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DANGEROUS SECRETS: CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS

CONFIDENTIALITY IN THE COURTS: PRIVACY PROTECTION OR PRIOR RESTRAINT?

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In civil litigation courts often deal with information that is subject to a previously imposed restraint on the ability of a court or others to use the information. Such “evidentiary prior restraints” arise most prominently in settlement agreements, which may include nondisclosure provisions that prevent information concerning the settlement from being used by parties to the agreement. But evidentiary prior restraints can also arise from prior court action, as when parties seek information subject to a protective order or sealing order made by a different court. Although evidentiary prior restraints have received great attention given recent controversies concerning sexual harassment, products liability, and other areas of the law, the issue has not received much attention from scholars.

This essay examines the effects of evidentiary restraints on the enforcement function of civil litigation. In general, the essay concludes that privacy interests alone do not justify the enforcement of litigation restraints because these privacy interests can, and often do, prevent courts from accurately assessing the liability of the parties. Moreover, such restraints prevent market pressure from regulating the conduct of market participants, leading to more harm. Nevertheless, the essay does discuss situations when the protection of privacy interests may aid, rather than hinder, enforcement objectives. Accordingly, the essay concludes that more empirical research should be done to guide courts in determining when evidentiary prior restraints should not be enforced.

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INTRODUCTION

In his recent book *Catch and Kill*, Ronan Farrow describes a nondisclosure agreement (“NDA”) entered between Harvey Weinstein and Ambra Gutierrez, one of his many alleged sexual assault victims.¹ Weinstein and Gutierrez signed the NDA shortly after Gutierrez recorded Weinstein admitting that he groped her without her consent.² In exchange for her silence, Gutierrez was paid \$1 million.³ Gutierrez would later show a copy of the agreement to Farrow:

The document was eighteen pages long. It was signed, on the last page, by Gutierrez and Weinstein. The lawyers involved in drafting it must have been so convinced of its enforceability that they never considered the possibility of it emerging. The contract ordered the destruction of all copies of audio recordings of Weinstein admitting to the groping. Gutierrez agreed to give her phone and any other devices that might have contained evidence to Kroll, a private-security firm retained by Weinstein. She also agreed to surrender the passwords to her email accounts and other forms of digital communication that could have been used to spirit out copies. “The Weinstein confidentiality agreement is perhaps the most usurious one I have seen in decades of practices,” one attorney who represented Gutierrez told me. A sworn statement, pre-signed by Gutierrez, was attached to the agreement, to be released in the event of any breach. It stated that the behavior Weinstein admitted to in the recording never happened.⁴

The NDA contained a liquidated damages clause but not an arbitration clause, even though arbitration clauses are common in such Draconian agreements.⁵ Despite its onerous terms, the agreement did not prevent the recording of Weinstein’s admission from becoming public.⁶

The theme of this conference is “Dangerous Secrets: Confronting Confidentiality in Our Public Courts,” and NDAs like the one entered into between Weinstein and Gutierrez are

¹ RONAN FARROW, *CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS* 63 (2019). Recent reporting has questioned the veracity of Ronan Farrow’s reporting on the issue. See David Folkenfink, *Opinion: ‘New York Times’ Argues Ronan Farrow Stretches the Facts. It’s Messy*, NPR.ORG (May 20, 2020, 5:50 PM), <https://www.npr.org/2020/05/22/860161652/opinion-new-york-times-argues-ronan-farrow-stretches-the-facts-it-s-messy>. Nevertheless, I will continue to use Farrow’s reporting for illustrative purposes, and nothing I say here depends on the veracity of his reporting.

² *Id.* at 58-62.

³ *Id.* at 62.

⁴ *Id.* at 63-64; see also Ronan Farrow, *Harvey Weinstein’s Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>.

⁵ FARROW, *supra* note 1, at 72.

⁶ Roisin O’Connor, *Ambra Gutierrez: Model says she was ‘forced into exile’ after trying to take down Harvey Weinstein*, INDEPENDENT (Dec. 17, 2017, 3:57 PM), <https://www.independent.co.uk/arts-entertainment/ambra-gutierrez-harvey-weinstein-exile-hotel-room-audio-a8115496.html>.

commonly used to keep “dangerous secrets” from being disclosed in court proceedings. Along with minimizing reputational harm, perpetrators utilize NDAs and other mechanisms to prevent criminal prosecution or civil liability by preventing victims from producing evidence of the perpetrators’ conduct. Indeed, NDAs are typically signed shortly after court proceedings are either threatened or initiated.⁷ For example, Weinstein sought an NDA with Gutierrez because he learned that, in recording Weinstein, Gutierrez was participating in a “New York Police Department sting operation” to gather evidence to support criminal charges against Weinstein.⁸ NDAs, in fact, have garnered heightened public scrutiny recently in light of the publicity they have received from the “#MeToo” movement, as they have deterred victims from disclosing acts of sexual harassment or assault committed against them.⁹

The use of restraints like NDAs to prevent the disclosure of information in court proceedings raises a wide variety of issues for state courts. In this essay I want to examine only a subset of these issues. Specifically, I focus on situations in which 1) NDAs or similar restraints created in the context of *prior* litigation 2) prevent the disclosure of information in subsequent civil litigation or to the public. For purposes of this essay I call such restraints created in prior litigation “evidentiary prior restraints.”

Defined in this way, “evidentiary prior restraints” can arise not just from NDAs, but from other, nonprivate sources, such as protective orders¹⁰ and orders to permit the filing of documents under seal,¹¹ which may be enforceable outside the litigation in which the orders were issued. For example, a public interest group may file a motion to obtain discovery materials from a prior lawsuit brought by an individual smoker against a tobacco company in which the discovery materials were subject to a protective order.¹² In addition, a third party may seek documents that were sealed in prior litigation, and which may contain pertinent information about, for example, government attempts to coerce social media platforms to spy on their users.¹³ Like the NDAs employed in sexual misconduct cases, protective orders and sealing orders can restrain the sharing of information necessary to prove facts in subsequent cases. More importantly, all of these evidentiary prior restraints may prevent third parties or the public from learning important information that, once known, may prevent future harm.

Admittedly, the term “prior restraint” has a well-established meaning in the law, and is used in the First Amendment context “to describe administrative and judicial orders forbidding

⁷ *Id.* (noting that “[s]uch agreements have been a requirement for years in virtually every out-of-court settlement for sexual misconduct.”).

⁸ Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

⁹ See Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (Jun. 15, 2019), <https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html>.

¹⁰ See FED. R. CIV. P. 26(c) (permitting any “person from whom discovery is sought” to seek a protective order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”); see also FLA. R. CIV. P. 1.280(c) (same).

¹¹ See, e.g., S.D. FLA. R. 5.4(b) (detailing procedure for filing under seal in civil cases); FLA. R. JUD. ADMIN. 2.051(c)(9) (permitting the sealing of court records if it is required, among other things, “to prevent a serious or imminent threat to the fair, impartial, and orderly administration of justice”).

¹² *E.g.*, *Public Citizen v. Liggett Group*, 858 F.2d 775 (1st Cir. 1989).

¹³ *E.g.*, *In re U.S. Dep’t of Justice*, 357 F. Supp. 3d 1041 (E.D. Cal. 2019) (The ACLU, among others, seeking to unseal documents relating to the federal government’s efforts to coerce social media platforms to aid in governmental surveillance).

certain communications when issued in advance of the time that such communications are to occur.”¹⁴ Moreover, the term “prior restraint” has a decidedly negative connotation, as the Supreme Court has stressed that “[a]ny system of prior restraints of expression comes to the Court bearing a heavy presumption against its constitutional validity.”¹⁵

Although protective orders and sealing orders are judicial orders, NDAs obviously are not. Moreover, NDAs, protective orders, and orders to seal do not necessarily, or even typically, restrain the type of political expression that is at the core of First Amendment concern.¹⁶ Instead, the restraints discussed in this essay are restraints on the use of information as *evidence*, either to prove material facts in a subsequent proceeding or to unearth facts that are important for the public to know.

Nevertheless, in using the term “evidentiary prior restraints,” I want to leverage both the legal meaning and negative connotation of prior restraints in the First Amendment context. Despite their differences, the “evidentiary prior restraints” I discuss here, like prior restraints in the First Amendment context, are designed to *prevent* disclosure, not to mitigate it. More importantly, and as I argue in more detail below, evidentiary prior restraints, like prior restraints in the First Amendment context, should be presumptively disfavored and subject to significant scrutiny by courts. This does not mean, of course, that evidentiary prior restraints should be prohibited altogether. As I discuss below, they can have justifiable uses. Instead, I argue that they should be presumptively disfavored, and that the burden should be on the parties seeking to impose evidentiary prior restraints to justify their use.

