. Amy B. Wang, *Why One of Harvey Weinstein's Former Assistants Just Broke Her Confidentiality Agreement*, WASH. POST (Oct. 24, 2017, 1:46 PM), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/10/24/why-one-of-harvey-weinsteins-former-assistants-just-broke-her-confidentiality-agreement/ [https://perma.cc/G9D6-ZABK].

334. *See Words We're Watching: "Streisand Effect"*, MERRIAM-WEBSTER, https://www.merriam-webster.com/wordplay/words-were-watching-streisand-effect-barbra#:~:text=The%20Streisand%20effect%20is%20a,attention%20or%20notoriety%20to%20it [https://perma.cc/5AUP-CMBW]; Mike Masnick, *Since When Is It Illegal to Just Mention a Trademark Online?*, TECHDIRT (Jan. 5, 2005, 1:36 AM), https://www.techdirt.com/articles/20050105/0132239_F.shtml [https://perma.cc/93BP-DH78] (coining the term); *see generally* Elizabeth L. Rosenblatt, *Fear and Loathing: Shame, Shaming, and Intellectual Property*, 63 DEPAUL L. REV. 1, 26–27 (2013).

335. *See* Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1792–93 (2019).

technology,[336] nonconsensual pornography,[337] sexual misconduct,[338] defamation,[339] and copyright violations[340] risk publicizing the wrongdoing from which they claim to suffer. The same phenomenon occurs with contracts: the fear of reputational costs can inhibit employers,[341] sellers,[342] and charitable organizations[343] from enforcing their rights against employees, consumers, and donors out of fear that doing so will damage their ability to recruit in the future.[344] #MeToo both encouraged silenced victims to come forward and inhibited employers from enforcing their contracts.[345]

The only fix that attorneys have devised for this dilemma that RNDAs inevitably face is to keep enforcement efforts secret by requiring disputes to be

336. *See* Courtney M. Cox, *Legitimizing Lies*, 90 GEO. WASH. L. REV. 297, 331 (2022).

337. *See* Eric Goldman & Angie Jin, *Judicial Resolution of Nonconsensual Pornography Dissemination Cases*, 14 I/S: J.L. & POL'Y FOR INFO. SOC'Y 283, 290 (2018).

338. *See* Jayne S. Ressler, *Anonymous Plaintiffs and Sexual Misconduct*, 50 SETON HALL L. REV. 955, 971 (2020).

339. *See* Roger Allan Ford, *Unilateral Invasions of Privacy*, 91 NOTRE DAME L. REV. 1075, 1095 (2016); Sean D. Lee, Note, *"I Hate My Doctor": Reputation, Defamation, and Physician-Review Websites*, 23 HEALTH MATRIX 573, 591–92 (2013).

340. *See* Rosenblatt, *supra* note 334, at 26–31.

341. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 968 (1984); Benjamin Klein, *Transaction Cost Determinants of "Unfair" Contractual Arrangements*, 70 AM. ECON. REV. 356, 360–61 (1980).

342. *See* Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 830 (2006).

343. *See* Mary Frances Budig, Gordon T. Butler & Lynne M. Murphy, *Pledges to Nonprofit Organizations: Are They Enforceable and Must They Be Enforced?*, 27 U.S.F. L. REV. 47, 115–16 (1992).

344. Some scholars are skeptical that reputational costs curb bad behavior by predatory employers and consumer goods sellers. *See, e.g.*, Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, 54 WAKE FOREST L. REV. 1239, 1243 (2019); Samuel Estreicher, *Employer Reputation at Work*, 27 HOFSTRA LAB. & EMP. L.J. 1, 2 (2009). Such skepticism focuses on the lack of a market to distribute and access credible information about reputation, a problem that that the public self-disclosures #MeToo inspired and the press helped alleviate.

