Just Tort Settlements

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In the United States, most civil disputes settle, often under a cloak of secrecy. Recently, secret settlements—particularly those that conceal a matter of public interest—have come under intense public attention, spurring a wave of restrictive state and federal legislation. And yet, the attitudes of plaintiffs, such as aggrieved employees and consumers, have been strangely absent from the discussion regarding such laws. Indeed, even though settlements are ubiquitous, and ordinary people are crucial to their existence and justice, current literature lacks quantitative data on plaintiffs' settlement-related attitudes, including on how nondisclosure agreements ("NDAs") affect the tendency to settle. This Article studies the relationship between the decision to settle a tort dispute and a defendant's demand for confidentiality, in tandem with other factors which play a role in plaintiffs' settlement decision-making.

The Article uses a preregistered survey experiment with two scenarios—one describing a products liability dispute and the other a sexual harassment dispute—that were each distributed to a representative sample of 500 Americans. The Article finds, first, that plaintiffs are more likely to accept a public than a confidential settlement offer, and, independently, are more prone to take a settlement with a first-time wrongdoer than with a repeat wrongdoer. Second, settlement goals are context dependent. Plaintiffs are overall more willing to settle a products liability dispute than a sexual harassment case. And when the wrongdoer is discharged as part of the settlement, only sexual harassment plaintiffs seem to care. Yet the amount of money on the table matters in both scenarios, suggesting that the monetary

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incentive might eventually swallow any competing urge to make valuable settlement information public.

The Article argues that these effects reflect a broader tendency for tort plaintiffs to consider non-monetary objectives—including expressive and punitive goals—when weighing settlement offers. As such, it has direct implications for negotiating and regulating tort settlements under various liability regimes. Recognizing the central role of settlements in resolving tort disputes, alongside the key position employees and consumers hold in decisions regarding settlement, this Article pushes beyond intuitions about settlement decision-making. It considers plaintiffs' engagement with established functions of tort law and points to how private and public law concepts about compensation and punishment for wrongdoing are intertwined in settlement decisions.

INTRODUCTION

Most disputes in the United States settle,[1] and often behind closed doors.[2] In particular, settlement agreements with nondisclosure clauses ("confidential settlements") have been debated for years in the products liability context, as such settlements might conceal information about hazards

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1. *See, e.g.*, Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?,* 6 J. EMPIRICAL LEGAL STUD. 111, 111–12 (2009) (reporting aggregate settlement rates in the 65%–70% range); John Barkai & Elizabeth Kent, *Let's Stop Spreading Rumors About Settlement and Litigation: A Comparative Study of Settlement and Litigation in Hawaii Courts*, 29 OHIO ST. J. ON DISP. RESOL. 85, 109 (2014) (reporting roughly similar settlement rates); *see also* Michael Moffitt, *Settlement Malpractice*, 86 U. CHI. L. REV. 1825 (2019); Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119 (2020); Jessica Bregant et al., *Perceptions of Settlement*, 27 HARV. NEGOT. L. REV. 93, 96 n.14 (2021) (citing studies of settlement rates). Of course, settlements might be reached at various points throughout the life cycle of a dispute, starting in the pre-lawsuit stage and ending at the course of the trial itself. Parties might also resolve only a subset of issues through settlement, leaving others for judicial or other third-party determination. *See generally* J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement,* 91 N.Y.U. L. REV. 59 (2016).

2. While it is difficult to assess the exact scope of the phenomenon of confidential settlements, its pervasiveness is undisputed. For a rare example of a study that examined the prevalence of such settlements, see ROBERT TIMOTHY REAGAN ET AL., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT (2004), https://www.uscourts.gov/sites/default/files/sealset3_1.pdf [https://perma.cc/K8TS-NDXB]. The Federal Judicial Center looked at 288,846 civil cases in a mostly random sample of fifty-two districts. *Id.* at 3. Roughly 1 in 227 cases had sealed settlement agreements, or 1,270 total cases. *Id.* Twenty-seven percent of the cases with sealed settlement agreements were employment cases. *Id.* at 5. Another 10% were other civil rights cases. *Id.*; *see also* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 869 (2007) ("Most lawsuits . . . end abruptly . . . without explanation. Settlement terms are usually not reflected in court documents, instead appearing only in settlement documents broadly forbidding the parties from discussing their allegations, evidence, or settlement amount."); Sasha Gombar, *Rethinking the Silent Treatment: Discovering Confidential Settlements in a Post-#MeToo World*, 74 VAND. L. REV. EN BANC 289, 292 (2021) ("Jeffrey Epstein, Matt Lauer, Harvey Weinstein, Roger Ailes, and Larry Nassar are all reported to have signed confidential settlements, some of them worth millions of dollars, before the extent of their misconduct became public."); Randall S. Thomas et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 5, 51 (2015) (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").

that endanger public health and safety.[3] Debates gave rise to a series of state-level "sunshine-in-litigation" laws ("sunshine laws") requiring judges to consider the public interest before approving a confidential settlement.[4] More recently, in December 2022, President Biden signed into law the Speak Out Act, which limits judicial enforcement of sexual harassment-related NDAs.[5] This Act marked the culmination of law reform efforts following the #MeToo movement in over a dozen states aimed at restricting NDAs that cover up sexual misconduct.[6] At the same time, this policy debate grapples with the argument that some NDAs are desirable or necessary for a well-functioning civil justice system.[7]

But do sunshine laws track plaintiffs'—specifically, consumers' and employees'[8]—values and perceptions about settlement?[9] We still know very little about how ordinary people perceive confidential settlements, as well as what other factors shape their settlement decision-making.[10] While legal scholars agree that it is essential to research lay perceptions of civil justice,

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3. *See* Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know* Can *Hurt You)*, 2 J. INST. FOR STUD. LEGAL ETHICS 115, 118–20 (1999) (criticizing secret settlements in cases involving public health and safety); Barry Meier, *Deadly Secrets: System Thwarts Sharing Data on Unsafe Products*, NEWSDAY (N.Y.), Apr. 24, 1988; Barry Meier, *Legal Merry-Go-Round: Case Highlights Lack of Data Sharing*, NEWSDAY (N.Y.), June 5, 1988; Elsa Walsh & Ben Weiser, *Public Courts, Private Justice* (pts. 1–4), WASH. POST, Oct. 23–26, 1988, at A1. As one example, risks involved in the use of certain breast implants were kept under wraps by having plaintiffs sign NDAs, while women continued to suffer injuries. *See* Laleh Ispahani, *The Soul of Discretion: The Use and Abuse of Confidential Settlements*, 6 GEO. J. LEGAL ETHICS 111, 119–20 (1992). NDAs were also widely used in connection with the Theranos scandal. *See* Lauren Rogal, *Secrets, Lies, and Lessons from the Theranos Scandal*, 72 HASTINGS L.J. 1663, 1665–66 (2021).

4. *See* Zitrin, *supra* note 3, at 122–23 (compiling state laws addressing sealed settlement agreements).

5. *See* Speak Out Act, 42 U.S.C. §§ 19401–19404.