In what follows I discuss various examples of “evidentiary prior restraints” that can arise from a variety of sources. In general, and as others have argued,¹⁷ NDAs, protective orders, and similar evidentiary prior restraints should *not* be enforced when there is a significant public interest in the information. Admittedly, this is the most obvious and compelling circumstance in which evidentiary prior restraints are the least justified, and the law typically recognizes that significant public interest in the information can justify the non-enforcement of confidentiality.¹⁸ Conversely, evidentiary prior restraints may be justified to protect proprietary interests such as the confidentiality of trade secrets.¹⁹ In those circumstances evidentiary prior restraints are

¹⁴ Alexander v. United States, 509 U.S. 544, 549-50 (1993).

¹⁵ Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

¹⁶ McCutcheon v. Fed. Elec. Comm’n, 572 U.S. 185, 203 (2014) (“[T]he First Amendment safeguards an individual’s right to participate in . . . public debate through political expression and political association.”).

¹⁷ This has been noted by scholars. See, e.g., Joseph F. Anderson, Jr., *Hidden from the Public By Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711 (2003) (arguing in favor of document public access and against court-imposed secrecy); Dennis J. Drasco, *Public Access to Information in Civil Litigation vs. Litigant’s Demand for Privacy: Is the Vanishing Trial an Avoidable Consequence?*, 2006 J. DISP. RESOL. 155 (discussing the impact of electronic filing on the public’s access to trial dockets); T.S. Ellis III, *Sealing, Judicial Transparency and Judicial Independence*, 53 VILL. L. REV. 939 (2008) (proposing that minimizing court document sealing and justifying sealing on the public record will bolster judicial independence); Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938–2006*, 78 U. COLO. L. REV. 817 (2007) (advocating that the public’s legitimate interests in materials gained through discovery should require the filing of discovery materials).

¹⁸ See *infra* Part I (discussing sources of evidentiary prior restraints and exceptions to their enforcement).

¹⁹ See FED. R. CIV. P. 26(c) (permitting the nondisclosure of “a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way”).

serving as adjuncts to nondisclosure policies external to the litigation, and thus are justified to the extent that these external nondisclosure policies are themselves justified.²⁰

Here I want to focus on the argument that, in the absence of a showing of significant public interest, and in the absence of an external nondisclosure policy like the protection of proprietary interests, such evidentiary prior restraints should be enforced to protect the privacy interests of the parties,²¹ who may seek to avoid “embarrassment”²² or harm to their reputation.²³ Privacy concerns can be, in themselves, compelling reasons. As put by Arthur Miller in criticizing efforts to reduce confidentiality in courts:

A legal system that does not recognize the right to keep private matters private raises images of an Orwellian society in which Big Brother knows all. Although proponents of increased public access may not have that result in mind, there is no doubt that unfettered authority to collect and disseminate private information through the judicial process could lead to that end.²⁴

I do not want to challenge the importance of protecting privacy interests, but I do want to argue that privacy interests alone are not sufficient to justify the enforcement of evidentiary prior restraints. This is because protection of privacy interests can be, and often are, in tension with the enforcement function of civil liability and the civil litigation system.

As I discuss in more detail below, a primary function of civil litigation is to ensure compliance with the law.²⁵ Civil litigation performs this either through specific performance in the form of injunctive remedies²⁶ or, more commonly, by deterring individuals from noncompliance through the threat and imposition of damage or similar monetary remedies.²⁷ Thus, unlike other regulatory tools, civil litigation often operates after the fact. It allows parties to act and later seek forgiveness, rather than requiring parties to seek permission before acting.

²⁰ Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 467-470 (1991) (defending privacy protections for proprietary information).

²¹ See *Dependable Sales & Serv., Inc. v. Truecar, Inc.*, 311 F. Supp. 3d 653, 665 (S.D.N.Y. 2018) (in deciding on motion to seal, court must weigh presumption of access “against ‘countervailing factors,’ including ‘the privacy interests of those resisting disclosure’ ” (quoting *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006))).

²² See FED. R. CIV. P. 26(c) (permitting protective orders “to protect a party or person from . . . embarrassment”).

²³ Miller, *supra* note 20, at 464-67 (rejecting court reforms increasing public access to discovery documents as, among other things, jeopardizing privacy).

²⁴ *Id.* at 465-66 (footnote omitted).

²⁵ This has been one of the key tenets of the law-and-economics approach. See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 389-418 (2004) (examining the basic theory of litigation); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 278 (1987) (discussing tort liability as an “ex post” approach to the regulation of risky behavior). However, I am not an economist, and I am not in complete agreement with all of the normative positions of law-and-economics scholars, to the extent that law and economic scholars even have shared or homogenous views.

Nevertheless, I find compelling the importance that law-and-economics scholars place on prevention, and I agree that that preventing injuries, particularly injuries like loss of life, cancer, or other harms where a victim cannot possibly be made whole, is preferable to permitting such injuries and imperfectly compensating for them. Accordingly, I strongly believe that courts, legislators and regulators should design civil litigation and its procedures with an eye towards reducing the “costs of accidents,” with a preference for preventing irreparable harm as much as possible. I discuss and expand on this view in more detail below. See *infra* Section II.A.

²⁶ See OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 8-18 (1978) (discussing the functions of injunctions).

²⁷ See SHAVELL, *FOUNDATIONS*, *supra* note 25, at 391-93.

One advantage of the after-the-fact nature of civil litigation is that it allows a court to use hindsight—the historical facts of what happened—to assess liability accurately. In doing so, and ensuring that defendants incur the full liability of their misconduct, litigation deters others from engaging in future misconduct.²⁸ Evidentiary prior restraints hinder this hindsight advantage of civil litigation by preventing access to the information necessary for a court to determine liability accurately. This can lead to less deterrence and, thus, more harmful misconduct.²⁹ Moreover, even in the absence of liability, the restraint of public information may distort markets, and thus allow wrongdoers to avoid market pressure that it *should* incur given its conduct.³⁰ Accordingly, evidentiary prior restraints should not be enforced for privacy reasons alone when those privacy reasons are, at bottom, attempts to avoid liability or market pressure.

Nevertheless, I argue that even evidentiary prior restraints based on privacy alone may be justified in very limited circumstances. First, the failure to enforce evidentiary prior restraints may give potential defendants greater incentive to *conceal* the information. In the case of sexual harassment, this may not be possible, given that the victims will have first-hand knowledge of the harassing conduct. But in the case of product defects or potentially toxic chemicals, as in the case of tobacco, companies may engage in greater efforts to conceal the information to prevent their discovery. Thus, and somewhat counterintuitively, the lack of evidentiary prior restraints may make it harder, not easier, to unearth information.

Second, the unavailability of evidentiary prior restraints may give potential defendants incentives to “play dumb” by not gathering information that may be harmful. For example, in the absence of regulatory requirements to test products, companies may decide not to test for safety at all. Even if testing is required, companies may fail to keep records to avoid a paper trail that can be discovered in the first place.³¹ Incentives to “play dumb” may be decreased if, for example, information is limited for use by regulatory authorities and courts but kept from the public to avoid unjustified panics or unjustified reputational harm. In this way protective orders or motions to seal may be justified for some limited circumstances.

Again, it is important to stress that this essay ultimately argues that evidentiary prior restraints should presumptively not be enforced. Accordingly, I ultimately argue that courts should subject evidentiary prior restraints to significant scrutiny, particularly when the arguments for these restraints are solely based on privacy concerns. But I am also arguing that this scrutiny must be informed by the enforcement objective of civil litigation, and that we must be careful to identify and distinguish those situations when confidentiality *aids* enforcement from those situations in which confidentiality may hinder enforcement. Accordingly, courts and scholars should engage in empirical research to identify those industries or subject matter areas where evidentiary prior restraints may be justified.

²⁸ SHAVELL, ACCIDENT, *supra* note 25, at 133-34.

²⁹ For a discussion of this in the context of motions to seal, see Sergio J. Campos & Cheng Li, *Discovery Disclosure and Deterrence*, 71 VAND. L. REV. 1993 (2018).

³⁰ A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1442 (2010) (noting importance of market pressure in regulating conduct).

³¹ A classic example of a failure to keep records can be found in JONATHAN HARR, A CIVIL ACTION (1995). I discuss this example in more detail below. See *infra* Section II.C.2.

