A Duty to Disclose Social Injustice Torts

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Are tort victims ever obligated to disclose the wrongdoing they suffered? This unanswered question demands our prompt attention given two recent trends: the prevalence of non-disclosure agreements concealing injustices such as sexual wrongdoing and police misconduct; and a new wave of sunshine-in-litigation laws attempting to curb confidentiality in at least a dozen states, from Tennessee to California. Such laws have sought to prioritize the public interest in information regarding certain harmful behavior over the interests of individual litigants. But, to date, scholars and policymakers have failed to identify one of the key justifications for curtailing the widespread practice of confidentiality in tort settlements. This Article is the first to fill this crucial gap, conceptualizing and delineating a disclosure duty owed by tort victims to others. The Article first creates a taxonomy of existing sunshine laws, arguing that current legislation has been miscalibrated and has failed to effectively address the problem of keeping valuable settlement information under wraps. Specifically, existing sunshine laws have been subject matter-based, resulting in both over- and under-inclusiveness. Instead, sunshine laws should target wrongs arising from social injustice, which breed the most significant tension between the interests of individual litigants and the public.

In the context of social injustice torts, the Article argues that victims owe a duty of disclosure to others. It contends that victims are best situated to report the injustices they suffered, that failing to disclose allows systems of oppression to continue to pervade our society and that disclosure should be understood as an act of solidarity between present and future victims of

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injustice. Next, the Article considers the administrability of such a duty for tort law, arguing that when victims seek to use the court system to vindicate a right of action against their wrongdoers, they should be required to disclose any information of public interest underlying their claim. The Article then addresses concerns regarding a potential chilling effect and suggests limiting the scope of disclosure to four categories of wrongdoers which pose the highest risk to third parties and to the public more broadly: (1) repeat wrongdoers, (2) disproportionally powerful wrongdoers, (3) organizations, and (4) public entities. Drawing on these categories to require disclosure of settlement information in social injustice torts, the Article argues, will allow society to maintain the practice of confidential settlements for the benefit of individual victims, without giving up on democratic transparency.

"*All actions relating to the right of other human beings are wrong if their maxim is incompatible with publicity*."
Immanuel Kant[1]

INTRODUCTION

Confidential settlements are a widespread practice.[2] They have lately come to the fore with the emergence of the #MeToo movement, which exposed the use of such settlements in concealing information regarding sexual misconduct, and subsequently gave rise to nation-wide policy efforts aimed at restricting secrecy in sexual harassment and related causes of action.[3] Investigative journalists have also showed that police departments

1. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO L.J. 2619, 2648 n.114 (1995) (citing IMMANUEL KANT, KANT'S POLITICAL WRITINGS 126 (Hans Reiss ed., H.B. Nisbet trans., 1970)).

2. Chase J. Edwards & Bradford J. Kelley, *#MeToo, Confidentiality Agreements, and Sexual Harassment Claims*, AM. BAR ASS'N (Oct. 19, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2018/10/02_edwards/ [https://perma.cc/2NZZ-SPR4] (discussing regular use of confidentiality provisions in sexual harassment and discrimination settlements); Blanca Fromm, Comment, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 664–65 (2001) (noting high percentage of cases settled confidentially out-of-court); David Grossbaum, *Can You Keep a Secret? The Ethical and Practical Issues of Confidential Settlement Agreements*, AON ATT'YS ADVANTAGE, https://www.attorneys-advantage.com/Risk-Management/Can-you-Keep-a-Secret [https://perma.cc/XYJ8-ZMPR] (stating confidentiality clauses in settlements have become common practice); Luban, *supra* note 1, at 2649–51 (explaining pervasiveness and nature of secret settlements).

3. For a discussion of the use of confidential settlements in the context of sexual misconduct cases, see *infra* notes 32–40, 53–60 and accompanying text. For a discussion of legislative responses designed to curb secrecy relating to confidential sexual misconduct

routinely utilize confidential settlements to keep police misconduct under wraps.[4] Yet, the phenomenon of confidential settlement agreements has been around for much longer. As David Luban notes, confidential settlements "became a matter of public controversy in the mid-to-late-1980s," when "[a] front page Washington Post series charged that secret settlements play a major role in concealing important health and safety information from the public."[5] For example, the risks of certain breast implants were kept from the public through confidential settlements, while women continued to undergo this procedure.[6] In response to the public outcry that followed this and similar scandals, several states, including Florida and Texas, began to introduce "sunshine-in-litigation" laws ("sunshine laws").[7] These statutes were aimed primarily at targeting settlement agreements that conceal public hazards by limiting their enforceability.[8]

The renewed attention in recent years to confidential settlements that inhibit debate on matters of public interest,[9] and recent attempts to limit

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settlements, see *infra* notes 18–31 and accompanying text. Some research has also evaluated psychological factors shaping the public's attitudes towards secret settlements in sexual harassment cases. *See* Gilat Juli Bachar, *The Psychology of Secret Settlements*, 73 HASTINGS L.J. 1, 38–44 (2022) (assessing lay attitudes towards secret settlements).

4. For a discussion of police departments utilizing confidentiality clauses in settlement agreements with police misconduct victims, see *infra* notes 41–52 and accompanying text.

5. Luban, *supra* note 1, at 2650.

6. *See* Laleh Ispahani, Note, *The Soul of Discretion: The Use and Abuse of Confidential Settlements*, 6 GEO. J. LEGAL ETHICS 111, 119–20 (1992).

7. Luban, *supra* note 1, at 2651–52; FLA. STAT. § 69.081(3) (2023) (preventing courts from entering judgments which serve to conceal information regarding public hazards); TEX. R. CIV. P. 76a(1) (stating court orders and opinions are open to public but may be sealed upon showing certain factors).

8. *See* Luban, *supra* note 1, at 2651–52.

9. Importantly, while the discussion of confidentiality in the resolution of civil disputes has encompassed various procedural issues, including discovery and alternative dispute resolution, my focus here is solely on confidential settlements. *See* Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. 501, 504 (2020) (explaining the secretive nature of modern dispute resolution). Specifically, information exchanged during the discovery process is often subject to protective orders prohibiting the information from being shared with the public. *Id.* Some scholars have also argued against the use of alternative dispute resolution because it is often insulated from public view. *Id.* at 504–05 (noting how discovery and alternative dispute resolution can serve to further secrecy in resolving civil cases); Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 610, 641–45 (2018) (discussing veil of privacy surrounding arbitration). Resnik states that some major domestic arbitration companies advertise confidentiality as a key component of their services. Resnik, *supra*, at 642. One court even noted that confidentiality is so engrained in arbitration that limiting it "would undermine the 'character of arbitration itself.'" *Id.* at 642–44 (quoting Guyden v. Atena Inc., 544 F.3d 376, 385 (2d Cir. 2008)) (highlighting secrecy of arbitration); *see also* Alexandra D. Lahav, *The Roles of Litigation in American Democracy,* 65

secrecy through sunshine laws, justify rethinking our approach to curbing settlement confidentiality. Indeed, "the argument behind such sunshine regimes [has been] that they recognize situations in which the public interest in matters relating to health, safety, and the operations of government outweighs the plaintiff's interest in gaining a favorable settlement."[10] These sunshine laws have thus sought to limit confidentiality by carving out substantive areas of torts—such as those pertaining to public health and safety, but also sexual harassment. Yet, such legislation has been miscalibrated, piecemeal and largely reactive to the most recent scandal on the public's mind, be it a defective product or sexual harassment. In contrast, these laws have failed to systematically define the universe of cases in which our societal interest in publicity should trump plaintiffs' freedom to settle their tort claims out of the public eye.

This Article fills this gap by offering the category of "social injustice torts." It argues that, instead of banning confidentiality by subject-matter, sunshine laws should target wrongs arising from social injustice, which breed the most significant tension between the interests of individual litigants and the public. It adopts a broad definition of social injustice: "the unequal or unfair social distribution of rewards, burdens, and opportunities for optimizing life chances and outcomes, whether inflicted by abusive actors, or by complacent authorities who fail to act when they are in a position to avert or prevent harm."[11] The Article uses two salient examples to illustrate the

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EMORY L.J. 1657, 1686 (2016) (stating information exchanged during discovery is between private parties and not always made public). Lahav highlights that keeping information exchanged during discovery private may have adverse consequences by shielding potentially valuable information from the public. Lahav*, supra* (noting information kept secret in discovery may have value for "public-oriented decision-making"). However, my focus here is solely on confidential settlements in the wake of a tort claim. As such, the analysis also does not refer to non-disclosure agreements as part of employment contracts. That said, portions of the analysis I offer will be relevant to the use of confidentiality in other stages of the civil process.

10. Luban, *supra* note 1, at 2657. As Luban notes:

> [t]he biggest worry about sunshine regimes is that secret settlements may be the only way that a weak plaintiff who has suffered serious harm can obtain compensation. If judges make secret settlements unenforceable, a weak plaintiff may not receive a serious settlement offer and the case goes to trial. Since plaintiffs can demand a generous settlement in return for secrecy, and trials are expensive, banning secret settlements may cost plaintiffs money.

Id. However, settlements might still be viewed as superior to a trial from an organization's perspective, despite the transparency. *Id*. Of course, as discussed in Part V below, whether sunshine regimes indeed create a chilling effect which affects disputants' behavior is an empirical question which remains to be answered.

11. *See* Sridhar Venkatapuram et al., *The Right to Sutures: Social Epidemiology, Human Rights, and Social Justice*, 12 HEALTH & HUM. RTS. 3, 3 (2010). This definition echoes Vittorio Bufacchi's understanding of social injustice as not simply the opposite of social justice, but rather

term social injustice: sexual wrongdoing and police misconduct. In both contexts, as elaborated below, confidential settlements have been prevalent,[12] and in both, the societal cost of keeping settlements under wraps is high. Establishing the category of social injustice torts, this Article contends that disclosure is most crucial when it comes to such torts, due to the potential risk wrongdoers pose to third parties and to society more broadly by concealing valuable settlement information.

Moreover, despite attempts to limit the enforceability of confidential settlements through state-based sunshine laws, a key justification for curtailing confidentiality has not been articulated to date. This Article is thus the first to address a provocative, unanswered question: to what extent is there a duty on tort victims to disclose a settlement between them and their wrongdoers related to torts arising from social injustice? In response to this question, the Article argues, first, that many of the goals of tort law are incompatible with systematically resolving disputes under wraps. Second, the Article identifies and delineates a moral disclosure duty owed by victims themselves in social injustice torts. It justifies the existence of this duty by building on moral philosophy arguments, particularly the special role that victims hold in the context of social injustice torts. It concludes that, despite the private nature of torts, failing to disclose wrongs arising from social injustice will allow wrongdoing to persist throughout society. This risk obligates victims of social injustice torts to share settlement information as an act of solidarity with future victims. Further, the Article contends that identifying this disclosure duty may eventually shift societal norms regarding solidarity between current and future victims.

However, taking into account the extent to which such a duty is administrable for tort law, as well as the imposition on victims' autonomy which disclosure involves, I argue that disclosure should be reserved to the

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a tool with which to achieve social justice through the elimination of a real-world phenomenon. *See generally* VITTORIO BUFACCHI, SOCIAL INJUSTICE: ESSAYS IN POLITICAL PHILOSOPHY 1–16 (2012). The definition is also mindful of the fact that social injustice is not necessarily inflicted solely by abusive actors, but also by complacent authorities. Surprisingly, there has been relatively little research on the concept of social *in*justice. BUFACCHI, *supra,* at 1. Rather, social justice is typically the focus of study and has attracted more attention than any other single concept in moral and political philosophy over the past 50 years. *Id.* John Rawls offered the foundation for a contemporary understanding of social justice with the notion of "justice as fairness." *See* JOHN RAWLS, A THEORY OF JUSTICE 10–15 (Oxford Univ. Press rev. ed. 1999). Rawls' system for building social justice in society is extended by Sen with the assertion that social justice not only has to take place according to the principles of justice, but it also needs to be "seen" to take place. *See* AMARTYA SEN, THE IDEA OF JUSTICE 126–28 (2009). This is an important element in the concept of social injustice torts.

12. For a discussion of the prevalence and use of confidential settlements in the context of sexual misconduct and police brutality cases, see *infra* notes 34–65 and accompanying text.

most potent defendants, as captured by four categories of wrongdoers. These categories include: the repeat wrongdoer, the disproportionally powerful wrongdoer, the organizational wrongdoer, and the public entity wrongdoer.

Furthermore, the practicable disclosure should be narrower than the moral duty in several additional ways. First, the Article draws a distinction between tort victims and plaintiffs. It argues that tort victims—those who suffered a wrong—are generally best situated to report the injustice to which they were subject. That said, only plaintiffs—victims that bring a legal action against their wrongdoers—should be required to disclose the wrongdoing under certain conditions, because they opted to use the legal system to seek redress for the harm they suffered, and because they have already experienced the shift of consciousness which accompanies turning a grievance into legal action. Second, the Article proposes to limit the type of information which disclosure requires to publicly valuable information, excluding plaintiffs' personally identifiable information, broadly understood. Such boundaries, the Article argues, will also help to alleviate a concern about a potential chilling effect on bringing suit against wrongdoers. Drawing on these guidelines to revisit our existing sunshine regime will allow society to maintain the limited practice of confidential settlements without paying an overly steep price.

The Article proceeds as follows. Part II surveys the legislative trend of sunshine laws, categorizing the statutes based on their substance and approach to regulating confidential settlements. Part III then pivots to focus on social injustice torts when seeking to limit the practice of confidential settlements and explores the use of confidential settlements in the context of two examples of social injustice torts: sexual wrongdoing and police misconduct. Next, Part IV examines the theoretical and practical underpinnings of confidential settlements, discussing the goals of tort law and assessing the reality of confidential settlements in light of these goals. Part V conceptualizes and delineates tort victims' disclosure duties, addressing potential objections and offering initial thoughts as to the legal application of such disclosure duties. In particular, I recommend four categories of wrongdoers, with regard to whom disclosure should apply. Finally, the conclusion raises open questions and suggests directions for future research.

I. A NEBULOUS LEGISLATIVE TREND: A TAXONOMY OF CURRENT SUNSHINE-IN-LITIGATION LAWS

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

civil disputes.[13] This trend has persisted despite some important critiques voiced against it.[14] More specifically, it is generally perceived that *confidential* settlements are quite common and that their numbers are growing.[15] Indeed, the discussion of confidential settlements in the context of public health and safety has been percolating for years.[16] Several investigative media reports during the late 1980s brought attention to this issue, by revealing that confidential settlements were concealing information about hazardous products and environmental dangers.[17]

Such public attention to the risks of keeping the resolution of legal disputes under wraps has generated legislation aimed at increasing transparency and public access to records commonly referred to as sunshine laws.[18] Importantly, though this Article focuses on confidential settlements,

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13. *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004); Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2131–33 (2018).

14. These critiques have been made most famously by Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075–78 (1984) (critiquing the settlement process); *see also* Luban, *supra* note 1, at 2619 (revisiting Fiss's critiques of settlement). More recently, concerns have been raised about the lack of lawyer accountability in the settlement process. *See* Michael Moffit, *Settlement Malpractice*, 86 U. CHI. L. REV. 1825, 1827–29 (2019) (finding that although the vast majority of civil lawsuits are resolved through negotiated settlements, there is currently a lack of lawyer accountability in the context of legal negotiations and arguing that it should not persist).

15. This is the case both specifically in the sexual misconduct context, *see* Ronan Farrow, *Harvey Weinstein's Secret Settlements*, THE NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements [https://perma.cc/629C-QH94] (discussing how the use of nondisclosure agreements in sexual misconduct cases has become "common practice"), and more generally in the employment context, *see* Norman D. Bishara et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 28 (2014) (explaining that, in general, the use of various restrictive covenants, including NDAs, in employment contracts has increased over time). This phenomenon has also been noted by judges. *See, e.g.*, Pansy v. Borough of Stroudsburg, 23 F.3d 772, 785 (3d Cir. 1994) ("Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders . . ."); City of Hartford v. Chase, 942 F.2d 130, 137 (2d Cir. 1991) (Pratt, J., concurring) (discussing the "increasing frequency and scope of confidentiality agreements that are ordered by the court").

16. Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 945–46 (2006); *see also* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 463–64 (1991) (responding to discovery reform proposals in the context of cases involving public health and safety); Richard A. Zitrin, *The Case Against Secret Settlements (or, What You Don't Know Can Hurt You)*, 2 J. INST. STUD. LEGAL ETHICS 115, 117–21 (1999) (criticizing secret settlements in cases involving public health and safety).

