Rethinking the Silent Treatment: Discovering Confidential Settlements in a Post-#MeToo World

"An NDA is really just an extension of the underlying abuse . . . Sexual abuse is about power. And with these NDAs, the network has chosen to step in the shoes of the abuser."

-Tamara Holder, seeking to be released from the nondisclosure agreement she signed in her sexual assault claim against Fox News[1]

INTRODUCTION

When the hashtag "MeToo" was popularized in the wake of the Harvey Weinstein scandal, the underlying philosophy was simple.[2] Too many people had claimed that women's stories about sexual assault lacked corroboration, dismissing evidence of workplace sexism as merely "anecdotal." However, when enough women started telling stories with common themes about common perpetrators, the truth became harder to ignore—cases that were once "he said, she said" cases were now "he said, *they* said" cases. Getting corroborating evidence from other individuals who have experienced similar discrimination at the hands of the same defendant is not only a therapeutic form of solidarity—during litigation, it may be the difference between winning and losing your claim.

Accessing such evidence may be complicated, however, if those individuals have signed confidential settlements. Settlement agreements are confidential when they contain provisions limiting parties' ability to describe the settlement negotiations, amount, or underlying allegations publicly. The American Bar Association has catalogued what it refers to as "speech-restricting" contractual provisions, including nondisclosure provisions, non-disparagement provisions, non-cooperation provisions, and affirmative statement provisions, which range in their effect from prohibiting litigants from

1. Diana Falzone, *After* Catch and Kill *Fallout, Former Fox News Staffers Demand To Be Released from Their NDAs*, VANITY FAIR (Oct. 28, 2019), https://www.vanityfair.com/news/2019/10/former-fox-news-staffers-demand-to-be-released-from-their-ndas [https://perma.cc/MTF2-AMAF].

2. Rose Friedman & Colin Dwyer, *Harvey Weinstein Heads to Trial for Sex Crimes in a #MeToo Landmark*, NPR (Jan. 6, 2020, 5:07 AM), https://www.npr.org/2020/01/06/793613868/harvey-weinstein-heads-to-trial-for-sex-crimes-in-a-metoo-landmark [https://perma.cc/XFH5-B69Z] (describing how eighty women have publicly accused former Hollywood producer Harvey Weinstein of sexual assault, helping to "ignite the #MeToo movement").

disclosing the amount for which a claim settled to actively requiring them to release positive statements about one another to the press.[3] This Note uses the term "confidential settlement" to refer to settlement agreements containing any of the formerly mentioned provisions.

Confidential settlements are a prominent and recurring theme in the most egregious stories to come out of the #MeToo movement. Rapper R. Kelly, who made headlines when BuzzFeed published an article detailing his alleged involvement in a "sex cult" of underage women and who has since been indicted on ten counts of aggravated criminal sexual abuse, has settled sexual misconduct claims with at least four different women since 1996.[4] Actor Bill Cosby, who is serving three to ten years in Pennsylvania prison as a "sexually violent predator," settled a 2006 sexual assault suit with Andrea Constand for three million dollars.[5] Journalist and political pundit Bill O'Reilly settled sexual harassment claims with at least six different women prior to his dismissal from Fox News in 2017, one of which required his former producer Andrea Mackris to "lie—even in legal proceedings or under oath—if any evidence becomes public, by calling evidence

3. Elizabeth Tippett, *Non-Disclosure Agreements and the #MeToo Movement*, A.B.A., https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/ (last visited Feb. 24, 2021) [https://perma.cc/Z7Z3-3GUG]. Nondisclosure provisions, Tippett explains, restrict litigants' ability to release certain kinds of information. *Id.* Non-disparagement provisions "restric[t] a party from making statements that would injure the reputation of the other party," even if such statements are accurate. *Id.* Non-cooperation provisions restrict an individual from helping future litigants bring claims against the defendant. *Id.* Affirmative statement provisions require individuals to release various positive statements about an individual, from providing letters of recommendation to giving positive statements to the media. *Id.*

4. *See* Mark Savage, *R. Kelly: The History of Allegations Against Him*, BBC NEWS (Aug. 28, 2020), https://www.bbc.com/news/entertainment-arts-40635526 [https://perma.cc/WV8Y-USDC] (cataloguing a 1996 settlement for "personal injuries and emotional distress" with Tiffany Hawkins, a 2001 settlement with Tracy Sampson, a 2002 settlement with Patrice Jones, and a 2002 settlement with Montina Woods).

5. Chris Francescani & Luchina Fisher, *Bill Cosby: A Timeline of His Fall from 'America's Dad' to a 'Sexually Violent Predator,'* ABC NEWS (Aug. 19, 2019, 4:38 PM), https://abcnews.go.com/Entertainment/bill-cosby-trial-complete-timeline-happened-2004/story?id=47799458 [https://perma.cc/K7BX-K4VN].

'counterfeit' or 'forgeries.' "[6] Jeffery Epstein,[7] Matt Lauer,[8] Harvey Weinstein,[9] Roger Ailes,[10] and Larry Nassar[11] are all reported to have signed confidential settlements, some of them worth millions of dollars, before the extent of their misconduct became public. While numerous theories abound about how perpetrators managed to commit decades of abuse while maintaining successful careers and immaculate public personas, the role of the confidential settlement is hard to ignore.

Such settlements have especially insidious effects in the context of workplace harassment suits, because successful discrimination claims often include evidence that "similarly situated" individuals experienced similar behavior at the hands of the defendant.[12] So-called "me too" evidence is particularly important because so much of the evidence in sexual harassment claims is circumstantial,[13] and evidence suggesting a repeated pattern of behavior can bolster a claim that otherwise merely pits the plaintiff's word against the defendant's.

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6. *See* Amanda Arnold, *Bill O'Reilly's Confidential Sexual-Harassment Settlements Are Finally Public*, THE CUT (Apr. 4, 2018), https://www.thecut.com/2018/04/bill-oreillys-confidential-settlements-are-finally-public.html [https://perma.cc/D6JA-VTGE] (describing settlements with various women, including Rachel Witlieb Bernstein, Andrea Mackris, and Rebecca Gomez Diamond, together totaling $45 million).

7. *See* Jane Musgrave, *Epstein Paid Three Women $5.5 Million To End Underage-Sex Lawsuits*, PALM BEACH POST (Oct. 3, 2017, 12:01 AM), https://www.palmbeachpost.com/news/crime—law/epstein-paid-three-women-million-end-underage-sex-lawsuits/8GEJk4YYa2X4ffig4HAqyJ/ [https://perma.cc/T5UP-BVNS] (reporting that the Florida billionaire settled $5.5 million worth of claims with three unnamed teenage girls).

8. *See* Igor Derysh, *Ronan Farrow: NBC Tried To Cover Up Matt Lauer Allegations with "Multiple" Settlements Before Firing*, SALON (Oct. 11, 2019, 7:30 PM), https://www.salon.com/2019/10/11/ronan-farrow-nbc-tried-to-cover-up-matt-lauer-allegations-with-multiple-settlements-before-firing/ [https://perma.cc/RJB4-8UX3] (writing that NBC news secretly settled multiple lawsuits related to sexual misconduct by journalist Matt Lauer).

9. *See* Michelle Dean, *Contracts of Silence*, COLUM. JOURNALISM REV., https://www.cjr.org/special_report/nda-agreement.php (last visited Feb. 24, 2021) [https://perma.cc/A2G9-UFEQ] (describing "Weinstein's baroque efforts to prevent his victims from speaking," including nondisclosure agreements).

10. *See id.* (mentioning Gretchen Carlson's $20 million settlement against Ailes and Laurie Luhn's $3.15 million settlement).

11. *See* Rebecca Davis O'Brien, *USA Gymnastics, McKayla Maroney Had Confidentiality Agreement To Resolve Abuse Claims*, WALL ST. J. (Dec. 20, 2017, 11:39 PM), https://www.wsj.com/articles/usa-gymnastics-reached-settlement-over-abuse-claims-with-gold-medalist-mckayla-maroney-1513791179 [https://perma.cc/YTL4-9DCR] ("Olympic gold-medal-winning gymnast McKayla Maroney signed a confidential $1.25 million settlement agreement with USA Gymnastics in December 2016 to resolve claims related to her alleged years long sexual abuse by the national team's longtime doctor, Larry Nassar.").

12. TOD F. SCHLEIER, DEPOSING AND EXAMINING EMPLOYMENT WITNESSES § 3:12 (rev. 2016) (ebook); *see also* Emily D. Wilson, Note, Sprint/United Management Co. v. Mendelsohn: *Tenth Circuit Employment Law Remains in "Me Too" Limbo*, 63. OKLA. L. REV. 167, 167 (2010) (explaining that the definition of "similarly situated" differs between courts).

13. Kathryn T. McGuigan & Justin Hanassab, *Admissibility of "Me Too" Evidence*, LEXISNEXIS (Apr. 18, 2018), https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/admissibility-of-me-too-evidence [https://perma.cc/9WEG-GHX2].

Such evidence is often key to determining if a claim survives summary judgment.[14] Thus, at the discovery stage, a plaintiff may seek to determine if the defendant has engaged in a pattern of previous violations that have been obscured by confidential settlements. They may wish to examine such settlements, read materials produced in advance of settlement negotiations, or depose prior victims about the settlement process.