I. Evidentiary Prior Restraints

As I noted earlier, I define an “evidentiary prior restraint” as

1. any restraint on
2. the use of information that is
3. imposed in the context of prior litigation.

Furthermore, an “evidentiary prior restraint” as used here is defined broadly to include restraints created by private agreement, such as nondisclosure agreements reached as the result of anticipated or pending litigation. Despite this broad definition, I will limit my focus to only those evidentiary prior restraints that are motivated solely by the parties’ privacy interests, and set aside those evidentiary prior restraints that are based upon proprietary interests or other external nondisclosure policies.

In this Part, I briefly discuss different sources of evidentiary prior restraints and their current treatment under the law.

A. Nondisclosure Agreements

Perhaps the most high-profile source of evidentiary prior restraints are nondisclosure agreements (“NDAs”). As I mentioned earlier, NDAs have gained significant attention because of their exposure by the “#MeToo” movement, but their use is ubiquitous in civil litigation. Indeed, it is typical for a settlement agreement to contain a nondisclosure clause, at the very least, if not a separate nondisclosure agreement.³² Evidence of NDAs and their terms is obviously anecdotal—after all, by their terms, NDAs are not supposed to be known. But the anecdotal evidence is ubiquitous, as any experienced litigator can attest.³³

Consider the following example of a nondisclosure provision in an actual, albeit heavily redacted, settlement agreement:

This Settlement Agreement, and any terms or conditions of this Settlement Agreement, shall not be disclosed by Franchisee to any other person or entity subject to the following exceptions. Franchisee may disclose the terms of this Settlement Agreement: (i) to the extent required by any law or regulation, or by order of any court; (ii) to auditors, business agents, insurers and bankers having a need to know and who shall be obligated to maintain such information in confidence, and; (iii) to the extent mutually agreed upon in writing by all of the

³² Blanca Fromm, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 675-76 (2001) (interviewing attorneys for corporate defendants and insurance companies and finding that most attorneys insist on nondisclosure provisions in settlement agreements); *see also* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469, 511 (1994) (based upon Judge Weinstein’s “own experience in helping to settle thousands of cases,” that “it is almost impossible to settle many mass tort cases without a secrecy agreement”).

³³ *See id.* (interviewing numerous attorneys regarding NDAs).

Parties. Before making any disclosures under (i), Franchisee shall first notify Franchisor by giving reasonable notice of the same, which shall be, if reasonably possible, to counsel for Franchisor at least seven (7) days before making any such disclosure. In the event of any disclosure under “(i)”, the Parties shall take or cooperate in all steps reasonably necessary, including the entry of a more restrictive protective order, to ensure that any terms of this Settlement Agreement will not be publicly displayed or revealed, with the costs to do so being borne solely by Franchisee.

Subject to the above Paragraph, this Settlement Agreement shall not be filed with any court in the interest of confidentiality. As the sole exception to this Paragraph, any of the Parties to this Settlement Agreement may disclose terms of this Settlement Agreement to such Court enforcing the terms of this Settlement Agreement. In such case, the Party seeking to disclose terms of this Settlement Agreement to such Court shall first provide notice to the other Party at least seven (7) days before making such disclosure and shall take or cooperate in all steps reasonably necessary, including the entry of a protective order, to ensure that any Settlement Agreement terms filed with such Court will not be publicly displayed or revealed.

Notwithstanding anything in this Settlement Agreement to the contrary, Franchisee and their attorneys may represent to third parties that the Parties had a difference of opinion, resolved the same and ended their relationship on mutually satisfactory and amicable terms.³⁴

These nondisclosure terms are typical of NDAs, as they prevent the parties from disclosing information about the Settlement Agreement, or “any terms or conditions of this Settlement Agreement.”³⁵ The scope of an NDA may go further, and prevent even the disclosure of the underlying acts that served as the basis of the NDA.³⁶ Still others further prohibit the parties from assisting the claims of others who are not parties to the NDA.³⁷ And still others, as evidenced by the Weinstein-Gutierrez NDA above, may require the actual destruction of evidence or a false

³⁴ Settlement Agreement, on file with author. The nondisclosure clause was redacted and used with permission. Many thanks to Attorney Jordan Shaw, a partner at Zeborsky Payne Shaw Lewenz LLP, for providing it.

³⁵ See Fromm, *supra* note 32, at 675-76 (“Defense attorneys, for example, often feel that because disclosure about a settlement can harm their client's reputation or expose their client to additional liability, it is their duty to draft confidential settlement agreements. Thus, it has been the ‘practice of many large corporate defendants . . . to insist on confidentiality in settlement agreements.’”).

³⁶ Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 491 (2008) (“An unknown, but undoubtedly significant, proportion of settlements also prohibit disclosures of factual information relating to the lawsuit.”).

³⁷ *Id.* at 490 (“Settlement agreements that prohibit a settling party from voluntarily providing evidence in other proceedings appear to be common.”).

statement upon disclosure denying the truth of the events covered by the NDA, although it is certainly questionable whether these extreme provisions would be enforceable.³⁸

In general, NDAs are contracts, and thus, with some exceptions, are subject to state contract law. Thus, NDAs are enforceable so long as state law contract requirements are met.³⁹ Indeed, as noted by the California Supreme Court,

The privacy of a settlement is generally understood and accepted in our legal system, which favors settlement and therefore supports attendant needs for confidentiality. Routine public disclosure of private settlement terms would “chill the parties’ ability in many cases to settle the action before trial. Such a result runs contrary to the strong public policy of this state favoring settlement of actions.”⁴⁰

Despite its recent endorsement by the California Supreme Court, some commentators have questioned the “chilled settlements” argument in favor of NDAs.⁴¹ Nevertheless, other states have recognized a similar “strong public policy” in the enforcement of settlement agreements,⁴² and, to promote settlement, many states have adopted subsidiary rules such as making settlement negotiations or their terms inadmissible.⁴³

Despite the general enforceability of NDAs, there are limits to their enforcement. It is notable, for example, that the sample nondisclosure terms above make an exception to nondisclosure “to the extent required by any law or regulation, or by order of any court.” Such a term is typical of NDAs, and show that NDAs, at the very least, yield to the court or to regulators when disclosure is required or ordered by law.⁴⁴ Indeed, the Supreme Court has held that an attempt to use a stipulated injunction to prevent compliance with a court order to testify in

³⁸ See Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 82 & n.21 (2018) (in discussing the Weinstein-Gutierrez NDA, noting that “[o]f course, promises to lie about sexual misconduct should be unenforceable as against public policy.”).

³⁹ *E.g.*, *Brunobuilt, Inc. v. Strata, Inc.*, 457 P.3d 860 (Idaho 2020) (“A settlement agreement stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts generally.”) (citations and quotation marks omitted); *cf.* *Rivendell Forest Prod., Ltd. v. Georgia-Pacific Corp.*, 824 F. Supp. 961, 968 (D. Colo. 1993) *rev’d on other grounds*, 28 F.3d 1042 (10th Cir. 1994) (NDA signed a year after employment when employer became concerned about protecting software found to lack consideration).

⁴⁰ *Monster Energy Co. v. Schechter*, 444 P.3d 97, 105 (Cal. 2019) (quoting *Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court*, 51 Cal. App. 4th 233, 241 (1996)).

⁴¹ James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859, 870 (2004) (“Despite the fervor of the corporate-side arguments that ‘sunshine’ provisions adopted by courts and legislatures to restrict secrecy will chill settlements, some evidence is emerging from publicly collected and maintained court statistics that undercuts claims that restrictions on secrecy discourage settlement.”).

⁴² *E.g.*, *Joseph v. Huntington Ingalls Inc.*, NO. 2018-CC-02061, 2020 WL 499939, at *18 (La. Jan. 29, 2020) (in a case involving the settlement of asbestos claims, stating that “[t]he law in its wisdom, and out of solicitude to end or avert threatened litigation, encourages settlement of disputes by compromise, and does not sanction the solemn acts of contending parties settling their disagreements being lightly brushed aside, unless there be present evidence of bad faith, error, fraud, etc.”); *Saleeby v. Rocky Elson Const., Inc.*, 3 So.3d 1078, 1083 (Fla. 2009) (noting “Florida’s public policy favoring settlement”).

⁴³ See, *e.g.*, *Saleeby*, 3 So.3d at 1083 (pointing to Fla. Stat. § 90.408, which provides that evidence of settlement offers or negotiations are “inadmissible to prove liability or absence of liability for the claim or its value”).