345. An example of this was CBS's public decision in the wake of the Weinstein scandal, #MeToo, and especially its own scandal with former CEO Les Moonves not to enforce the RNDA that was part of the sexual harassment settlement it reached with Eliza Dushku. *See* Emily Birnbaum, *Actress Eliza Dushku Defies Non-disclosure Agreement in CBS Sexual Harassment Settlement*, THE HILL (Dec. 19, 2018, 4:55 PM), https://thehill.com/media/422155-actress-breaks-non-disclosure-agreement-in-cbs-sexual-harassment-settlement/ [https://perma.cc/ZAH7-P2H3]; Eliza Dushku, *I Worked at CBS. I Didn't Want to Be Sexually Harassed. I Was Fired*, BOS. GLOBE (Dec. 19, 2018, 2:32 PM), https://www.bostonglobe.com/opinion/2018/12/19/eliza-dushku-responds-what-happened-cbs-took-job-and-because-objected-being-sexually-harassed-was-fired/OCh7h0pwg4Aq7xfwOUasyO/story.html [https://perma.cc/3TZT-DBRJ].

resolved by private arbitration.[346] But arbitration clauses have not proven foolproof, as Michael Cohen learned, and Congress and state legislators have limited their enforcement by statute.[347] Ultimately, the adverse publicity from efforts to enforce RNDAs can encourage further breach and pressure non-breaching parties to save face by releasing parties from future enforcement.[348]

E. The Insufficiency of Contract Remedies

The default remedy for contract breach requires the defendant to pay damages based on the non-breaching party's frustrated expectations, as measured by the loss "of the other party's performance caused by its failure or deficiency, plus any other loss, including incidental or consequential loss, caused by the breach."[349] A plaintiff must show that damages are reasonably certain both as to their existence and their causation by the defendant's breach.[350] Mere embarrassment is not compensable; a non-breaching party must identify specific lost contracts or wages caused by the disclosures.[351] Rather than bar recovery, the reasonable certainty standard adds an element of doubt

346. *See* text accompanying *supra* notes 67–76.

347. *See* text accompanying *supra* notes 67–76. This trend is not universal, however. *See* Jonathan Cisneros, *Indiana in the Midst of #MeToo: The Argument for Enforcing Arbitration in Sexual Harassment Claims*, 22 PEPP. DISP. RESOL. L.J. 175, 195 (2022) (noting that Indiana courts tend to strictly enforce arbitration clauses and the state legislature has to date resisted any exceptions for RNDAs that cover sexual harassment or assault).

348. *See, e.g.*, Alexia Fernández Campbell, *NBC Will Now Let Former Employees Talk About Sexual Harassment*, VOX (Oct. 28, 2019, 2:30 PM), https://www.vox.com/identities/2019/10/28/20936150/nbc-lauer-weinstein-employees-sexual-harassment-nda [https://perma.cc/ZT3R-DSQC]; *supra* text accompanying note 156 (discussing the Trump Organization's release of parties to NDAs following the *Denson* litigation).

349. RESTATEMENT (SECOND) OF CONTRACTS § 347(a)–(b) (AM. L. INST. 1979). Any costs the non-breaching party avoids by not having to perform are deducted from the damage award, but in most RNDAs, the non-breaching party has already performed by providing payment and avoids no loss by no longer being bound to silence.

350. *See id.* § 352 (precluding recovery "for loss beyond an amount that the evidence permits to be established with reasonable certainty"); *see generally* JOSEPH M. PERILLO, CONTRACTS 520 (7th ed. 2014) (discussing how courts define "reasonable certainty," noting that the "quality of the evidence must be of a higher caliber than is needed to establish most other factual issues in a lawsuit"); John M. Golden, *Reasonable Certainty in Contract and Patent Damages*, 30 HARV. J.L. & TECH. 257, 269–70 (2017) (the reasonable certainty requirement "can be fairly hazy in how it channels trial court discretion").