The information that comes to light before cases settle may be highly probative. During Bill Cosby's deposition with Constand's attorneys, for example, he admitted to drugging multiple women in order to rape them, lying about it to his wife, and paying the women off to keep them from disclosing his crimes.[15] This information was hidden from the public when the case settled for three million dollars.[16]

Where prior victims have signed confidential settlement agreements, however, formal and informal barriers prevent plaintiffs from accessing evidence that can reveal legally significant patterns of behavior. Former victims may be reluctant to respond to subpoenas for fear of legal or personal retaliation, particularly if they lack the legal sophistication necessary to determine if they can respond to a subpoena without being sued for breach of contract. If a plaintiff subpoenas a victim, the defendant may move to quash the subpoena under Federal Rule of Civil Procedure 45(d)(3).[17]

In resolving such disputes, courts have struggled with reconciling what they view as conflicting public policy goals—the goal of allowing expansive discovery so that parties can litigate with complete information, and that of promoting and respecting confidential settlement agreements.[18] If defendants cannot trust that courts will respect the confidentiality of settlements in the future, some legal experts worry that parties will be less candid during the settlement process or reluctant to settle at all, leading to a decrease in settlements overall and a resulting decline in judicial efficiency.[19]

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14. SCHLEIER, *supra* note 12.

15. Francescani & Fisher, *supra* note 5.

16. *Id.*

17. FED. R. CIV. P. 45(d)(3).

18. *See, e.g.*, Bottaro v. Hatton Assocs., 96 F.R.D. 158, 160 (E.D.N.Y. 1982) (interpreting a motion to compel in light of the "strong public policy of favoring settlements and the congressional intent to further that policy"). This deference towards confidential settlements stems not only from a desire to protect the secrecy of prior agreements, but from a fear that opening up old settlements to the public will make the prospect of settling future claims less attractive to defendants who highly value secrecy. *See infra* Section III.B.

19. FED. R. EVID. 408 advisory committee's notes on proposed rules (noting disclosing evidence of settlement negotiations at trial may "inhibit freedom of communication with respect to compromise, even among lawyers").

Courts in the Second, Third, and Seventh Circuits have responded to this conflict by raising the relevance barrier required to compel discovery of information in confidential settlements.[20] Federal Rule of Civil Procedure 26(b) allows for the discovery of any matter that is relevant, proportional, and non-privileged,[21] and a party that fails to produce such information may be compelled to do so under Rule 37, which authorizes courts to compel discovery and then sanction the failure to comply.[22] In deference to public policy favoring out-of-court settlements, the Second, Third, and Seventh Circuits require a "particularized showing" of relevance above and beyond that required by Rule 26(b) in order to compel discovery.[23] When victims of sexual assault and harassment seek access to confidential settlements to uncover "me too" evidence, this heightened standard paradoxically renders such evidence harder to compel in the very cases for which it is most necessary.

In light of this contradiction, Part I of this paper outlines how courts interpret the relevance standard in the context of confidential settlements, and compares those courts that apply a heightened standard with those that do not. Part II assesses the merits and disadvantages of a heightened relevance standard, emphasizing how the aforementioned policy considerations apply in the context of sexual harassment law and paying particular attention to how legislative and judicial regulation of confidential settlements has changed in response to the #MeToo era. Part III advocates for a presumption of relevance for confidential settlements in sexual assault and harassment cases.

I. BACKGROUND: CONTRASTING RELEVANCE STANDARDS FOR CONFIDENTIAL SETTLEMENTS

Information contained in confidential settlements is integral to enabling sexual harassment plaintiffs to get the "me too" evidence necessary to prove their claim, but in some circuits, demonstrating that such information is "relevant" and thus subject to discovery is particularly challenging. Federal Rule of Civil Procedure 26(b) authorizes broad discovery of any information that is relevant,

20. *Bottaro*, 96 F.R.D. at 160.

21. FED. R. CIV. P. 26(b).

22. *See* FED. R. CIV. P. 37 (authorizing "appropriate sanctions" for, among other things, a party's failure to make a required disclosure or a deponent's failure to answer a deposition question). Such sanctions may include an award of attorney's fees for the cost of making the motion.

23. Vardon Golf Co., Inc. v. BBMG Golf Ltd., 156 F.R.D. 641, 650–51 (N.D. Ill. 1994); Fidelity Fed. Sav. & Loan Ass'n v. Felicetti, 148 F.R.D. 532, 534 (E.D. Pa. 1993); *Bottaro*, 96 F.R.D. at 160.

proportional, and non-privileged, and evidence "need not be admissible in evidence to be discoverable."[24] Not all information uncovered in discovery is admissible at court, however, and Federal Rule of Evidence 408 limits parties' ability to use both evidence that parties offered to settle and any conduct or statements made during settlement negotiation. For example, parties may not use such evidence for the purpose of demonstrating liability or impeaching witness statements, but may introduce it for other purposes, such as demonstrating bias.[25] In deference to what they perceive as tension between the procedural rules favoring broad discovery and evidentiary rules respecting the integrity of settlement negotiations, courts in at least three circuits have carved out a modified discovery standard solely for confidential settlements.[26] Courts in the Second and Third Circuits require a "particularized showing" of relevance beyond that required by Rule 26(b), while courts in the Seventh Circuit require parties to articulate the "chain of inferences" by which their discovery request would lead to admissible evidence.[27] These modified relevance standards disproportionately impact sexual assault and harassment cases, which often require circumstantial comparator evidence of the kind shielded by confidential settlements to be successful.

A. Bottaro "Particularized Showing" Approach

Courts in the Second, Third, and Seventh Circuits have all applied a heightened relevance standard to compel the discovery of information protected by prior confidential settlements, including in sexual assault and harassment cases. First articulated by the Eastern District of New York in *Bottaro v. Hatton* in 1982, this standard generally requires a "particularized showing" of relevance above and

24. FED. R. CIV. P. 26(b). Until 2015, the rules deemed discoverable any information "reasonably calculated to lead to the discovery of admissible evidence." The phrase was deleted in 2015 due to its repeated misuse by courts and in order to clarify the limits on discovery. However, the phrase is central to the pre-2015 case law, including that cited in this Article. *See* FED. R. CIV. P. 26(b) advisory committee's note to 2015 amendment. *See also* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) ("Discovery of matter not 'reasonably calculated to lead to the discovery of admissible evidence' is not within the scope of [Rule 26(b)(1)]."); Maxey v. Banks, 26 F. App'x 805, 810 (10th Cir. 2001) (denying two discovery requests that were not "reasonably calculated to lead to the discovery of admissible evidence"); U.S. Commodity Futures Trading Comm'n v. Parnon Energy Inc., 593 F. App'x 32, 36 (2d Cir. 2014) (Rule 26(b) "require[es] only that discovery be '*reasonably calculated* to lead to the discovery of admissible evidence' ").

25. FED. R. EVID. 408 (allowing such evidence, however, for other purposes).

26. *Bottaro*, 96 F.R.D. at 160.

27. *Id.*; see also *Fidelity Fed. Sav. & Loan Ass'n*, 148 F.R.D. at 534; *Vardon Golf Co. Inc.*, 156 F.R.D. at 650–51.

beyond that required by Rule 26(b).[28] However, there is great inconsistency in how different circuits, and even districts within the same circuit, interpret this standard.

In *Bottaro*, the Eastern District of New York deemed Rule 26(b)'s expansive definition of discovery incompatible with the goal of respecting confidential settlements, requiring instead a "particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement."[29] The defendant in *Bottaro* sought to discover the contents of a confidential settlement between plaintiffs and a prior defendant regarding an alleged securities law violation, on the basis that the settlement would generate admissible evidence about damages.[30] The court held, however, that the standard for discoverability must be informed by the standard for admissibility,[31] seeking to balance the "strong public policy of favoring settlements" and Congress's policy to "insulat[e] the bargaining table from unnecessary intrusions."[32] While the court did not engage in a fact-specific analysis of what would constitute such a particularized showing, it rejected the movant's request on the basis that it was based on a mere "hope" that it would lead to admissible evidence regarding damages.[33] Acknowledging that the amount for which plaintiffs settled with prior defendants was necessary to determine the ultimate apportionment of damages, the court held, nonetheless, that such information had limited relevance until a final judgment was reached.[34]

In *Morse/Diesel, Inc. v. Fidelity & Deposit Co.*, in 1988, the Southern District of New York elaborated upon the *Bottaro* "particularized showing" standard, holding that it requires specific factual allegations demonstrating relevance.[35] *Morse/Diesel* concerned a contract dispute between Morse/Diesel, the general contractor on a hotel construction project, and electrical sub-contractor T. Frederick Jackson, Inc., wherein Jackson sought to compel settlement documents that Morse/Diesel withheld.[36] Noting the vagueness of the *Bottaro*

28. 96 F.R.D. at 160.

29. *Id.*

30. *Id.* at 159.

31. *Id.* ("[W]hile admissibility and discoverability are not equivalent, it is clear that the object of the inquiry must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue.").

32. *Id.* at 160.