⁴⁴ Bauer, *supra* note 36, at 492 n.21 (“Confidentiality clauses in settlements frequently contain an exception for disclosures required by subpoena or court order.”).

unrelated litigation in a different state would not be entitled to full faith and credit,⁴⁵ and may not even be enforceable within the home state.⁴⁶ Nevertheless, as evidenced by the Weinstein-Gutierrez NDA discussed in the introduction, such a term making an exception for court orders may not be present,⁴⁷ and may thus undermine compliance with subpoenas or other court orders.

Moreover, some states have passed rules or statutes that limit the enforceability of NDAs in limited circumstances. For example, in 1990, my home state of Florida enacted the “Sunshine in Litigation Act,” which expressly provides, among other things, that “[a]ny portion of an agreement or contract which has the purpose or effect of concealing a public hazard . . . is void, contrary to public policy, and may not be enforced.”⁴⁸ Similarly, although more narrowly, California has prohibited the use of any nondisclosure agreements which “prevents the disclosure of factual information . . . that may be prosecuted as a felony sex offense.”⁴⁹ Other states, no doubt motivated by the #MeToo movement, have either proposed or adopted similar legislation with respect to NDAs concerning sexual misconduct claims.⁵⁰

Along with state restrictions on the enforcement of NDAs, there are some federal restrictions that are of interest. Most notably, federal tax laws have been amended to eliminate tax deductions for settlements, payouts, and attorney’s fees in sexual harassment cases if such payments are subject to a nondisclosure agreement.⁵¹ In addition, federal courts have refused to enforce settlement agreements that prohibit *voluntary* cooperation with public regulators such as the Equal Employment Opportunity Commission (“EEOC”).⁵² Similarly, the Securities & Exchange Commission (“SEC”) has issued guidance suggesting that NDAs that prevent voluntary cooperation with SEC investigation efforts may violate SEC rules.⁵³

A common theme emerges when one reviews the restrictions on the enforceability of NDAs. Almost all of the restrictions prohibit enforcement of NDAs when doing so would undermine enforcement objectives. For example, the Florida Sunshine in Litigation Act flatly prohibits NDAs which prevent disclosure of “public hazards,” as such information is necessary for enforcement to fulfill the objective of preventing harm. Similarly, the unenforceability of provisions which directly impede public enforcement efforts supports a general consensus that the privacy interests of the parties, as reflected in the NDA, must yield when it is in tension with enforcement.

⁴⁵ *Baker v. Gen. Motors Corp.*, 522 U.S. 222 (1998). The opinion is somewhat ambiguous as to the holding, but Justice Ginsburg, writing for the plurality, stressed that “the Michigan decree cannot determine evidentiary issues in a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court.” *Id.* at 239 (Ginsburg, J., plurality).

⁴⁶ *Id.* at 251 (Kennedy, J., concurring) (concluding that Michigan law “would not seek to bind the Bakers to the injunction”).

⁴⁷ Bauer, *supra* note 36, at 492 n.21 (“Sometimes even this is lacking.”).

⁴⁸ FLA. STAT. § 69.081(4).

⁴⁹ CAL. CODE CIV. P. § 1002(a)(1).

⁵⁰ See Harris, *supra* note 9.

⁵¹ 26 U.S.C. § 162(q).

⁵² *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 745 (1st Cir. 1996) (concluding that “non-assistance covenants which prohibit communication with the EEOC are void as against public policy”).

⁵³ See Brian Mahoney, *SEC Warns In-House Attys Against Whistleblower Contracts*, LAW360 (Mar. 14, 2014, 5:16 PM), <https://perma.cc/45RA-2QXN> (discussing how NDAs designed to prohibit cooperation with the SEC may violate 17 C.F.R. § 240.21F-17(a)).

B. Court Orders

1. Protective Orders

It is worth noting that the sample nondisclosure terms quoted above provide that if information subject to its terms must be disclosed by court order, then “the Parties shall take or cooperate in all steps reasonably necessary, including the entry of *a more restrictive protective order*, to ensure that any terms of this Settlement Agreement will not be publicly displayed or revealed.” Thus, even NDAs can contemplate the use of protective orders to restrain information.

In general, protective orders are orders issued by a court to, among other things, “forbid[] the disclosure or discovery” of otherwise discoverable information “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”⁵⁴ To obtain a protective order under federal rules and state analogues, a party must show “good cause.”⁵⁵ Unlike NDAs, “protective orders,” by their nature as court orders, cannot prevent the disclosure of information to the court itself, or to parties or witnesses involved in the litigation.⁵⁶ However, protective orders can, and are frequently used to, limit disclosure of information to the public.

As the Supreme Court has recognized, “[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”⁵⁷ Given this general right, and because protective orders typically require a showing of “good cause,” some federal circuits have concluded that “the public has a presumptive right of access to discovery materials.”⁵⁸

However, a majority of circuits have concluded that the public does not have presumptive access to pretrial discovery materials because “a holding that discovery motions and supporting materials are subject to a presumptive right of access would make raw discovery, ordinarily inaccessible to the public, accessible merely because it had to be included in motions precipitated by inadequate discovery responses or overly aggressive discovery demands.”⁵⁹ Thus, for these circuits a protective order is not necessary to prevent disclosure of discovery materials.⁶⁰

⁵⁴ FED. R. CIV. P. 26(c); *see also* Fla. R. Civ. P. 1.280(c) (same); MASS. R. CIV. P. 26(c) (same).

⁵⁵ FED. R. CIV. P. 26(c); Fla. R. Civ. P. 1.280(c); MASS. R. CIV. P. 26(c).

⁵⁶ Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1260 (2020) (noting that under protective orders, “[a]ccess to the materials designated as confidential is then frequently limited to the court, parties, attorneys, and witnesses”).

⁵⁷ *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978).

⁵⁸ *See In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 145–46 (2d Cir. 1987) (“Unless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order [under Rule 26(c)] since the public would not be allowed to examine the materials in any event.”); *see also* Pub. Citizen v. Liggett Grp., Inc., 858 F.2d 775, 790 (1st Cir. 1988) (modifying a protective order under Rule 26(c)).

⁵⁹ *Leucadia Inc. v. Applied Extrusion Tech. Inc.*, 998 F.2d 157, 164 (3d Cir. 1993); *see also* SEC v. TheStreet.com, 273 F.3d 222, 233 (2d Cir. 2001) (concluding that discovery materials “do not carry a presumption of public access”); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (“There is no tradition of public access to discovery, and requiring a trial court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process.”)

⁶⁰ *Cryovac*, 805 F.2d at 13; *Leucadia*, 998 F.2d at 165 (“The public policy implications of an expansion of the common law presumption of access to discovery motions are unclear, and this alone should counsel restraint.”); *see also* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) (noting that “pretrial deposition and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law and, in general, they are conducted in private as a matter of modern practice.”).

State courts similarly recognize a right to public access, and similarly do not extend it to discovery materials unless the materials are otherwise filed with the court or relied upon in the adjudicatory process.⁶¹ Moreover, state courts often consider federal court decisions and other federal materials in addressing issues of public access to judicial records.⁶²

Although motions for protective orders are frequently filed by single parties, a common practice is for the parties to negotiate and file a joint motion for a protective order.⁶³ Such joint motions for protective orders often attach a draft “umbrella” protective order, which is an agreement between the parties as to how discoverable materials are to be disclosed.⁶⁴ Indeed, when parties file a joint motion for a stipulated umbrella protective order, such motions are routinely approved, although the good cause requirement still has to be met.⁶⁵

Because protective orders prevent third parties from obtaining information produced in prior litigation, third parties sometimes intervene in the prior litigation to seek modification of the protective order.⁶⁶ However, courts are divided as to which party has the burden concerning a motion to modify—the party seeking modification, who would have to argue against a presumption that good cause supports the existing protective order, or the party seeking to maintain the protective order, who would have to show that good cause remains.⁶⁷

Finally, as with NDAs, protective orders may also be subject to restrictions in their enforcement. For example, Florida’s “Sunshine in Litigation Act” expressly provides that “no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard,”⁶⁸ and that prohibition extends to protective orders.⁶⁹

2. Sealing Orders

Like protective orders, orders to permit the sealing of documents are often used to prevent the disclosure of court documents to the public. With some exceptions, motions to seal

⁶¹ *E.g.*, *Fiorella v. Paxton Media Grp., LLC*, 424 S.W.3d 433 (Ky. Ct. App. 2014) (concluding that “once filed with the courts, ‘the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public.’”); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 36 (2008) (concluding that “raw discovery materials exchanged among parties, but not filed with the court, are not open to the public.”).

⁶² *See, e.g.*, *Fiorella*, 424 S.W.3d; *Rosado*, 292 Conn.