351. Garfield, *supra* note 93, at 289–90.

to recovery if a non-breaching party lacked specific proof of lost business.[352] In simple cases, disclosure of an embarrassing secret might cause customers, employers, and business partners to cancel existing commitments. A breaching party could argue, however, that the cause in fact of such damages is not the disclosure but the previously confidential act itself, especially if the act would have created criminal or civil liability. The relative weight of multiple but-for causes creates further uncertainty for the non-breaching party who seeks damages—especially if the trier of fact finds the secrets that the breach disclosed makes the non-breaching party unsympathetic and therefore less worthy of compensation. Breaches of RNDAs frustrate the contracts' purpose, but even if awarded, uncertain and unprovable money damages cannot easily remedy the non-breaching party's lost expectations nor make them whole.[353]

Several of the RNDA contracts discussed in Part II sought to address this concern by including liquidated damage clauses that stipulate the damages a breaching party would owe.[354] If the non-breaching party challenges enforcement, a court would consider whether the clause is valid as a good-faith, agreed-upon effort to ascertain damages in advance of the contract rather than a penalty for breach, which would be unenforceable.[355] A recent empirical study

352. *See* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES 814 (2018) (noting that courts can take "hard" or "soft" approaches, or "attitudes," to resolve whether damage claims are reasonably certain).

353. An alternative developed in the national security context is the constructive trust that the Supreme Court provided to the government as a remedy in *Snepp v. United States*, 444 U.S. 507, 515–16 (1980) (ordering that proceeds from sales of Snepp's book, which included classified information that he failed to allow the government to review as required by his employment contract, be given to the government as a constructive trust). The proceeds from the breaching employee's book at least offered some financial relief to the non-breaching party as well as a disincentive for future employees from publishing government secrets without following their contractual obligations to submit their manuscript for pre-publication review. *See id.* at 516. But the victims in RNDAs generally do not profit directly from their disclosure.

354. *See* sources cited *supra* note 42.

355. Courts that refuse to enforce liquidated damages clauses ping between policing "penalty" clauses and identifying those clauses that are "unreasonable," implicitly equating the two standards. New York courts presume that they are valid, see *JMD Holding Corp. v. Cong. Fin. Corp.*, 828 N.E.2d 604, 609 (N.Y. 2005), but must nevertheless consider whether "the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation," and then refuse to enforce clauses in which "the amount fixed is plainly or grossly disproportionate to the probable loss," thereby "call[ing] for a penalty." Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc., 361 N.E.2d 1015, 1018–19 (N.Y. 1977) (citations omitted); *see also, e.g.*, Tullett Prebon Fin. Servs. v. BGC Fin., L.P., 975 N.Y.S.2d 18, 20 (App. Div. 2013) (refusing to enforce aspect of liquidated damages award as an "unenforceable penalty"). The California Civil Code requires

found that courts frequently hold liquidated damages clauses included in settlement agreements as a class to be unenforceable,[356] but RNDA drafters—whether or not the contract settles an existing dispute—face a particularly difficult challenge of estimating damages. What are the potential losses a non-breaching party suffers to their reputation (whose value cannot be clearly ascertained in advance) from a particular disclosure (which is not yet known) and the resulting public opprobrium (which can change over time with shifting moral values)? Most of the contracts from Part II that included liquidated damages stipulated an extraordinarily high amount ranging from $100,000 to $1,000,000 to be paid per breach.[357] The contracts that estimated amounts did so without offering any rationale to account for the sums, nor why each breach would create an equal and cumulative harm.[358] These terms seem, on their face, intended not merely to impose a penalty but to create an *in terrorem* effect on the victim as an extreme deterrent to breach, and make no effort to provide a realistic assessment of the provable damage.[359] Courts, in sum, are likely to enforce a carefully considered and crafted liquidated damages clause, such as one that would require return of the financial consideration for a confidentiality clause,[360] but enforcement still faces the reputational challenges described in the previous Section.

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courts to presume liquidated damages clauses are valid "unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." CAL. CIV. CODE § 1671(b) (West 2023) (concerning clauses in contracts that are not for consumer goods and services and residential leases). *See, e.g.*, Kaufman v. Diskeeper Corp., No. B247315, 2014 WL 1665560, at *15 (Cal. Ct. App. Apr. 28, 2014), *order vacated on other grounds* (July 30, 2014) (upholding arbitrator's award of liquidated damages award as amount was "not unreasonable"). California courts have interpreted the statute as requiring the clause to be "the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained," the lack of which would render the clause a "penalty." Ridgley v. Topa Thrift & Loan Ass'n, 953 P.2d 484, 487 (Cal. 1998) (internal quotations and citations omitted).