33. *Id.*

34. *Id.*

35. Morse/Diesel, Inc. v. Fidelity & Deposit Co. of Md., 122 F.R.D. 447, 450–51 (S.D.N.Y. 1988).

36. *Id.*

"particularized showing" of relevance standard, the *Morse/Diesel* court looked to the definition of "particularized" in other procedural contexts.[37] The court drew primarily on Federal Rule of Civil Procedure 9(b), under which a party must plead fraud "with particularity," and held that making a particularized showing requires articulating specific factual allegations.[38] Defendant met this showing by citing letters, testimony, and affidavits that either directly referenced the increased construction central to its case or pointed to other potential sources for such information.[39]

Rather than interpreting *Bottaro* to require specific factual allegations, in *Fidelity Fed. Sav. & Loan Ass'n v. Felicetti*, in 1993, the Eastern District of Pennsylvania interpreted the *Bottaro* standard as a burden-shifting framework that "switch[es] the burden of proof from the party in opposition to the discovery to the party seeking the information."[40] *Fidelity* concerned racketeering, fraud, and conspiracy charges regarding a series of construction loans.[41] The *Fidelity* court granted plaintiffs' motion to compel the production of documents related to defendant's settlement negotiations with the Department of Justice. While the court did not elaborate upon how the plaintiffs successfully met the burden to compel discovery, it noted that the particularized showing standard should balance the conflicting goals of promoting settlements and promoting wide-ranging discovery.[42]

B. Vardon "Chain of Inferences" Approach

The Northern District of Illinois has likewise departed from the Rule 26(b) relevance standard, adopting a modified version of the *Bottaro* test based upon the reasoning that, while there are important policy objectives behind a heightened relevance standard, the *Bottaro* test is insufficiently grounded in the Federal Rules of Civil Procedure ("FRCP").[43] In *Vardon Golf Co. v. BBMG Golf*, in 1993, Plaintiff Vardon sued BBMG Golf for patent infringement.[44] Vardon sought to discover information in third-party defendant Dunlop's custody regarding prior settlement negotiations between the two, arguing that the settlement

37. *Id.* at 451.
38. *Id.*
39. *Id.*
40. 148 F.R.D. 532, 534 (E.D. Pa. 1993).
41. *Id.*
42. *Id.* at 533–34.
43. Vardon Golf Co., Inc. v. BBMG Golf Ltd., 156 F.R.D. at 650–51.
44. *Id.* at 644–45.

amount was relevant to determining reasonable royalties.[45] In determining whether such information should be subject to a regular or heightened relevance standard, the court reiterated the importance of encouraging settlement negotiations.[46] Though the court acknowledged that the policy of encouraging settlements conflicts with "policies favoring sweeping discovery," the court held that the former has a "stronger basis in [judicial] policy."[47] The *Vardon* court also concluded that requiring Dunlop to demonstrate that a discovery request could *not* lead to the discovery of confidential information was too complex, because it would require them to "refute all possible alternative uses of the evidence" and "prove a negative."[48]

Though acknowledging that a modified relevance standard is appropriate for information protected by confidential settlements, the *Vardon* court ultimately held that the "particularized showing" standard unduly inflated the proponent's burden.[49] Rather than replacing Rule 26(b)'s test with a "particularized showing" test, the *Vardon* court argued for construing Rule 26(b) in light of the restrictions on the admissibility of confidential settlements.[50] The *Vardon* court held that

> where information sought in discovery would not be admissible due to an exclusionary rule in the Federal Rules of Evidence, the proponent of discovery may obtain discovery (1) by showing that the evidence is admissible for another purpose other than that barred by the Federal Rules of Evidence or (2) by articulating a plausible chain of inferences showing how discovery of the item sought would lead to other admissible evidence.[51]

The *Vardon* court held that plaintiff had met neither prong of the modified *Bottaro* test.[52] First, because there is no direct correlation between the amount of a settled claim and reasonable royalties, the plaintiff could articulate no purpose to admit the evidence at hand other than purposes precluded by Federal Rule of Evidence 408.[53] Further, the plaintiffs did not adequately demonstrate how the settlement evidence could elicit other admissible evidence.[54]

45. *Id.* at 651.
46. *Id.* at 650.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 650–51.
51. *Id.* at 651.
52. *Id.*
53. *Id.*
54. *Id.*

C. Bennett "Reasonably Calculated" Approach

At least one court has explicitly rejected the *Bottaro* heightened relevance standard for compelling discovery of confidential settlements in favor of applying the standard in the text of Rule 26(b), which for many years allowed for the discovery of any information "reasonably calculated to lead to the discovery of admissible evidence."[55] In *Bennett v. LaPere*, a 1986 case in the District of Rhode Island, the defendant sought discovery of a confidential settlement the plaintiff reached with a former codefendant.[56] The court granted the defendant's motion on the basis that the discovery request was reasonably calculated to lead to the discovery of admissible evidence under 26(b), "flatly reject[ing]"[57] the *Bottaro* heightened pleading standard as unworkable and "out of kilter with the spirit and philosophy of the Federal Rules."[58] In justifying its decision to subject discovery requests for confidential settlement documents to the same relevance standard to which Rule 26 subjects all other discovery, the *Bennett* court advanced three key criticisms of *Bottaro*.

First, the court argued that *Bottaro* relies too heavily on Federal Rule of Evidence 408, which concerns admissibility, not discoverability.[59] Second, the court argued that *Bottaro* inappropriately weighs the incentives that permitting the discovery of confidential settlements would create.[60] The court argues that Rule 408 incentivizes settlements by blocking evidence that prior efforts to settle the present claim failed, not by blocking evidence that totally different claims have already settled.[61] Parties may be reluctant to engage in settlement negotiations if, should the negotiations fail, their content will be revealed at a subsequent trial.[62] Once negotiations conclude and a settlement is reached, however, different incentives apply.[63] Though the settling parties may be concerned about settlement terms being discovered by some hypothetical future litigant, such speculative concerns are likely outweighed by the desire to settle the present action, lest the parties both lose "the benefit of the bargain" and risk "the more

55. The "reasonably calculated" language was removed from the rules in 2015, which now state "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." *See* FED. R. CIV. P. 26(b) advisory committee's note to 2015 amendment.

56. 112 F.R.D. 136, 137 (D.R.I. 1986).

57. *Id.* at 138–39.

58. *Id.* at 139.

59. *Id.* at 140–41.

60. *Id.* at 140.

61. *Id.*

62. *Id.*

63. *Id.*

public airing occasioned by a fullblown trial."[64] Indeed, disclosing terms of previous settlements during discovery may foster settlement negotiations by giving both parties more information to facilitate that "negotiation process."[65]

Third, the *Bennett* court argued that *Bottaro* exaggerates the scope of Rule 408 as a blanket prohibition on all information related to confidential settlements and fails to adequately grapple with its numerous exceptions.[66] By its terms, Rule 408 precludes parties from using evidence from settlement negotiations only to prove liability.[67] In contrast, the rule expressly allows such evidence to be used for other purposes, like proving a witness's bias.[68] However, "there is . . . no satisfactory way" for a party to determine if it may use settlement documents for one of these permissible purposes unless it has access to the documents themselves.[69] Finally, "fundamental fairness" dictates that both parties enter negotiations with equal knowledge.[70] Deliberately withholding non-privileged information from the defendant is an unjust attempt to gain an "[ ]unfair[ ] tactical advantage which would attach to keeping [the Defendant] uninformed."[71] Indeed, the court argued, disclosing as much information as possible could actually promote the prompt settlement of claims by reducing parties' ability to engage in gamesmanship.[72]

II. BALANCING PRO-SETTLEMENT AND PRO-DISCOVERY POLICIES

The *Bottaro* heightened relevance standard represents a compromise between competing policy objectives of encouraging settlements and promoting thorough discovery. However, because discovery is particularly important in sexual assault and harassment cases, and settlements are particularly undesirable, *Bottaro* does not appropriately balance the interests at stake. Further, federal and state reforms in response to the #MeToo movement call for a consideration of whether the *Bottaro* standard's binary focus on discovery versus settlements appropriately considers all of the relevant interests, or

64. *Id.*
65. *Id.*
66. *Id.* at 139.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 140.
71. *Id.*
72. *Id.* at 140–41 ("Pretrial discovery was meant to end the sporting theory of justice.").

whether courts should weigh policy considerations other than the two articulated in *Bottaro*.

A. Sweeping Discovery is More Valuable in Cases with Information Asymmetries

Courts that follow *Bottaro* fail to address how sweeping discovery may be more valuable for some types of claims, including sexual assault and harassment claims, and thus should gain more weight as a policy consideration in such cases. In particular, courts and scholars alike have identified an information asymmetry problem particular to civil rights cases, including those concerning sexual assault and harassment, which means that meritorious claims are often dismissed prematurely because plaintiffs' success depends upon information in the exclusive custody of the defendant.[73]

Much of this scholarship focuses on employment discrimination cases, wherein demonstrating "[d]iscrimination in hiring, promotion, or employee discipline depends on comparative data drawn from the employer's records that simply are inaccessible absent discovery."[74] Scholars have highlighted that "discriminatory animus or intent is rarely patent or explicit," and thus "[i]nformational and power asymmetries between parties tend to be more pronounced" in civil rights cases.[75] Courts in several circuits have demonstrated a

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73. While certain types of workplace sexual harassment may fall under criminal prohibitions on assault or obscenity, Title VII of the Civil Rights Act of 1964 remains one of the most important legal avenues for survivors to seek justice. *See* Khadija Murad, *Sexual Harassment in the Workplace*, NAT'L CONF. STATE LEGISLATURES (Feb. 17, 2020), https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx [https://perma.cc/8B7M-TY2L] (cataloguing relevant state and federal statutes on the topic of workplace harassment).

74. Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 435 (Tenn. 2011); *see also* Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 52 (2010) (stating that "[c]ivil rights and discrimination claims" are "good examples" of claims plagued by "information asymmetry" that render them particularly likely to be dismissed before discovery); Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post*-Iqbal, 57 N.Y.L. SCH. L. REV. 719, 727 (2013) ("[T]he court will not permit discovery unless the plaintiffs provide the very facts they cannot discover. Thus, [civil rights] plaintiffs' complaints die on the vine not because they lack merit, but because plaintiffs do not have the same access to information that the defendants do."); Charles Falck, Note, *Equitable Access: Examining Information Asymmetry in Reverse Redlining Claims Through Critical Race Theory*, 18 TEX. J. ON C.L. & C.R. 101, 103 (2012) (describing information asymmetries suffered by racial minorities in the context of Fair Housing Act litigation); Colin T. Reardon, Note, *Pleading in the Information Age*, 85 N.Y.U. L. Rev. 2170, 2180–81 (2010) (arguing that, in the civil rights context, "significant numbers of plaintiffs with meritorious claims cannot present adequate factual information in their complaints" because "the defendant possesses more information directly bearing upon its own liability than the plaintiff does").