⁶³ Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 285 (1999); see also *Endo*, *supra* note 56 (“Stipulated protective orders have long been an important part of civil litigation and are used in a wide range of cases,” citing sources.).

⁶⁴ *Endo*, *supra* note 56, at 1257-61 (describing how “stipulated protective orders work”).

⁶⁵ *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981) (“We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court.”); *Endo*, *supra* note 56, at 1259 & n.55 (same, quoting *Zenith*).

⁶⁶ *E.g.*, *Public Citizen*, 858 F.2d at 778 (filing motion to modify, although formally not moving to intervene under Rule 24); *Leucadia*, 998 F.2d at (intervening under Rule 24 and seeking modification of protective order).

⁶⁷ Doré, *supra* note 63, at 357 (citing sources).

⁶⁸ FLA. STAT. § 69.081(3).

⁶⁹ *See State Farm Fire & Cas. Co. v. Sosnowski*, 830 So. 2d 886 (Fla. Dist. Ct. App. 2002) (concluding that protective order did not contain information concerning a “public hazard” to be subject to the Act).

seek to prevent disclosure of specific documents, or specific information, and parties do not seek the type of “umbrella” orders that are commonly seen when parties move for protective orders.

However, sealing orders differ from protective orders in two important respects. First, unlike protective orders, sealing orders are governed by a hodgepodge of legal sources. In federal court, for example, motions to seal are not governed by Federal Rules of Civil Procedure, but instead are governed by local rules, which can vary from jurisdiction to jurisdiction.⁷⁰ The local variability found in federal court may not be true in state courts, where some states, such as Texas, have highly detailed rules on the sealing of judicial records.⁷¹

Second, sealing orders tend to be more disfavored than protective orders, and thus courts will only grant a motion to seal if “compelling reasons” are shown, a standard that is actually greater than the “good cause” showing required for a protective order.⁷² However, courts tend to limit the use of the “compelling reasons” standard in motions to seal dispositive motions such as motions for summary judgment, as “the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the public’s understanding of the judicial process and of significant public events.”⁷³ For nondispositive motions, federal courts utilize the lower, “good cause” standard, as “those documents are often unrelated, or tangentially related, to the underlying cause of action.”⁷⁴

As emphasized by the Supreme Court, the decision to seal documents “is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.”⁷⁵ In exercising this discretion, “[c]ourts have weighed competing interests in a variety of contexts in determining whether to grant access to judicial documents.”⁷⁶ Such interests can include “enforcement concerns, judicial efficiency, and the privacy interests of the parties.”⁷⁷ Courts consider the same factors in determining whether to *unseal* documents, balancing such concerns with “the presumption of access.”⁷⁸ As with protective orders, third parties who seek information filed under seal typically move to intervene in the proceeding and then move to unseal the documents. Examples abound.⁷⁹

⁷⁰ See, e.g., S.D. Fla. R. 5.4(b) (detailing procedure for filing under seal in civil cases).

⁷¹ See Tex. R. Civ. P. 76(a) (providing for the “[s]ealing of court records”); see also Jillian Smith, *Secret Settlements, What You Don’t Know Can Kill You!*, 2004 MICH. ST. L. REV. 237, 244-47 (discussing, and critiquing, Texas Rule 76a).

⁷² *Apple, Inc. v. Samsung Elec. Co.*, 727 F.3d 1214, 1221 (Fed. Cir. 2013).

⁷³ *Kamakana v. City of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (citations omitted); see also *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 252 (4th Cir. 1988).

⁷⁴ *Kamakana*, 447 F.3d at 1179 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984)).

⁷⁵ *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 599 (1978).

⁷⁶ *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995) (citing cases).

⁷⁷ *Dependable Sales & Serv., Inc. v. Truecar, Inc.*, 311 F. Supp. 3d 653, 665 (S.D.N.Y. 2018) (in deciding on motion to seal, court must weigh presumption of access “against ‘countervailing factors,’ including ‘the privacy interests of those resisting disclosure’ ” (quoting *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006))).

⁷⁸ See *Diversified Grp., Inc. v. Daugerdas*, 217 F.R.D. 152, 159 (S.D.N.Y. 2003) (noting that, in determining whether to *unseal* documents, such “countervailing factors” must be considered against “the presumption of access” of certain judicial documents).

⁷⁹ *U.S. ex rel. Joshua Harman v. Trinity Indus., Inc.*, 622 F. App’x 448 (Mem) (5th Cir. 2015); *O’Keefe v. Schmitz*, Case No. 14-C-139, 2014 WL 2779091 *1, *1-*7 (E.D. Wis. June 19, 2014); *Milton Hershey Sch. v. Penn. Hum. Relations Comm’n*, 226 A.3d 117, 120-124 (Pa. Commw. Ct. Feb. 11, 2020).

II. Enforcement of Such Restraint

In Part I, I have discussed the concept of an evidentiary prior restraint and discussed the sources of such restraints, such as nondisclosure agreements (“NDAs”), protective orders, and sealing orders. The sources discussed were not meant to be exhaustive, and certainly evidentiary prior restraints can also arise in such diverse contexts as prior arbitration proceedings or the disclosure rules of regulatory agencies. However, by focusing on NDAs, protective orders, and sealing orders, I hope to both simplify the analysis by focusing on the most typical sources. Moreover, I hope that by focusing on these typical restraints I can create some workable conclusions that can be tested in less conventional settings.

In Part II, I discuss whether evidentiary prior restraints should be enforced. As noted earlier,⁸⁰ I focus on evidentiary prior restraints that are created primarily, or solely, to protect the privacy interests of the parties who obtained the restraint. Thus, I do not discuss evidentiary prior restraints that are designed to be adjuncts to other, external nondisclosure policies, such as policies in favor of protecting trade secrets or other proprietary information.⁸¹ Those prior restraints are justified to the extent that the external nondisclosure policies are themselves justified. Indeed, even Florida’s “Sunshine in Litigation Act,” which prohibits restraints on the disclosure of “public hazards,” provides that “[t]rade secrets . . . which are not pertinent to public hazards shall [remain] protected.”⁸²

Instead, I focus on whether the privacy interests of the parties alone are sufficient to support enforcement of an evidentiary prior restraint. As I discuss in more detail below, the sufficiency of those interests will depend on their effect on the enforcement objectives of the litigation. In general, I find that there can be a tension between the privacy interests of the parties in avoiding reputational harm and the goal of civil litigation to enforce the law and remedy unlawful or dangerous conduct. Thus, I ultimately conclude that evidentiary prior restraints that solely protect the privacy interests of the parties should be subject to significant scrutiny. Nevertheless, I further explore situations in which protection of the privacy interests of the parties may actually aid, rather than hinder, the enforcement of the law, and thus I try to carve out situations where privacy-based evidentiary prior restraints actually are justified.

A. Privacy and Enforcement

In order to explore whether evidentiary prior restraints should be enforced, I think it is helpful to use a simple model of litigant behavior in civil litigation, one that is generally accepted by economists who study litigation.⁸³ A simple model can be helpful for identifying relevant and irrelevant matters, and, more importantly, to gain insights that can be tested in more realistic

⁸⁰ See *supra* Introduction.

⁸¹ See FED. R. CIV. P. 26(c); see also FLA. R. CIV. P. 1.280(c) (same); MASS. R. CIV. P. 26(c) (same).

⁸² FLA. STAT. § 69.081(5) (providing that trade secrets “not pertinent to public hazards shall be protected pursuant to chapter 688” of the Florida statutes).

⁸³ See SHAVELL, FOUNDATIONS, *supra* note 25, at 389–418 (examining the basic theory of litigation). The model and its basic assumptions are generally accepted and have been used by other procedural scholars. See, e.g., ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 34 (2003) (modeling litigant behavior in decisions to file suit using the same factors); see also PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04, reporters’ notes & cmt. a (AM. LAW INST. 2010).

settings. In many ways the model I use here is like a paper road map. A road map purposefully omits details, like people, houses, or farm animals, and instead provides stylized information about roads, landmarks, and city and state boundaries. Indeed, a road map that was more realistic would be useless, as it would be hard to read or discern where you are with respect to roads or places.