6. *See, e.g.*, Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76 (2018); Gilat Bachar, *The Psychology of Secret Settlements*, 73 HASTINGS L.J. 1 (2022); David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165 (2019); Maureen A. Weston, *Buying Secrecy: Nondisclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 507.

7. *See infra* Section I.C.

8. "Plaintiffs" indicate ordinary people involved in a legal dispute. In the scenarios explored here, they are either consumers or employees. "Litigants" is used when referring to both plaintiffs and defendants.

9. As explained below, I am not making a normative argument that law (neither in general nor this law in particular) should necessarily track people's perceptions, but rather that data about lay perceptions is vital for successful regulation, particularly in this area.

10. *See* Bregant et al., *supra* note 1, at 98–99 ("[L]ittle is known about how people perceive the settlement of legal disputes or the parties entering into the settlements.").

they have mainly focused on jurors' perceptions of trials, leaving a significant gap regarding plaintiffs' attitudes toward settlement.[11]

Yet, such attitudes are consequential to regulating confidential settlements. Although recent policy efforts try to limit the enforcement of such settlements,[12] the real-world impact of sunshine laws ultimately depends on litigants themselves. Why? First, because laws governing NDAs—like the Speak Out Act—typically address only a subset of such agreements: either NDAs attached to an employment agreement or those signed *after* a lawsuit has been filed.[13] Sunshine laws rarely catch confidential settlements reached during the pre-lawsuit stage, when lawyers might not be involved and aggrieved employees or consumers play a key role.[14] Second, because even when lawyers and sunshine laws *are* brought to bear, settlement decisions are reserved solely to clients in civil matters.[15] Litigants' attitudes are thus central to the settlement process whenever it occurs.

Furthermore, research on plaintiffs' settlement-related attitudes can help establish where regulatory intervention is needed with respect to confidential settlements. Presumably, sunshine laws should only be put in place where the market fails to guarantee that settlement information of public interest will become public. Thus, should we seek to effectively regulate confidential settlements—or evaluate whether regulation is necessary at all—we must study which factors push plaintiffs to accept or reject a settlement offer and

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11. *See infra* Sections I.A–B.

12. *See generally* ANDREA JOHNSON ET AL., NAT'L WOMEN'S L. CTR., 2020 PROGRESS UPDATE: METOO WORKPLACE REFORMS IN THE STATES (2020), https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020States_Report-MM-edits-11.11.pdf [https://perma.cc/Y4X2-D6QA] (surveying state laws in the post-#MeToo era).

13. *Id.* As noted, the Speak Out Act only refers to NDAs that are not related to a particular dispute. This aspect of the Act has been criticized. *See* Tom Spiggle, *How the Speak Out Act Will Help Victims of Workplace Sexual Harassment*, FORBES (Dec. 13, 2022), https://www.forbes.com/sites/tomspiggle/2022/12/13/how-the-speak-out-act-will-help-victims-of-workplace-sexual-harassment [https://perma.cc/778H-5U7U] ("As good as this law is, it has some limitations. The most notable one is that it only applies to pre-dispute non-disparagement and nondisclosure provisions.").

14. Even one of the most expansive legislative efforts, the California STAND Act, does not prohibit pre-lawsuit but post demand letter NDAs. *See* CAL. CIV. PROC. CODE § 1001(a). This point has been noted by practitioners. *See California Employers to Face Raft of New #MeToo Laws*, FISHER PHILLIPS (Oct. 1, 2018), https://www.fisherphillips.com/en/news-insights/california-employers-to-face-raft-of-new-metoo-laws.html [https://perma.cc/3LS5-PA86] ("Therefore, there may be a narrow set of circumstances in which such clauses may still be utilized in sexual harassment and other similar cases.").

15. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020) ("A lawyer shall abide by a client's decision whether to settle a matter.").

under what circumstances. Such data can point to where market failures occur.[16]

In this context, policymakers and scholars have raised concerns about the challenges presented by settlements with "repeat offenders"—wrongdoers who repeatedly perpetrate wrongs but escape broader accountability by settling under a veil of secrecy.[17] Nevertheless, we still don't know to what extent a defendant's history of wrongdoing shapes plaintiffs' settlement decisions. Assume, for example, that a consumer who purchased a defective product and suffered an injury is offered a settlement conditioned upon confidentiality. To what extent would it matter to her whether the manufacturing company is a "repeat wrongdoer," meaning that its products have caused harm to other consumers in the past and are likely to continue to injure? Would her decision change if she were instead an employee subject to sexual harassment? And would the amount of settlement money at stake make a difference? This Article is the first to offer insight into such questions.

Studying plaintiffs' attitudes is also valuable for improving settlement negotiations. If plaintiffs are content pursuing punitive or expressive goals through settlement, such information about their interests could expand the zone of potential agreement. Research on plaintiffs' attitudes thus provides important predictive data for practitioners, who have so far been forced to rely on abstract theories and unwarranted assumptions regarding plaintiffs' settlement behavior.

This Article builds on an original preregistered survey experiment, comprised of two vignette scenarios—one describing a products liability case and the other a sexual harassment case. Each scenario was distributed to a representative sample of 500 Americans.[18] Beyond increasing robustness by conducting the research through two different scenarios, this design allows me to compare the results of the two scenarios and draw inferences from the

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16. The typical law and economics argument is that the relevant piece of information when regulating confidential settlements is less how the parties think and more how big the negative externality to society is. *See, e.g.*, Assaf Jacob & Roy Shapira, *An Information-Production Theory of Liability Rules*, 89 U. CHI. L. REV. 1113, 1165 (2022). This Article seeks to show how data on plaintiffs' attitudes can nonetheless nuance regulation efforts.

17. *See, e.g.*, Ayres, *supra* note 6; Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 333 (2018) (arguing that offenders in sexual harassment cases are often in a better position to know whether there is a pattern of abuse, giving rise to information asymmetry); Hannah Albarazi, *One by One, States Are Banning NDAs to Protect Workers*, LAW360 (Apr. 1, 2022), https://www.law360.com/articles/1476428/one-by-one-states-are-banning-ndas-to-protect-workers [https://perma.cc/F6SY-Y9EL] (noting that repeat offenders are the key targets of anti-NDA legislation).

18. For a detailed description of the research design, see *infra* Part II.

differences found between them.[19] The Article uses the data collected to theorize on the extent to which plaintiffs pursue goals beyond profit maximization when settling a dispute, including punitive and expressive goals. While survey participants are not *actual* plaintiffs, their attitudes and perceptions are presumably similar to other laypeople facing real disputes. This study is thus a significant step in the direction of better understanding plaintiffs' real-world behavior.