17. *See* Bachar, *supra* note 3, at 10 and references there.

18. For a relatively recent review of such laws in the context of workplace sexual misconduct claims, see Mushu Huang, Legislative Responses to the Use of Non-Disclosure Agreement Regarding Workplace Sexual Misconduct Claims: From Information Transparency to Systematic Protection 9–13 (2019), (Student Scholarship, Seton Hall Law School) (eRepository 1023), https://scholarship.shu.edu/student_scholarship/1023 [https://perma.cc/3XPZ-6LA7].

sunshine laws often refer to a broader set of confidentiality issues, including sealing of court records. Unlike general public records laws such as Freedom of Information Act ("FOIA") statutes, not every state has sunshine laws. Of the states that do, there tend to be four categories of sunshine laws.

The *first* category of laws creates presumptions of openness for court records in matters regarding public officials or institutions rather than private parties. States with these types of laws, such as North Carolina and Oregon, usually prohibit sealing court records unless there is a substantial countervailing interest.[19] However, there are exceptions. Delaware, for example, provides other procedures such as discretionary in camera review for deciding whether to seal court records.[20]

The *second* type are sunshine laws that limit confidentiality in settlement agreements in cases of environmental public hazards which may involve private parties. These laws are commonly used to illuminate details about tort litigation regarding environmental hazards where confidential settlements could seriously harm the surrounding community.[21] From a practical standpoint, these laws try to curb the ability of parties who may have caused environmental hazards such as gas leaks or chemical spills from entering into confidential settlements during the course of litigation. In most states, such as Florida and Louisiana, the laws are written such that settlement agreements of this type violate public policy and are therefore unenforceable.[22]

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19. *See* CAL. R. CT. § 2.550 (providing that court records are presumed to be open unless confidentiality is required by law); *see also* N.C. GEN. STAT. § 132-1.3(b) (2023) (stating that no judge may seal a court settlement unless "(1) the presumption of openness is overcome by an overriding interest and (2) that such overriding interest cannot be protected by any measure short of sealing the settlement"); NEV. REV. STAT. § 41.0375 (2023) (requiring that any settlement agreement "against a present or former officer or employee of the State or any political subdivision, immune contractor or State Legislator: (a) Must not provide that any or all of the terms of the agreement are confidential"); OR. REV. STAT. § 17.095 (2023) (explaining that a public body or an officer of a public body may not enter a confidential settlement agreement); *see also* S.C. R. CIV. PRO. § 41.1(c) (2023) (providing that "[u]nder no circumstances shall a court approve sealing a settlement agreement which involves a public body or institution").

20. *See* DEL. R. CIV. P. SUPER. CT. 5(g)(2) (2021) (providing that "the Court may, in its discretion, receive and review any document in camera without public disclosure thereof and, in connection with any such review, may determine whether good cause exists for the sealing of such documents").

21. Kellie Fisher, *Communities in the Dark: The Use of State Sunshine Laws to Shed Light on the Fracking Industry*, 42 B.C. ENV'T. AFFS. L. REV. 99, 123 (2015).

22. *See* ARK. CODE ANN. § 16-55-122 (2023) (providing that "any provision of a contract or agreement entered into to settle a lawsuit which purports to restrict any person's right to disclose the existence or harmfulness of an environmental hazard is declared to be against the public policy of the State of Arkansas and therefore void"); *see also* FLA. STAT. ANN. § 69.081 (West 2023) (explaining that "any 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"); LA.

Washington state's sunshine law provides yet another means for increasing transparency in these cases by requiring courts to conduct a balancing test to determine whether a settlement may be kept confidential.[23]

The *third* category of sunshine laws that some states have passed are aimed more broadly at protecting public health and safety by limiting confidentiality in court records and settlements. These laws are not necessarily limited to environmental hazards or toxic torts. Instead, some states have expanded on the "public hazard" concept to encapsulate the broader notion of "public interest." Like the first category of sunshine laws, state legislatures have approached this goal of increased transparency in a few different ways. For example, Texas and Georgia aim to achieve this goal by creating a presumption of openness that any court records or settlements of this kind can only be sealed if the court finds a compelling privacy interest.[24] Other states, like New York and Michigan, require the court to balance the parties' interests with the public interest more generally.[25]

Finally, the *fourth* and newest category explicitly limits confidentiality in settlements involving sexual misconduct. This category has emerged more recently due to the prominence of the #MeToo movement. Such laws borrow from the rationale in public hazard and public interest sunshine laws, but apply it specifically to the context of sexual wrongdoing. Several approaches have been used to limit confidentiality in this context. California and Vermont have made explicit mention of sexual misconduct settlements in their

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CODE CIV. PROC. ANN. art. 1426 (2023) (prohibiting a court from entering a protective order "if the information or material sought to be protected relates to a public hazard or relates to information which may be useful to members of the public in protecting themselves from injury that might result from such public hazard, unless such information or material sought to be protected is a trade secret or other confidential research, development, or commercial information").

23. *See* WASH. REV. CODE ANN. § 4.24.611(4)(b) (West 2023) (explaining that "the court shall balance the right of the public to information regarding the alleged risk to the public from the product or substance . . . against the right of the public to protect the confidentiality of information").

24. *See* TEX. R. CIV. P. ANN. § 76a (West 2023) (outlining the "presumption of openness" for court records which are defined as "all documents of any nature filed in connection with any matter before a civil court" with a few exceptions); *see also* GA. UNIF. SUPER. CT. 21.2 (2023) (stating that a court may not limit access to an order unless it finds that the harm to a person's privacy "clearly outweighs the public interest").

25. For example, in New York the law simply requires courts to consider the interests of the public and the parties before deciding to seal any records. N.Y. JUD. LAW. § 216.1(a) (McKinney 2021). In Michigan, the law prohibiting courts from sealing records except otherwise provided by statute or court rule or unless a party has filed a motion that identifies a specific interest, the court makes a finding of good cause or if there is no less restrictive means to adequately and effectively protect the specific interest asserted. MICH. CT. RULES MCR. § 8.119 (West 2021). *See generally,* Thomas K. Byerley, *Secret Litigation Settlements*, MICH. BAR J. (1998).

sunshine laws.[26] Of the two, California's law is the most far-reaching.[27] Other states have passed legislation to promote transparency in sexual misconduct cases that govern employers' ability to have employees sign pre-dispute non-disclosure agreements ("NDAs") as a condition of employment.[28] For example, Virginia, Oregon, New Mexico, Hawaii, and Illinois have enacted such legislation.[29] A third approach is the legislation adopted in Arizona, Maryland, Nevada, New Jersey, New York and Tennessee, which limit the enforceability of an NDA signed by an employee after sexual misconduct or harassment have been perpetrated.[30]

Well-intentioned as these laws may be, they fail to adequately address the issue of settlement confidentiality. Existing legislation has carved out areas

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26. More recently, California has amended its law to ban non-disclosure in any workplace-related harassment or discrimination. *See* CAL. CIV. PROC. CODE § 1001(a) (West 2023) (prohibiting settlement agreement provisions that prevent disclosure of factual information related to civil claims regarding acts of sexual assault and sexual harassment, as well as any act of workplace harassment or discrimination); *see also* Jingxi Zhai, *Breaking the Silent Treatment: The Contractual Enforceability of Non-Disclosure Agreements for Workplace Sexual Harassment Settlements*, 2020 COLUM. BUS. L. REV. 396, 431 n.145 (2020) (citing VT. STAT. ANN. tit. 21, § 495h(h) (West 2019)); *see generally* ANDREA JOHNSON ET AL., NAT'L WOMEN'S L. CTR., 2021 PROGRESS UPDATE: # METOO WORKPLACE REFORMS IN THE STATES 4 (2021) [hereinafter 2021 Progress Update] (citing S.B. 331, 2021-2022 Leg. (Cal. 2021)). https://nwlc.org/wp-content/uploads/2021/11/v2_2021_nwlcMeToo_Report-10.15.21.pdf [https://perma.cc/DGV7-6AMS].

27. It will be interesting to see if states begin to adopt more targeted sunshine laws like California's or if plaintiffs are able to use the pre-existing "public interest" and/or "public hazard" frameworks in states that have not yet adopted laws specific to sexual misconduct. In addition to these two states, Pennsylvania has introduced two bills, one in the house and one in the senate, which if passed would have impacted an employer's ability to have non-disclosure agreements relating to sexual harassment or discrimination in both employment agreements and settlement agreements. However, neither bill has moved past the initial legislative process. *See* S.B. 392, 2021-2022 Reg. Sess. (Pa. 2021); H.B. 938, 2021-2022 Reg. Sess. (Pa. 2021).

28. California's law that bans the use of non-disclosure agreements in sexual misconduct cases altogether also bans pre-dispute non-disclosures. CAL CIV. PROC. CODE § 1001(a) (West 2023).

29. *See generally*, ANDREA JOHNSON ET AL., NAT'L WOMEN'S L. CTR., 2020 PROGRESS UPDATE: METOO WORKPLACE REFORMS IN THE STATES 8 nn.23–25, 9 nn.31 & 34 (2020) (citing H.B. 2054 HD1 SD1, 30th Leg., Reg. Sess. (Haw. 2020); H.B. 21, 2020 Reg. Sess. (N.M. 2020); S.B. 726, 80th Leg., Reg. Sess. (Or. 2019); S.B. 479, 80th Leg. Assemb., Reg. Sess. (Or. 2019); H.B. 1820, Reg. Sess. (Va. 2019); VA. CODE ANN. § 40.1-28.01 (2019); S.B. 0075, 101st Gen. Assemb., Reg. Sess. (Ill. 2019))., https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020States_Report.pdf [https://perma.cc/94EB-7VCV].

30. *See id*. at 8 nn.27–29, 9 nn.33 & 35, 10 n.38 (citing H.B. 2020, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018); S.B. 1010, § 1, 2018 Gen. Assemb., Reg. Sess. (Md. 2018); Assemb. B. 248, 2019 Leg., 80th Sess. (Nev. 2019); S. 121, § 2, 218th Leg., Reg. Sess. (N.J. 2019); N.J. STAT. ANN. § 10:5-12.8 (West 2023); Assemb. B. 8421, § 7, 2019-2020 Gen. Assemb., Reg. Sess. (N.Y. 2019); H.B. 594, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019)); *see generally* 2021 Progress Update, *supra* note 26, at 5 n.16 (citing Assemb. B. 60, 81st Leg., Reg. Sess. (Nev. 2021)).

of sunshine by subject matter, such as public health and safety, environmental hazards, or sexual misconduct. The subject-matter approach is ill-advised for several reasons. First, it is too reactive and unsystematic. Rather than reflecting the broader underlying concerns we share as a society about concealing certain types of wrongdoing, it merely reacts to the current scandal on the public's mind; be it defective products or sexual harassment. Second, the subject-matter approach does not provide enough nuance, which can result in either over- or under-inclusiveness. As discussed below, limiting confidential settlements entails a price, including potentially creating a chilling effect on victims, discouraging defendants from settling and infringing on victims' autonomy. As a result, any regulation in this area needs to carefully thread the needle between over- and under-intervention. In this sense, prohibiting confidential settlements in all cases of sexual harassment and related causes of action might be over-inclusive,[31] as it will include cases of one-off, minor sexual harassment where we may want to allow confidential settlement in order to prevent excessive infringement on parties' freedom as well as potential harm to the victim.[32] Furthermore, a subject-matter approach also risks being under-inclusive, by limiting regulation to certain categories of cases which might affect the public interest but avoiding intervention in other areas, such as police wrongdoing.

II. WHERE CONFIDENTIALITY MATTERS THE MOST: SOCIAL INJUSTICE TORTS

Instead of the existing sunshine regime, I argue that we should use the category of *social injustice torts* to identify situations in which there is a broader public interest underlying the private dispute. I adopt a broad definition of social injustice, defined as: "the unequal or unfair social distribution of rewards, burdens, and opportunities for optimizing life chances and outcomes, whether inflicted by abusive actors, or by complacent authorities who fail to act when they are in a position to avert or prevent harm."[33] To clarify this definition in the context of tort actions, in this Part, I examine the use of confidential settlements in two illustrative causes of action

31. As the California statute does, for example. *See* CAL. CIV. PROC. CODE § 1001(a) (West 2023).

32. In this context, in a previous paper I found that the public is generally less concerned about minor sexual harassment being settled confidentially compared to severe cases of sexual harassment. Bachar, *supra* note 3, at 8. In a subsequent paper, I found that this was also the case with regard to one-off harassment as opposed to repeated cases. *See* Gilat J. Bachar, *Just Tort Settlements* (under review).

33. *See supra* note 11 and accompanying text.

arising from social injustice: lawsuits brought in response to sexual misconduct, and Section 1983 claims for police misconduct.

Confidential settlements utilizing NDAs have gained an increased level of national attention in recent years, specifically in the context of sexual misconduct claims.[34] At the forefront of national attention are high-profile sexual misconduct cases involving film mogul Harvey Weinstein, the late Fox News chairman and CEO, Roger Ailes, and former USA Gymnastics and Michigan State team doctor, Larry Nassar, among others.[35] Such perpetrators often employed confidentiality provisions in settlement agreements with their victims.[36] In effect, the victims pledged to keep the sexual misconduct confidential in exchange for financial compensation.[37] Typically, the victim would face liquidated damages penalties or remit a percentage of the settlement payout for breaking their silence.[38] Although the cases involving Harvey Weinstein, Fox News and Larry Nassar received significant national attention, the use of NDAs in sexual misconduct settlements extends well

34. *See* Elizabeth Tippett, *Non-Disclosure Agreements and the #MeToo Movement*, AM. BAR ASS'N DISP. RESOL. MAG. – WINTER 2019, https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/ [https://perma.cc/WUM7-UH36] (addressing how the #MeToo movement shed light on secret settlements and subsequent effects on maintaining victims' silence).

35. *See, e.g.*, *Did Non-Disclosure Agreements Protect Harvey Weinstein?*, THE LAW. PORTAL, https://www.thelawyerportal.com/blog/non-disclosure-harvey-weinstein/ [https://perma.cc/3YR3-E9ZE] (noting Weinstein Company's tendency to settle claims confidentially through use of nondisclosure agreements); Daniel Hemel, *How Nondisclosure Agreements Protect Sexual Predators*, VOX (Oct. 13, 2017, 7:20 AM), https://www.vox.com/the-big-idea/2017/10/9/16447118/confidentiality-agreement-weinstein-sexual-harassment-nda [https://perma.cc/ZNF8-UGC6] (stating that nondisclosure agreements and confidential settlements Weinstein used for decades drew increasing scrutiny at time of article's publication); Mark Hudspeth, *Gretchen Carlson and the Complicated Truth About NDAs*, CBS NEWS (March 1, 2020, 9:18 AM), https://www.cbsnews.com/news/gretchen-carlson-and-the-complicated-truth-about-ndas/ [https://perma.cc/LS22-3JF5] (discussing NDA signed by Gretchen Carlson as part of sexual misconduct settlement with Roger Ailes); Sarah Fitzpatrick & Tracy Connor, *McKayla Maroney Says USA Gymnastics Tried To Silence Her Abuse Story*, NBC NEWS (Dec. 20, 2017, 7:22 PM), https://www.nbcnews.com/news/us-news/mckayla-maroney-says-usa-gymnastics-tried-silence-her-abuse-story-n831416 [https://perma.cc/K6UX-GJXB] (claiming that in a lawsuit filed by Maroney, she alleges that USA Gymnastics tried to silence her by making her sign an NDA as part of a financial settlement she needed to pay for psychological treatment).

36. *See* sources *cited* supra note 35 (referencing use of NDAs by Harvey Weinstein, Roger Ailes, and USA Gymnastics in settling sexual misconduct claims).

37. *See* sources *cited* supra note 35 (explaining effect of NDAs on compelling secrecy).