75. Ramzi Kassem, *Implausible Realities:* Iqbal*'s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PA. ST. L. REV. 1443, 1482 (2010).

willingness to relax procedural requirements, including pleading standards, where such an information asymmetry would harm meritorious claims.[76]

Sexual harassment claims, however, are often subject to similar information asymmetries. Because claims are bolstered by evidence of "similarly situated" victims, many of whom cannot come forward due to the terms of their confidential settlement, plaintiffs may be unable to access information that is integral to the success of their case.[77] Thus, the *Bottaro* relevance standard does not give appropriate weight to the importance of discovery in the context of civil rights cases, including those related to sexual assault and harassment.

B. Settlements Are Not Preferable to Litigation

The *Bottaro* approach erroneously presumes that the value of expansive discovery is consistent across claims, ignoring that it may be more important for some claims, including sexual assault and harassment claims, than for others. Additionally, it falsely presumes that settlement is equally desirable for all claims. Numerous scholars, however, have advanced critiques of what they see as an overemphasis on settling claims out of court, highlighting particular disadvantages for indigent defendants, the public safety hazards of allowing repeat offenders to evade accountability, and the inability of settlements to provide the same public catharsis and virtue signaling as litigation.[78] These problems are often particularly salient for sexual assault and harassment claims, where the very dynamics that contributed to abuse in the first place, including wealth and power disparities between victim and perpetrator, often render settlement negotiations unduly coercive and the role of public trial particularly significant.

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76. *See, e.g.*, Devaney v. Chester, 813 F.2d 566, 569 (2d Cir. 1987) (holding that Rule 9(b), which establishes heightened pleading standards for claims of fraud, must be read "in light of such circumstances as whether the plaintiff has had an opportunity to take discovery of those who may possess knowledge of the pertinent facts").

77. See Schleier, *supra* note 12, at 4; McGuigan, *supra* note 13, at 4.

78. *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) ("I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis."); *see also* Kate Webber Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PA. ST. L. REV. 463, 513 ("Scholars have frequently criticized the effect of confidential settlements on discrimination and other cases.").

1. Victims and Perpetrators Lack Parity in the Settlement Negotiation Process

While settlements are often lauded as a "win-win" scenario providing satisfactory compensation for both plaintiffs and defendants, power asymmetries between litigants, particularly in the sexual assault and harassment context, impair plaintiffs' ability to assert their bargaining power. In his canonical *Yale Law Review* piece *Against Settlement*, Owen Fiss of Yale University articulated a series of critiques of confidential settlements, ultimately referring to them as a "highly problematic technique for streamlining dockets" that "should be neither encouraged nor praised."[79] Most proponents of pre-trial settlement, he argues, "assume a rough equality between the contending parties."[80] However, where there is a resource discrepancy between plaintiffs and defendants, plaintiffs may settle for far less than their claim is worth, or else abandon valid claims altogether. Fiss outlines three main reasons why confidential settlements disadvantage indigent plaintiffs. First, under-resourced plaintiffs may be "less able to amass and analyze the information needed to predict the outcome of the litigation."[81] Second, they may have a greater need for money in the near future, and thus settle rapidly to obtain payment instead of holding out for a better offer. Third, indigent plaintiffs simply may lack the money to engage in protracted litigation.[82]

The unusual dynamics of sexual assault and harassment claims exacerbate this inequality of bargaining power. Indeed, Robert Friedman has described how unequal bargaining power is particularly prevalent in employment discrimination cases, including sexual harassment suits.[83] Employees suing for sexual assault or harassment likely have fewer financial resources than the employer on the other side of the bargaining table. Employers may have the backing of an experienced legal team which, in some circumstances, will have substantial experience defending this employer or even this perpetrator

79. Fiss, *supra* note 78, at 1075.

80. *Id.* at 1076.

81. *Id.*

82. *See id.* at 1077 (acknowledging circumstances under which wealthy defendants may be pressured to settle non-meritorious claims with indigent defendants, but "doubt[ing] that these circumstances occur with any great frequency"); *see also* Theresa M. Beiner, *The Many Lanes out of Court: Against Privatization of Employment Discrimination Disputes*, 73 MD. L. REV. 837, 878 (2014) (criticizing the "imbalances of material resources" which characterize many settlement negotiations).

83. *See* Robert D. Friedman, Comment, *Confusing the Means for the Ends: How a Pro-Settlement Policy Risks Undermining the Aims of Title* VII, 161 U. PA. L. REV. 1361, 1364 (2013) ("Many of these [sexual harassment] settlements [take] place under conditions that suggest unequal bargaining power.").

from similar claims. Employers may also have social and professional capital that newcomers to the field lack and may be able to threaten reputational consequences if the employee fails to cooperate in negotiations. Further, the dynamics which contributed to abuse in the first place may also render survivors vulnerable during legal negotiations. Where the perpetrator is older, more professionally experienced, wealthier, more charismatic, or better connected, and has previously used this position of power for sexual exploitation, victims may be psychologically intimidated during negotiations and thus more likely to accept an unfavorable settlement offer.

This disparate bargaining power is exemplified by the Harvey Weinstein case, where Weinstein used his wealth, legal team, and professional reputation to discourage his victims from speaking out. Numerous victims and witnesses reported declining to take legal action against Weinstein because of his power within the film industry.[84] Actress Asia Argento explained that she did not report her 1997 assault by Weinstein out of fear that he would "crush" her, as he had "crushed a lot of people before."[85] One employee who disclosed the allegations to *The New Yorker* insisted on remaining anonymous lest Weinstein "ruin [the employee's] life."[86] A second anonymous source described her fear that Weinstein would "drag[ ] [her] name through the mud."[87] The same source explained that she did not report her own assault because she knew Weinstein had superior legal resources: "I thought it would be a 'he said, she said,' and I thought about how impressive his legal team is, and I thought about how much I would lose, and I decided to just move forward."[88] She likewise explained how Weinstein's position as her employer prevented her from exposing his behavior, stating simply that "[she] needed [her] job."[89]

Argento and others were speaking about factors that render victims unlikely to speak about their experiences generally, not specifically in the context of settlement negotiations.[90] However, their line of reasoning is applicable to the settlement context. The fear of professional, legal, social, and even physical harm that prevented

84. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories [https://perma.cc/982Q-WPW4].

85. *Id.*

86. *Id.*

87. *Id.* (quoting an anonymous source as saying that Weinstein "drags your name through the mud, and [will] come after you hard with his legal team").

88. *Id.*

89. *Id.* (quoting the source as explaining that she "was in a vulnerable position").

90. *Id.*

individuals like Argento from reporting abuse to friends, family, and supervisors can likewise render individuals who come to the negotiating table reluctant to advocate for themselves or take their claims to a public court of law. Because victims like Argento could not even share with family for fear of personal and professional ruin, sharing during formal legal proceedings seemed out of the question.

2. Settlements Enable Serial Assailants To Assault Again

Litigation may be preferable where a confidential settlement would conceal threats to public health and safety, including the existence of a sexual predator who may continue to victimize women if not exposed. Indeed, scholars have written about the dangerous effect of confidential settlements in fields from product liability to environmental hazards.[91] The federal government has already recognized how confidential settlements can obscure dangerous behavior, leaving the public vulnerable and enabling dangerous actors to evade accountability; parties to medical malpractice suits, for example, must report any settlement to the Secretary of Health and Human Services and to state licensing boards.[92]

Just as repeatedly settling product liability suits enables a manufacturer to continue to peddle dangerous products to unsuspecting consumers, repeatedly settling sexual harassment and assault suits enables assailants to continue committing acts of violence without repercussions. Of course, individuals who are found civilly liable for sexual misconduct will not be incarcerated, and thus are just as physically capable of re-offending as those who have settled their claims. However, the public nature of a civil trial still has important effects on public safety. Women may be more guarded around individuals who have been found liable for assault or harassment, and they may take greater measures to protect themselves. Employers may be reluctant to hire somebody with a repeated history of sexual assault allegations, especially for a position that involves extensive interaction

91. *See, e.g.*, Alison Lothes, Comment, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433, 433–34 (2005) ("Litigation regarding the Dalkon Shield, the Ford Pinto, and other consumer products or environmental toxins has brought to public attention cases of businesses keeping dangerous secrets."); Jennifer D. Oliva, *Opioid Multidistrict Litigation Strategy*, 80 OHIO ST. L.J. 663, 687 (2019) (describing how pharmaceutical companies implicated in the opioid crisis frequently "seek confidential settlement agreements" which "may not be in the public's interest"); Jillian Smith, Comment, *Secret Settlements: What You Don't Know Can Kill You!*, 2004 MICH. ST. L. REV. 237, 238 (recounting how secret settlements prevented the public from learning about dangerous flaws with Bridgestone/Firestone tires, silicone gel breast implants, as well as the environmental hazards of power lines, landfills, and chemical plants).

92. Smith, *supra* note 91, at 241.

with young women. Further, federal and state authorities may be more eager to prosecute somebody on a sexual assault or harassment claim if they believe they are targeting an individual with a recurring history of violence.

The dangers of obscuring patterns of dangerous behavior are particularly salient in the context of sexual assault and harassment claims due to the high proportion of sexual assaults committed by repeat offenders. One study found that the majority of rapists are serial rapists, committing an average of almost six rapes each.[93] A study of sexual assault on college campuses found that serial rapists commit almost ninety percent of alcohol-related sexual assaults, and that perpetrators who have raped ten or more individuals are responsible for about half of sexual assaults.[94] In fact, RAND has found that "past perpetration of sexual assault is one of the most consistently found predictors of future sexual assault."[95] If a pattern of sexual misconduct is one of the key indicators of continued sexual misconduct, then hiding those patterns behind a screen of confidential settlements may have dire effects for public safety.