356. *See* Luca S. Marquard, Note, *An Empirical Study of the Enforcement of Liquidated Damages Clauses in California and New York*, 94 S. CAL. L. REV. 637, 653–57 (2021).

357. *See* sources cited *supra* note 42. *But see* sources cited *infra* note 359 (noting contract with liquidated damages clause that clearly is not a penalty).

358. *See, e.g.*, Isabella NDA, *supra* note 35, at 1; Sheen NDA, *supra* note 35, § 3.1; Trump-Clifford NDA, *supra* note 31, at 19–20.

359. Leasing Serv. Corp. v. Justice, 673 F.2d 70, 73 (2d Cir. 1982); Goetz & Scott, s*upra* note 117, at 555. *But see* Goetz & Scott, s*upra* note 117, at 594 (defending the use of high liquidated damage clauses as a means to provide compensation to a promisee with "non-provable idiosyncratic wants" who might be unable otherwise to protect themselves).

360. One RNDA specifically identified the return of the payment as liquidated damages. *See* O'Reilly-Diamond NDA, *supra* note 35, § 4.5.

Non-breaching parties could seek equitable remedies for an RNDA breach. They should be able to win the return of at least some of the money paid under the contract, whether as restitution or as a recission of the contract—a remedy that could be available even if the contract was unenforceable, assuming a court found the equities to balance in the non-breaching party's favor.[361] Alternatively or in addition, non-breaching parties could seek an injunction to stop disclosure.[362] Unsurprisingly, many RNDAs specifically stipulate injunctions as an agreed-upon remedy.[363] As Bill O'Reilly found, however, an injunction has little effect if imposed *after* an initial disclosure; it may stop the release of some secrets or their exposure on some forum, but the confidential information will be available elsewhere.[364] And as the Donald Trump-Stormy Daniels imbroglio demonstrated, even a pre-disclosure injunction (in the Trump case, gained via a secret filing with an arbitrator) cannot always prevent later disclosure when a party contests the contract's enforceability in court and appends the RNDA to their complaint.[365] At least in theory, an effective pre-disclosure injunction constitutes a perfect remedy by supplementing a private right with the force of a judicial decree. A post-disclosure injunction, however, cannot keep the information from regaining its status as secret, especially when a single instance of disclosure can spread easily and remain accessible indefinitely. Equitable remedies thus offer some relief, but their extent would be uncertain and would not come without cost.

In obtaining a remedy for breach of an RNDA, a party faces a nearly insoluble practical problem that stems from the contract's subject matter.

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361. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 37, 54 (AM. L. INST. 2011) (allowing rescission and the return of consideration as an alternative remedy to damages for contract breach or if the contract is invalidated); DOBBS & ROBERTS, *supra* note 352, at 422 (describing rescission as a process by which the contract is "being unmade, so restoration of benefits received under the contract seems to follow"). A breaching party could contest the return of the entirety of consideration in light of the extent of their own performance before they breached. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54(3) (AM. L. INST. 2011).

362. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 357 (AM. L. INST. 1979) (noting the availability of an injunction as a remedy for contract breach).

363. *See, e.g.*, O'Reilly-Diamond NDA, *supra* note 35, § 4.5; Trump-Clifford NDA, *supra* note 31, at 20; Trump Organization NDA, *supra* note 35, at 3–4.

364. *See supra* text accompanying notes 15–19 (describing court's issuance of an injunction against breach on a particular television talk show after widespread coverage of information via several prior breaches).

365. *See supra* text accompanying notes 128–35; *see also* Sarah Fitzpatrick, *Trump Lawyer Michael Cohen Tries to Silence Adult-film Star Stormy Daniels*, NBC NEWS, (Mar. 7, 2018, 11:21 PM), https://www.nbcnews.com/news/us-news/trump-lawyer-michael-cohen-tries-silence-stormy-daniels-n854646 [https://perma.cc/42U4-528K].