38. *See* Courtney Han, *USA Gymnastics Revokes Fine for McKayla Maroney After Chrissy Teigen Offers To Pay*, ABC NEWS (Jan. 17, 2018, 7:00 AM), https://abcnews.go.com/US/usa-gymnastics-revokes-fine-mckayla-maroney-chrissy-teigen/story?id=52400598 [https://perma.cc/FGB4-2F82] (outlining potential $100,000 fine imposed on McKayla Maroney if she wanted to speak at Larry Nassar's trial, thus violating the NDA she signed in settlement with USA Gymnastics).

beyond those high-profile cases.[39] Various faith-based organizations, Google, and even members of Congress have utilized NDAs to silence victims of sexual misconduct, suggesting that the use of NDAs in settlements is quite prevalent.[40]

Police departments across the United States also employ the practice of incorporating NDAs into settlement agreements with victims of police misconduct.[41] Civil claims brought by victims of police misconduct against police departments[42] are often resolved through confidential settlements or judgments sealed by courts.[43] Such settlements contain confidentiality provisions or non-disparagement clauses preventing victims from speaking

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39. *See* Ryan M. Philip, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL L. REV. 845, 845 (2003) (discussing the Catholic Church's use of confidential settlements to silence abuse victims); *see also* Jaya Harrar, *Google Harassment Scandal: Should NDAs Be Banned?*, LAW. MONTHLY (Nov. 30, 2018), https://www.lawyer-monthly.com/2018/11/google-harassment-scandal-should-ndas-be-banned/ [https://perma.cc/9QNJ-B8E2] (noting Google's use of confidentiality agreements in handling claims of sexual misconduct against high-level executive); Rachael Bade, *Lawmaker Behind Secret $84k Sexual Harassment Settlement Unmasked*, POLITICO (Dec. 1, 2017, 4:35 PM), https://www.politico.com/story/2017/12/01/blake-farenthold-taxpayer-funds-sexual-harassment-274458 [https://perma.cc/WU7W-EB7U] (explaining former Texas congressman's $84,000 settlement with communications director that incorporated confidentiality provisions).

40. *See* sources cited *supra* note 39 (discussing several instances of sexual misconduct settlements utilizing confidentiality provisions outside of mainstream national cases).

41. *See* Overbey v. Mayor of Balt., 930 F.3d 215, 220 (4th Cir. 2019) (analyzing whether the Baltimore Police Department's use of non-disparagement clause in settlement with police brutality victim violated First Amendment rights); *see also* Andrew Ford et al., *Dead, Beaten, Abused: New Jersey Fails To Stop Police Brutality*, ASBURY PARK PRESS (Dec. 15, 2019, 8:59 PM), https://www.app.com/in-depth/news/investigations/watchdog/shield/2018/01/22/nj-police-brutality-cases-secret-settlements/109479668/ [https://perma.cc/Q837-36Z4] (detailing police corruption in New Jersey and use of NDAs by police departments to silence victims); Todd Bookman, *N.H. Towns Pay Millions To Settle Claims Against Police; Details Often Hidden from Public*, N.H. PUB. RADIO (July 23, 2020, 5:54 PM), https://www.nhpr.org/post/nh-towns-pay-millions-settle-claims-against-police-details-often-hidden-public#stream/0 [https://perma.cc/FKG5-C6CJ] (noting prevalence of NDAs in settlements paid out by New Hampshire municipalities for civil rights violations by police officers); Mark Puente, *Undue Force*, BALT. SUN (Sept. 28, 2014), http://data.baltimoresun.com/news/police-settlements/ [https://perma.cc/QT9U-MS7W] (finding the City of Baltimore used confidentiality clauses in settlement agreements with police misconduct victims to prohibit them from making public statements).

42. For an analysis including such claims under the torts umbrella, see generally Noah Smith-Drelich, *The Constitutional Tort System*, 96 IND. L.J. 571, 583–84 (2021).

43. *See* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 775 (2004) (claiming that tort suits against police are rare, in part, because such claims are usually settled through secret settlements or judgments sealed by courts).

about the misconduct.[44] Again, violating confidentiality provisions in police misconduct settlements can result in the victim having to relinquish a percentage of the payout or pay a liquidated damages fee.[45] Such settlements are typically paid out by the police department's respective municipality or local government, passing the often substantial cost of police misconduct onto local taxpayers.[46]

How prevalent is the use of confidential settlements in the context of police misconduct and sexual misconduct cases? Despite the general lack of data regarding such settlements,[47] several journalistic articles do provide data points on the use of confidential settlements by police departments and municipalities across the nation in the context of police misconduct. Specifically, the *Asbury Park Press*, in a nineteen-part investigation of police corruption in New Jersey, found that New Jersey municipalities spent roughly $1,768,349 in taxpayer dollars to confidentially settle twenty-six police misconduct cases.[48] Furthermore, the Baltimore City Solicitor stated that 95% of settlement agreements involving the Baltimore police included non-disclosure clauses.[49] In New Hampshire, eighty-seven legal settlements were

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44. *See Overbey*, 930 F.3d at 219 (describing non-disparagement clause prohibiting Overbey from speaking with media about her allegations against, and settlement with, Baltimore Police).

45. *See id.* at 220 (summarizing city of Baltimore withholding half of Overbey's settlement payout on grounds that comments she made violated non-disparagement clause of settlement agreement).

46. *See* Ford et al., *supra* note 41 (establishing taxpayer dollars as funding source for police brutality settlements paid out by municipalities); Katherine Macfarlane, *Section 1983 Dealmaking*, 97 TUL. L. REV. (forthcoming 2023) (manuscript 15–16), https://ssrn.com/abstract=4043209 [https://perma.cc/62EV-Z33C] (noting cities and individual taxpayers incur cost of section 1983 police misconduct settlements).

47. I was unable to find any comprehensive datasets or empirical studies evaluating the frequency/prevalence of the use of NDAs and confidential settlements in police misconduct cases. Given the secret nature of these settlements and the difficulty involved with obtaining corresponding data, it may not be surprising.

48. *See* Ford et al., *supra* note 41. To calculate the $1,768,349 figure, I added the settlement numbers listed as 'not stated' in the dataset provided in the article. In calculating the twenty-six figure, I added the number of lawsuits listed as 'not stated'. *Id. See also* Matthew Kassel, *'We Found This and You Gotta Fix It': Asbury Park's Mighty Watchdog*, COLUM. JOURNALISM REV. (Mar. 6, 2018), https://www.cjr.org/united_states_project/asbury-park-press-goldsmith-prize-investigation.php [https://perma.cc/4DFU-4TSA] (stating that the *Asbury Park Press* conducted an exhaustive nineteen-part investigation of police corruption in New Jersey). This project took two years to complete and required reporters to comb through 30,000 pages of documents obtained via public records requests and to exclusively focus on the investigation for months at a time. Kassel, *supra*.

49. Tim Prudente, *Federal Appeals Court Faults Baltimore Police for Gag Orders, Calls Practice Unconstitutional 'Hush Money*,*'* WASH. POST (July 12, 2019, 4:34 PM), https://www.washingtonpost.com/local/public-safety/federal-appeals-court-faults-baltimore-

paid out by municipalities following allegations of civil rights violations by police officers between 2010-2020.[50] In those eighty-seven settlements, roughly half contained non-disclosure clauses.[51] Several additional sources suggest that the use of confidential settlement provisions is widespread across police departments and municipalities.[52]

Similarly, with regard to sexual misconduct, comprehensive data on the use of confidential settlements is in short supply. There is a large body of journalistic and scholarly work discussing how confidential settlements were used by Harvey Weinstein,[53] USA gymnastics,[54] Fox News,[55] various

police-for-gag-orders-calls-practice-unconstitutional-hush-money/2019/07/12/64bc60c0-a4c4-11e9-b8c8-75dae2607e60_story.html [https://perma.cc/C2T4-9JM6].

50. *See* Bookman, *supra* note 41.

51. *Id.*

52. Rachel Dissell, *Some Police Settlements Confidential; Criminal Charges Deter Some from Calling out Brutality, Lawsuits Say: Forcing Change*, CLEVELAND.COM (Jan. 28, 2015, 3:00 PM), https://www.cleveland.com/forcing-change/2015/01/city_wanted_some_police_settle.html [https://perma.cc/N4CB-9EJL] (noting that civil rights attorneys said that city lawyers used to routinely ask that settlement terms in police excessive force cases be secret); Cheryl Corley, *Police Settlements: How the Cost of Misconduct Impacts Cities and Taxpayers*, NPR (Sept. 19, 2020, 7:00 AM), https://www.npr.org/2020/09/19/914170214/police-settlements-how-the-cost-of-misconduct-impacts-cities-and-taxpayers#:~:text=Over%20the%20past%20decade%2C%20Chicago,of%20city%20law%20department%20data [https://perma.cc/4FKC-5WTT] (finding that cities can face hundreds of lawsuits every year charging, among other things, that police used excessive force or made a false arrest. Many times, the details of settlements are hidden behind confidentiality agreements).

53. *See Did Non-Disclosure Agreements Protect Harvey Weinstein?*, *supra* note 35 (noting that when female employees of the Weinstein Company took legal action against Weinstein for sexual harassment, the company tended to settle claims confidentially by using nondisclosure agreements); *see* Hemel, *supra* note 35 (stating that the NDAs and confidential settlements that Weinstein used for decades began to draw increasing scrutiny at the time the article was published).

54. Fitzpatrick & Connor, *supra* note 35 (claiming that in a lawsuit filed by Maroney, she alleges that USA Gymnastics tried to silence her by making her sign an NDA as part of a financial settlement she needed to pay for psychological treatment).

55. Clare Duffy, *Gretchen Carlson Fights Back Against Nondisclosure Agreements Like the One She Signed with Fox News*, CNN (Dec. 15, 2019), https://www.cnn.com/2019/12/15/media/gretchen-carlson-fox-news-nda-reliable-sources/index.html [https://perma.cc/JJ3C-8AKM]. Carlson has founded, along with fellow former Fox colleagues Julie Roginsky and Diana Falzone, the nonprofit organization "Lift Our Voices" to advocate for an end to NDAs that prohibit people who have been sexually harassed at work from speaking about it. *See Timeline*, LIFT OUR VOICES, https://www.liftourvoices.org/timeline [https://perma.cc/3UGQ-TQ4W]. Fox News was sanctioned by the New York City Commission on Human Rights for its conduct in the context of sexual harassment complaints. *See* David Bauder, *Fox News Fined $1 Million Following Sexual Harassment and Retaliation Investigation*, HUFFPOST (Jun. 30, 2021, 4:44 AM), https://www.huffpost.com/entry/fox-news-fined-1-million_n_60dc2a7be4b0d3e35f9ac4ec [https://perma.cc/46NB-S2E7].

churches,[56] Google,[57] members of Congress,[58] and, most recently, Airbnb[59] to silence victims of sexual misconduct.[60] While we lack comprehensive data, these reports give us a sense of both the scope and societal impact of the phenomenon of confidential settlements, thus highlighting the need for more effective regulation in this space.

Importantly, as noted, the category of social injustice torts does not include all cases related to a given subject-matter category like sexual misconduct.[61] For example, a one-off case of minor sexual misconduct may not meet the criteria of a social injustice tort; indeed, nor may it be sufficient to establish a Title VII claim. Furthermore, while some of the behaviors which might give rise to a social injustice tort could also bring about criminal prosecution, this overlap is only partial. For example, one could imagine public nuisance wrongs in the environmental context which would not be criminal in nature

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56. Philip, *supra* note 39 at 845 (discussing how the Catholic Church used confidential settlements to silence abuse victims).

57. Harrar, *supra* note 39 (noting that a Google employee accused high-level executive of sexual misconduct). When Google's investigation into the matter concluded that her claim had merit, the executive resigned after confidentiality agreements were signed. *Id.* That executive allegedly was protected over the previous decade after he was accused of sexual misconduct on other occasions. *Id.*

58. Bade, *supra* note 39 (explaining that a former Texas congressman sexually harassed and created a hostile work environment towards his communications director). Both parties ultimately reached a private settlement, and the congressman used taxpayer funds for the settlement totaling $84,000, which also included a confidentiality agreement. *Id.*

59. Olivia Carville, *Airbnb Is Spending Millions of Dollars To Make Nightmares Go Away*, BLOOMBERG (June 15, 2021, 1:00 AM), https://www.bloomberg.com/news/features/2021-06-15/airbnb-spends-millions-making-nightmares-at-live-anywhere-rentals-go-away [https://perma.cc/USU3-9FH5] (discussing Airbnb's policy of handling sexual assault cases through its "black box" team and having complainants sign non-disclosures).

60. Although these sources do provide helpful background information, they are anecdotal in nature. The most promising data deals with a Maryland state law, "Disclosing Sexual Harassment in the Workplace Act of 2018," which requires Maryland employers with fifty or more employees to submit survey answers to the Maryland Commission on Civil Rights. H.B. 1596, 438th Gen. Assemb., Reg. Sess. (Md. 2018) (codified as amended at MD. CODE ANN., LAB. & EMPL. § 3-715 (West)). In relevant part, one of the survey questions asks how many settlements an employer made after allegations of sexual harassment that included a provision requiring both parties to keep the terms of the settlement confidential. STATE OF MD. COMM'N ON C.R., EXECUTIVE SUMMARY – SEXUAL HARASSMENT IN THE WORKPLACE DISCLOSURE SURVEY, REPORTING PERIOD: JUL. 1, 2020 TO JULY 1, 2022, https://mccr.maryland.gov/Pictures/Sexual%20Harassment%20Disclosure%20Survey%20-%20Transmittal%20%26%20Executive%20Summary%20(2022)%20(1).pdf [https://perma.cc/54P3-2LCE]. Of the 368 responses, sixteen employers responded that they made one settlement of that kind and two employers answered that they made two such settlements. Three hundred fifty employers answered that they settled zero cases requiring both parties to keep the terms of the agreement confidential. *Id.*

61. Nor will most cases of property torts such as trespass to land or conversion. For example, taking another person's sandwich and consuming it.

but might meet the definition of a social injustice tort. Similarly, not all forms of sexual misconduct are criminalized, but such behavior might still be the subject of a social injustice tort. As such, social injustice tort claims can be thought of as lying in a grey area between private and public wrongs.[62] Within this grey area, as explained below, there is room for restricting individual litigants' freedom to contract confidentially to remove issues from the public domain. A key issue in identifying a social injustice tort is thus articulating the public importance of information produced through litigation of a given tort claim.

III. THEORETICAL AND PRACTICAL UNDERPINNINGS OF CONFIDENTIAL SETTLEMENTS

The preceding Part has shown the renewed public attention to the lack of accountability for cases of sexual and police misconduct, many of which have been settled confidentially. Nevertheless, most of the focus in the literature so far has been either on contract law and the use of the public policy doctrine to deny enforcement of such agreements,[63] on confidentiality in mandatory

62. A fuller discussion of the definition and scope of social injustice torts exceeds the scope of this Article and is best left for future work.

63. *See* David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 214 (2019) (arguing courts should not enforce hush contracts violating public policy); Maureen A. Weston, *Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 507, 529 (2021) (stating courts may strike confidentiality provisions in contracts if found to be in violation of public policy); E. M. Bauer, *A Conflict of Two Freedoms: The Freedom of Information Act Disclosure of Confidential Settlements in the #MeToo Era*, 58 SAN DIEGO L. REV. 209, 236–38 (2021) (discussing public policy considerations behind confidential settlements, stating courts may not enforce provisions of contract violating public policy); Sidney W. DeLong, *Paradigm Shift: #MeToo and the Paradox of Secrets Bribery*, 52 U. PAC. L. REV. 7, 19 (2020) (suggesting public limitations on NDAs should be developed); *NDAs Silence Sexual Assault Victims and Protect Predators*, MANLY STEWART FINALDI LAWS. (Oct. 17, 2021), https://www.manlystewart.com/ndas-silence-sexual-assault-victims-and-protect-predators/ [https://perma.cc/HA6G-95DK] (providing courts may not enforce sexual misconduct NDAs based on public policy grounds); Picton v. Anderson Union High Sch. Dist., 57 Cal. Rptr. 2d 829, 833–34 (Cal. Ct. App. 1988) (holding NDA between former teacher and school district unenforceable as violating public policy, based largely on school district's legal duty to inform teacher credentialing authority). Picton was a high school teacher accused of sexual misconduct with students. 57 Cal. Rptr. 2d at 831. He later resigned and his settlement with the school district included an NDA. *Id.* Picton sued the district after they released information about his charges to the state's teacher credentialing authority. *Id.* at 831–32. *See also* Sanchez v. Cnty. of San Bernardino, 98 Cal. Rptr. 3d 96, 97 (Cal. Ct. App. 2009) (finding NDA between county-employee and county enforceable, citing California courts' reluctance to declare confidentiality provisions void without legislative direction). The issue stemmed from an extramarital affair between two county employees. *Id.* at 99. One of the employees resigned and confidentially settled with the county, however, the county later released news of the affair and suit was brought. *Id.* at 100–01.

arbitration,[64] and on constitutional, primarily First Amendment, aspects of the debate.[65] This Part seeks to address an overlooked aspect of the discussion on confidential settlements: a tort theory perspective. To begin this analysis, this Part discusses, first, the goals of tort law as we know them. Second, it addresses the relationship between these stated goals and the current reality of settlements—often confidential ones—being the default in most civil cases.