When one complains about the “unrealistic” nature of economic models, I often think of the Jorge Luis Borges short story “On Exactitude in Science.” The story describes an ancient Empire so devoted to cartography that its cartographers created a map “whose size was that of the Empire, and which coincided point for point with it. The following Generations, who were not so fond of the Study of Cartography as their Forebears had been, saw that that vast Map was Useless.”⁸⁴

1. The Enforcement Function of Civil Litigation

Before setting forth a simple model of litigation, it is important to discuss one important aspect of civil litigation and its role in enforcement. To fully understand the enforcement function of civil litigation, one must recognize that, prior to any contemplated litigation, a potential defendant can choose conduct that can change its potential liability.⁸⁵ For example, to use the examples discussed so far, a potential defendant can choose to engage in sexual misconduct or not. Similarly, a potential defendant can choose to market a defective product or not, or choose between warning, and failing to warn, of the dangers of smoking cigarettes. This observation should not be controversial. Parties, particularly corporate parties, typically try to modify their behavior before the fact to avoid potential harmful consequences such as litigation. These efforts are not limited to liability imposed by a court. It can also include efforts to modify prior conduct to avoid harm to reputation, as reputational harm may lead to decreased business opportunities or decreased sales.⁸⁶

Ideally, litigation would be costless and perfect, and thus any harm (call it *h*) created by a defendant’s act will be remediable, for example through a damage award.⁸⁷ If litigation were perfect and costless, then it would have the benefit of deterring a potential defendant from engaging in unlawful conduct that would cause harm *h*.⁸⁸ Instead, the potential defendant would

⁸⁴ Jorge Luis Borges, *On Exactitude in Science*, in COLLECTED FICTIONS 325-33 (Andrew Hurley trans. 1999).

⁸⁵ For an early and famous articulation of this approach, see Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”).

⁸⁶ See Kishanthi Parella, *Public Relations Litigation*, 72 VAND. L. REV. 1285 (2019) (discussing importance of reputation to firm’s decisionmaking regarding litigation).

⁸⁷ For purposes of clarity I will focus on damage remedies, although courts can certainly impose injunctive or specific performance remedies in certain contexts. For a discussion of the injunctive and damage remedies and their similarities, see Fiss, *supra* note 26, at 8-18.

⁸⁸ Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 357 (1984) (noting that after-the-fact liability rules regulate conduct “indirectly, through the deterrent effect of damage actions that may be brought once harm occurs.”); *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) (recognizing that “litigation in general . . . has a deterrent as well as a compensatory objective.”).

be induced to consider, and ideally choose, conduct that reduces or eliminates harm h .⁸⁹ The potential perpetrator would not engage in sexual misconduct, or the company would try to design safer products.

Conversely, if a potential defendant did not have to pay h to compensate its victims for the harm it caused, the potential defendant, if it is rational, will not let the potential harm affect its choice of conduct. This point, I hope, is intuitive, and is backed up by experience. If anyone has ever slowed down when a police car is nearby, and then sped up when the police car was *not* nearby, then one can attest to the power of potential liability in changing one's prior behavior.

Again, assuming that liability is costless and perfect, then it has a number of advantages as a tool for the regulation of prior behavior. Perhaps the most important advantage is that it reduces the informational costs of the regulator, understood broadly to include any regulator, including courts.⁹⁰ Consider, for example, a regime whereby a party could not engage in acts, such as selling a good, unless it received preclearance or permission from a regulator. This type of "permission" regime is ubiquitous, and is how U.S. pharmaceuticals and medical devices are regulated.⁹¹ Courts can also engage in this type of "permission" regulation, as when it issues an injunction enjoining a party from acting prior to court approval.⁹² But imagine seeking permission from a court as to the safety of a car before introducing the car into the market. A court would be tasked with evaluating numerous and highly technical design issues, which would tax the resources of the court, or any regulator.

In contrast to a "permission" regime, civil liability and its subsequent litigation tends to develop a "forgiveness" regime, in which parties are permitted to act, but may have to make amends after the fact if they injure others. Thus, courts do not engage in pre-market testing of cars, but essentially permit carmakers to make whatever cars they want, subject to the potential of liability.⁹³ In a very real sense, carmakers have an "option" to injure persons so long as they pay the "strike price" of damages if the carmaker is found to be liable.⁹⁴

Because carmakers risk being held liable for their conduct after a loss, they have an incentive to design their cars in the first instance in such a way as to avoid or reduce their potential liability as much as practicable. Indeed, under the risk-utility standard employed in many product defect claims, whether a defendant is liable will depend on "whether the aggregate costs of adding some safety feature proposed by the plaintiff is or is not outweighed by the

⁸⁹ Admittedly, in some contexts, such as those involving inherently dangerous activities like the use of explosives, the goal of the liability is not to induce reasonable care, but to induce potential defendants to engage in the optimal level activity. In those contexts, a strict liability regime is optimal, not because it prevents the harmful activity altogether, but because it provides the proper incentives to engage in the optimal amount or level of activity. See SHAVELL, ACCIDENT, *supra* note 25, at 17. For the sake of simplicity, I want to focus on negligence and similar liability regimes.

⁹⁰ See IAN AYRES, OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS (2005) (discussing the informational advantage of after-the-fact liability rules).

⁹¹ W. Nicholson Price II, *The Cost of Novelty*, 120 COLUM. L. REV. 769, 772 (2020) ("To develop a new drug similar to an existing drug, the developer needs to undergo the entire process of preclinical work, clinical trials, and Food and Drug Administration (FDA) approval, at a cost of many millions of dollars.").

⁹² Fiss, *supra* note 26, at 8-18.

⁹³ Of course, a hybrid system regulates car safety, with, for example, the National Highway Traffic Safety Administration ("NHTSA") monitoring accidents and imposing recalls in some instances. See <https://www.nhtsa.gov/>.

⁹⁴ AYRES, *supra* note 90, at 5.

aggregate benefit of preventing foreseeable accidents like that which injured the plaintiff.”⁹⁵ In other words, under the “risk-utility” standard, a carmaker can avoid liability by making its cars as safe as practicable, and thus is *deterred* from making unsafe cars by the threat of potential damages in a lawsuit.

If an accident does happen, and a claim is brought, a court does not necessarily have to engage in the kind of all-encompassing review of the safety of the car it would have to carry out under a “permission regime.” Instead, the court has the benefit of both the limited nature of the inquiry (i.e., Is THIS design defective? What is the amount of harm?)⁹⁶ and the benefit of hindsight. Although the court’s inquiry after the fact is limited, the carmaker will leverage all of its own information in advance to design a car that will not lead to lawsuits and liability. Thus, “*the virtue of the liability rule is that it allows the state to harness the information that the injurer naturally possesses about his prevention cost.*”⁹⁷

2. The Tension Between Privacy and Enforcement

Of course, civil litigation is not perfect or costless. In fact, it is famously riddled with costs. Under a simple model of litigant behavior, the parties seek to maximize their returns and minimize their costs. Moreover, the model assumes that the “American Rule” applies, and thus the parties bear their own costs of litigation.⁹⁸ Accordingly, under this model, the plaintiff seeks to maximize his or her net expected return on the litigation, while the defendant seeks to minimize its total litigation costs.⁹⁹

Obviously, this model is much too simple to describe actual litigation. Parties can be risk averse, or have nonpecuniary reasons for suing. But simplifying litigation in terms of recovery

⁹⁵ See DAVID G. OWEN, PRODUCTS LIABILITY LAW § 8.5 (2005) (discussing the risk-utility standard in the context of design defects).

⁹⁶ Obviously, the inquiry is much more limited in strict liability regimes, where the court would only have to determine causation and harm. See SHAVELL, ACCIDENT, *supra* note 25, at 17.

⁹⁷ Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 725 (1996) (emphasis in original).

⁹⁸ *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975) (defining the “American rule,” stating that “[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.”).

⁹⁹ More precisely, and for those interested in math, under the model used here, the parties seek to optimize their gains and losses based on three factors:

- (1) the damages recoverable (or the liability that may be imposed) (h);
- (2) the probability (p) of h being imposed by the court; and
- (3) the costs of the litigation process itself (for example, c_P for plaintiffs and c_D for defendants).

Under this model, plaintiffs seek to maximize their net expected recovery, or $ph - c_P$, while defendants seek to minimize their total expected litigation costs, or $ph + c_D$.