The statistically significant findings indicate that in products liability and sexual harassment alike, both confidentiality and repeat wrongdoing make settlement less likely. Thus, plaintiffs generally prefer publicity in settlements, confirming the assumption that confidentiality is rarely the plaintiff's—rather than the defendant's—preference. Moreover, plaintiffs tend to reject a settlement with a repeat wrongdoer, irrespective of whether it is confidential. Exploring the differences between participants' reactions to the two scenarios,[20] this Article finds, first, that plaintiffs are more likely to settle a products liability dispute than a sexual harassment dispute. Second, plaintiffs considering a sexual harassment-related settlement might be more punitive than those weighing a products liability settlement, as discharging the harasser significantly increases settlement likelihood.[21] Finally, the

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19. This Article joins the growing scholarship on "Experimental Jurisprudence." For more on the origins of the term, see Stephen Stich & Kevin Tobia, *Experimental Philosophy and the Philosophical Tradition*, *in* A COMPANION TO EXPERIMENTAL PHILOSOPHY 5, 5 (Justin Sytsma & Wesley Buckwalter eds., 2016) (explaining different versions and goals of experimental philosophy); Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2465 n.5 (2014) (citing JOHN MIKHAIL, ELEMENTS OF MORAL COGNITION (2011); and Kenworthey Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J. EMPIRICAL LEGAL STUD. 149 (2012)). *See also* BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007) (discussing related theoretical work); Frederick Schauer, *Social Science and the Philosophy of Law*, *in* CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 95 (John Tasioulas ed., 2020) (addressing the role of social science in legal philosophy). Experimental jurisprudence seeks to allow thought experimentation through an empirically grounded method. Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735, 736, 743 (2022) (explaining that experimental jurisprudence is "scholarship that addresses jurisprudential questions with empirical data, typically data from experiments," and that it "normally begins online, by surveying lay-people with no special legal training"); *see also* Markus Kneer & Sacha Bourgeois-Gironde, *Mens Rea Ascription, Expertise and Outcome Effects: Professional Judges Surveyed*, 169 COGNITION 139 (2017); Joshua Knobe, *Intentional Action and Side Effects in Ordinary Language*, 63 ANALYSIS 190 (2003). For a discussion of why lay attitudes regarding settlement matter, see *infra* Section I.B.

20. The term "participants" is used when referencing the responses of actual survey respondents.

21. As discussed below, any sanction would be subject to due process limitations, meaning that the alleged wrongdoers would be entitled to know the nature of the misconduct they are accused of and have a reasonable opportunity to respond.

Article shows evidence to suggest that when offered a larger amount of money, the monetary incentive "crowds out" whatever competing values cause participants to turn down a confidential settlement.[22]

As plaintiffs settle disputes in a variety of situations, often without legal representation,[23] it is vital to understand their attitudes toward settlement agreements, particularly those kept from the public eye through NDAs. This Article thus makes several contributions. First, it deepens our understanding of consumers' and employees' individual decisions to resolve legal disputes, challenging the assumption that such decisions revolve exclusively around monetary payments. Rather, the Article argues, both private and public values underlie settlement decision-making, including a desire to "punish" or send a public message about wrongful behavior. Second, acknowledging the central role of settlement in the resolution of tort disputes, the Article articulates predictions for settlement negotiations which will help inform practitioners. Third, recognizing the trade-off between monetary and other incentives when it comes to confidential settlements—particularly with repeat wrongdoers—this Article's findings help articulate why and where the regulation of confidential settlements is warranted. Finally, the Article provides a blueprint for future research that further studies both plaintiffs' and defendants' settlement decision-making.

The Article proceeds in four parts. Part I surveys the existing literature, from jury perceptions of civil justice, to the almost nonexistent research on plaintiffs' perceptions of settlement, to the normative debate on confidential settlements. Pointing to the scholarly gap regarding plaintiffs' attitudes toward confidential settlements, Part II describes the research design and methods employed in the two scenarios this Article builds on, and the results with respect to each scenario. Part III then discusses the key findings and implications under products liability and sexual harassment legal regimes. Part IV briefly concludes.

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22. This is one reading of this finding. A competing interpretation is that people simply recognize the additional value in that setting and seek to extract it, or that they expect the additional payment to serve as a deterrent. Future research should seek to tease out these different motivations.

23. Research indicates that many plaintiffs will not seek or obtain legal representation for their civil legal needs. *See generally* Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51 (2010) (explaining how many Americans facing civil justice problems appear in court without attorneys and the consequences of this trend).

I. PERCEPTIONS OF JUSTICE IN TORTS: FROM TRIAL TO SETTLEMENT

A. Juror Perceptions of Tort Litigation

Existing literature on lay perceptions of the goals of tort cases tends to focus on jurors.[24] Research looking at the way jurors perceive the goals of tort litigation generally suggests that they view the key goals of such litigation as helping harmed plaintiffs, deterring bad actors, and creating a safer environment for all.[25] In this context, Neal Feigenson finds that jurors in tort cases "have multiple, sometimes competing, goals."[26] Jurors try to reach decisions that are just, but their decisions sometimes go further than what justice recommends.[27] Juror motivation to produce just verdicts that reflect the available evidence is illustrated in some scholarship detailing post-verdict juror interviews. In such interviews, jurors frequently ask the judge whether they "got it right" and express disappointment when cases do not reach a verdict.[28] Further, Valerie Hans found in post-trial jury interview research that some jurors refer to general and specific deterrence motives as supporting their verdict decisions.[29] Similarly, jurors sometimes express views that their verdicts should "send a message," primarily when punitive damages are at issue and they are instructed that deterrence is a goal.[30] Specifically, one juror in a sports injury trial referred to wanting to help the

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24. A related line of research addresses public attitudes toward tort reform. In this context, Moran, Cutler, and De Lisa's survey experiment found that potential jurors' attitudes toward tort reform generally predicted the verdict. *See* Gary Moran et al., *Attitudes Toward Tort Reform, Scientific Jury Selection, and Juror Bias: Verdict Inclination in Criminal and Civil Trials*, 18 LAW & PSYCH. REV. 309, 324 (1994) (summarizing main finding of research). Furthermore, Wilson and Warner found that respondents generally held negative attitudes toward tort reform, which was "at odds with past polling." *See* Molly J. Walker Wilson & Ruth H. Warner, Knowledge, Attitudes Toward Corporations, and Belief in a Just World as Correlates of Tort Reform Attitudes 14 (July 14, 2012) (unpublished manuscript), https://ssrn.com/abstract=2105623 [https://perma.cc/6YL9-XP8L] (noting conclusions of lay attitudes toward tort reform).

25. *See generally* Shari Seidman Diamond & Jessica M. Salerno, *Empirical Analysis of Juries in Tort Cases*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS (Jennifer Arlen ed., 2015).

26. *Id.* at 9–10 (citing NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS (2000)).

27. *Id.* (providing observation of jury decision-making).

28. Shari Seidman Diamond, *Thoughts on Total Justice*, 30 QUINNIPIAC L. REV. 467, 476 (2012) (explaining reactions from jurors that shed light on their motivations).