A. The Goals of Tort Law

Scholars have articulated many different aims to tort law, including to deter behavior considered harmful, to offer a mechanism for remedying wrongs, to allocate injury costs, and to provide compensation to injured individuals.[66] Traditional accounts of tort law tended to focus on its result-oriented objectives. In particular, the divide regarding the primary goal of torts is typically between deterrence—creating incentives for desirable

64. *See* Weston, *supra* note 63, at 522–27 (discussing instances of backlash against companies for use of forced arbitration in sexual misconduct claims, concluding arbitration and confidential settlements serve to conceal sexual misconduct); *see also* Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to #MeToo*, 54 HARV. C.R.-C.L. L. REV. 155, 183–86 (2019) (contending forced arbitration makes it more difficult for employees to file claims against employers); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 681 (2018) (stating that imposing obligations on employees to arbitrate rather than litigate allows employers to maintain secrecy over misconduct allegations). Importantly, in March 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which voids pre-dispute arbitration clauses in cases involving sexual misconduct allegations. *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (codified as amended in scattered sections of 9 U.S.C.).

65. *See* Overbey v. Mayor of Baltimore, 930 F.3d 215, 222 (4th Cir. 2019) (holding non-disparagement clause in police brutality settlement agreement void and unenforceable as waiver of First Amendment rights, contrary to public interests); *see also* Abigail Stephens, *Contracting Away the First Amendment?: When Courts Should Intervene in Nondisclosure Agreements*, 28 WM. & MARY BILL RTS. J. 541, 567 (2019) (discussing need for courts to intervene in private non-disclosure agreements regarding sexual misconduct and other cases to protect First Amendment rights); Wilson R. Huhn, *The Trump/Clifford Non-Disclosure Agreement: Violation of Public Policy and the First Amendment*, JURIS MAG. (May 13, 2018) https://sites.law.duq.edu/juris/2018/05/13/the-trump-clifford-non-disclosure-agreement-violation-of-public-policy-and-the-first-amendment/ [https://perma.cc/2HJX-NS8Y] (outlining how constitutional law and contract law might be invoked to render agreement between Stephanie Clifford and Donald Trump invalid).

66. For a useful summary of the various objectives of tort law, see JENNIFER K. ROBBENNOLT & VALERIE P. HANS, THE PSYCHOLOGY OF TORT LAW 2–5 (2016). For an analysis of alternative compensation regimes outside the tort model, see Elizabeth Rolph, *Framing the Compensation Inquiry*, 13 CARDOZO L. REV. 2011, 2014–21 (1992).

behavior and disincentives for unacceptable behavior[67]—on the one hand, and corrective justice—restoring the moral balance between parties and communicating a message about the wrong—on the other hand.

While these traditional objectives focus on the outcomes of tort litigation,[68] they largely ignore procedural, process-related considerations.[69] For example, civil recourse theory distinguishes corrective justice, which emphasizes restoring the balance between victim and wrongdoer, from the more process-oriented idea that tort law is a vehicle for civil recourse: "In permitting and empowering plaintiffs to act against those who have wronged them, the state is . . . relying on the principle that plaintiffs who have been wronged are entitled to some avenue of civil recourse against the tortfeasor . . . ."[70] Civil recourse theorists thus posit that corrective justice views fail to consider tort law's inherently relational nature.

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67. Under an economic model focused on deterrence, tort liability aims to minimize the combined cost of accidents and accident prevention by forcing actors to take into account the consequences of their decisions to act or not to act, through requiring them to pay compensation to injured victims. *See generally* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 189–90 (6th ed. 2012); GUIDO CALABRESI, THE COST OF ACCIDENTS 293 (1970); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 31 (1972); STEVEN SHAVELL, THE ECONOMIC ANALYSIS OF ACCIDENT LAW 5–6 (1989); Howard A. Latin, *Problem Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677, 678 (1985).

68. *See* Dale T. Miller, *The Norm of Self-interest*, 54 AM. PSYCH. 1053, 1055 (1999); Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. SOC. 171, 181 (2005) (discussing the tendency of mass media and the legal literature to perpetuate the view that monetary outcomes drive legal behavior, judgments, and evaluations of the legal system).

69. MacCoun, *supra* note 68, at 182. For a review of the extensive social-psychological research on distributive justice, see Karen A. Hegtvedt & Karen S. Cook, *Distributive Justice: Recent Theoretical Developments and Applications*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 108 (Joseph Sanders & Lee Hamilton eds., 2000). *See also* MORTON DEUTSCH, DISTRIBUTIVE JUSTICE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE (1985).

70. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 699 (2003); *see also* John C. P. Goldberg & Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 1 (1998); Jason M. Solomon, *Equal Accountability through Tort Law*, 103 NW. U. L. REV. 1765, 1777 (2009) (explaining that the theory seeks to strengthen the explanatory power of corrective justice theory while retaining its notion that tort law was a matter of "private wrongs"). Relatedly, Matthew Shapiro labels his version of this argument "dignity-as-status," noting that "the procedures of civil litigation allow individual plaintiffs to realize one aspect of their dignity by empowering them to call those who have allegedly wronged them." *See* Shapiro, *supra* note 9, at 501. However, according to Shapiro, "civil litigation can also undermine another aspect of plaintiffs' dignity [. . .] by requiring them to divulge sensitive personal information and thus to cede control over their public self-presentation." *Id.*

The claiming process also helps to reveal and transmit information about risks and harms.[71] An aspiration to uncover information about what happened often underlies plaintiffs' decision to bring a tort action.[72] As Alexandra Lahav notes, "the process of litigation can combine the facts and the law to produce narratives and explanations of past events, frameworks for addressing hurtful events that are ongoing, and opportunities for healing. Even when these narratives are not fully satisfactory, [. . .], they help participants come to terms with the past."[73] Further, as scholars of procedural justice explain, the tort system provides a forum in which plaintiffs and defendants can share their stories—that is, have their "day in court."[74] Relatedly, tort lawsuits provide parties with an official governmental

71. *See generally* Wendy Wagner, *When All Else Fails: Regulatory Risky Products through Tort Litigation*, 95 GEO. L.J. 693, 717–19 (2007) (discussing the information forcing function of tort litigation in the context of products liability); Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 WAKE FOREST L. REV. 293, 328 (2018) (discussing similar roles for the tort system in auto accidents); Elizabeth Chamblee Burch & Alexandra D. Lahav, *Information for the Common Good in Mass Torts*, 70 DEPAUL L. REV. 345, 352 (2021) (delineating the information forcing function of mass torts, treating information unearthed in such litigation as a "common good").

72. *See, e.g.*, Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1609 (1994); Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse*: *Experiences with the 9/11 Victim Compensation Fund*, 42 L. & SOC. REV. 645, 649 (2008).

73. Lahav, *supra* note 9, at 1683–84. For other functions of court-enabled transparency, see Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 844–45 (2012); Gillian K. Hadfield & Dan Ryan, *Democracy, Courts and the Information Order*, 54 EUR. J. SOC. 67, 70 (2013); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 849 (2001) (arguing that there are reasons to expect that awarding constitutional tort damage awards against individual officers or their municipal employers will have a deterrent effect on governmental actors and entities).

74. Tyler, Lind and their colleagues showed that decision-making procedures, including civil litigation, not only deliver outcomes; they also convey information about our relationship with the group and its authorities. Tom R. Tyler & E. Allan Lind, *Procedural Justice*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 7 (Joseph Sanders & Lee Hamilton eds., 2000). Individuals are especially attuned to the procedure's neutrality, third parties' trustworthiness, and signals of social standing, such as having a voice in the process. *See id.*; E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 230, 251 (1988).

recognition,[75] as well as with the opportunity to stand on equal footing with injurers,[76] even if they end up losing their case.

These various aims[77] also highlight the mixture of private and public orientations which characterizes torts. While tort law has traditionally focused on relationships between individuals,[78] its capacity to impact the public sphere, including in effecting social change[79] and catalyzing regulatory action,[80] has now been well documented. A tort action is often part of a broader political campaign, aimed at raising awareness of an issue and

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75. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 606 (2005) (noting that the fact that a plaintiff can assert her claim and require both a government official and the person who has wronged her to respond is a significant form of recognition of her dignity and autonomy). In a similar vein, in explaining the key roles of litigation, including recognition, Lahav relies on Hannah Arendt's "right to have rights"—the ability to assert that one is entitled to respect as a moral agent, a foundational form of recognition from the state. Lahav, *supra* note 9, at 112–13.

76. *See* Jason M. Solomon, *What is Civil Justice*, 44 LOY. L.A. L. REV. 317, 336 (2010) (relating the civil recourse aspects of tort law to concepts of democratic equality). In the words of Attorney Rhon Jones, a lawyer representing claimants eschewing the Gulf Coast Claims Facility following the Deepwater Horizon oil spill: "There's only one place where a waitress or a shrimper can be on equal footing with a company the size of BP, and that's a courtroom." Debbie Elliot, *BP's Oil Slick Set to Spill into Courtroom*, NPR MORNING EDITION, Feb. 16, 2012, https://www.npr.org/2012/02/16/146938630/bps-oil-slick-set-to-spill-into-courtroom [https://perma.cc/5YPK-9QTS].

77. For a discussion of these and other benefits of the tort system, including the tort system's role as a public space for society to debate how tort obligations should be defined, see Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 74 (2010); John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 515 (2003).

78. Goldberg, *supra* note 77, at 516–20 (discussing the traditional account of tort law which described tort actions as personal to the victims, and money damages as personal redress to victims).

79. *See, e.g.*, TSACHI KERE-PAZ, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE 1–4 (2007) (arguing, from a normative perspective, for the incorporation of an egalitarian sensitivity into tort law and private law more generally); Yifat Bitton, נשים ונזיקין: בין הפליה להשעייה: מחשבות בעקבות ת א (בית-שמש) 41269-02-13 פיליף נ אבוטבול הארת פסיקה 41 [*Women and Torts: Between Discrimination and Suspension: Thoughts Following CC (Bet-Shemesh) 41269-02-13 Phillip vs. Abutbul*], 41 MIVZAK HE'ARAT PSIKA 4, 5–10 (2015) (Hebrew) (discussing the benefits, and complexities, of using torts as a vehicle to achieve social change). As John Goldberg explains, social justice theory "conceive[s] of tort as a device for rectifying imbalances in political power," which "corrects for pathologies of interest-group politics." Goldberg, *supra* note 77, at 560. "By arming citizens with the power to sue corporations" and other powerful actors "for misconduct outside of the legislative and regulatory process," tort law permits judges and juries to hold such actors accountable. *Id.*; *see also* THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 9 (2001); Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 556 (1999) (arguing that judges better represent the interests of the people than legislatures and regulators).

80. *See generally* Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285 (2021) (discussing this role in the context of the opioid and tobacco litigation).

prompting action by policymakers.[81] This argument applies, perhaps with greater force, to social injustice torts such as actions brought in response to sexual harassment and police brutality.[82] In such cases, which often involve fundamental rights, deterrence may induce organizations and government entities to change their practices.[83]

Focusing on the plaintiff's side, tort claimants may seek many different types of justice, either outcome- or process-oriented. Apart from procedural justice, which as noted is related to the fairness of the process itself, claimants may resist settlements that they perceive as unfair for distributive reasons.[84] They may also be concerned with reestablishing justice between the parties or within society, seeking to punish the other side and make sure they receive their just deserts as part of retributive justice.[85] And some may be interested in an apology, which can provide information and accountability, signal the other side's willingness to change their behavior, and temper negative emotions and revenge impulses.[86] As Hans and Robbennolt observe, and as

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81. PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 151–52 (1997).

82. *See generally* Peter A. Joy & Kevin C. McMunigal, *The Ethics of Buying Silence*, AM. BAR ASS'N (Oct. 20, 2021), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2021/fall/ethics-buying-silence/ [https://perma.cc/9GQW-4ZEE] (arguing use of NDAs in sexual misconduct context creates additional disincentives for victims to report and disclose misconduct against them).

83. For justifications for using torts to promote social justice, see, e.g., Gregory Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 194 (2000); Tsachi Keren-Paz, *An Inquiry into the Merits of Redistribution Through Tort Law: Rejecting the Claim of Randomness*, 16 CAN. J. L. JURIS. 91, 92 (2003). This might be done, among other reasons, to avoid paying revenues as damages to individuals. *See* Bitton, *supra* note 79, at 7–8. Social justice theory has also been criticized, both for its lack of descriptive power and for treating the political process as systematically skewed against plaintiffs. *See* Goldberg, *supra* note 77, at 562. Moreover, P.S. Atiyah in his critique of English tort law notes that, though the tort lawsuit is ostensibly conducted between a particular plaintiff and defendant, in practice the public pays for the damages (through insurance premiums or taxes, depending on the defendant), and plaintiffs are "in effect jumping the queue" by determining which topics are given political salience. P. S. ATIYAH, THE DAMAGES LOTTERY 171, 114–16 (1997).

84. ROBBENNOLT & HANS, *supra* note 66, at 19–20.

85. *See, e.g.*, Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 295 (2002); Dale T. Miller & Neil Vidmar, *The Social Psychology of Punishment Reactions, in* THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR: ADAPTING TO TIMES OF SCARCITY AND CHANGE 145, 146 (Melvin J. Lerner & Sally C. Lerner eds., 1981).

86. Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 463 (2003) [hereinafter Robbennolt, *Apologies and Legal Settlement*]; Kathleen M. Mazor et al., *Health Plan Members' Views About Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409–418 (2004); Jennifer K. Robbennolt, *Apologies and Settlement*

highlighted in the context of settlements, tort claimants' goals are often intertwined and even contradictory: "Claimants may want both information and reform. They may need compensation, but wish for public accountability. A claimant's request for an apology may be tied to the search for an explanation for what happened, a desire to be treated with respect, and the hope that the offense will not be repeated."[87] Importantly for our discussion here, claimants may sometimes abandon one or more of these goals to achieve another, to secure a faster resolution, or for another administrative reason.[88]

A final goal of tort law merits attention; its expressive function. What exactly does the expressive function of tort law mean and how does it differ from criminal condemnation? The idea that criminal punishment carries a message of condemnation is widely accepted, distinguishing it from other sorts of penalties or burdens.[89] In contrast, tort law generally does not express condemnation, except when punitive damages are in play. As Scott Hershovitz notes, "if tort liability carries a message, it cannot consist in the condemnation of all those subject to it."[90] In that sense, tort law is an expressive institution which sends different messages than the messages conveyed by criminal law.[91] Nonetheless, tort law does communicate a message: "The defendant wronged the plaintiff."[92] While some may argue that the key role of torts is in the practical implications—the remedies—that follow from the declaration that the defendant wronged the plaintiff,[93]

Levers, 3 J. EMPIRICAL LEGAL STUD. 333, 340 (2006) [hereinafter Robbennolt, *Apologies and Settlement Levers*]; Jennifer K. Robbennolt, *The Effects of Negotiated and Delegated Apologies in Settlement Negotiation*, 37 LAW & HUM. BEHAV. 128, 131 (2013) [hereinafter Robbennolt, *Negotiated and Delegated Apologies*]. As Robbennolt points out, while attorneys perceive apologies in ways that are similar to claimants, they are more influenced by the evidentiary value of the apology, seeing it as an admission of liability. Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 375 (2008) [hereinafter Robbennolt, *Settlement Negotiation*].

87. ROBBENNOLT & HANS, *supra* note 66, at 20; *see, e.g.*, Robbennolt, *Apologies and Legal Settlement*, *supra* note 86, at 510–11 n.237; Robbennolt, *Apologies and Settlement Levers, supra* note 86, at 334–35.

88. ROBBENNOLT & HANS, *supra* note 66, at 10–13.

89. *See generally* Joel Feinberg, *The Expressive Function of Punishment*, *in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 118 (1970).

90. Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, J. TORT L. 1, 2 (2017).

91. *See* Jean Thomas, *Which Interests Should Torts Protect?*, 61 BUFF. L. REV. 1, 1 (2013) (discussing the wrongs that tort protects against, which are related to the expressive significance of tort law).