The model is generally well-accepted by law-and-economics scholars, and is frequently used in the literature. See SHAVELL, FOUNDATIONS, *supra* note 25, at 389–418 (examining the basic theory of litigation). For more robust versions of this simple model, see, e.g., I.P.L. Png, *Litigation, Liability, and Incentives to Care*, 34 J. PUB. ECON. 61 (1987); see also A. Mitchell Polinsky & Steven Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law*, 5 J.L. ECON. & ORG. 99 (1989) (providing a survey of the literature). A version of this model has been used in my previous writings. See, e.g., Campos & Li, *supra* note 29, at 1998–2000; Sergio J. Campos, Christopher S. Cotton, & Cheng Li, *Deterrence Effects Under Twombly: On the Costs of Increasing Pleading Standards in Litigation*, 44 INT’L REV. L. & ECON. 61 (2015).

and costs has the advantage of providing some insights about litigation that can be extended to more realistic situations. One of the most important insights one can glean from this model is that, in general, the private interests of the parties in litigation often diverge from the public, or social, interest in the litigation.¹⁰⁰ As noted earlier, if litigation were perfect and costless, then defendants would always have to pay h when they were actually liable. Moreover, society benefits from the imposition of h because it would optimally deter potential defendants from engaging in harmful unlawful activity.¹⁰¹

But, again, litigation is not perfect, and it is riddled with costs. Thus, a plaintiff will not file a lawsuit every time a defendant has unlawfully harmed him or her. The plaintiff will only do so if he or she can expect a positive return, or when $ph - c_p > 0$. Thus, the costs of litigation may deter lawsuits that should be filed, leading to potential defendants *not* being deterred from engaging in unlawful conduct.¹⁰² Moreover, because the parties bear their own costs, all parties have an incentive to settle to reduce or avoid costs.¹⁰³ Although, privately, the parties benefit from settlement, settlement may lead to the filing of nuisance suits that have no merit, and thus may over-deter potential defendants who want to avoid such suits.¹⁰⁴ But more generally, because the parties have to consider the costs of litigation, and, more importantly, may fail to consider the costs of their litigation on third parties and the court, they may not make decisions regarding litigation that would be optimal from a social perspective.

Although the private interests of the parties do not necessarily align with the social interest in litigation, mechanisms like class actions, recovery of attorney fees, statutory damages, and other procedures can better align those interests.¹⁰⁵ But this divergence between the private and social interest in litigation can be further exacerbated by evidentiary prior restraints. Here the simple model can provide some insight as to why evidentiary prior restraints based on privacy interests alone further undermine the socially optimal functioning of litigation.

Consider, for example, NDAs in the context of settlement agreements. Even in the absence of NDAs, the effect of settlement agreements on the enforcement function of litigation is, at best, ambiguous.¹⁰⁶ On one hand, defendants can use settlement to reduce or avoid their liability, and, knowing that they can settle any claim against them, they have a reduced incentive to avoid unlawful conduct. However, because settlements reduce the costs of litigation, they can also encourage the filing of claims that would not otherwise be filed, and thus augment deterrence rather than undermine it.¹⁰⁷

But NDAs, particularly in the context of sexual misconduct claims, point in the direction of less deterrence, not more. Ideally, insistence on an NDA would result in a higher payment to

¹⁰⁰ See Steven Shavell, *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997).

¹⁰¹ *Id.*

¹⁰² SHAVELL, FOUNDATIONS, *supra* note 25, at 397.

¹⁰³ *Id.* at 402.

¹⁰⁴ David Rosenberg & Steven Shavell, *A Solution to the Problem of Nuisance Suits: The Option to Have the Court Bar Settlement*, 26 INT'L REV. L. & ECON. 42 (2006). It is also worth noting that plaintiffs attorneys play an important gatekeeping role by policing nonmeritorious claims and choosing which ones to file. *See id.*

¹⁰⁵ SHAVELL, FOUNDATIONS, *supra* note 25, at 398-401 (discussing these interventions).

¹⁰⁶ *Id.* at 412 (discussing this ambiguity).

¹⁰⁷ *Id.*

the victim to settle the claim.¹⁰⁸ This higher payment, moreover, would ideally mimic the liability a perpetrator would face from actual litigation, and thus one can imagine that NDAs could provide the same deterrence that would result from the claims being litigated in court.

But there are important reasons to believe that the settlement amount would result in less deterrence, not more. One reason has to do with asymmetric information. If the perpetrator is a repeat offender, then he probably has used NDAs before. Thus a victim, in negotiating an NDA, would be deprived of information about the amounts of previous settlements. In fact, for that reason, NDAs tend to enable repeat offenders because “potential future victims of the perpetrator” would not be warned of prior misconduct.¹⁰⁹

Second, there is reason to believe that victims of sexual misconduct may not be in the best bargaining position to insist on compensation. Power imbalances that lead to the sexual misconduct in the first place may manifest themselves again in settlement negotiations. Moreover, many victims themselves may prefer NDAs themselves, and thus not insist on a higher payment for them, as a way to avoid the stigma of “being known as a person who makes sexual misconduct allegations.”¹¹⁰

It is important to stress that the asymmetric information and power imbalances that may be present in the negotiations of NDAs involving sexual misconduct claims are not unique to those claims. One can imagine that NDAs involving claims related to employment conditions such as workplace safety, retaliation for asserting rights, or gender or racial discrimination may suffer from the same problems of asymmetric information and imbalance of power. Similar problems may actually be found outside the employment context, particularly in situations of mass tort or toxic tort where potential defendants may use NDAs not only to prevent disclosure of harmful conduct, but also as a way to divide and conquer potential victims from working together to bring claims.¹¹¹

Unlike NDAs, evidentiary prior restraints arising from court orders like protective orders or sealing orders at least permit disclosure to a court in the course of litigation. Thus, in theory, the evidentiary prior restraints would not undermine the enforcement objectives of the litigation because the litigation itself would not be hindered by disclosure restraint, although, admittedly, the information would not be available for future litigation.

But protective orders and sealing orders can similarly impair deterrence insofar as they reduce the *reputational* harm that can result from the defendant’s misconduct, a point that I have stressed in my prior writing.¹¹² Ideally, the liability imposed by the court would mimic the

¹⁰⁸ Ayres, *supra* note 38, at 77 (“When unlawful sexual misconduct did in fact occur, the promise of nondisclosure might be valued by the survivor solely because it secures for the survivor a larger settlement payment.”).

¹⁰⁹ *Id.* (noting that “[a] central concern with enforcement is that NDAs do not adequately manifest the assent of potential future victims of the perpetrator.”).

¹¹⁰ *Id.*

¹¹¹ See Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1077–79 (2012) (discussing why class actions are necessary to allow for coordinated investment in common issues); David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEG. ANALYSIS 305, 305–06 (2014) (arguing that class action treatment is preferable when the plaintiffs are numerous, but their claims share common issues of law and fact).

¹¹² See Campos & Li, *supra* note 29, at 2003 (using a simple game theoretic model to show that sealing reduces reputational losses, and thus “makes the [liability] action more attractive to D and D is thus more likely to take the [liability] action”).

reputational harm the defendant would suffer, and thus fully deter the defendant from engaging in unlawful conduct. But civil litigation may not perfectly do so,¹¹³ and a failure to do so can reduce the deterrence impact of the litigation.

Moreover, in products liability situations, the risk of reputational harm is necessary to regulate conduct because it allows market pressure to work with civil liability to deter harmful conduct.¹¹⁴ If consumers know that a product is unsafe, or the product is more expensive because of the manufacturer's liability,¹¹⁵ consumers will buy less, and such market pressure can induce potential defendants to create safer products. Thus, "product liability litigation may result in publicity about product problems and thereby enhance market forces and spur regulation."¹¹⁶ But if this publicity is eliminated by a protective order or sealing order, potential defendants' incentives to create safe products may be reduced, leading to more harm.

Indeed, the sealing of information that may be harmful to others may prevent nonparties to the litigation from taking protective measures, and thus expose future victims to harm that could have been avoidable.¹¹⁷ Moreover, and as I noted when discussing NDAs, protective orders and sealing orders can allow defendants to "divide and conquer" victims, preventing victims of mass torts to coordinate the investment and development of common issues.¹¹⁸

In sum, although there is an inherent divergence between the private and social interest in litigation, evidentiary prior restraints like NDAs, protective orders, and sealing orders exacerbate that divergence by:

- 1) reducing the information that courts and third parties have about the wrongdoing; and
- 2) exacerbating power imbalances between the parties.

For that reason, evidentiary prior restraints should be disfavored.

B. Possible Exceptions

Although evidentiary prior restraints tend to undermine the enforcement objectives of civil litigation, I want to briefly discuss situations in which some privacy protection may actually aid, rather than hinder, the enforcement function of the litigation. As I mentioned earlier, one significant advantage of civil litigation as a regulatory tool is that it "it allows the state to harness the information that the injurer naturally possesses about his prevention cost."¹¹⁹ Thus, in what follows I explore situations in which the absence of evidentiary prior restraints may result in the

¹¹³ Arguably inadequate damages can be supplemented with punitive damages, although this can be tricky. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003) (discussing the use of punitive damages to account for losses that are not recoverable).