29. Diamond & Salerno, *supra* note 25, at 9 (citing VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000)).

30. Diamond, *supra* note 28, at 472–73 (referring to specific juror response that their verdict should send a message).

plaintiff and ensure that the defendant would receive a message out of their ultimate verdict.[31]

In contrast, when juries only have to decide compensatory damages and liability, jurors generally focus on the "balance between the parties and reestablishing that balance."[32] Shari Diamond refers to this as jurors targeting internal considerations (i.e., the specific parties in a case) rather than external considerations (i.e., the impact of their decision on future behavior of potential litigants).[33] Neal Feigenson describes this distinction as a juror's focus on "just deserts, rather than social utility."[34] This suggests that jurors tend to view civil litigation as a means to impose appropriate consequences for a defendant's actions (micro-focused, internal considerations) rather than as a way to positively impact broader society and the system (macro-focused, external considerations). As Diamond and Salerno note, "[w]e can be fairly certain that juries do not have optimal allocation of costs and benefits in mind as they decide cases."[35] Jurors tend to think of the goals of tort law on a more individual scale, and a predominant goal of civil litigation as laypeople view it is to proportionally impose liability on a defendant rather than to provide broader societal benefits, such as general deterrence.[36]

Extrapolating from this work to the study at hand, we should expect plaintiffs' decisions on how to resolve a dispute to be focused on the instant parties, rather than on any future victims. In other words, concerns about future harm that might be caused by a repeat wrongdoer should not underlie a plaintiff's settlement decisions with such a defendant. That said, in contrast to the professionalized role taken by jurors as decision-makers, participants in the present study are positioned in a social role as plaintiffs resolving legal disputes. This difference may well impact the values and considerations underlying their decisions.

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31. VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 146 (2000) (referring to juror responses to lawsuit against sports equipment manufacturer for defective product which injured player).

32. Diamond, *supra* note 28, at 472 (stating the main focus of juries in certain cases).

33. *Id.*

34. *Id.* (describing a juror's micro-level goals in cases where they decide compensatory damages and liability).

35. Diamond & Salerno, *supra* note 25, at 9.

36. Similarly, Gary Schwartz argues that "the public understands tort law largely in moral terms—as a device for identifying and remedying moral wrongs," and "[a]ny effort to reformulate tort law entirely in terms of social policy would run the risk of confusing or estranging this strong base of public support." Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1816 n.121 (1997).

B. Perceptions of Settlement

As noted, in the United States, most legal disputes settle; the parties reach an agreement, and the lawsuit ends.[37] But despite this prevalence, settlements receive a lot less scholarly attention than other, less frequently used methods of dispute resolution, such as a jury verdict or a judicial decision.[38] It is conceivable that this relative lack of attention to settlement is due, at least partially, to the difficulty of assessing the actual percentage of cases that settle. But data derived from various legal settings support the conclusion that most legal cases in the U.S. do in fact settle.[39] And in some areas of the law, all cases settle.[40]

Because settlements are so pervasive in the legal system, it is vital to understand how the public perceives them. But some might still wonder why we should we care about the views of laypeople who lack formal legal training regarding a legal issue like settlement. The simple answer is because these people often get to decide. Ordinary people serve as parties to contracts, including settlement agreements. Thus, if we seek to understand the process of civil settlement, our inquiry should involve studying the potential parties to such settlements.[41] Civil settlement decisions are reserved to clients rather than lawyers; in fact, the decision to settle is the only procedural decision in a civil proceeding for which a lawyer must abide by the client's decision.[42] And in some settlements, those seeking redress might be unrepresented. As a result, plaintiffs' attitudes toward settlement matter even more than their

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37. *See* Eisenberg & Lanvers, *supra* note 1, at 112.

38. *Id.*

39. *Id.* ("Whatever uncertainty exists about settlement rates, settlement is the modal civil case outcome."). For a global comparative perspective on settlement rates, see Yun-chien Chang & Daniel Klerman, *Settlement Around the World: Settlement Rates in the Largest Economies*, 14 J. LEGAL ANALYSIS 80 (2022).

40. *See, e.g.*, Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement*, 29 J. L. ECON. & ORG. 898 (2013) (building on the notion that civil cases typically settle and examining how motion practice, especially non-discovery motions, can substantially shape parties' knowledge about their cases, thus influencing the timing of settlement); *see also* Nicole Summers, *Civil Probation*, 75 STAN. L. REV. 847 (2023) (explaining how systematic settlement of eviction cases effectively creates a separate legal system). In state courts, unlike federal courts, the typical outcome is default rather than settlement. *See, e.g.*, David A. Hoffman & Anton Strezhnev, Longer Trips to Court Cause Evictions 10–16 (U. Pa. Inst. for L. & Econ., Working Paper No. 22-29, 2022), https://ssrn.com/abstract=4130696 [https://perma.cc/DMG4-FTEQ].

41. *See generally* Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2302–05 (2020).

42. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020) ("A lawyer shall abide by a client's decision whether to settle a matter.").

attitudes toward other aspects of the civil legal process in which lawyers' decision-making weighs much more heavily.[43]

Of course, there are other good reasons to study plaintiffs' attitudes toward settlement. What plaintiffs think and understand about the law influences whether a legal system is seen as legitimate.[44] Because settlements occur so frequently, an important element of the system's legitimacy—and its alignment with the law—is how people perceive civil settlement.[45] Perceptions of *confidential* settlement, in particular, can help inform ongoing

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43. As Kevin Tobia notes, in building theories of jurisprudence, we tend to respond to or engage with what is happening "on the ground." Tobia, *supra* note 19, at 766. This is a strong rationale to examine the views and perceptions of laypeople who create and participate in that law. *Id.* The decision to settle is also less "legal" in the strict sense, relying on value judgments and untrained opinions of complex legal terms like "consent" and "reasonableness."

44. *See* John M. Darley, *Citizens' Sense of Justice and the Legal System*, 10 CURRENT DIRECTIONS PSYCH. SCI. 10, 12 (2001); Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches,* 20 ACAD. MGMT. REV. 571 (1995); Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707 (2000). Relatedly, the public's attitudes on legal issues can inform regulation and thus help change behavior. *See generally* Kenworthey Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, *in* OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241 (Eyal Zamir & Doron Teichman eds., 2014) (discussing how legal regulation is most efficient when it targets the public's attitudes).

45. *See* Jennifer K. Robbennolt & Valerie P. Hans, *Tort Law and Commonsense Justice: Convergence and Divergence*, 53 CT. REV. 110, 114 (2017) (discussing the importance of understanding public views of tort law for preserving the legal system's legitimacy); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375 (2006) (delineating the relationship between a legal system's perceived legitimacy and compliance with its laws). Furthermore, the law should arguably reflect ordinary judgments and concepts so that citizens can provide input into the legal system. *See generally* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995) (comparing legal code provisions with the public's shared intuitive notions of justice); Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565 (2017) (explaining how harmony between shared community judgments of justice and criminal laws creates the most effective means of crime control); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367 (2017) (describing competing views on whether the criminal justice system should be subject to lay influences). While this view is most associated with democratic theories of criminal law, it should arguably apply to private law areas like torts, where moral intuitions loom large. That said, Robinson's and Darley's "empirical desert theory" has been subject to significant challenges. *See, e.g.*, Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77 (2013) (arguing that lack of lay consensus regarding appropriate punishment, importance of preventive goals when it comes to less serious crimes, and the complex relationship between people's willingness to abide by the law and the law's congruence with their beliefs about appropriate punishment, all cast doubt on the theory). This study, however, does not aim at this exact problem as participants are not asked about the legitimacy of confidentiality.