92. Hershovitz, *supra* note 90, at 2. On the idea that torts are wrongs, see John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

93. As Hershovitz observes:

Hershovitz insists that this expressive function is actually tort law's primary aim.[94]

But what precisely do courts mean when they declare that a defendant has wronged the plaintiff? And why does such a declaration matter? Wrongs have different meanings. As Hershovitz notes, in common language, when discussing whether someone did something wrong, we often think about blameworthiness or an assessment of the wrongdoer's conduct.[95] However, tort law is concerned with the plaintiff's rights, not with the character manifested in the defendant's conduct.[96] Thus, when declaring the defendant has wronged the plaintiff, courts do not aim to condemn the defendant but rather to vindicate the victim.[97]

This notion of courts' role in tort actions ties back to one of tort law's key traditional aims: corrective justice.[98] It is a view of corrective justice which

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> This view is common among those interested in the economics of tort, but it pops up in justice and fairness-oriented accounts as well. In his early work, Jules Coleman argued that justice requires annulling wrongfully caused losses, a task which a no-fault insurance scheme might achieve at least as well or better than tort. *See* Jules L. Coleman, *Justice and the Argument for No-Fault*, 3 SOC. THEORY & PRAC. 161, 173–78 (1974). Jeremy Waldron has suggested that we follow New Zealand and adopt an administrative compensation scheme for accidents, on the ground that victims come out just as well or better than they do in tort, while wrongdoers are protected against the risk of massive loss. *See* Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387–408 (David G. Owen ed., 1995). But, as Hershovitz observes, even among those who think that justice requires linking wrongdoers to their victims through an institution like tort, the reason given is rarely that tort has something to say about them. Hershovitz, *supra* note 90, at 4. Rather, the idea is that tort has a task to do, like seeing to it that the wrongdoer restores his victim to her rightful position, or that the victim's wrongful losses are offset with the wrongdoer's wrongful gains. For examples of such views, see JULES L. COLEMAN, RISKS AND WRONGS 1 (1992); ERNEST WEINRIB, THE IDEA OF PRIVATE LAW 1 (rev. ed. 2012); and John Gardner, *What is Tort Law For? Part 1. The Place of Corrective Justice*, 30 LAW & PHIL. 1 (2011).

Hershovitz, *supra* note 90, at 4 n.8

94. Hershovitz, *supra* note 90, at 31, 33 (noting importance of the expressive function of tort law).

95. *Id.* at 33 (explaining how people generally evaluate "wrong" actions).

96. This approach is reflected in tort law's view of excuses, which manifests itself in the objective standard of care (that is, plaintiff has a right not to be injured by defendant's failure to take ordinary care; the defendant may well have a good excuse for that failure, but tort law will not hear it). *Id.* at 33–36. For a thorough exploration of the role of excuses in tort, see generally John C.P. Goldberg, *Inexcusable Wrongs*, 103 CAL. L. REV. 467 (2015).

97. Hershovitz, *supra* note 90, at 34.

98. Corrective justice requires that we vindicate the social standing of victims, but it does not require that we condemn the wrongdoers, which is the domain of retributivism. *Id.* at 40.

does not focus on a defendant's duty to repair the plaintiff's injury, or "restore the plaintiff, insofar as possible, to the position the plaintiff would have been in had the wrong not been committed."[99] Rather, it highlights tort's ability to do justice "by saying, clearly and loudly, *this defendant wronged that plaintiff*."[100] As discussed below, for this aspect of corrective justice which requires the court's role, settlements are not an easy fit.

B. The Reality of Confidential Settlements

To what extent can the various goals of tort law, including the expressive function on the one hand and deterrence on the other, be reconciled with the reality of settlements, many of which are conducted under a veil of secrecy?

This question is far from purely theoretical. As noted, over the last several decades, settlements and alternative dispute resolution methods have become the overwhelming norm in the resolution of civil disputes, including tort claims. Given the prevalence of settlements on the one hand, and the trend of sunshine laws aiming to restrict parties' capacity to enter into confidential settlements on the other, the timing could not be riper for addressing this question.

As a preliminary notion, if tort law is a matter of private justice rather than a public good, settlements should not be precluded. According to John Goldberg, "tort law's distinctiveness resides in conferring on individuals (and entities) a power to pursue a legal claim alleging that she (or it) has suffered an injury flowing from a legal wrong to her by another. How that claim is pursued and resolved [—through a trial or through settlement—] is a matter for the victim to decide."[101] Furthermore, even though juries and judges apply

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However, the distinction between retributive and corrective justice is rarely so neat. Just as tort law is not purely corrective, especially given punitive damages' capacity to communicate condemnation, criminal law is not purely retributive. *Id.* at 41. In particular, punishing a defendant for a wrong that had a victim affirms that the victim was, in fact, wronged. *Id.* For example, if we fail to punish a sexual wrongdoer, we send a message about the victim and how seriously we take the offense against her, thus denying the victim a form of corrective justice. In this context, Hershovitz argues that "in some cases, we have to seek retributive justice in order to do corrective justice." *Id.*

99. Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L. J. 277, 286 (1994). According to Weinrib, when a court cannot award the very thing that was taken, destroyed, or denied, it can award a monetary equivalent instead, thus preserving "continuity of right and remedy." ERNEST WEINRIB, CORRECTIVE JUSTICE 94 (2012). However, in some situations there is no monetary equivalent for what the plaintiff has lost. *See generally* Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L. J. 56, 67–68 (1993).

100. Hershovitz, *supra* note 90, at 39.

101. John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L. J. 524, 605 (2005).

tort doctrine to resolve only a subset of cases as relatively few cases go to trial, judicial resolutions cast a long shadow over the tort litigation process, influencing what cases are brought, whether and how cases are defended, and how disputants and their lawyers settle cases.[102]

In this Section, I examine the arguments regarding confidential settlements through the lens of the goals of tort law as described above. I argue, first, that the widespread nature of confidential settlements does not align with torts' expressive function, particularly the expressive function of social injustice torts which bear broader societal implications. Second, I argue that systematically settling cases of social injustice torts creates negative externalities incompatible with a deterrence-focused view of torts.

1. Confidential Settlements and the Expressive Function of Torts

How does the expressive function of tort law—which, as explained above, is fulfilled through courts' declaration that a defendant wronged a plaintiff—play out in the context of settlement of tort lawsuits, and particularly confidential settlements? Even if we consider the expressive function of tort law to be its primary goal, this does not necessarily preclude the possibility of settlement. As Scott Hershovitz explains: "the very possibility of settlement depends on the expectation that courts would speak up for the rights of tort victims if called upon to do so. And that means that the messages that courts send matter, even to people who settle their disputes long before they reach the courthouse steps."[103] In this sense, Hershovitz agrees with Goldberg that it is eventually up to the victim to decide whether and how to vindicate a tort.[104]

However, a court's role in publicly declaring and clarifying the rights of tort victims is vital under the expressive function. This is where confidential settlements threaten to endanger the very premises on which tort law is built. According to Hershovitz, the reason lies in the relationship between a

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102. *See* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 233 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 973 (1979); Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements,* 95 CORNELL L. REV. 957, 974–75 (2010). In this context, recent work reveals that, despite common models of settlement as a cost-benefit analysis not necessarily tied to responsibility, lay people tend to attribute responsibility to settling defendants. *See* Jessica Bregant et al., *Perceptions of Settlement*, 27 HARV. NEGOT. L. REV. 93, 96 (2021).

103. Hershovitz, *supra* note 90, at 33.

104. *Id.* at 32 ("The holder of a right ought to be able to decide how far—and in what forum—she will press it. Otherwise, there is an important sense in which it is not her right.") (emphasis omitted).

wrongdoing and a victim's social standing. Hershovitz posits that a wrongdoing is manifested in a threat to an individual's perceived social standing.[105] Similarly, according to Pamela Hieronymi, a victim's social standing is so inherently valuable that any attempt to diminish it must be corrected: "[A] past wrong against you, standing in your history without apology, atonement, retribution, punishment, restitution, condemnation, or anything else that might recognize it as a wrong, makes a claim. It says, in effect, that you can be treated this way, and that such treatment is acceptable."[106] Thus, public disclosure of the wrongdoing supports the system tort law has in place to correct such wrongdoing. Through declaring certain conduct such as battery as wrong, tort law sends messages about moral conduct.[107] Such declaration, I argue, is particularly crucial in social injustice torts, which inherently involve the interests of third parties.

2. Confidential Settlements and Other Accounts of Torts

But confidential settlements present a significant challenge, even for those who do not subscribe to the expressive function of torts, but rather focus on a deterrence-based account. Confidential settlements are objectionable from a deterrence perspective particularly when it comes to social injustice torts, given the public importance of litigation-produced information in such cases.[108] As David Luban observes:

> The sticking point with settlements is not truth but openness. Parties consummate settlements out of public view. The facts on which they are based remain unknown, their responsiveness to third parties who they may affect is at best

105. *Id.* at 10; *see also* MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 9–10 (2007) (arguing that individuals each have social power and standing in society, and an inflicted wrongdoing reduces one's social power from active to passive).

106. Pamela Hieronymi, *Articulating an Uncompromising Forgiveness*, 62 PHIL. & PHENOMENOLOGICAL RES. 529, 546 (2001).

107. Hershovitz, *supra* note 90, at 22. However, as Hershovitz notes, the expressive function of torts also relates to the parties themselves, and in this sense it is not limited by the confidentiality of the settlement. *Id.* at 32 ("What about settlement? . . . Most cases settle long before that and the details of the settlement are often kept confidential. This limits the role that tort can play in vindicating the victim's social standing. And if I am right to think the expressive function of tort law important, this is yet one more reason to worry about the frequency of settlement in civil litigation. But confidential settlements can nevertheless serve an expressive function. There are, after all, many audiences for a tort suit, and the plaintiff and defendant are among the most important.")

108. Ross E. Cheit, *Tort Litigation, Transparency, and the Public Interest*, 13 ROGER WILLIAMS U.L. REV. 232, 235 (2008).

> dubious, and the goods they create are privatized and not public. Settlements are opaque.[109]

Luban describes two key arguments against confidentiality: the *other-litigants* argument and the *public warning/debate* argument.[110] Applying his broader arguments about secrecy to the specific issue of confidential settlements, *the other-litigants argument* holds that other litigants have a legitimate interest in settlement information. Settlement information—like discovery material—is a form of "public good, which is "purchased" by one litigant and should be made available for other litigants to avoid unnecessary multiplication of expense."[111] But settlement information can also be of great public importance because "it informs public deliberation about an issue of substantial political significance,"[112] which echoes Luban's *public debate argument*. A confidential settlement sometimes allows the plaintiff to receive compensation and the defendant to retain secrecy, all the while perpetuating public hazards or social problems.[113] The two parties settle their case by passing on costs to third parties not at the table.[114] The other-litigants argument and the public debate argument are thus versions of the instrumental arguments against settlements as applied in the context of

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109. Luban, *supra* note 1, at 2648. This observation also relates to the information forcing function of tort law. As Wendy Wagner notes in the context of consumer and health protection, the tort system may allow the general public to gain easier access to information more relevant to evaluating the costs and benefits of regulating a risky product than the regulatory process. Wagner, *supra* note 71, at 717–20. Indeed, the publicity principle lies at the core of democratic political morality. *See* David Luban, *The Publicity Principle*, *in* THEORIES OF INSTITUTIONAL DESIGN 154 (Robert Goodin & H. Geoffrey Brennan eds., 1996). Per Luban, although the publicity principle has exceptions because political morality cannot dispense with all forms of secrecy and confidentiality, awarding officials the discretion to keep secrets or grant confidentiality is itself a policy that should be able to withstand public scrutiny. Luban, *supra* note 1, at 2648.

110. Luban, *supra* note 1, at 2653. Though Luban's arguments are made in the context of discovery material, they apply just as forcefully to settlement information.

111. *Id.* This argument was articulated by Judge H. Lee Sarokin in the *Cipollone* cigarette products liability litigation. In that case, the judge lifted a federal magistrate's protective order on discovery material that would have forced all other plaintiffs in cigarette cases to respect the discovery. Cipollone v. Liggett Group, Inc., 106 F.R.D. 573, 577 (D.N.J. 1985). According to Judge Sarokin: "To require that each and every plaintiff go through the identical, long and expensive process would be ludicrous . . . . There can be no justification for defendants' position other than to discourage other claimants and deprive them of evidence already known and produced to others similarly situated." *Id.*

112. Luban, *supra* note 1, at 2653.

113. *See generally* Joy & McMunigal, *supra* note 82 (referencing potential tension between sexual misconduct victims' interests in signing NDAs and greater public's interest in learning of such misconduct).

114. *See generally id.* (referring to potential third-party effects that may arise from use of NDAs in sexual misconduct cases).

sunshine regimes.[115] Both these arguments emphasize that the goals of deterrence and creating optimal incentives cannot be accomplished if most tort lawsuits are settled confidentially.

Of course, there are both theoretical and practical reasons which may justify a confidentiality regime, at least in some cases. First, some argue that non-disclosure agreements attached to settlements are needed to allow victims to recover.[116] According to this argument, settlement often can only occur if the parties agree to hold its terms (and very existence) silent. Because compromise can be the only practical recourse for private parties, making nondisclosure clauses enforceable may be necessary to remedy harms.[117] Relatedly, some argue that the secrecy of a settlement can be of great value to an organization and should that benefit be removed from the negotiation, settlement may become less attractive from that organization's perspective.[118] In extreme instances, an organization's inability to negotiate for secrecy may result in the decision not to offer a settlement at all, rendering trial as the only avenue for victims to seek recourse.[119] This argument is particularly pronounced when it comes to weak plaintiffs. Luban observes:

> [S]ecret settlements may be the only way that a weak plaintiff who has suffered serious harm can obtain compensation. If judges make secrecy agreements unenforceable, a weak

115. In the context of the public debate argument, Judge Sarokin noted: "It would be difficult to envision a case involving a greater or more widespread interest. Other than food and water, there is probably no substance more utilized than tobacco. Its use affects hundreds of millions of people throughout the world. . . . Plaintiffs contend that the discovery in this matter reveals the knowledge of the tobacco industry regarding the effects of smoking, the steps taken to conceal and offset that knowledge, the efforts to enlist the aid of legislators and the medical profession to support the industry and mislead the public, and an alleged conspiracy of silence and chicanery within the industry itself. The court makes no finding at this juncture as to the validity of any of those charges, but it cannot be a party to their suppression if they are true." *Cipollone*, 106 F.R.D. at 576–77.

116. *See* Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 314 (2018) (recommending that the facts of settlement, but not the amount, might in extraordinary circumstances be made public); *see also* Ian Ayres, Essay, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 78–79 (2018) (arguing NDAs should be enforceable only if they meet certain formalities).

117. *See, e.g.*, Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 959, 1009 (1988) (discussing the importance of confidentiality agreements as a negotiating tool); Hoffman & Lampmann, *supra* note 63, at 169.

118. Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 267 (2018) (noting this argument in the context of sexual harassment NDAs); *see also* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 878 (2007) (arguing that confidentiality of settlements makes defendants more likely to settle due to "liability costs of lawsuits" which can include both monetary costs and reputational harms).

119. Tippett, *supra* note 118, at 266 n.211; Brazil, *supra* note 117, at 1009.

> plaintiff may not receive a serious settlement offer and the case goes to trial. Since plaintiffs can demand a generous settlement in return for secrecy, and trials are expensive, banning secret settlements may cost plaintiffs money.[120]

Relatedly, Arthur Miller famously made the freedom of contract point: that enforcing confidential settlements respects the private wishes of the parties involved, without impeding the efficient resolution of disputes by the courts.[121] According to Miller, confidentiality protects both parties from vexatious claims: plaintiffs are not harassed by long-lost relatives, and defendants are shielded from claimants with meritless actions, looking for a deep pocket.[122] For Miller, NDAs thus represent a mutually beneficial pay-for-silence deal that facilitates settlement, serves judicial economy and prevents frivolous copycat lawsuits. Furthermore, Miller argues that settlement should trump the desirability of disclosure because "[o]ur civil justice system could not bear the increased burden that would accompany reducing the frequency of settlement or delaying the stage in the litigation at which settlement is achieved."[123] Finally, Miller argues that the justice system recognizes a variety of instances—including discovery, settlement negotiations, and jury deliberations—in which the public's interest in knowing the details of a case pale in comparison with the justice system's interest in the resolution of disputes. Since the primary aim "of the judicial system is to resolve private disputes, not to generate information for the

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120. Luban, *supra* note 1, at 2657. However, defendants will still have all the standard incentives for settlement. They may decide that a settlement with no guarantee of confidentiality is a better bet for keeping information out of the headlines than is a public trial. *Id.*

121. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 464 (1991). In this context, Miller and others worry about the possible invasion of privacy and fear that judges might compensate for the loss of privacy by limiting discovery, thereby undermining the purpose of liberal discovery rules. *Id.* at 465; *see also* Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 482–83 (1991) (opposing open records rules).