3. Settlements Sacrifice Benefits Unique to Trial, Including Public Accountability

Scholars have also noted that while judicial settlements enable private parties to resolve disputes peacefully, this often comes at the expense of justice either for those parties or for society as a whole. This concern is particularly salient for sexual harassment and assault claims, wherein plaintiffs may seek the catharsis or social validation that only a public trial can provide. Plaintiffs in general may settle claims because a settlement provides immediate and guaranteed relief, and litigation, while potentially more rewarding, is a riskier process. Essentially, plaintiffs may settle not because settlement is equivalent to litigation, but because it is safer. "To settle for something," Fiss explains, "means to accept less than some ideal."[96] Theresa Beiner,

93. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 80 (2002).

94. John D. Foubert, Angela Clark-Taylor & Andrew F. Wall, *Is Campus Rape Primarily a Serial or One-Time Problem? Evidence from a Multicampus Study*, 26 VIOLENCE AGAINST WOMEN 296, 305 (2019).

95. Sarah Michal Greathouse, Jessica Saunders, Miriam Matthews, Kirsten M. Keller & Laura M. Miller, *A Review of the Literature on Sexual Assault Perpetrator Characteristics and Behaviors*, RAND CORPORATION, at xiii (2015), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1000/RR1082/RAND_RR1082.pdf [https://perma.cc/3253-7HXN].

96. Fiss, *supra* note 78, at 1086.

likewise, distinguishes between peaceful conflict resolution, which settlements may achieve, and justice, which trials best achieve.[97] Because settlement negotiations are a bargaining process where each party is acting solely in self-interest, Beiner argues, such negotiations may or may not lead to justice.[98]

Confidential settlements also may defer justice long-term, Beiner argues, by precluding public conversations about what is and is not appropriate in the workplace. Because sexual harassment cases use a "reasonable person" standard, they depend almost entirely on what behavior the public deems to be reasonable—a standard that is heavily influenced by the kinds of public conversations occurring about sex in the workplace.[99] Richard Delgado argues, relatedly, that such public conversations can "fuel reform" and ensure justice in the long term by drawing attention to the bad behavior of certain actors.[100] Robert Friedman notes that repeated settlements for discrimination and harassment hide the severity of the problem, thereby limiting the development of case law and inhibiting legislators' ability to formulate effective responses based on real-life events.[101]

Further, even if private parties are content with their financial settlement, foregoing litigation denies the courts their role as public arbiters of social values, including values like dignity, consent, and gender equality.[102] Scholars like Marc Galanter have highlighted the key role that courts have in exposing facts and holding individuals publicly accountable.[103] Fiss likewise explains how courts are publicly funded and judges represent the public writ large.[104] Thus, the job of courts

> is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes; to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.[105]

97. Beiner, *supra* note 82, at 878.

98. *Id.*

99. *Id.* at 882

100. Richard Delgado, *Alternative Dispute Resolution—Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391, 1401 (1997).

101. Friedman, *supra* note 83, at 1366–67.

102. *See* Fiss, *supra* note 78, at 1085 (explaining these limitations of settlement).

103. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 22 (2006) ("The trial is a site of 'deep accountability' where facts are exposed and responsibility assessed[.]").

104. Fiss, *supra* note 78, at 1085.

105. *Id.*

Mere judicial efficiency, or relief that "another case has been 'moved along,' " Fiss suggests, is not always an adequate tradeoff for deferred justice.[106]

The courts arguably have an especially important role to play in publicly affirming social values during the #MeToo era. The theme of public accountability has pervaded the #MeToo movement, with many prominent activists speaking about the therapeutic value of society-wide conversations. Tarana Burke, who started the #MeToo movement, described "self-reflection and accountability" as necessary steps on "the road to redemption" for perpetrators.[107] In the wake of sexual assault allegations against rapper R. Kelly, Burke issued a "call for public accountability."[108] Similarly, after describing the sexual harassment she suffered at the hands of movie mogul Harvey Weinstein, Miramax employee Lauren O'Connor described the "great distress" she suffered "remaining silent" about her abuse.[109] Actress Ashley Judd noted that, while Weinstein's victims frequently discussed the abuse amongst themselves, it was "simply beyond time to have the conversation publicly."[110]

In a legal context specifically, Judge Rosemarie Aquilina emphasized the therapeutic value of public testimony when, during the sentencing hearing of former USA Gymnastics team doctor Larry Nassar for sexual abuse and assault, she allowed each of Nassar's victims to testify.[111] Emphasizing that doing so would enable victims to "leave [their] pain" behind in the courtroom, Aquilina assured victims that she was "listening" and made repeated reference to "giv[ing] the victims a voice."[112] "You found your voice," Aquilina stated to one victim, while telling another that her "words replace what [Nassar has] done

106. *Id.* at 1086.

107. Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES, https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html (last updated Oct. 29, 2018) [https://perma.cc/28MD-XU7Z].

108. Anastasia Tsioulcas, *#MeToo Founder Tarana Burke Responds to R. Kelly*, NPR (May 1, 2018, 4:57 PM), https://www.npr.org/sections/therecord/2018/05/01/607448801/-metoo-founder-tarana-burke-responds-to-r-kelly [https://perma.cc/DA2R-9YHD].

109. 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/3HME-7SN5].

110. *Id.*

111. Jenny Proudfoot, *These are Judge Aquilina's Most Powerful Quotes from the Larry Nassar Sexual Abuse Trial*, MARIE CLAIRE (Jan. 26, 2018, 11:14 AM), https://www.marieclaire.co.uk/news/judge-aquilina-quotes-574902 [https://perma.cc/9XW4-3J79].

112. *Id.*

to you."[113] Plaintiffs who settle their claims, however, never get the opportunity to use their voice to bring their perpetrators to account publicly—and in fact, may face legal repercussions for doing so.[114]

C. Many Policies in Addition to Sweeping Discovery Weigh Against Settlements

In addition to minimizing the importance of discovery and overestimating the importance of settlements, the *Bottaro* standard does not encompass other policy goals that weigh against settlements. The *Bottaro* court assumes that policymakers seek to encourage settlements at all costs and thereby fails to give appropriate weight to other important policies in the context of sexual harassment law; such values include judicial transparency,[115] transparency within the workplace,[116] and deterrence of sexual harassment and assault.[117]

1. Rule 408 Recognizes Key Judicial Values, Including Information Gathering and Fair Play During Discovery

Courts that adopt the *Bottaro* standard often treat Federal Rule of Evidence 408 as an unequivocal expression of Congress's desire to encourage confidential settlements, ignoring the manner in which the rule itself limits that policy to promote fair and accurate proceedings. *Bottaro*, for example, was based partially upon the "strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions."[118] However, Rule 408 specifically provides that, in some circumstances, the value of the evidence outweighs the negative effects of such "intrusions." For example, 408(a) dictates that evidence of offering to settle a claim may not be used to "prove or disprove the validity or amount" of that claim, or to "impeach by a prior inconsistent

113. Julyssa Lopez, *Judge Rosemarie Aquilina's 10 Most Powerful Quotes from the Nassar Hearings*, GLAMOUR (Jan. 24, 2018), https://www.glamour.com/story/judge-rosemarie-aquilina-most-powerful-quotes-nassar-hearings [https://perma.cc/NAN6-L49D].

114. Alyssa Bailey, *Chrissy Teigen Pledges To Pay $100K Fine for McKayla Maroney*, ELLE (Jan. 16, 2018), https://www.elle.com/culture/career-politics/a15174640/mckayla-maroney-larry-nassar-nda-chrissy-teigen-response/ ("[B]ecause of a non-disclosure agreement contained in a settlement agreement Maroney signed with USA Gymnastics, Maroney could face a $100,000 penalty for speaking about her alleged abuse or the settlement.") [https://perma.cc/F8WQ-YP9Z].

115. *See* Richard A. Zitrin, *The Laudable South Carolina Court Rules Must Be Broadened*, 55 S.C. L. REV. 883 (2004) (explaining the failure in this regard).

116. 2018 Wash. Sess. Laws 688.

117. 2019 N.Y. Sess. Laws 160 (A. 8421) (McKinney).

118. Bottaro v. Hatton Assocs., 96 F.R.D. 158, 160 (E.D.N.Y. 1982).

statement," but may be admitted for any other purpose.[119] Rule 408(b) elaborates upon such purposes, specifically mentioning proving witness bias, responding to an accusation of undue delay, or alleging effort to hinder a criminal investigation or prosecution.[120] The Advisory Committee notes set out examples of cases and authorities supporting the successful use of such evidence for permissible purposes.[121]

Indeed, Rule 408, the bedrock of the *Bottaro* principle's deference to confidential settlements, is riddled with exceptions, suggesting that such deference need not be absolute for sexual assault and harassment cases. While promoting settlements is desirable, the means to do so must be narrowly tailored in consideration of other judicial norms, such as ensuring the quality of evidence and promoting the fair and efficient resolution of valid claims. What many of these exceptions have in common—whether they have to do with uncovering potential biases, preventing parties from concealing probative evidence, or promoting smooth criminal investigation—is that they represent explicit scenarios in which value of truth telling outweighs the value of using out-of-court settlements to promote judicial efficiency. Indeed, the Advisory Committee notes concede that an offer to settle may be highly probative of a defendant's liability, depending on the amount of the offer and other surrounding circumstances.[122] Due to the particular role that confidential settlements have had in concealing information about sexual predators from the public, this truth-telling value is particularly salient for sexual assault and harassment cases.[123]

Further, the Advisory Committee is wary of gamesmanship within settlement negotiations that would exclude useful information from trial, in opposition to the court's role of resolving claims on the basis of complete and truthful information.[124] For example, the Advisory Committee notes stipulate that otherwise discoverable evidence remains admissible at trial, even if it was referenced in the course of settlement negotiations, because "[a] party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation."[125] A party would therefore be prevented from, for example, presenting incriminating information from "independent sources" in the course of a settlement negotiation in order to preclude the plaintiff from later subpoenaing

119. FED. R. EVID. 408(a).

120. FED. R. EVID. 408(b).

121. FED. R. EVID. 408(b) advisory committee's notes.

122. *Id.*

123. *See supra* Section II.B.2 (overviewing how settlements enable repeat offenses).