policy debates about laws limiting NDAs.[46] But this does not indicate that "where ordinary concepts and legal concepts diverge, the law has been refuted."[47] Rather, lay intuitions are worth studying, because "ordinary concepts are at the heart of legal concepts."[48]

These arguments push us to study plaintiffs' understanding of civil settlement, particularly how ordinary people experience the tradeoff between public accountability and private redress depending on the parties' characteristics, the dispute, and the settlement terms. With regard to contract breaches, Tess Wilkinson-Ryan and David Hoffman note that such knowledge "helps us to predict when [individuals] will make or avoid contracts . . . and how they will resolve disputes."[49] Unifying findings from the legal and psychological literature with private law theory is therefore useful in achieving a fuller, more accurate understanding of parties' behavior when settling a tort claim.[50]

Despite these compelling reasons to study plaintiffs' attitudes toward settlement, such research is in very short supply. In contrast, scholars have long been studying perceptions of the legal system more broadly, identifying gaps between public understanding of substantive legal rules and the rules themselves.[51] The literature has also found misconceptions among people

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46. For more on why it is worthwhile to study attitudes towards confidential settlements, see Bachar, *supra* note 6, at 20–22.

47. Roseanna Sommers, *Experimental Jurisprudence: Psychologists Probe Lay Understandings of Legal Constructs*, 373 SCIENCE 394, 395 (2021) ("Although courts have shown some openness to considering public opinion polling when it comes to defining obscene speech, that does not mean that surveys to set the definitions of all legal concepts should be used.").

48. Tobia, *supra* note 19, at 750.

49. Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1005 (2019).

50. Psychological insight also plays a role in understanding contracts more generally. As Wilkinson-Ryan and Hoffman observe, "Although scholars tend to defend contract damages normatively, they often rest their theories on descriptive and psychological claims about behavior; thus, it is essential that these psychological foundations be sound and accurate." *Id.* at 1005–06.

51. *See, e.g.*, John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165 (2001); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110 (1997); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447; Robert MacCoun et al., *Do Citizens Know Whether Their State Has Decriminalized Marijuana? Assessing the Perceptual Component of Deterrence Theory*, 5 REV. L. & ECON. 347 (2009); Arden Rowell, *Legal Knowledge, Belief, and Aspiration*, 51 ARIZ. ST. L.J. 225 (2020). A related body of scholarship has found both overlap and gaps between people's intuitions about the law and the law itself. *See, e.g.*, ROBINSON & DARLEY, *supra* note 45; JENNIFER K. ROBBENNOLT & VALERIE P. HANS, THE PSYCHOLOGY OF TORT LAW (Linda J. Demaine ed., 2016) (describing how tort law does and does not align with lay intuitions); *see*

about legal processes, including the nature and availability of dispute resolution procedures,[52] civil juries,[53] and the civil justice system.[54] Several

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also NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW (Harvard Univ. Press 2001) (1995); Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCH. 857 (1991). Scholars have shown how it is often difficult for laypeople to understand content that should be accessible to them. *See, e.g.*, Sharon Kelley et al., *Review of Research and Recent Case Law on Understanding and Appreciation of Miranda Warnings*, *in* 3 ADVANCES IN PSYCHOLOGY AND LAW 77 (Monica K. Miller & Brian H. Bornstein eds., 2018); Richard Rogers, *Getting It Wrong About Miranda Rights: False Beliefs, Impaired Reasoning, and Professional Neglect*, 66 AM. PSYCH. 728 (2011); Joel D. Lieberman, *The Psychology of the Jury Instruction Process*, *in* JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESSES: PSYCHOLOGY IN THE COURTROOM 129, 129–49 (Joel D. Lieberman & Daniel A. Krauss eds., 2009); J. Alexander Tanford, *The Law and Psychology of Jury Instructions,* 69 NEB. L. REV. 71 (1990); Michael E.J. Masson & Mary Anne Waldron, *Comprehension of Legal Contracts by Non-Experts: Effectiveness of Plain Language Redrafting*, 8 APPLIED COGNITIVE PSYCH. 67 (1994).

52. *See, e.g.*, Kristen M. Blankley et al., *ADR Is Not a Household Term: Considering the Ethical and Practical Consequences of the Public's Lack of Understanding of Mediation and Arbitration*, 99 NEB. L. REV. 797 (2021); Donna Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189 (2017); Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793, 833 (2016) (suggesting that a disconnect between macro and micro preferences might stem from an inaccurate understanding of which attributes actually characterize various procedures); Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349.

53. *See, e.g.*, Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DEPAUL L. REV. 221 (1998) (reviewing research finding inaccuracies in public views of civil juries).

54. *See, e.g.*, Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation,* 20 LAW & HUM. BEHAV. 419 (1996); WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004); Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 27 LAW & HUM. BEHAV. 5 (2003); Donald E. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 S.C. L. REV. 585 (1988) (discussing misperceptions among lawmakers). Relatedly, scholars have examined perceptions of fairness and legitimacy of legal institutions. *See generally* Darley*, supra* note 44 (highlighting conflicts between the public's moral retributive justice principles and criminal law); E. ALAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (exploring the interaction between people's judgments about process and about attitudes or behaviors); Tyler & Darley, *supra* note 44 (discussing how a law-abiding society can be reached through application of social values to the rule of law). This includes perceptions of courts and juries. *See, e.g.*, Brian Bornstein et al., *JUST: A Measure of Jury System Trustworthiness*, 26 PSYCH. CRIME & L. 797 (2020); DAMON M. CANN & JEFF YATES, THESE ESTIMABLE COURTS: UNDERSTANDING PUBLIC PERCEPTIONS OF STATE JUDICIAL INSTITUTIONS AND LEGAL POLICY-MAKING (2016); DAVID B. ROTTMAN ET AL., PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY (2003), https://www.ncjrs.gov/pdffiles1/

studies have also examined people's attitudes toward plea bargains, the criminal equivalent of civil settlement.[55] Studies have found that people disapprove of plea bargaining due to a concern that defendants are receiving insufficient punishments,[56] and that the public would tend to support plea bargaining if it were a less covert process.[57]

This is not to say that civil settlement has not been studied at all. The literature has looked at how the dynamics of settlement work.[58] The vanishing

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nij/grants/201302.pdf [https://perma.cc/4FFF-7PKD]. Procedural justice has also been examined in a variety of contexts. *See, e.g.*, Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Sharing Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003); Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts,* 63 HASTINGS L.J. 127 (2011); Tom R. Tyler, *Procedural Justice and the Courts,* 44 CT. REV. J. AM. JUDGES ASS'N 26 (2007); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1; Rebecca Hollander-Blumoff, *Just Negotiation,* 88 WASH. U. L. REV. 381 (2010); Rebecca Hollander-Blumoff, *Formation of Procedural Justice Judgments in Legal Negotiation,* 26 GRP. DECISION & NEGOT. 19 (2017); E. Alan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System,* 24 LAW & SOC'Y REV. 953 (1990); Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures*, 36 CONFLICT RESOL. Q. 69 (2018); Gross & Black, *supra* note 52.