122. Miller, *supra* note 121, at 485. Similarly, according to Shapiro, public civil litigation can undermine an aspect of plaintiffs' dignity—which he calls "dignity-as-image"—"by requiring them to divulge sensitive personal information and thus to cede control over their public self-presentation." Shapiro, *supra* note 9, at 501. According to Shapiro, secrecy can help to preserve this aspect of plaintiffs' dignity. *Id.*

123. Miller, *supra* note 121, at 486. Luban agrees with Miller with respect to this argument, noting that "a wholesale transformation of settlements into adjudications might be more than the law could bear," but argues that "we should not tolerate *any* practice that increases the number of settlements, or resist *any* reform that turns settlements into adjudications. That would convert 'capitulation to the conditions of mass society' into an unconditional surrender." Luban, *supra* note 1, at 2656 (quoting Fiss, *supra* note 14, at 1075).

public,"[124] we must favor privacy over transparency whenever they are in tension.[125]

In contrast, I argue that even if we accept a view of the tort system which generally focuses on dispute resolution between private parties,[126] there are reasons to object to confidential settlements where the information produced through settlement is of public value, as is the case regarding social injustice torts.[127] In such cases, the negative externalities resulting from settlement should outweigh its benefit to the parties at hand.[128]

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124. Miller, *supra* note 121, at 441; *see also* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984) ("Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes."). Miller acknowledges that in rare instances, some public access to information may be appropriate, but even in those cases, according to his view, there is never a reason to make public the amount of a settlement: "It is difficult to imagine why the general public would have anything more than idle curiosity in the dollar value of a settlement . . . ." Miller, *supra* note 121, at 484–86.

125. Miller, *supra* note 121, at 441; *see also* Marcus, *supra* note 121, at 468–70 ("The starting point is simple—courts exist to resolve disputes that are brought to them by litigants, a bedrock principle that finds expression in the case or controversy requirement of Article III of the Constitution . . . . [C]ourts, like other organs of government, cannot be all things to all people. Certainly, civil litigation has, in some instances, made information available to the public that would not otherwise have been publicly available . . . . But these are basically side effects. The primary purpose for which courts were created, distinguishing them from other organs of government, is to decide cases according to the substantive law. The collateral effects of litigation should not be allowed to supplant this primary purpose.").

126. According to Luban, this debate amounts to which philosophical view of the civil justice system one subscribes to: a view which adheres to a *problem-solving* conception of adjudication (s*ee also* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 790 (1984) (viewing successful negotiation as an effort to move beyond the bargaining positions of parties to their underlying needs in order to craft solutions that respond to the parties' problems, a view of the dispute resolution process which informs her support of ADR as a method to solve the disputants' underlying problems)); or an approach which highlights adjudication's *public-life* function. *See* Owen M. Fiss, *The Supreme Court 1978 Term-Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 1 (1979) ("[C]ourts exist to give meaning to our public values, not to resolve disputes."); RONALD DWORKIN, LAW'S EMPIRE 189–90 (1986) (advancing a similar theory to Fiss's). For a detailed account of each of these views, see generally Luban, *supra* note 1.

127. As Luban notes, "the argument behind sunshine regimes is that they recognize situations in which the public interest in matters relating to health, safety, and the operations of government outweighs the plaintiff's interest in gaining a favorable settlement." Luban, *supra* note 1, at 2657.

128. Indeed, some settlements will break down if secrecy is unavailable. But the other-litigants argument and the public debate/warning argument aim to show that these are settlements that *should* break down. In this context, Nissen compares two cases involving the same basic fact pattern. Robert C. Nissen, *Open Courts Records in Products Liability Litigation Under Texas Rule 76a*, 72 TEX. L. REV. 931, 950 (1991). In *Grundberg v. Upjohn Co.*, 137 F.R.D. 372, 381 (D. Utah 1991), the plaintiff alleged that Halcion caused her to kill her mother. Utah has no sunshine law; the case was settled. *Id.* at 950–51. In *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 543 (Tex. Ct. App. 1994), plaintiff alleged that Halcion caused him to kill his best friend. The case was tried to a jury. *Id.* at 545.

In the context of social injustice torts, then, how should we decide which situations merit a limitation on confidential settlements? To help answer this question, the following Part draws on the moral philosophy discussion regarding victims' duties to resist injustice to articulate a theory of why and when it might be justified to require disclosure from victims of social injustice torts.

IV. CONCEPTUALIZING A DUTY TO DISCLOSE SOCIAL INJUSTICE TORTS

The previous Part has established the need to ensure at least some settlement information—information needed to protect third parties and society more broadly—is public, both from a deterrence and an expressive perspective. But how should we go about ensuring such information does not remain under wraps? As explained below, victims of social injustice torts may be in the best position to report the wrongdoing to which they were subjected. Their victimhood gives them a special social role, one which involves owing a duty to others to warn them about such wrongdoing as an act of solidarity. However, the interests of individual tort victims are not always aligned with those of third parties or the general public. Identifying the existence and scope of victims' disclosure duties regarding settlement information is thus crucial. I argue that tort plaintiffs owe a moral duty of disclosure to others regarding social injustice torts, which mark cases where settlement information is of significant public interest. This duty is derived from a broader view of victimhood, which builds on solidarity between present and future victims to bring about social change. That said, the effect of this disclosure duty should not extend to victims' identifying information. This Part explains the justifications, addresses the potential objections and sketches the confines of such a disclosure duty.

A. Justifications for Victims' Disclosure Duties

Do victims have duties? When discussing victims in this Part, I refer to a definition of the term which encompasses the targets, explicitly or implicitly, of various forms of social injustice:

> Injustice can arise at the hands of the state, for example, through a criminal justice system that persistently targets racial minorities. Or it can be structural, prevailing alongside a reasonably just constitution, laws and public values and without the direct involvement of the state. Everyday norms, seemingly benign institutions, assumptions and stereotypes systematically restrict the meaningful options available to

> individuals. These structures, in which everyone participates, often unwittingly, result in injustice.[129]

According to Ashwini Vasanthakumar, "[p]olitical history . . . reveals victims to be the protagonists in struggles against injustice. And it is widely accepted that victims of injustice have the right to protest their mistreatment."[130] The question is to what extent, and in what sense, victims bear duties as well.

In general, in the criminal context, while there are no affirmative *legal* duties on victims to report crimes,[131] there are certainly a host of participation duties imposed on victims once a criminal process has been initiated, including a duty to testify.[132] Furthermore, some have argued that there are *moral* duties on victims to report crimes as well. Scholars have articulated two main philosophies regarding what reporting duties, if any, victims owe others. The first tend to fall into the category of duties that victims owe to themselves—as Vasanthakumar describes them, *self-regarding* duties.[133] These duties are rooted in the idea that victims have not only the right, but also the duty, "to resist their own oppression."[134] Vasanthakumar draws on the work of Carol Hay who bases these duties in "the duty to respect and protect one's rational nature" and explains that according to Kant's Categorial Imperative, individuals are capable of rationality and should therefore act rationally.[135] In situations of abuse or mistreatment, this logic requires individuals to "respond appropriately" as part of a duty that individuals owe first and foremost to themselves: "Acquiescence as opposed to protest, expresses servility rather than self-respect."[136] Furthermore, the duty to resist

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129. Ashwini Vasanthakumar, *Recent Debates on Victims' Duties to Resist Their Oppression*, 15 PHIL. COMPASS 1, 2 (2020) (citations omitted).

130. *Id.* at 1–2.

131. Sungyong Kang, *In Defense of the "Duty To Report" Crimes*, 86 UMKC L. REV. 361, 361 (2017) (noting that the most common victim duty appears to be reporting the offense committed against them, as failing to report a crime can be perceived as an omission, and yet while 18 U.S.C. § 4 criminalizes the concealment of federal offenses, it does not criminalize the failure to report them).

132. MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS 197 (2009) (noting that "the notion that victims have at least a prima facie duty to testify has been relatively uncontroversial, while academic discussion has focused instead on the justifiability of enforcing that duty through legal mechanisms such as subpoenas, contempt of court, and material witness warrants").

133. Vasanthakumar, *supra* note 129.

134. *Id.*

135. *Id.*

136. *Id.*; *see also* Carol Hay, *The Obligation to Resist Oppression*, 42 J. SOC. PHIL. 21, 21–23 (2011); Thomas E. Hill, *Servility and Self-Respect*, 57 MONIST 87, 87–88 (1973); Bernard R. Boxill, *The Responsibility of the Oppressed To Resist Their Own Oppression*, 41 J. SOC. PHIL. 1, 1 (2010).

can be grounded in victims' duty to their (own) well-being.[137] According to Daniel Silvermint, an individual's well-being requires self-respect and autonomy, and thus individuals must resist oppression in keeping with such values.[138]

Furthermore, by resisting oppression, individuals gain a number of important benefits, including enhancing their self-esteem, protecting their rationality, and developing life skills which would be helpful in future situations. Importantly, individual resistance also fosters solidarity with other victims, which in turn improves an individual victim's well-being.[139] Applying this rationale to tort victims, they can potentially vindicate such self-regarding duties when settling their case confidentially, by asserting their injustice vis-à-vis their wrongdoer. Furthermore, victims' autonomy may actually require leaving reporting the injustice committed against them to their own discretion.[140]

However, the second philosophy behind victims' duties raises what is to me a much stronger argument in the context of confidential settlements, referring to these duties as those that victims may owe to the state, society, and/or others who may be similarly situated. Vasanthakumar calls these *other-regarding* duties.[141] There are two components to the argument that victims have other-regarding duties. First, if victims fail to resist oppression, it may signal larger acceptance of not only their own mistreatment, but the values and structures underlying that mistreatment. As Vasanthakumar explains: "Particularly in cases where oppression is invisible and is perpetuated through seemingly benign institutions and natural social or cultural values, victims' non-resistance normalises oppression, making it

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137. *See generally* Daniel Silvermint, *Resistance and Well-being*, 21 J. POL. PHIL. 405, 417–18 (2013) (arguing that individuals have a duty to their well-being and that in conditions of oppression this duty entails resistance).

138. *Id.*

139. *Id.*; *see also* Vasanthakumar, *supra* note 129, at 3 (noting that "[s]elf-regarding approaches to victims' duties centre on the ways in which resistance is intrinsically an assertion of self-respect and autonomy, and the ways in which it can contingently improve victims' lot, be it by preserving their rational capacities and autonomy or by improving other aspects of their well-being. Where an individual's self-regarding duties call on her to target broader institutions and practices of injustice, then, it does so only insofar as these diminish her autonomy or well-being as an individual.").

140. Leigh Goodmark's work on "autonomy feminism" in the context of domestic violence is informative. *See* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Case*s, 37 FLA. ST. U. L. REV. 1, 1 (2009) (arguing that policy choices, like no-drop prosecution and bans on mediating in domestic violence cases, are marked by their denial of decision-making to women who have been battered, thus infringing on their autonomy).

141. Vasanthakumar, *supra* note 129, at 3.

difficult for other victims or bystanders to even claim that these institutions or social values are in fact oppressive."[142]

The second component of these other-regarding duties relates to epistemic knowledge. This means, Vasanthakumar argues, that because of their special position, victims have knowledge that others do not.[143] In other words, since victims' role gives them the capacity to recognize injustice where others may simply not be able to see it, this role gives rise to special obligations, including the duty to alert others.[144] As Michelle Dempsey notes in the context of domestic violence, "the political community's pursuit of the valuable project of denouncing wrongdoing requires the victim's assistance for, without her providing information (at very least), the community will not know what conduct should be called to account."[145] Under such circumstances, failure to report the injustice allows systemic oppression to persist throughout society. As to the general public, Kimberley Brownlee explains that a victim has a duty to protect all citizens from future offenses if they can do so.[146]

This rationale is especially strong when it comes to structural, societal problems, as is the case with social injustice torts. As Eric Miller notes in the context of police wrongdoing:

> [T]his feature of calling out or challenging wrongdoing is a feature of a victim's social role, one that makes a victim's role morally significant and distinctive. Wrongdoing places the victim in a relationship of subordination with the wrongdoer. In response, the victim is paradoxically burdened with and

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142. *Id.* In this context, Vasanthakumar notes that Ann Cudd discusses women in heterosexual relationships who leave paid employment to become primary caregivers, which may be a rational decision from that family's perspective but problematic when we consider larger systems of oppression. *Id.*; *see generally* ANN CUDD, ANALYZING OPPRESSION 63 (2006).

143. *See generally* Ashwini Vasanthakumar, *Epistemic Privilege and Victims' Duties To Resist Their Oppression*, 35 J. APPLIED PHIL. 465, 465 (2018).

144. Vasanthakumar, *supra* note 129, at 3; *see also* Ashwini Vasanthakumar, *Do Victims Have Obligations Too?*, PHIL. 24/7 (Aug. 12, 2017), https://philosophy247.org/podcasts/do-victims-have-obligations-too/ [https://perma.cc/96ZX-VMCB]; Hay, *supra* note 136, at 21 (arguing that victims have an inherent duty to resist their oppression by speaking out against harms and advocating for other victims).

145. DEMPSEY, *supra* note 132, at 19.

146. Kimberley Brownlee, *What Are the Duties in the Duty View?*, 5 JERUSALEM REV. LEGAL STUD. 62, 73 (2012). It should be noted that bystanders have collective moral duties to their fellow human beings too, which may include a legal duty to report criminal offenses. *See, e.g.*, Zachary D. Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders Amid Sexual Crimes*, 92 S. CAL. L. REV. 1317, 1335–36 (2018). In this context, Zachary Kaufman explores the duties that witnesses of criminal offenses have toward victims. *See id.* at 1318. Moreover, his work explores duty to report laws and a collective accountability that aims to better society, hold accountable the wrongdoer, and honor the survivor. *See id.* at 1324.

> empowered by the role-based authority to hold the wrongdoer accountable for the wrongdoing. This role-based authority is an especially valuable route to undoing subordination and recovering self-respect. It is burdensome, however, because a failure to call out wrongdoing is a failure to live up to the standards that apply to the role of the victim.[147]

Applying this rationale to the confidential settlement of social injustice torts, it echoes two of the main arguments against such settlements: the other-litigants argument and the public debate argument.[148] As noted, the *other-litigants* argument holds that other, similarly situated litigants have an interest in the information produced through settlement of tort lawsuits. Therefore, I argue, victims have a duty to disclose the injustice perpetrated against them because it might affect others. The *public debate* argument is related, but it is broader; the information produced through settlement can also be of public importance because it informs deliberation about an issue of substantial public interest. Settling a claim confidentially when it prevents a public discourse on a systemic injustice is thus inappropriate.

Therefore, I argue, victims of social injustice torts have a *moral* duty to disclose the wrongdoing they suffered, because failing to disclose such wrongdoing allows social injustice to continue and because of their unique epistemic knowledge. The information that tort victims possess gives them a special role in such situations, a role which obligates them—as an act of solidarity with future victims—to help protect others from suffering similar wrongdoing.[149]

B. Objections to Victims' Disclosure Duties

That said, there are several significant reasons that may lead us to reject the view that victims of injustice have duties towards others altogether, or at the very least question the extent to which such duties are administrable for tort law. As a preliminary matter, when considering the existence and effect of victims' duties, we should bear in mind the distinction between criminal law and civil law. While areas of private law such as contracts and torts generally concentrate on relationships between individuals, criminal law is

147. Eric J. Miller, *The Moral Burdens of Police Wrongdoing*, 97 RES PHILOSOPHICA 219, 221 (2020).

148. *See infra* Part IV.B; Luban, *supra* note 1, at 2653.