124. S. REP. NO. 93-1277, at 7056–57 (1974).

125. *Id.* at 7057.

those sources for evidence.[126] Such gamesmanship may be particularly prevalent in cases where there is a great power asymmetry between plaintiffs and defendants, as there is in many workplace harassment cases.[127] For example, absent the Advisory Committee's note, a workplace harasser represented by high-powered corporate counsel may have the sophistication necessary to use Rule 408 to strategically introduce evidence in settlement negotiations to make it inadmissible at trial, to the plaintiff's detriment.

2. Federal and State Legislatures Are Limiting Settlements To Deter Workplace Harassment

Since the adoption of the Federal Rules of Evidence in 1975, federal and state legislators have become even more aggressive in policing the confidential settlement of sexual assault and harassment claims so that their role in promoting judicial efficiency does not become a hindrance to the fair and accurate resolution of cases. Both federal and state legislatures have signaled a shift from prioritizing confidential settlements above all other judicial policies by passing laws that limit the circumstances under which individuals can enter confidential settlements and minimize the benefits individuals receive from such settlements. Federally, Title VII of the Civil Rights Act, which governs workplace discrimination and sexual harassment claims, already stipulates that even victims who sign nondisclosure agreements may file complaints with the Equal Employment Opportunity Commission.[128] Section 13307 of the Tax Cut and Job Reform Act of 2017 denies tax deductions for confidential settlements of sexual assault and harassment claims.[129] Further, while attorneys' fees incurred by employers who are party to confidential settlement negotiations are not tax deductible, attorneys' fees of claimants are.[130] Though other legislation passed in the wake of the #MeToo movement has stalled in committee,[131] the Tax Cut and Job Reform Act represents a key shift away from the policy of indiscriminately encouraging

126. FED. R. EVID. 408 advisory committee's notes.

127. *See supra* Section II.B.1 (illustrating problems associated with disparate bargaining power).

128. Jonathan Ence, Comment, *"I Like You When You Are Silent": The Future of NDAs and Mandatory Arbitration in the Era of #MeToo*, 2019 J. DISP. RESOL. 165, 170–74.

129. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13307, 131 Stat. 2129 (2017).

130. *Section 162(q) FAQ*, I.R.S., https://www.irs.gov/newsroom/section-162q-faq (last updated Jan. 17, 2020) [https://perma.cc/5VR9-CYRF]

131. *See, e.g.*, EMPOWER Act, H.R. 1521, 116th Cong. (2019) (designed to "deter, prevent, reduce, and respond to harassment in the workplace," and referred to the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties, where it has been under review since April 2019).

confidential settlements, as well as an acknowledgment that employers and employees do not come to settlement negotiations with equal bargaining power.

Numerous states have passed laws limiting the enforcement of nondisclosure agreements for sexual assault and harassment victims. Arizona, for example, passed a 2016 law enabling victims of sexual harassment or assault to violate the terms of confidential settlements to testify in criminal court.[132] The law also bans public officials from using tax dollars to settle sexual harassment or sexual misconduct claims.[133] Washington passed a 2018 law "encouraging the disclosure and discussion of sexual harassment and sexual assault in the workplace."[134] This law precluded employers from conditioning employment on signing a nondisclosure agreement and held all such preexisting agreements void and against public policy.[135] While the law contains a provision specifying that employees and employers may still enter into settlement agreements with confidentiality provisions,[136] the limitations represent an acknowledgment that the preference for settlements is not indiscriminate.

Most ambitiously, New York state passed a 2019 law instituting "special protections for employees who have been sexually harassed."[137] The law's expansive purpose was to "maximize deterrence of discriminatory conduct" in the workplace, and it contained provisions encouraging courts to interpret its dictates broadly in light of its remedial purpose.[138] The law contained sweeping reforms of workplace harassment law, including a provision stipulating that settlements can only contain confidentiality provisions at the request of the complainant.[139] Once such a provision is added to the agreement, the complainant has twenty-one days to consider the provision, and an additional seven days after the settlement is signed to revoke the agreement.[140] Further, such confidentiality provisions cannot preclude the complainant from "initiating, testifying, assisting, complying with

132. Ence, *supra* note 128, at 174.

133. *Id.*

134. S. 5996, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

135. *Id.*

136. *Id.* ("This section does not prohibit a settlement agreement between an employee or former employee alleging sexual harassment and an employer from containing confidentiality provisions.").

137. S06577, 1999 Assemb., 2019–2020 Reg. Sess. (N.Y. 2019).

138. *Id.*

139. *Id.*

140. *Id.*

a subpoena from, or participating in any manner" with a governmental agency.[141]

While none of these states have outlawed confidential settlements altogether, even for sexual assault and harassment claims, the limits they place on such settlements indicates that support of confidential settlements is not unequivocal, as the *Bottaro* standard implies. Further, many of these bills articulate specific policy goals in the field of sexual assault and harassment—such as encouraging the disclosure of sexual misconduct in the workplace and encouraging equity in the workplace—that courts may weigh against the goal of promoting settlements when navigating the tension between Rule 408 and Rule 26(b).

3. State Court Rules on Document Sealing Increasingly Reflect the Importance of Exposing Public Safety Threats

Statutes restricting the circumstances under which a judge may seal documents also undercut the presumption that confidentiality, either of settlement agreements or of other information uncovered in discovery, should outweigh threats to the public health, safety, or other interests. Insofar as serial perpetrators of assault and harassment threaten public safety, these limits on document sealing also support limits on confidential settlements.[142] Twenty-nine states have rules limiting a court's ability to seal records in civil cases.[143] In eight states, a court may not seal settlement records in a suit against a government entity.[144] For other suits, regardless of whether or not a public entity is involved, states have established a range of standards dictating when a court may seal a document. Five states permit a judge to seal a document only for good cause.[145] Four states permit sealing where privacy interests outweigh public interests.[146] Two states permit sealing if privacy interests clearly outweigh the public interest.[147] Utah allows for documents to be sealed where there is a "compelling" privacy interest.[148] Seven states further stipulate that documents may be sealed only if sealing is the least restrictive means possible to promote privacy,

141. *Id.*

142. *See supra* Section II.B.2 ("Settlements Enable Serial Assailants to Assault Again.").

143. Zitrin, *supra* note 115, at 890.

144. *Id.* at 890, 890 n.31 (listing Arkansas, Colorado, Florida, Iowa, Nevada, North Carolina, Rhode Island, and Texas).

145. *Id.* at 890 (listing Delaware, Michigan, New York, Tennessee, and Vermont).

146. *Id.* at 890–91 (listing California, Idaho, Indiana, and North Carolina).

147. *Id.* at 891 (listing Georgia and Utah).

148. *Id.*

while California adds that any sealing be "narrowly tailored to the privacy interests."[149]

Florida, Texas, Louisiana, Arkansas, and Washington all restrict a court's ability to seal documents where public health or safety is at issue.[150] Both Texas and Washington afford a presumption of openness to settlements.[151] For example, Florida and Louisiana both have laws declaring that

> [a]ny portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.[152]

Admittedly, courts often narrow the scope of these provisions by imposing rigid definitions. In both Florida and Louisiana, for example, the outer bounds of what constitutes a public hazard is unclear (with one Florida court ruling, for example, that economic fraud is not a public hazard), as is the appropriate procedure for determining if a hazard exists.[153] Texas excludes unfiled discovery from the rule's application, while Washington's statute is narrowly drafted to apply only to products liability and hazardous substance cases, and Arkansas's applies only to environmental hazards.[154] Practical applications aside, both statutes are examples of legislation that subordinates confidentiality to other policy goals. Further, while they regulate document sealing, not confidential settlements, they articulate a legislative preference for public health and safety over confidentiality in a manner applicable to sexual misconduct settlements that also implicate public safety concerns.

III. SOLUTION: A PRESUMPTION OF RELEVANCE FOR "ME TOO" EVIDENCE

Courts should apply a presumption of relevance where plaintiffs seek "me too" evidence to find "similarly situated" individuals also

149. *Id.* (listing California, Florida, Idaho, Michigan, New Hampshire, North Carolina, and Texas).

150. *Id.*

151. *See id.* at 892–94. Texas's Rule of Civil Procedure 76a reads, in relevant part, that "court records, as defined in this rule, are presumed to be open to the general public" and can only be sealed if four factors are met. *Id.* at 892 (quoting TEX. R. CIV. P. 76a(1)). Washington's statute reads that "[c]onfidentiality provisions may be entered into or ordered or enforced by the court only if the court finds, based on the evidence, that the confidentiality provision is in the public interest." *Id.* at 893 (quoting WASH. REV. CODE § 4.24.611(4)(b)).

152. *Id.* at 891 (quoting FLA. STAT. ANN. §69.081(4) (2004)).

153. *Id.* at 892.