55. *See, e.g.*, Thea Johnson, *Public Perceptions of Plea Bargaining*, 46 AM. J. CRIM. L. 133, 133 (2019); Stanley A. Cohen & Anthony N. Doob, *Public Attitudes Towards Plea Bargaining*, 32 CRIM. L.Q. 85, 93 (1989); Sergio Herzog, *The Relationship Between Public Perceptions of Crime Seriousness and Support for Plea-Bargaining Practices in Israel: A Factorial-Survey Approach*, 94 J. CRIM. L. & CRIMINOLOGY 103, 111 (2003); Sergio Herzog, *Plea Bargaining Practices: Less Covert, More Public Support?*, 50 CRIME & DELINQ. 590 (2004) [hereinafter Herzog, *Plea Bargaining Practices*].

56. Cohen & Doob, *supra* note 55, at 94 (noting research method). However, their attitudes shifted after viewing a scenario. *See id.* at 95, 97 (describing survey respondents appearing to link plea bargaining views with sentencing).

57. Herzog, *Plea Bargaining Practices*, *supra* note 55, at 603, 606 (partially confirming hypothesis that the public generally disfavors plea bargaining practices). Relatedly, a survey of law students at the University of Maine found that students supported a narrative that plea bargaining "facilitates a mutually beneficial exchange between the parties." Johnson, *supra* note 55, at 151. Many student respondents thought plea bargaining benefitted the defendant most directly, and none thought plea bargaining was meant to achieve justice. *Id.* at 151–53.

58. *See, e.g.*, Boyd & Hoffman, *supra* note 40; Alyson Carrel, *Reimagining Settlement with Multi-Party Computation*, J. TECH. & INTEL. PROP. BLOG (May 19, 2020), https://jtip.law.northwestern.edu/2020/05/19/reimagining-settlement-with-multi-party-computation [https://perma.cc/8H65-LGBL]; Robert D. Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001 (2021); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiation and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991); Randall L. Kiser

jury trial phenomenon has been studied through assessing settlement rates.[59] And scholars have used empirical methods to examine settlement practices in a variety of contexts,[60] such as employment discrimination,[61] as well as the relationship between settlements and motion practice.[62]

With respect to perceptions of settlement, recent work by Jennifer Robbennolt, Jessica Bregant, and Verity Winship examined views of settlement to identify what people think motivates parties to settle.[63] Notably, they found that people tend to attribute responsibility to settling defendants across a wide array of contexts.[64] Their respondents generally believed the plaintiff (or prosecutor) settled a case because the settlement was a satisfactory outcome, either because of cost, time, or difficulty of the trial, a desire to move on or "get it over with," or because of concerns about the risk of losing.[65] In their most recent study, Robbennolt's team asked a nationally representative sample basic questions about settlement.[66] Among other findings, the vast majority of their respondents thought that settlement, at

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et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551 (2008); Russel Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994); Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333 (2006).

59. Diamond & Salerno, *supra* note 1; Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004). *See generally* SUJA A. THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES (2016) (discussing the declining use of juries in the judicial system).

60. *See, e.g.*, ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION (2019); Bernard Chao et al., *Crowdsourcing and Data Analytics: The New Settlement Tools*, 102 JUDICATURE 62 (2018).

61. *See, e.g.*, Stewart J. Schwab & Michael Heise, *Splitting Logs: An Empirical Perspective On Employment Discrimination Settlements*, 96 CORNELL L. REV. 931 (2011) (finding, based on a data set of successful settlements in the U.S. District Court for the Northern District of Illinois from 1999 to 2004, that the typical settlement "splits the difference between plaintiff demand and defendant offer," and that "settlement amounts rise if a trial date is set for a case").

62. *See* Boyd & Hoffman, *supra* note 40.

63. *See* Bregant et al., *supra* note 1.

64. *Id.* at 119, 121 (testing scenarios in the context of #MeToo, policing, crime, regulatory enforcement, and tort, and outlining five hypothetical cases which survey respondents were asked to consider). The authors also found that the four most prevalent reasons due to which respondents believed the defendant settled included: defendant was responsible for the harm, defendant was worried about the risk of losing, defendant wanted to minimize punishment or payout, and issues of publicity or reputation. *Id.* at 123.

65. *Id.* at 127.

66. Jennifer K. Robbennolt et al., *Settlement Schemas*: *How Laypeople Understand Civil Settlement*, 20 J. EMPIRICAL LEGAL STUD. 488, 488 (2023).

least sometimes, includes an agreement to keep it secret.[67] Some respondents depicted secrecy as a negative feature of settlement, describing it as getting "paid to be quiet," and a way for companies to "continue to hide the crappy and exploitative business practices they engage in."[68]

While these studies provide important background, this Article is the first to study a new, pressing question: do confidentiality and/or repeat wrongdoing affect plaintiffs' attitudes toward settlement? The Article further addresses the effect that the amount of settlement, its context, and introducing a sanction might have on plaintiffs' decision-making. By using an experimental design rather than asking respondents directly about their perceptions, this Article allows us to examine people's attitudes when it comes to settlement, including the extent to which confidentiality shapes such attitudes, in a way that elicits more candid responses.

The Article closes another important gap in the study of settlement, by exploring settlement attitudes from the perspective of *plaintiffs* themselves, rather than a neutral standpoint of those observing litigation.[69] In this context, Julie Macfarlane's work discusses her conversations with victims of sexual misconduct that have settled their claims subject to a nondisclosure provision.[70] She notes that signing an NDA did not represent the victims' preferences: "they were pressured into signing such agreements and told that they would not receive a negotiated monetary settlement until they did so."[71]

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67. *Id.* at 507. Furthermore, a few responses to the study's open-ended questions pointed to NDAs as typical aspects of a settlement: for instance, Respondent 661 ("[W]hen you say settle what comes to mind is settl[ing] out of court with mutual agreement and in the case of institutions with a gag order on the person who b[r]ought the suit."); Respondent 178 ("When a dispute settles both parties agree to terms that allow the court proceedings to end. In most cases a monetary agreement and NDA accompany the settlement. [A] settlement does [not] always mean the dependent admits guilt or fault."); and Respondent 672 ("I believe when a dispute is settled it means that both parties have agreed to [the] terms of a settlement including any monetary, facts, and responsibility of the parties involved *and whether that information be made public or sealed as described in the terms of the settlement*."). *Id.* at 506–07 & nn.67–69.

68. *Id.* at 507 (statements of Respondents 643 and 919, respectively).

69. The latter perspective has been adopted in Robbennolt et al.'s work as well as other previous work. *See generally* Robbennolt et al., *supra* note 66; Bachar, *supra* note 6, 26–30.

70. *See generally* Julie Macfarlane, *How a Good Idea Became a Bad Idea: Universities and the Use of Non-Disclosure Agreements in Terminations for Sexual Misconduct*, 21 CARDOZO J. CONFLICT RESOL. 361 (2020) (detailing conversations with sexual assault victims who settled their claims under an NDA).