149. Importantly, the duty I identify is not a duty of care which might result in imposing liability on tort victims. As explained below, such an analysis is beyond the scope of the current argument.

more concerned about protecting the community.[150] Arguably, it is also justified to impose more substantial burdens on victims in the criminal context given the high stakes that criminal behavior entails for society.[151] In contrast, protecting the autonomy of victims and preventing excessive imposition on their freedom to resolve disputes as they see fit are particularly crucial in civil disputes.[152]

Scholars have identified two key objections to recognizing victims' duties: demandingness and unfairness.[153]

First, *demandingness*. Requiring victims to report injustice they have experienced—while morally desirable and perhaps at times in their best interest—may be too demanding to justify such a reporting duty.[154] In particular, the duty is burdensome to the extent that charging victims with it entails social repercussions if they fail to deliver, including finding victims morally blameworthy.[155] As a result, imposing duties, including a reporting duty, on victims is a form of 'blaming the victim,' and even "replicating a pernicious element of the very oppression at which they take aim."[156] This objection echoes Leigh Goodmark's argument against imposing duties on victims of domestic violence, given their unique needs. According to Goodmark, mandatory policies deprive people of the ability to determine whether and how the state will intervene into their relationships, shifting

150. *See, e.g.*, Jules L. Colman, *Doing Away with Tort Law*, 41 LOY. L.A. L. REV. 1149, 1168 (2008) (stating tort law aims to regulate behavior by defining norms which specify relational duties); Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 408 (1989) (describing morality of tort law as concerned with relationship between doer and sufferer); Ellen Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 57 (2006) (noting that while tort law addresses an individual victim's interests, it need not also address broader public objectives); Kenneth Simmons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 730 (2008) (discussing communicative justice principle underlying criminal law and the state's role in prosecuting violations).

151. *See generally* Simmons, *supra* note 150, at 720 (contrasting the broad spectrum of acts that criminal law seeks to punish with tort law, which predominantly seeks to provide remedy for harmful acts); John C. Coffee Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—and What Can Be Done About It*, 101 YALE L.J. 1875, 1878 (1992) (noting criminal law's reliance on public enforcement and prosecutorial discretion to inflict punishment).

152. *See generally* Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107, 107–09 (2011) (describing tort law as an amicable way for plaintiffs to seek remedies from defendants); Simmons, *supra* note 150, at 719 (highlighting victims' discretion in whether or not to bring a tort claim against their wrongdoers).

153. Vasanthakumar, *supra* note 129, at 5–6 (explaining arguments that imposing victims' duties to resist their oppression and injustice may be overly demanding and unfair).

154. *Id.* at 5.

155. *Id.*

156. *Id.*

power from the individual to the state.[157] While on the individual level, criminal laws validate the experiences of people subjected to abuse by clearly and unequivocally stating that what has been done to them is wrong,[158] these laws are often too focused on safety to allow victims the autonomy to fully contemplate their choices.[159] As Vasanthakumar notes:

> Requiring resistance is demanding on several counts. First, it is costly. It requires significant psychological, social, epistemic and capital resources that the oppressed, in particular, are less likely to hold or to hold adequately. It exposes the oppressed to the risks of retaliation: being harassed by police, being labelled and dismissed as a "troublemaker" at work, being politely ostracized from their social circle. Second, it is psychologically onerous. […] …[I]t requires a perpetual alertness on the part of victims, who must be vigilant for instances when oppression might harm themselves or others, and must then deliberate on what an effective response would be, and what costs it is likely to exact.[160]

Furthermore, much in the way that oppression can limit victims' life-choices, resisting it can constrain such life-choices too.[161]

Requiring disclosure of settlement information can be costly for tort victims too.[162] In the sexual harassment context, for example, victims might

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157. Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J. L. & GENDER 53, 72 (2017).

158. *Id.* at 90.

159. *See* Goodmark, *supra* note 140, at 25. Goodmark also identifies a particular tendency to limit victims' autonomy when it comes to women victims. *Id.* As an alternative to traditional prosecution, Goodmark argues for restorative justice, which "focuses on harm rather than crime, allowing victims to define the harm done to them, requiring offenders to acknowledge the harm, and bringing victims, offenders, and their supporters together to craft a plan that holds offenders accountable for and addresses the harm." Goodmark, *supra* note 157, at 94. "Community-based options do not appeal to all those subjected to abuse . . . [a]nd alternatives to the criminal legal system must prioritize redressing the harm to the victim over reintegrating offenders." *Id.* at 100–01.

160. Vasanthakumar, *supra* note 129, at 5–6.

161. *See generally* CUDD, *supra* note 142, at 151 (suggesting that this is acutely the case when resistance to oppression calls on victims to make stereotype-defying life-choices). In this context, see also Brenda Dvoskin, *Speaking Back to Sexual-Privacy Invasions*, 98 WASH. L. REV. (forthcoming 2023) (arguing that banning digital sexual expression is not a productive tool for protecting victims of sexual privacy losses, as it perpetuates the culture of shame around such wrongs and limits their autonomy, instead of allowing victims to "rewrite(e) the social script" which led to shame being placed with them rather than their invaders).

162. *See generally* Joy & McMunigal, *supra* note 82 (referencing loss of privacy, fear of retaliation, and possibility of public shaming as reasons why sexual misconduct victims may prefer NDA settlement to litigation).

lose employment opportunities if known as "trouble-makers."[163] As noted above, requiring disclosure might also result in less favorable settlements or even in fewer opportunities to settle.[164] Demanding disclosure can also be psychologically onerous on tort victims; assuming settlement would be less available to victims, it might deny them the possibility to settle their claim, get some closure and a measure of justice without having to go to trial or deal with the public attention which disclosure might involve.

Two key responses can be given to this valid objection. *First*, victims are not required to disclose all settlement information, but rather only such information which is valuable and can assist in protecting future victims. In other cases, victims retain their autonomy to make choices regarding publicity and dispute resolution. However, recognizing a disclosure duty is vital as we cannot rely on victims to distinguish those cases in which litigation-produced information is of public interest from those which can safely remain under wraps. *Second*, as detailed below, even in such cases in which settlement information is vital to protect third parties or society more broadly, victims should be able to keep their own identifying information—which is not typically of public interest—under wraps. This should include any information which might reveal a victim's identity.[165] Avoiding a disclosure requirement which encompasses victims' personally identifiable information thus helps to alleviate the thrust of a demandingness objection to disclosure.

A second objection relates to *unfairness*. Because victims are already carrying the burden of oppression itself, it may seem unfair to add a duty to report the injustice they suffered to this heavy burden.[166] Other, more privileged actors—including perpetrators and bystanders—should perhaps be the ones carrying the burden.[167] Imputing disclosure duties to tort victims can thus become another imposition on victims that have already been subjected to injustice.[168]

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163. *See generally* Joy & McMunigal, *supra* note 82 (citing adverse impacts on future employment opportunities as possible reason for sexual misconduct victims' reluctance to report).

164. *See supra* Section III.B.2.

165. In this sense, any definition of personally identifiable information (PII) should be broad and take into account the discussion in privacy law regarding risk of identification. *See generally* Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information,* 86 N.Y.U L. REV. 1814 (2011).

166. Vasanthakumar, *supra* note 129, at 6–7.

167. *See generally* Ekow N. Yankah, *Whose Burden to Bear? Privilege, Lawbreaking and Race*, 16 CRIM. L. & PHIL. 13, 28–29 (2019).

168. Unfairness exists as a result of charging victims with the uncompensated and onerous duty of educating other people about the experience of oppression. *See* Jean Harvey, *Victims, Resistance, and Civilized Oppression*, 41 J. SOC. PHIL. 13, 17–18 (2010) (critiquing well-meaning

Of course, identifying a duty owed by victims does not mean that other actors have no such duties themselves.[169] But even when others do their part—which perpetrators and bystanders typically will not, due to competing interests—victims still have an essential role to play. In particular, victims possess knowledge about injustice that is often invisible to others and can thus call attention to such injustice.[170] Furthermore, other-regarding arguments prompt us to view victims as needed for the process of dismantling or at least disrupting structural injustice. In contrast, failure to disclose can be regarded as sustaining or normalizing systemic wrongs.[171] In addition, victims of social injustice owe a duty of disclosure to future victims of the same injustice as an act of solidarity, given their shared experience as victims and the desperate need for coordination between victims. Such cooperation is particularly crucial when it pertains wrongs which still cast shame on victims themselves, such as sexual wrongdoing.[172] Finally, given the public importance of information produced through social injustice tort claims, these claims can be thought of as lying in a grey area between private and public law. Within this grey area, individuals' freedom to contract confidentially to remove issues from the public domain is limited.

Yet, as we consider the extent to which a disclosure duty is administrable for the law of torts, the objections above should serve as a check on the nature and scope of disclosure. In particular, concerns about demandingness and

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moral deference which creates moral expectations from victims based on their oppression); Nora Berenstain, *Epistemic Exploitation*, 3 ERGO 569, 581–85 (2016) (arguing that exploiting victims' knowledge can also reinforce oppressive structures as it prioritizes the needs of the privileged over those of the oppressed, and it allows the privileged a posture of innocent ignorance—often through 'gaslighting'—as they continue to be complicit in and benefit from oppression).

169. This ties into a previous note regarding bystander duties (see *supra* note 146) which, while important, are outside the scope of this Article.

170. Vasanthakumar, *supra* note 129, at 6–7.

171. Other-regarding arguments thus lay the groundwork for conceiving of victims' duties as a species of role obligations. *See generally* Michelle M. Dempsey, *Public Wrongs and the 'Criminal Law's Business': When Victims Won't Share*, *in* CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF 254–271 (Rowan Cruft, Matthew H. Kramer & Mark R. Reiff eds., 2011) (discussing the role of individual victims in public wrongs); Robin Zheng, *What is My Role in Changing the System? A New Model of Responsibility for Structural Injustice*, 21 ETHICAL THEORY & MORAL PRAC. 869, 871–73 (2018) (arguing that we are each responsible for structural injustice through and in virtue of our social roles, because roles are the site where structure meets agency); Miller, *supra* note 147, at 219–23 (discussing victimhood as a morally significant social role in the context of police misconduct).

172. In this context, it is interesting to note *Callisto*, an application which harnesses technology to encourage reporting and enable coordination between victims of sexual assault. *See* Ian Ayers, *Meet Callisto, the Tinder-like platform that aims to fight sexual assault*, WASH. POST (Oct. 9, 2015), https://www.washingtonpost.com/opinions/using-game-theory-technology-to-fight-sexual-assault/2015/10/09/f8ebd44e-6e02-11e5-aa5b-f78a98956699_story.html [https://perma.cc/3MNP-CZPN].

unfairness should prompt us to limit the required disclosure to when absolutely necessary to protect the public interest; when, as detailed below, the defendants involved are the most potent.

C. Defining the Nature and the Scope of Settlement Disclosure

1. The Nature of Disclosure

In light of the above discussion regarding victim duties, what disclosure should be required of victims regarding the wrongdoing they suffered? Given the complexity of burdening victims as explained above, I argue that we should strive for a nuanced approach. The baseline for such an approach should be the following: tort victims should avoid a beneficial confidential settlement when the information concealed by the settlement can potentially harm similarly situated litigants or where the media, lawmakers, or the public at large are unaware of the gravity, scope or very existence of a social problem. As explained above, this baseline argument should be acceptable even to those who do not subscribe to the expressive function of torts, given the negative externalities resulting from confidential settlements in such cases. How should we define these situations? Below, I offer a list of categories which delimit the universe of cases to which disclosure applies. I also argue that disclosure should only be required from tort *plaintiffs*, who seek to use the court system to find redress for the harm they suffered and have already experienced a shift of consciousness towards potential publicity, rather than from tort *victims* more generally.

First, we should use the concept of social injustice torts to identify situations in which there is a broader public interest underlying the private dispute.[173] In this context, the notion of public wrongs can provide a useful reference point. The scope of public wrongs is not limited to those which directly victimize the public collectively (such as terrorist attacks), but also includes wrongs which are directed primarily at individual victims (such as murder, rape, and assault). Wrongs inflicted upon individual victims can thus be shared by a polity, becoming public wrongs.[174] However, at times, the domain of public wrongs should be limited by consideration of individualistic values like a victim's interest in privacy. As Michelle Dempsey notes in the domestic violence context, "[p]ut in terms of reasons for action: victims have their reasons, and communities have their own. If we think of wrongs as being

173. *See supra* Part III.

174. Sandra Marshall & R.A. Duff, *Criminalization and Sharing Wrongs*, 11 CANADIAN J.L. & JURIS. 7, 20 (1998).

shared . . . we obscure this distinction between the reasons that apply to individual victims and the reasons that apply to their communities—thereby obscuring some of the reasons that may justify a community's response to wrongdoing."[175]

Applying this analysis to civil wrongdoing, we need to carefully balance a tort victim's legitimate interest in settling her dispute as she desires and our societal interest and the interest of third parties to be aware of certain categories of wrongdoing. For this reason, a category of social injustice torts is needed. As noted,[176] rather than tracking a public or criminal-like definition, the concept of social injustice torts seeks to focus on cases which would produce information of public interest to third parties or society more broadly.[177]

Second, the disclosure prescribed here is limited in another important way. I argue that, while victims of social injustice torts are not, and should not be, required to bring suit against their wrongdoers,[178] once a suit is brought, victims should disclose the information underlying it. There are two main rationales behind this argument. First, by bringing suit against their wrongdoers, the victims are choosing to use the state's institutions to vindicate their right of action against the wrongdoer. Such vindication thus gives rise to an affirmative disclosure requirement. Second, suing one's wrongdoer represents a shift of consciousness for victims from a grievance

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175. *See* Dempsey, *supra* note 171, at 263. Dempsey further notes that "very often when victims refuse to share their wrongs with their communities, the victims are perfectly justified in their refusal." *Id.* at 269. According to Dempsey, "[t]he Duff-Marshall account has a difficult time explaining why wrongs such as domestic violence or racist violence fall within the ambit of the 'criminal law's business' even when the victim won't share. After all, too often these wrongs are not the kind which violate 'genuinely shared . . . values and interests' nor do they offend 'goods in terms of which the community identifies and understands itself ' They are instead the kinds of wrongs that many people (both historically and still today) have been content to leave alone, thinking that a criminal justice response is unnecessary or inappropriate. Moreover, oftentimes these wrongs are not, in actuality, shared by the individual victim with her community." *Id.* at 268 (citation omitted). It is only the criminal law's business to prosecute when prosecutors are well positioned to act on behalf of the community to condemn issues such as structural inequality. *Id.* at 270. While this distinction is drawn in the criminal law context, it informs some of the impetus behind this Article, justifying the existence of a disclosure duty that victims owe others when structural, societal problems are implicated.

176. *See supra* Part III.

177. While a tentative definition of social injustice torts is provided in this Article, a fuller discussion of their scope and meaning is best left for future work.

178. *Cf.* Scott Altman, *Selling Silence: The Morality of Sexual Harassment NDAs*, 39 J. APPLIED PHIL. 698, 701–03 (2022) (noting the important difference between victims' legitimate reasons for keeping secret the details of their victimization, and the moral objection to them doing so as part of an NDA).

to legal action,[179] which likely had prepared them for the possibility of publicity.[180] Having gone through this shift of consciousness and having overcome the barrier of bringing suit against their wrongdoers, plaintiffs are then obligated to share the information underlying their claim if it is of public interest.

Of course, a counterargument to this distinction may be that requiring plaintiffs' disclosure might create a chilling effect on victims, discouraging them from coming forward about the wrongdoing they suffered. In other words, victims of social injustice torts may prefer to settle their claims without bringing a lawsuit against their wrongdoers to avoid the need to disclose the wrongdoing.[181] However, as with other arguments regarding a chilling effect resulting from legal intervention, this argument requires empirical evidence.

Furthermore, there are at least two reasons to think that a chilling effect should not be a significant concern. First, identifying a moral disclosure duty, as this Article has done, may help victims recognize the potential harm to third parties and to society resulting from a confidential settlement, thus contributing to shifting societal norms about the private nature of victimhood in certain contexts. The duty delineated here will eventually help to breed further solidarity between current and future victims in cases where the actions of early victims may impact the risks to later victims. Needless to say, this will not be a simple nor a quick process, given how embedded the understanding of victimhood as a personal matter is in our society. Yet, pointing to the disclosure duty owed by victims as a justification underlying sunshine laws might help begin this process of changing societal norms around victimhood and encouraging solidarity between present and future victims.

Second, on a more practical level, victims may need the court system to encourage their wrongdoer to settle or to enforce the settlement. Such a need may push them to bring suit despite the disclosure it entails. In some ways, this distinction thus parallels and expands on the existing distinction between

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179. For the classic piece on the various stages in the life cycle of a dispute, see William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & SOC'Y REV. 631, 633–49 (1981).