154. *Id.* at 892–94.

experienced sexual assault or harassment perpetrated by the defendant. Doing so would recognize the particular desirability of expansive discovery in sexual assault and harassment cases in accordance with existing precedent and recent public policy shifts, helping to address the troubling role that serial secret settlements have played in helping sexual assailants evade accountability. This approach represents a more accurate balancing of the competing incentives between promoting settlements and promoting sweeping discovery than the *Bottaro* approach.

As explained above, the judicial calculation weighing the value of sweeping discovery against the value of confidential settlements lacks nuance.[155] First, it ignores that robust discovery is more important for some types of claims than for others, particularly those that rely upon evidence possessed by defendants.[156] It also neglects long-standing judicial precedent of relaxing procedural rules for particular types of cases, or even individual claimants, where rigid procedural application would lead to meritorious cases being dismissed.[157]

Second, any assertion of a blanket public policy unequivocally favoring settlements is oversimplified, particularly as it relates to sexual assault and harassment. Federal Rule of Evidence 408, the foundation of this claim, itself is riddled with exceptions reflecting the reality that courts have a key role as public forums for truth telling and fact finding, and not just as organs to funnel as many claims as possible into private settlement.[158] This was true when the rules were drafted in 1975, and is even more true today, when state and federal legislators and judges increasingly acknowledge the role that confidential settlements have had in shielding serial perpetrators of sexual misconduct from liability.[159]

Finally, adopting a presumption of relevance for discovering "me too" evidence concealed behind confidential settlements more

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155. *See supra* Part II.

156. *See* Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 45–46 (2010) (describing a "problem of information asymmetry" in civil rights and employment-discrimination cases, wherein the success of a claim "depends on comparative data drawn from the employer's records that simply are inaccessible absent discovery"); *see also supra* Section II.A.

157. *See, e.g.*, Devaney v. Chester, 813 F.2d 566, 569 (2d Cir. 1987) (holding that Rule 9(b), which establishes heightened pleading standards for claims of fraud, must be read "in light of such circumstances as whether the plaintiff has had an opportunity to take discovery of those who may possess knowledge of the pertinent facts"); *see also supra* Section II.A.

158. *See* FED. R. EVID. 408(b) (allowing the use of such "evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."); *see also supra* Section II.C.1.

159. *See supra* Section II.C.

accurately addresses relevant policy concerns by examining the dynamics particular to settlement, discovery, and trial for sexual assault and harassment claims. In particular, it recognizes the unique importance that expansive discovery plays in cases plagued by information asymmetry and civil rights cases in particular, while still comporting with existing precedent.[160] It also recognizes that confidential settlements are not always desirable and acknowledges the particular role that they have had in enabling repeat sexual offenders to evade accountability, all in a manner that corresponds to the federal and state reforms sweeping legislatures and courts across the country.[161]

Not only can this solution supplement existing legislative reforms on sexual harassment law, but it also has key advantages over those solutions. First, it is a solution that judges can implement independently, outside of the time-consuming legislative process.[162] Second, most legislative solutions apply only prospectively, leaving the scores of past confidential settlements sealed permanently. A new relevance standard, however, could allow for the discovery of any settlement that is relevant to present or future claims, even those entered into long ago. Finally, this solution is narrowly tailored to allow sexual harassment claimants access to comparator evidence for their own claims, but does not make the contents of confidential settlements available to the public at large. Therefore, it advances key goals, like enabling litigants with meritorious claims to prove their case and further the development of caselaw, but may prompt less backlash from employers concerned about the reputational costs of having all of their workplace harassment suits aired to the public writ large.

A. Bases for a Presumption of Relevance in Caselaw, Statutes, and Procedural Rules

Legal precedent for a modified relevance standard is already in place. Though procedural rules are often believed to be trans-substantive, this is not an absolute principle.[163] The Prison Litigation Reform Act and Private Securities Litigation Reform Act establish specialized rules for pleading and dismissal for prison and securities

160. *See generally supra* Part II.

161. *See generally supra* Part II.

162. *See* discussion *infra* Section III.A.

163. Margaret B. Kwoka, *Judicial Rejection of Transsubstantivity: The FOIA Example*, 15 NEV. L.J. 1493, 1496 (2015) (explaining that "transsubstantivity was viewed as one of the major achievements of the Federal Rules of Civil Procedure").

litigation, respectively.[164] Various environmental statutes relax the rules of joinder for citizens who wish to join a government enforcement action.[165] At the state level, substance-specific rules for medical malpractice suits are common.[166] Within the FRCP itself, Rule 9(b), for example, establishes a special pleading standard for fraud cases.[167] Thus, while it is true that the FRCP remain largely trans-substantive, the aforementioned statutes indicate that courts depart from the principle of trans-substantivity in compelling circumstances. The pursuit of "me too" evidence should be among those circumstances.

It is true that the above deviations from trans-substantivity were decided by the legislatures, and courts may be reluctant to alter legislatively adopted rules. However, courts that follow either the *Bottaro* or *Vardon* approach unilaterally altered the standard of relevance for certain types of discovery motions without legislative input. If judicial intervention is justifiable to raise the relevance standard, it is justifiable to lower it.

Notably, courts that provide some sort of heightened relevance standard to discovering confidential settlements generally point to Federal Rule of Evidence 408 as indisputable evidence of legislative deference to promoting settlements.[168] However, Federal Rules of Evidence 413, 414, and 415 proscribe specialized evidentiary principles for sexual misconduct cases.[169] Those rules depart from the long-standing prohibition on propensity evidence to allow evidence that a defendant has prior accusations of sexual assault or child molestation.[170] If Rule 408 can provide a legitimate basis for raising the relevance standard, Rules 413 through 415 provide a legitimate basis for lowering it.

In fact, courts already relax procedural rules for particular types of cases, even without a direct legislative mandate. Courts in the Second, Third, Fourth, and Seventh Circuit have all relaxed pleading requirements for cases where substantial information is in the hands of defendants on the basis that specific types claims, such as civil rights claims, are particularly difficult to prove absent discovery.[171] In *Woods*

164. *Id.* at 1498.

165. *Id.*

166. *Id.* at 1499.

167. FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").

168. Bottaro v. Hatton Assocs., 96 F.R.D. 158, 160 (E.D.N.Y. 1982).

169. FED. R. EVID. 413–415.

170. FED. R. EVID. 413–415.

171. *See, e.g.*, DaCosta v. City of New York, 296 F. Supp. 3d 569 (E.D.N.Y. 2017) (permitting plaintiff to amend his complaint to include more detailed information about the defendant, noting a broad Second Circuit principle "that courts should not be quick to dismiss plaintiffs for lack of

v. City of Greensboro, for example, the Fourth Circuit considered the information asymmetry inherent in civil rights claims when denying a 12(b)(6) motion to dismiss a racial discrimination claim.[172] *Woods* concerned the City of Greensboro's decision to deny the Black Network Television Ad Agency ("BNT"), a minority-owned television network, an economic development loan based on what BNT alleged were negative stereotypes about the risk of loaning money to racial minorities.[173] While noting that the *Bell Atlantic v. Twombly* pleading standard was "more stringent" than previous standards, the court held that it could not be interpreted in a manner that risked dismissing "legitimate discrimination claims."[174] "In reaching our conclusion," the court wrote, "we note that discrimination claims are particularly vulnerable to premature dismissal because civil rights plaintiffs often plead facts that are consistent with both legal and illegal behavior, and civil rights cases are more likely to suffer from information-asymmetry, pre-discovery."[175]

Other courts have recognized the importance of sweeping discovery in cases where defendants have sole custody over key information and have altered their procedural rules accordingly, often focusing on civil rights cases in particular.[176] One recurring example of

information that is in the possession of the defendants," particularly in the face of the "informational asymmetry between a civil rights plaintiff and the government"); Kirkland v. DiLeo, No. 2:12-1196, 2013 U.S. Dist. LEXIS 54869 (D.N.J. 2013) (permitting plaintiff's civil rights claim against the city government to go forward even with limited factual allegations, "in light of the information asymmetry between the parties" necessitating further discovery); Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422 (Tenn. 2011) (declining to adopt the *Twombly* pleading standard recently adopted by the Supreme Court because this pleading standard would dismiss claims without adequate discovery, and certain types of claims, including the retaliatory discharge claim at issue, depend upon sweeping discovery for success*); see also* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 535–36 (2010) (noting Judge Milton Shadur of the Northern District of Illinois's concerns that the *Twombly*/*Iqbal* pleading standard would disadvantage civil rights plaintiffs).

172. 855 F.3d 639, 641, 652 (4th Cir. 2017).

173. *Id.* at 641.

174. *Id.* at 648, 652.

175. *Id.* at 652.