71. *Id.* at 364 ("Some [victims] refuse to sign such a 'gag order'; they prefer to reserve the right to talk about the case in the future if they wish to, as they go through a recovery process, and do not receive their settlement."); *see also* Jumping Off the Ivory Tower with Prof JulieMac, *NDAs: A Toxic Bargain,* NAT'L SELF-REPRESENTED LITIGANTS PROJECT (June 4, 2019), https://representingyourselfcanada.com/ndas-a-toxic-bargain [https://perma.cc/4DWK-3774]

Yet, beyond such anecdotal accounts, we do not have a broader sense of how a confidentiality provision shapes plaintiffs' settlement decision-making. This Article is the first to provide such a sorely missed perspective.

C. The Normative Debate on and the Challenge of Regulating Confidential Settlements

As we have seen, other than a few noteworthy exceptions, the literature has largely failed to address ordinary people's perceptions of civil settlement in general, and of settlement confidentiality in particular. In contrast to this lack of empirical knowledge, a considerable amount of ink has been spilled about NDAs as a common element of settlement, by both academics[72] and the popular press.[73] This normative debate provides another piece of necessary background to our discussion.

As a general matter, confidentiality has been viewed as "critical to the ultimate settlement of many civil lawsuits,"[74] and secret settlements are perceived as not only common, but growing in numbers.[75] Secrecy is understood to facilitate the settlement process, and in some cases, settlement could not occur without some assurance of its confidentiality.[76] For the most part, confidentiality remains the prerogative of the parties. Litigants possess

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(discussing instances in which victims of sexual misconduct are pressured to sign an NDA as a "gag").

72. *See, e.g.*, Ayres, *supra* note 6; Bachar*, supra* note 6; Hoffman & Lampmann, *supra* note 6; Weston, *supra* note 6.

73. *See, e.g.*, E.J. Dickson, *What, Exactly, Is an NDA?*, ROLLING STONE (Mar. 19, 2019), https://www.rollingstone.com/culture/culture-features/nda-non-disclosure-agreements-809856 [https://perma.cc/9K8U-2435]; Ariella Steinhorn & Vincent White, *NDAs Bear Blame for Some of the Worst Corporate Cover-Ups. How That Should Change,* FORTUNE (Sept. 18, 2020, 1:00 AM), https://fortune.com/2020/09/18/nda-workplace-sexual-harassment-discrimination [https://perma.cc/P2VU-7355].

74. Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 384 (1999).

75. *See* sources cited *supra* note 2.

76. *See* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2656 (1995) (recognizing that some settlements will collapse without confidentiality); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 429 (1991) (asserting that confidentiality is "not only acceptable, but essential" to settlement); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 510–11 (1994) (noting that many mass tort cases could not settle without a secrecy agreement). *But see* Ispahani, *supra* note 3, at 119 (asserting that settlements will occur even without confidentiality because they benefit all parties); Barry C. Schneider, *Sealing of Records and Other Secrecy Problems*, *in* PRODUCTS LIABILITY 95, 111 (Am. L. Inst.-Am. Bar Ass'n Comm. on Continuing Prof. Educ., ALI-ABA Course of Study No. C949, 1994) (predicting that elimination of secret settlements will have no impact upon settlement frequency or amount).

extensive freedom to privately contract for settlement secrecy and may enforce their confidentiality agreement in a separate suit for breach of contract.[77] Thus, many confidential settlements occur without any involvement of the court or judicial review of their terms or fairness.[78] Yet, courts today are often involved in the settlement process, typically encouraging civil litigants to settle.[79] Furthermore, some litigants seek additional judicial involvement in their settlement, either by filing it for approval with the court or requesting that it be embodied in a court order containing confidentiality or sealing provisions.[80]

In particular, public-health-related confidential settlements have been a contested issue for years,[81] as, for example, the danger of certain prescription drugs was kept under wraps through such settlements.[82] More recently, confidential settlements returned to the spotlight given their role in concealing sexual harassment as exposed by the #MeToo movement.[83] High-

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77. *See* Pansy v. Borough of Stroudsburg, 23 F.3d 772, 788 (3d Cir. 1994) (noting that litigants possess the "option of agreeing privately to keep information concerning settlement confidential, and may enforce such an agreement in a separate contract action"); Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C., 992 F.2d 932, 936–37 (9th Cir. 1993) (holding that a protective order does not foreclose the existence of a separate and independent nondisclosure agreement that renders parties directly liable to each other for breach of its terms). *But see* Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 266 (1998) (recommending that courts refuse to enforce contracts of silence "when the public interest in access to the suppressed information outweighs any legitimate interest in contract enforcement").

78. Various exceptions to this general rule of judicial indifference to settlement exist. For instance, a court must approve the settlement of class actions certified under Federal Rule of Civil Procedure 23. *See* FED. R. CIV. P. 23(e). Similarly, actions "in which a receiver has been appointed may be dismissed only by court order." FED. R. CIV. P. 66.

79. Dore, *supra* note 74, at 384.

80. *Id.* at 385; *see also* Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 505 n.285 (admitting that increased role of judiciary in promoting settlement "may one day provide a basis for allowing the public to observe judges at work on this effort"); Miller, *supra* note 76, at 485–86 n.290 (refusing to rule out public access in cases involving "significant judicial participation in the [settlement] process").

81. Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 932, 946 (2006) (criticizing secret settlements in labor discrimination cases and noting this phenomenon is not new); *see also* Miller, *supra* note 76, at 464 (responding to discovery reform proposals in the context of cases involving public health and safety); Zitrin, *supra* note 3, at 118–19 (arguing against confidential settlements in a variety of tort-related cases, including defective products).

82. *See* Ispahani, *supra* note 3, at 119–21. Several investigative media reports during the late 1980s revealed that secret settlements were concealing information about hazardous products and environmental dangers. *See, e.g.*, Walsh & Weiser, *supra* note 3.

83. *NDAs 'Should Not Silence Sexual Harassment Claims*,' BBC (Feb. 10, 2020), https://www.bbc.com/news/business-51438851 [https://perma.cc/ZVA8-Y4FQ] (quoting Acas

profile breaches of such NDAs exposed patterns of abuse and prompted policymakers and scholars to reconsider the legitimacy and desirability of secret settlements,[84] generating another wave of legislative action aimed at restricting their use, primarily at the state level from New York to Nevada.[85] However, even one of the most expansive laws regarding sexual harassment NDAs, California's Stand Together Against Non-Disclosure ("STAND") Act, does not prohibit pre-lawsuit (but post-demand letter) NDAs.[86] As of December 2022, federal law—the Speak Out Act—restricts sexual harassment NDAs too, but is narrower than many state-level statutes, focusing only on NDAs signed before a specific dispute arises.[87]

Why are confidential settlements so pervasive, and so difficult to curtail? NDAs are said to increase the chances of settlement, which, some argue, can only occur if the parties agree to hold its terms or even existence confidential.[88] Without the benefit of secrecy, powerful defendants may not be willing to pay as much for settling claims,[89] or they may be reluctant to

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chief executive Susan Clews, who explained that "NDAs can be used legitimately . . . but they should not be used routinely" or to silence employees from reporting harassment).