180. For an argument justifying the publicity of the procedure in terms of institutional authority, see Hamish Stewart, *Procedural Rights and Factual Accuracy*, 26 LEGAL THEORY 156, 160 (2020) ("The procedure must be public . . . because only an institution that can be understood as acting on behalf of all can have the authority to impose a resolution of the dispute on the parties.").

181. This limitation is especially significant given the fact that, generally speaking, only about half of those who claim compensation end up filing a lawsuit. *See generally,* Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1500 (2009).

a stipulated dismissal based on a private settlement reached by the parties (whether independently or as part of a court-sponsored process such as mediation), and situations in which the parties reach a final agreement and request court assistance to ensure its confidentiality. While the former at best permits the litigants to negotiate in private, the latter shifts the necessary balancing of private and public interests. As Laurie Kratky Dore notes, "[l]itigants presumably do not file their agreement unless they want the court to take some action concerning it—either by issuing a confidentiality order incorporating its terms or, at the very least, a dismissal order retaining jurisdiction to enforce the accord."[182] By a similar token, while victims should be allowed considerable leeway on how to resolve their disputes in the pre-suit period, once public institutions have become involved in the dispute, this wiggle room should narrow. But this may not result in fewer suits being brought given the benefits of involving a court in the process.

I thus argue that, notwithstanding the chilling effect argument—which as noted merits an empirical examination—disclosure should be required only of tort plaintiffs, rather than tort victims.[183] At the same time, I suggest below a way to limit such a chilling effect by controlling the type of information to be disclosed.

2. The Scope of Disclosure

The analysis so far has highlighted the need to balance tort victims' autonomy to reach the most favorable settlement for their individual interests, and the impact that the confidentiality of such a settlement might have on similarly situated plaintiffs and on society at large in the context of social injustice torts. As I argued, while a moral disclosure duty might be broader, its legal effect should pertain only to tort plaintiffs that are seeking to use the court system to vindicate their claims. But in which cases should disclosure be demanded? This Section is dedicated to identifying the universe of cases in which tort plaintiffs' freedom of contract should be limited due to competing societal interests. To this end, though not yet fully developed, I offer four initial characteristics that define such cases.

Importantly, my analysis focuses on wrongdoer—rather than victim—characteristics, in order to identify those wrongdoers who pose the most

182. Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 394 (1999).

183. *Cf.* Altman, *supra* note 178 (arguing that while victims have good reasons for silence, the state should not facilitate their commitments to remain silent).

significant risk to others.[184] Why focus on wrongdoers rather than victims? While sunshine laws which limit confidential settlements in effect constrain both plaintiffs and defendants, the public nature of the dispute will typically be determined by the type of wrong in question and the characteristics of the alleged wrongdoer. Thus, alongside the wider category of social injustice torts, I suggest policymakers should consider the following wrongdoer characteristics as they strive to regulate confidential settlements in a more systematic manner.

The first characteristic is *the repeat wrongdoer*. Since one of the main concerns about confidential settlements is the risk of harming third parties and society more broadly, it is conceivable that we pay the greatest price for secrecy when it comes to cases of repeat wrongdoers—those that have offended more than once—rather than one-off wrongdoers. It is thus justified to limit plaintiffs' freedom to enter into confidential settlements in such cases. In my view, the repeat wrongdoer characteristic is also superior to a severe wrongdoing characteristic (that is, limiting secrecy in the more severe torts), because of the inherent subjectivity involved in severity rankings. However, this characteristic does present a challenge when it comes to one-off wrongdoers that cause a significant amount of harm to a large number of victims, such as mass environmental torts. For example, a polluting factory which, in one act of disposal of toxic waste, harms many. Such cases may require a separate category which will prevent secrecy based on the scope of the harm. In terms of operationalizing this characteristic, as discussed below, a database run by a third party should maintain the information, thus helping to identify repeat wrongdoers.

The second characteristic is *the disproportionally powerful wrongdoer*. In contrast to situations in which parties to a private settlement are on a leveled playing field, with more or less equal bargaining power, my concern is that situations in which victims have significantly diminished power may lead to them surrendering to a secrecy demand posed by a much stronger defendant.[185] This seems to be especially true in situations in which the agreement in question is part of a boilerplate provision in a standard form contract, with little room for bargaining on the plaintiff's side. This situation thus requires disclosure. That said, as noted, offering one's silence may sometimes be used as a bargaining chip for a weaker party to be able to extract

184. However, as explained below, one of the characteristics refers to disproportionately powerful wrongdoers, which obviously bears implications on the type of victims involved.

185. This characteristic is in some ways harkening to George Fletcher's famous idea of non-reciprocal risks, as the disproportionately powerful wrongdoer is subjecting the victim to a risk which the victim is not similarly creating. *See generally* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972).

more money in a settlement. Though further thinking is needed to best identify these situations, I argue that when there is a significant disparity in bargaining power, silence is unlikely to operate as a bargaining chip. It is far more likely that nondisclosure will be presented unilaterally, as part of a "take-it-or-leave-it" deal.

The third characteristic is related to and partially overlaps with the first two: *the organizational wrongdoer*. As Hoffman and Lampmann argue in the sexual harassment context, NDAs created by organizations pose the most significant amount of harm for three reasons: the impact on employees resulting from repeated sexual misconduct; more turnover in organizations with repeated harassment; and uncertainty for new employees when NDAs keep sexual misconduct secret.[186] In addition to these rationales, and even if we assume that corrective justice can effectively be achieved through a settlement,[187] it seems more difficult to vindicate such goals in settlements reached with organizations. The reason is that when it comes to organizations, the damages are often not paid by, nor is liability imposed on, the actual wrongdoer. This argument thus weakens a compelling reason to allow confidential settlements.[188]

The fourth and final characteristic is *the public entity wrongdoer*. As evident in FOIA laws, we generally tend to require more transparency of public entities than we do of private bodies.[189] We justify this tradition, among other rationales, based on the coercive power public entities hold and our sense that transparency promotes healthier democratic governance.[190] In

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186. Hoffman & Lampmann, *supra* note 63, at 177–78. That said, an individual repeat offender might pose similar risks and might be powerful enough to keep them under wraps, as evident in the Weinstein case. Such cases should be captured under the first two categories.

187. This argument is contested, and is, to some, an aspect which differentiates civil recourse theory from corrective justice. *See* Zipursky, *supra* note 70, at 723 (explaining his view that tort law involves liabilities rather than affirmative legal duties of repair and noting that such a view is consistent with defendants paying plaintiffs as part of a settlement).

188. This issue ties into disclosures required of some organizations through corporate law and securities law. *See* Tom C.W. Lin, *Executive Private Misconduct*, 88 GEO. WASH. L. REV. 327, 352–70 (2020) (arguing that business law struggles with issues of disclosure and fiduciary duties when it comes to private misconduct of corporate executives).

189. As Luban notes, "awarding officials the discretion to keep secrets or grant confidentiality is itself a policy that should be able to withstand public scrutiny." Luban, *supra* note 1, at 2648.

190. *About FOIA*, U.S. DEP'T OF JUST., https://www.justice.gov/archives/open/foia#:~:text=The%20United%20States%20Supreme%20Court,means%20for%20citizens%20to%20know%20 [https://perma.cc/TJ8L-WTTF] (last updated Nov. 6, 2020) (referencing Supreme Court explanation that FOIA serves vital purpose in democratic society); Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1367–68 (2016) (explaining rationale that access to government information encourages informed citizens which democratic societies require).

light of similar rationales, plaintiffs settling with public entities, including municipalities and government agencies, should disclose information about the settlement. Acting in such "private" capacity should not allow public entities the same degree of freedom enjoyed by private bodies and individuals, especially when their actions could adversely affect others.

Before concluding, and as we transition from a moral disclosure duty to its prescriptive legal implications, it is important to dedicate some attention to the question of what information should be disclosed and to whom. While I have argued in this Article that tort plaintiffs must disclose settlement information under certain circumstances, we need to afford plaintiffs the opportunity to keep their own identity private, including any information that may reveal their identity. The plaintiff's information is typically less valuable to the public than the identity of the defendant, the facts underlying the case, and the amount of the settlement. Keeping plaintiffs' personally identifiable information confidential would thus help protect their privacy interest at a minimal cost to society,[191] and would help combat a potential chilling effect resulting from a disclosure requirement.

To control the dissemination of information, it would be useful to establish a clearinghouse of settlement information to be managed by an independent, third-party entity, similar to the database created for settlements of medical malpractice claims in several states.[192] Such a database could also help operationalize Ian Ayes' suggestion to target repeat offenders by using an information escrow to be released if another complaint is brought against the

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191. In this vein, the California statute explicitly provides that victims can request nondisclosure of personally identifying facts. CAL. CIV. PROC. CODE § 1001(c) (West 2022). For a discussion regarding plaintiffs' privilege to withhold from the public record sensitive personal information that would be humiliating if publicly disclosed, see Shapiro, *supra* note 9, at 510–11 (arguing that "such information would be disseminated beyond the immediate parties to a lawsuit only if the plaintiff either assented to public disclosure or opted to make the underlying events to which the information pertained part of his or her affirmative case").

192. *See About Us*, NAT'L PRAC. DATA BANK, https://www.npdb.hrsa.gov/topNavigation/aboutUs.jsp [https://perma.cc/GUB4-PHUA] (illustrating national data bank used to track medical malpractice payments and reports against health care practitioners); *see also Malpractice Claim Information*, OREGON.GOV, https://www.oregon.gov/omb/investigations/Pages/Malpractice-Claim-Information.aspx [https://perma.cc/67NJ-GPZT] (providing searchable database that includes disciplinary and malpractice records of Oregon medical practitioners). In this context, it is also interesting to consider the implications of the discussion offered here for legal data mining, i.e., gathering data about violations and disputes. *See, e.g.*, *Justice Intelligence*, DARROW, h https://www.darrow.ai/how-it-works/ [https://perma.cc/G3CR-LVYD] (explaining the mission of Israel-based startup company *Darrow*, a claim-mining platform which monitors the deep web to surface legal violations, enrich evidentiary foundation, and match them with legal professionals).

same offender.[193] Though a full proposal articulating the design of a database exceeds the scope of this Article, I argue that at a minimum, the database should contain information regarding the defendant, the underlying facts of the claim and the settlement amount. While some have argued that the amount of the settlement need not be disclosed,[194] I tend to think such information is vital both for calibrating future claims and as a societal acknowledgment of the value placed on certain harms.

Finally, more work is required to refine the legal implications of the moral disclosure duty discussed here, including enforcement and the role judges should play in it.[195] Transitioning from a moral duty to a legal duty would also raise thorny liability questions. For instance, should a plaintiff's failure to disclose the wrongdoing she suffered result in a future victim's right to bring an action against her? And if so, under what circumstances would such a duty arise? Furthermore, what is the ethical role of lawyers under a disclosure duty framework? Further work is also needed to consider the ex-ante effects of imposing a legal duty to disclose. Such work should inquire which plaintiffs might be most affected and what would be the resulting distributive effects. I leave these and other important questions for a future discussion.

V. CONCLUSION AND A PROPOSED RESEARCH AGENDA

Confidential settlements are a longstanding phenomenon. Over the last few decades, public attention to the risks of keeping the resolution of legal disputes under wraps generated legislation aimed at increasing transparency and public access to records commonly referred to as sunshine laws. These laws are based on the underlying assumption that having the option of confidentiality available is favorable to individual litigants, but that there are circumstances under which society will limit parties' ability to enter into confidential settlements, because of a competing public interest. Unlike FOIA

193. *See* Ayres, *supra* note 116, at 76 (arguing NDAs should be enforceable only if they meet certain formalities, including if they explicitly disclose the rights which the survivor retains to report the perpetrator's behavior to the Equal Employment Opportunity Commission (EEOC)). *See also* Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 146–50 (2012) (considering the concept of information escrows as trusted intermediaries in whom individuals could confide and who would disclose that sensitive information only under specified circumstances).

194. *See* Levmore & Fagan, *supra* note 116, at 314 (recommending that the facts of settlement, but not the amount, might in extraordinary circumstances be made public).

195. This may involve requiring further scrutiny of settlements with a confidentiality clause submitted for the court's approval, which is currently limited. *See generally* Dore, *supra* note 182, at 384–401.

statutes, not every state has sunshine laws. Of the states that do, they tend to fall into several categories, focusing on substantive areas of torts that, according to policymakers, justify limiting the commonplace practice of confidential settlements. This legislation has been largely reactive, carving out exceptions to confidentiality in response to media exposés and public outcries.

But confidential settlements have recently gained renewed attention given their role in concealing information and preventing public debate about sexual wrongdoing and police misconduct. This resurgence of interest prompts us to reconsider our approach to regulating private parties' freedom to settle claims outside the public eye, as our current approach tends to be either over- or under- inclusive. In both the sexual wrongdoing and the police misconduct contexts, the use of confidential settlements has been prevalent.[196] And in both, there is a broader social problem that implicates the public interest and potential third parties. This Article thus used these examples as a vantage point for an analysis seeking to identify the universe of cases in which the public interest should outweigh private plaintiffs' interest in reaching a favorable settlement.

Alongside the critique offered on the current sunshine regime, this Article shined a light on a key moral justification for this legislation which, in time, will help to foster a climate of transparency and solidarity between victims. The Article identified a disclosure duty owed by victims of social injustice torts to others. It then argued that only tort plaintiffs, who seek to use the court system to find redress for the harm they suffered, should be obligated to disclose the wrongdoing committed against them when it could potentially affect others. Within the realm of social injustice torts, this Article pointed to several categories of wrongdoers which will help set the parameters of disclosure.

However, these categories of cases require further development as we transition from the moral discussion to the policymaking realm. Such a transition will raise vexing legal questions, such as the extent to which plaintiffs' disclosure duty should become a duty of care, resulting in potential liability to future victims. Further thinking is also required regarding ways to combat a potential chilling effect that imposing a legal disclosure duty might give rise to, to the extent an empirical account indeed reveals such an effect. One way suggested in this Article was to limit the type of information disclosed such that we avoid disclosure of plaintiffs' personally identifiable information. A fuller discussion of these questions is best left for future work.

196. *See supra* Part II.

This Article thus makes several theoretical contributions as the first to identify tort victims' disclosure duties and the first to define the nature and scope of disclosure. Furthermore, it offers a novel critique of the current sunshine regime, proposing a shift towards a focus on social injustice torts.

Finally, the Article helps establish an agenda for future *empirical* research in this area. Before closing, I will point out three such directions for empirical research projects, in no particular order. First, observational research is needed to assess the effects that requiring disclosure might have on claimants' behavior, including a potential chilling effect on bringing suit against wrongdoers. Second, research is needed to better understand how plaintiffs perceive the trade-off between the public value of litigation and confidentiality, and the extent to which they care about the latter, given the price future victims and society more broadly might pay.[197] Third, research is missing on the role of lawyers in confidential settlements. So far, there have been calls to impose rules of professional responsibility in this context, and a push back from those that perceive such rules as compromising a lawyer's commitment to her individual client. But there has not been a systematic attempt to evaluate lawyers' perceptions of confidential settlements and how they might shape the application of the law.[198]

Pursuing such research will help us to better understand, and subsequently regulate, the realm of confidential settlements in a way that appropriately balances democratic publicity on the one hand, and the interests of individual litigants on the other.

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197. Relatedly, findings of previous empirical research have indicated a lay perception that links severity of the wrong to a preference to publicity. *See* Bachar, *supra* note 3, at 8 (finding severity of offender's misconduct had negative connection with lay persons' approval of secret settlement). More research is needed to better understand whether this perception stems from a focus on the wrongdoer's act itself or rather on other related aspects, such as the risk of re-offending, or a power imbalance between the parties. *See id.* at 43–45. For research pointing to a causal relationship between lay perception of repeat wrongdoing and settlement likelihood, see generally Bachar, *Just Tort Settlements*, *supra* note 32.

198. *See generally* Joy & McMunigal, *supra* note 82 (evaluating ethical concerns of lawyers utilizing NDAs in sexual misconduct settlements). Joy and McMunigal argue that lawyers should be prohibited from using NDAs in the sexual misconduct context in order to ensure the judicial system functions properly, protect the rights of victims, and mitigate the adverse effects NDAs may cause to third parties. *Id.* (addressing reasons legal profession should prohibit lawyer's use of NDAs in sexual misconduct context).