176. The Second Circuit has relaxed standards for summary judgment, amending pleadings, and tort law rules about identifying tortfeasors, all on the basis that courts should be more lenient with civil rights plaintiffs suffering from a lack of information. *See, e.g.,* Davis v. Kelly, 160 F.3d 917, 922 (2d Cir. 1998) ("[D]ismissal [of a civil rights claim] is premature where the opportunity to identify those involved has not yet been accorded."); Valentin v. Dinkins, 121 F.3d 72, 75 (2d Cir. 1997) ("From [plaintiff's] place of incarceration, it is hard to see what investigative tools would be at his disposal to obtain further information," so tort law principles requiring a tort victim to identify the tortfeasor should be "relaxed"); Oliveri v. Thompson, 803 F.2d 1265, 1279 (2d Cir. 1986) ("In view of the strong policies favoring suits protecting the constitutional rights of citizens, we think it would be inappropriate to require plaintiffs and their attorneys before commencing suit to obtain the detailed information needed to prove a pattern of supervisory misconduct . . . ."). Numerous scholars have also published articles advocating for modified pleading standards where

such procedural relaxation outside of the civil rights context concerns Federal Rule of Civil Procedure 9(b), which dictates that fraud must be pled "with particularity."[177] Courts in the Second, Third, and Seventh Circuits, however, are frequently more lenient where discovery is necessary because defendants have custody over key information.[178] In *In re Burlington Coat Factory*, for example, the Third Circuit opposed requiring too much specificity in the complaint prior to discovery, holding that this would enable "sophisticated defrauders" who had effectively concealed their evidence to go undetected.[179]

While cases like *Woods* and *In re Burlington Coat Factory* concern Rules 12(b)(6) and 9(b), not Rule 26(b), such cases stand for the proposition that where individual claimants cannot meet a procedural requirement due to the defendant's concealment of evidence (whether in bad faith or not), and where such actions may cause meritorious claims to fail, requirements should be relaxed on a case-by-case basis. As a heightened pleading standard could enable "sophisticated defrauders" of the kind referenced in *In re Burlington Coat Factory* to evade detection by concealing information from plaintiffs, a heightened relevance standard could enable sophisticated harassers to evade detection by concealing information within confidential settlements. Such cases establish precedent for the willingness and authority of courts to relax procedural rules to accommodate information asymmetries of the kind present when repeat sexual offenders engage in a pattern of settling claims.

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material information remains in the hands of defendant. See, for example, Kassem *supra* note 75, advocating for "limited discovery before ruling on a motion to dismiss, especially for civil rights plaintiffs, so that potentially meritorious claims advanced by plaintiffs who do not have sufficient evidence due to informational asymmetries are not prematurely dismissed," because "what might be appropriate in commercial litigation under Twombly does not necessarily hold in civil rights cases." *See also* Goutam U. Jois, *Pearson, Iqbal, and Procedural Judicial Activism*, 37 FLA. ST. U. L. REV. 901, 938 (2010) (posing a pleading standard wherein "if the allegations regarding a particular defendant's actions are 'conclusory,' a court is to determine whether the claims against him are consistent with liability and, if so, whether the facts necessary to support such a claim are likely to be in the defendant's possession.")

177. FED. R. CIV. P. 9(b).

178. *See* Emery v. Am. Gen. Fin., Inc., 134 F.3d 1321, 1323 (7th Cir. 1998) (discussing that the Seventh Circuit cautions against "creat[ing] a Catch-22 situation in which a complaint is dismissed because of the plaintiff's inability to obtain essential information without pretrial discovery . . . that she could not conduct before filing the complaint."); In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1418 (3d Cir. 1997); Devaney v. Chester, 813 F.2d 566, 569 (2d Cir. 1987) (discussing that the Second Circuit reads 9(b) "in light of such circumstances as whether the plaintiff has had an opportunity to take discovery of those who may possess knowledge of the pertinent facts.").

179. In re Burlington Coat Factory, 114 F.3d at 1418 (quoting Shapiro v. UJB Fin. Corp., 964 F.2d 272, 283 n.12 (3d Cir. 1992)).

B. Perceived Merits of Confidential Settlements

Amongst the most fervent arguments in favor of confidential settlements is that, without confidentiality, most defendants would not want to settle at all. As explored above, however, this is not necessarily a bad thing.[180] Sexual harassment settlements often stifle victims, enable dangerous perpetrators to evade accountability, and deny courts their rule as public arbiters of justice. However, establishing a presumption of relevance for prior confidential settlements would not sound the death knell for settling altogether.[181] Further, what settlements are reached will be based on more complete information, leading to more efficient negotiations and more accurate valuation of claims.[182]

More information about the value of claims is particularly important for sexual assault and harassment cases, because so few cases go to trial that caselaw research may not reveal the appropriate value of a claim.[183] Settlements serve the dual goals of compensating plaintiffs and deterring defendants; thus, accurate valuation of settlements is necessary to ensure not only that plaintiffs receive just compensation, but that penalties neither over- nor under-deter

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180. *See supra* Section II.B.

181. As the *Bennett* court explains, maintaining the confidentiality of settlement talks encourages parties to enter such negotiations without fear that failed negotiations will be used against them at trial; however, "the climate changes when a settlement is achieved" and "[n]o discouragement attends discoverability anent completed compromises" because "[f]rom the point of view of the settling parties, the deal is done." Bennett v. La Pere, 112 F.R.D. 136, 140 (D.R.I. 1986).

182. Scholars have described how an economic analysis of plaintiffs' and defendants' incentives during negotiation suggest that every claim is capable of mutually beneficial settlement; parties fail to settle when, due to incomplete information, each party is overly optimistic about the success of their claim. Essentially, where a plaintiff overestimates and a defendant underestimates the strength of a given claim, each party is less likely to compromise. The more information that litigants exchange, however, the more accurately each party will assess the validity of its case, and the more quickly they will settle. Professor Scott A. Moss of Marquette University Law School, for example, has described how the progression of discovery "tends to deflate the self-servingly optimistic views of both [parties]: the plaintiff's estimate of [success] falls ('Wait, there's actually a chance I could lose?!') while the defendant's estimate of [failure] rises ('Wait, there's actually a chance he could win?!')." *See* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 873, 875–77 (2007) (explaining that "[t]he traditional economic model of litigation predicts that all cases will settle," but that "[l]itigant optimism makes cases less likely to settle."). Because "me too" evidence can often make or break a sexual harassment claim, the early disclosure of whether such information exists will enable plaintiffs to more accurately assess the strength of their claim—potentially prompting them to accept a settlement instead of litigating, or even to dismiss a non-meritorious suit unilaterally. Where plaintiffs dismiss claims early and of their own volition, without requiring the court to litigate a 12(b)(6) or summary judgment motion, overall litigation costs decrease.

183. Friedman, *supra* note 83, at 1366–67 (describing how confidential settlements themselves have led to a paucity of case law on sexual assault and harassment).

defendants from undesirable behaviors.[184] "With better information about the value of similar legal claims," Professor Scott Moss of Marquette University explains, "parties to litigation would know more about whether to settle and for how much."[185]

Critics may also argue that drastically increasing the availability of information within confidential settlements violates the right of victims to settle claims in a manner that preserves their privacy. Proponents of confidential settlements often focus on the value of secrecy to the defendant, who may not want to suffer the reputational damage associated with public litigation. Plaintiffs, however, have legitimate reasons to settle their claims privately as well. They may feel, for example, that a monetary settlement will provide a sufficient deterrent to the defendant even without public reputational damage, while sparing the plaintiff potential victim blaming, public scrutiny, and even retaliation by peers and future employers who view them as overly litigious. In a recent op-ed in the Los Angeles Times, prominent attorney and women's rights activist Gloria Allred defended her decision to pursue confidential settlements for her clients, arguing that "[m]any victims choose to protect their privacy and want to enter into a confidential settlement to avoid having to file a public lawsuit."[186] Allred emphasized the importance of allowing victims of sexual assault, who have been stripped of their autonomy by their assailant, to "at the very least have choices when it comes to asserting their legal rights."[187]

While these are valid concerns, a presumption of relevance standard is not necessarily an affront to victims' privacy. First, lowering the relevance standard for discovering former settlements reveals the contents of former claims to other litigants, but not to the public at large. While this still violates the privacy of prior victims in a manner worthy of consideration, it does not expose victims to the same potential for widespread judgment as a public lawsuit, with all of its attendant media attention and online commentary. Second, plaintiffs seeking "me too" evidence, unlike the public at large, have a vested interest in believing other victims and validating their stories. The more credible victims exist, the stronger a given plaintiff's case. Thus, not only does discovery expose victims' personal information to a far more limited

184. Moss, *supra* note 182, at 890 ("Too-low liability leaves defendants insufficiently incentivized to consider the harms they cause; too high liability overdeters defendants' activities.").

185. *Id.* at 881.

186. Gloria Allred, *Opinion: Gloria Allred: Assault Victims Have Every Right To Keep Their Trauma and Their Settlements Private*, L.A. TIMES (Sept. 24, 2019, 3:00 AM PT), https://www.latimes.com/opinion/story/2019-09-23/metoo-sexual-abuse-victims-confidential-settlements-lawsuits [https://perma.cc/89NQ-CUQH].

187. *Id.*

audience than litigation, it reveals such information to an audience that is uniquely sympathetic and unlikely to engage in victim blaming or ridicule. Finally, litigants may negotiate to redact the personal identifying information of prior plaintiffs, so that they may benefit from evidence about defendants' patterns of conduct without revealing the identify of victims against their will.

CONCLUSION

Courts should apply a presumption of relevance where plaintiffs seek "me too" evidence concealed in a confidential settlement. While courts in at least three circuits raise the relevance standard for discovering confidential settlements in deference to the long-standing public policy of encouraging litigants to settle claims out-of-court, this approach represents an inaccurate assessment of the value of discovery, appropriate role of settlements, and the shift in public policy regarding sexual misconduct.

Adopting a presumption of relevance would recognize that the information asymmetry inherent in many civil rights claims, specifically sexual assault and harassment claims, renders expansive discovery uniquely valuable for these cases. Further, though it may mitigate some of the effectiveness of settlements, settlements are not always desirable; secret sexual assault and harassment settlements, in particular, deny litigants the catharsis of a public conversation and deny courts the opportunity to interpret, speak to, and ultimately reinforce key social values. Even where settlements are desirable, they may not be excessively deterred by expansive discovery, which may in fact enable litigants to settle with more accurate information. Finally, adopting a presumption of relevance represents a response to the increasing legislative and judicial reforms, particularly those limiting the circumstances under which employers and employees can enter into confidential settlements in the first place, that emphasize the importance of free and frank discussions about gender dynamics, even at the expense of confidentiality.