Secrecy, the practice that the contract is intended to establish and protect, is always vulnerable to defection; information's intangibility allows it to move freely, costlessly, and immediately; the contract is meant to resolve a dispute fraught with hurt, emotion, and trauma; and reputation, the thing that the RNDA is intended to protect, is ethereal and susceptible to the vicissitudes of public opinion and shaped by fact and rumor alike. The gulf between the rights and duties created by an RNDA and the ability of a party to gain a remedy for breach thus constitutes a particularly vivid illustration of the complex relationship between rights and available remedies.[366]

VI. CONCLUSION: IN (REALISTIC) PRAISE OF BREACH

RNDA breach redistributes control over secrets away from the parties and to the public commons, revealing the undercurrent of class, gender, race, and other inequities that confidentiality helps hide.[367] Those who breach and those who assist others in breaching have diverse motivations. The victim might pursue justice and revenge, seek the help of friends, family members, and mental health professionals, and hope to assist others currently in the same situation or to avoid the situation in the future. Breach agents might act on behalf of the victim and the broader public, and perhaps for professional gain or personal reasons as well. Together, they break the dam that a contract had constructed by disclosing secrets and identifying the legal technology by which secrets were controlled. Held in disrepute by laypeople and embraced more by hardnosed legal economists than contracts scholars, breach at its best constitutes a remedy for the troubling use of contract law to hide the wrongdoings of the powerful. It provides victims with a more satisfactory resolution to a dispute over an embarrassing and painful incident than courts or legislatures can offer.

Breaches cannot solve the discrimination and violence that RNDAs hide. As an initial, descriptive study of RNDA breach, this Article can offer no more of a normative takeaway than the claim that breach constitutes an admittedly

366. For a thorough discussion of the jurisprudential debates surrounding the relationship between rights and remedies that offers a descriptive and pragmatic rather than normative account that is consistent with my approach in this article, see generally Felipe Jiménez, *Rethinking Contract Remedies*, 53 ARIZ. ST. L.J. 1153 (2021).

367. *See generally* CLARE BIRCHALL, RADICAL SECRECY 9 (2021) (arguing that secrecy and transparency are "distributive modes that determine what is sensible to us—what is available, knowable, and actionable"); BOK, *supra* note 263, at 19 (relating control over information to power); *id.* at 24 (noting that secrecy is often invoked as a kind of property right). My thanks to Jeffrey Harrison for pointing this out to me.

imperfect solution to the problem that contract law creates, when statutes, common law adjudication, and contractual innovation can provide only inadequate, patchwork corrections. Consider, as an analogy, unauthorized whistleblower leaks by public employees whose disclosures of government abuses deliver a limited but crucial correction to the public record. The political theorist Rahul Sagar notes, with a mixture of hope and regret, that unauthorized leaks represent a least-bad means to hold the state accountable given the constitutional, political, and administrative difficulties of imposing transparency on the federal government.[368] Leakers may act out of mixed or even bad motivation; they may leak selectively in order to advance personal or political agendas rather than the broad public interest; and journalists may utilize and publish the leaked information in a manner that distorts its meaning rather than add to public knowledge and debate.[369] And yet leakers surmount the obstacles that the state imposes on the release of important secrets and, on the whole, play an essential role in maintaining a functional democracy by enabling political and administrative accountability, even as they can endanger the state's security.[370]

Sagar's reasoning is relevant for RNDAs insofar as their breach, too, constitutes an imperfect tool for personal and institutional accountability. As this Article has noted, the non-breaching party cannot easily gain sufficient remedies for the breach that has not only disclosed their secrets but the fact that they attempted to keep them secret. In some cases, the breaching party will have seemingly paid no price for breaking their promise and violating their contract. Such is the nature of breach that it flouts the rule of law and mocks private agreements—even if, in these instances, it creates public and private goods and itself remedies a wrong. Sagar proposes what he calls a "realistic" understanding of leaking that concedes its vigilantism but nevertheless "forgo[es] platitudinous calls for 'transparency' and quixotic endeavors to 'tame the prince'" because disclosure can encourage responsible executives and effective oversight.[371] RNDA breach similarly forces us to confront deep questions about contracts, the rule of law, and the conflict between promised performance and justifiable remorse. Considering what #MeToo taught and revealed, breach in this context seems worthy of praise.

368. *See* RAHUL SAGAR, SECRETS AND LEAKS 183 (2013).

369. *Id.* at 158–70.

370. *Id.* at 179–80.

371. *Id.* at 204.