¹¹⁴ Polinsky & Shavell, *supra* note 30, at 1454-55.

¹¹⁵ *Id.* at 1459 ("[B]ecause product liability causes prices to rise to reflect product risks, it may beneficially discourage consumers from buying risky products").

¹¹⁶ *Id.* at 1454.

¹¹⁷ SHAVELL, FOUNDATIONS, *supra* note 25, at 413 (noting that "if the public learns about the defect, perhaps people can take precautions to reduce harm").

¹¹⁸ Campos, *supra* note 111; Rosenberg & Spier, *supra* note 111.

¹¹⁹ Kaplow & Shavell, *supra* note 97, at 725 (emphasis omitted).

injurer concealing, or otherwise not producing, the information necessary for civil litigation to perform its enforcement function.

1. Concealing Behavior

Counterintuitively, the nonenforcement of evidentiary prior restraints may lead to less information, not more, if it would increase the incentive of parties with damaging information to conceal that information. Although counterintuitive, this rationale should ring true to experienced litigators, because this is the rationale that underlies the work product doctrine.

In federal courts, documents created “in anticipation of litigation or for trial” are presumptively not discoverable, and, even if discoverable, a court “must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”¹²⁰ As famously put by the Supreme Court in *Hickman v. Taylor*, such protection is necessary to the proper function of the judicial system:

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.¹²¹

In other words, the Court in *Hickman* anticipates that, in the absence of work product protection, attorneys would take greater efforts to conceal their “mental impressions,” leading to inefficiencies in the provision of legal services and in the ultimate product of the judiciary. Thus, the “work product doctrine” is a classic example where a restraint on disclosure actually leads to more information, not less, as it allows for a candor that would not exist in the absence of such a restraint.¹²² Of course, the information is never made public, but at least it is accessible for the persons who need it the most.

In the context of sexual misconduct claims, it is not hard to imagine that, in the absence of NDAs, less information about sexual misconduct may result, not more. This is because victims may be deterred from even coming forward because they “reasonably fear that being known as a person who makes sexual misconduct allegations will reduce their future employment prospects or lead to being accused or suspected of lying or a variety of other negative consequences.”¹²³ Thus, and counterintuitively, the absence of an NDA may allow a perpetrator to commit sexual misconduct with impunity.

¹²⁰ FED. R. CIV. P. 26(b)(3)(A) & (B).

¹²¹ *Hickman v. Taylor*, 329 U.S. 495, 393-394 (1947).

¹²² See Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313, 405-07 (1991) (arguing that work product protection may be necessary to encourage the sharing of information between an attorney and his client, but arguing for more empirical evidence).

¹²³ Ayres, *supra* note 38, at 77.

Even outside the context of sexual misconduct claims, one can imagine that, in some limited contexts, enforcement of evidentiary prior restraints may have a similar effect in revealing information that would otherwise be concealed completely from others. For example, imagine a potential defendant who manufactures a product that may expose a consumer or third party to a toxic chemical.¹²⁴ Further assume that a consumer is exposed to the substance, and is injured, and sues the defendant.

If the defendant knows that information about its conduct will be made publicly available, and cannot use an NDA, protective order, or sealing order to prevent its public disclosure, then the defendant may engage in conduct to further conceal the information. For example, the defendant may seek to dismiss the case prior to discovery, or fight tooth and nail in discovery to prevent the disclosure of any information from being revealed. The re-emphasized “proportionality” requirement for discovery requests under the Federal Rules, for example, make it easier for a potential defendant to claim that discovery requests are not “proportional” in order to conceal information.¹²⁵ Such hardball tactics may, in effect, dissuade plaintiffs from coming forward and prevent the discovery of important information.

In essence, because public disclosure increases the potential liability of the defendant, the defendant has greater incentives to hide it.¹²⁶ Thus, even if any protective order issued in this litigation would not be enforced in a collateral proceeding, there would be no protective order because nothing would be disclosed in the first place.

But it is important to recognize that there are common techniques to deal with a defendant’s concealing behavior that stop short of enforcing an evidentiary prior restraint. In the case of sexual misconduct claims, procedures that permit a victim to report confidentially or anonymously, at least at first, may induce the filing of claims without necessarily requiring the concealment of the perpetrator’s conduct.¹²⁷ Similarly, and perhaps even more counterintuitively, courts could refrain from fee-shifting or an insistence on proportionality, and thus prevent defendants from using discovery rules to conceal information that should otherwise be disclosed.

2. Production of Information

A perhaps harder issue concerns the production of information. Consider a modified version of the toxic tort example above. Imagine that a potential defendant knows that a product may be subject to litigation. Rather than engage in product testing, it may “play dumb” and fail to test or otherwise keep records that would be discoverable in the first place.

¹²⁴ See, e.g., *In re Roundup Prods. Liab. Litig.*, MDL No. 2741 (N.D. Cal. July 5, 2017).

¹²⁵ See FED. R. CIV. P. 26(a). I am working with David Rosenberg on a project about discovery costs and how defendants can use costs to prevent disclosure of information.

¹²⁶ Using the mathematical model above, in essence, because public disclosure increases the potential harm (h) of the litigation, the defendant now has greater incentives to increase its costs (c_D) to reduce the probability (p) that this information is ever disclosed.

¹²⁷ Ian Ayres, in fact, suggests that NDAs may be permitted, but they must meet “particular disclosure, condition, and escrow requirements” to prevent repeat offenders from hiding behind the terms of the NDA. See Ayres, *supra* note 38, at 79.

For example, in a famous section of *A Civil Action*, the plaintiff's attorney Jan Schlichtman seeks records of a defendant, a tannery, and its use of a carcinogenic substance which may have seeped in the groundwater and caused a spike in leukemia among children who lived nearby. The owner of the tannery denies using the substance and, more importantly, kept no records of its use which could be discovered.¹²⁸ Thus, unlike in the concealment context above, potential defendants may not even create the information that would need to be concealed in the first place.

"Playing dumb" as a tactic may not be viable in situations where regulatory measures require the keeping of information, and thus may subject a potential defendant to liability regardless of whether the damaging information is collected or not. Moreover, "playing dumb" is unlikely to be a strategy in the context of claims like sexual misconduct when the victim has the same information as the defendant (after all, they were both there). But "playing dumb" may be a tempting strategy in toxic tort cases like the one above, where the misconduct occurs prior to the toxic exposure, and out of view of the victims who are harmed.

In such cases, a commitment to the enforcement of evidentiary prior restraints may induce the production of valuable information insofar as such evidentiary prior restraints can provide some protection against the harmful consequences of the information, primarily the defendant's risk of being held liable as well as any reputational harm. In fact, such protections may be necessary in some contexts when the "reputational harm" may not be rational, as in situations where the public may impose reputational harm on a company that is unjustified because the public is panicked.¹²⁹

Although a defendant's disinclination to produce information may justify the enforcement of evidentiary prior restraints, it is unlikely that these situations would be common. This is because, in most situations, the potential reputational harm associated with producing information is justified, because such harm is necessary for market pressure to regulate conduct. Thus, enforcement of evidentiary prior restraints to induce the production of information would most likely be limited to very narrow circumstances where the risk of panics or other irrational responses is apparent.

CONCLUSION

In this essay I have discussed evidentiary prior restraints and when they should be enforced. In general, I have argued that such restraints, when based upon privacy interests alone, should be subject to significant scrutiny and should be highly disfavored. This is because evidentiary prior restraints interfere with the enforcement function of the litigation. Nevertheless, I have also tried to identify situations when evidentiary prior restraints may be justified, as when they are needed to protect the very information that the restraints will prevent from being disclosed.

I suggest that more empirical research is needed to better understand the consequences of non-enforcement of restraints in some contexts. Here I have discussed claims involving sexual misconduct and products liability contexts where the tension between privacy and enforcement

¹²⁸ JONATHAN HARR, *A CIVIL ACTION* c. 6, Discovery (1995).

¹²⁹ See Campos & Li, *supra* note 29, at 2006-07 (discussing the possibility of sealing orders to protect against panics).

has garnered the most attention. However, courts, regulators, and scholars should consider other contexts, such as litigation involving pharmaceuticals, toxic substances, government practices, antitrust, securities regulation, and other areas where the same tensions are present.

As evidenced by Florida's Sunshine in Litigation Act,¹³⁰ as well as efforts to curtail the enforcement of NDAs involving sexual misconduct claims, it appears that such an assessment is underway. I hope my thoughts are helpful in guiding further reform.

¹³⁰ *Supra* note 48.