84. Scholars have identified the difficulty of assessing the net effects of restrictions on confidentiality. *See, e.g.*, Moss, *supra* note 2, at 873 (economically analyzing confidential settlements and concluding that given competing effects it is difficult to predict the net result of a confidentiality ban). For a recent attempt at such an assessment, see Blair Druhan Bullock & Joni Hersch, *The Impact of Banning Confidential Settlements on Discrimination Dispute Resolution*, 77 VAND. L. REV. 51 (2024).

85. *See generally* JOHNSON ET AL., *supra* note 12 (surveying state laws in the post-#MeToo era). For a relatively recent review of such laws in the context of workplace sexual misconduct claims, see generally Mushu Huang, Legislative Responses to the Use of Non-Disclosure Agreement Regarding Workplace Sexual Misconduct Claims: From Information Transparency to Systematic Protection (2019) (Seton Hall L. Sch., Student Works No. 1023), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2027&context=student_scholarship [https://perma.cc/R72Z-B3KA].

86. *See supra* note 14.

87. *See* 42 U.S.C. § 19403(a).

88. *See* Ayres, *supra* note 6, at 79 (arguing NDAs should be enforceable only if they meet certain formalities). *See generally* Levmore & Fagan, *supra* note 17, at 314 (recommending that the fact of settlement, but not the amount, might be kept public in extraordinary circumstances).

89. *See* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 267 (2018); Jeff Daniels, *New State Laws: From Workplace Harassment Protections to Mandating Women on Boards*, CNBC (Dec. 28, 2018, 9:36 AM), https://www.cnbc.com/2018/12/28/new-state-laws-in-california-elsewhere-inspired-by-metoo-movement.html [https://perma.cc/P25J-4AHM] (noting a concern expressed by professionals that laws limiting confidential settlements will hinder settlement); *see also* David Rocklin, *Secret No More: Confidential Settlements and Sexual Harassment Claims*, WOODRUFF SAWYER: INSIGHTS (Oct. 23, 2018), https://woodruffsawyer.com/do-notebook/confidential-settlements-sexual-harassment-claims [https://perma.cc/CRH2-DTBB] (explaining that for many employers, confidentiality clauses are "more a matter of business common sense" than malevolence).

offer a settlement at all.[90] This can also affect the availability of counsel, particularly in harassment disputes, as the private bar relies heavily on settlements.[91] Allowing settlements to remain confidential thus might be crucial for ensuring recourse for private parties,[92] encouraging wealth transfers to victims,[93] and giving them a sense of closure alongside tangible gains.[94] Some victims, such as those of lower socioeconomic status, may prefer to remain silent and thereby obtain faster, guaranteed compensation. For example, individuals in low-paying industries, which are plagued by

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90. *See* Tippett, *supra* note 89, at 267; Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 1009 (1988).

91. *See* Hoffman & Lampmann, *supra* note 6, at 182. As they further note, "The defenders of hush contracts take significant comfort from the status quo, where hush contracts are both enforceable and nearly omnipresent." *Id.*

92. *See, e.g.*, Brazil, *supra* note 90, at 959, 1009 (discussing the importance of confidentiality agreements as a negotiating tool).

93. *See* Lynn Parramore, *$MeToo: The Economic Cost of Sexual Harassment* (Inst. for New Econ. Thinking, Working Paper, 2018), https://www.ineteconomics.org/research/research-papers/metoo-the-economic-cost-of-sexual-harassment [https://perma.cc/Y2UN-VM3M].

94. Hoffman & Lampmann, *supra* note 6, at 184. According to the U.S. Equal Employment Opportunity Commission ("EEOC"), from 2010 to 2016, "employers have paid out $698.7 million to employees alleging harassment through the [EEOC's] administrative enforcement pre-litigation process alone." U.S. EQUAL EMP. OPPORTUNITY COMM'N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 24 (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace [https://perma.cc/7J3Z-RNQ5]. A study cited by the EEOC and conducted by a national liability insurance provider examined "a representative sample of closed employment dispute claims" and revealed "that 19% of the matters resulted in defense and settlement costs averaging $125,000 per claim." *Id.* at 25; HISCOX, EMPLOYEE CHARGE TRENDS ACROSS THE UNITED STATES 6 (2015), https://www.hiscox.com/documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf [https://perma.cc/LL3N-TKB2].

sexual harassment,[95] are likely in the most pressing need of the payouts.[96] Some argue that victims themselves may demand confidentiality, and even refuse to come forward if it is not guaranteed.[97] More broadly, enforcing

95. *See, e.g.*, Susan Chira, *We Asked Women in Blue-Collar Workplaces About Harassment. Here Are Their Stories*, N.Y. TIMES (Dec. 29, 2017), https://www.nytimes.com/2017/12/29/us/blue-collar-women-harassment.html; *see also 700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017, 11:11 AM), https://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault [https://perma.cc/JM2W-GSUF]; Collier Meyerson, *Sexual Assault When You're on the Margins: Can We All Say #MeToo?*, NATION (Oct. 19, 2017), https://www.thenation.com/article/archive/sexual-assault-when-youre-on-the-margins-can-we-all-say-metoo [https://perma.cc/RCH9-Q7V7] (noting that "[p]eople on the margins—women of color, poor women, undocumented women, and trans men and women—are uniquely impacted by sexual assault and harassment" and subjected to sexual misconduct at disproportionately high rates); Sarah Childress, *Undocumented Sexual Assault Victims Face Backlash and Backlog*, PBS (June 23, 2015), https://www.pbs.org/wgbh/frontline/article/undocumented-sexual-assault-victims-face-backlash-and-backlog [https://perma.cc/5XYD-53G4]. In a 2016 report, the EEOC concluded that "60% to 70% of women have been on the receiving end of sexual harassment on the job at some point during their careers." Chai R. Feldblum & Victoria A. Lipnic, *Breaking the Silence*, HARV. BUS. REV. (Jan. 26, 2018), https://hbr.org/2018/01/breaking-the-silence [https://perma.cc/CN73-CWGT].

96. *See* Gilat J. Bachar, *Collateral Damages: Domestic Monetary Compensation for Civilians in Asymmetric Conflict*, 19 CHI. J. INT'L L. 375, 409–10 (2019) (discussing the importance of compensation as a key motivating factor for bringing tort claims in Israeli courts, especially when plaintiffs experience financial hardships as a result of the incident).

97. Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment Settlements*, NATION (Jan. 12, 2018), https://www.thenation.com/article/archive/how-to-end-the-silence-around-sexual-harassment-settlements [https://perma.cc/8MBZ-JW4Q]; *see also* Areva Martin, *How NDAs Help Some Victims Come Forward Against Abuse*, TIME (Nov. 28, 2017, 11:39 AM), https://time.com/5039246/sexual-harassment-nda [https://perma.cc/6NAP-2U76] (discussing reasons victims may want to keep settlements confidential, including unwanted attention, fear of retaliation, shame, and financial restitution). Furthermore, according to plaintiffs' lawyer Debra Katz, survivors "want their privacy protected and if they feel like they can't end these situations with a private resolution, they're not going to come forward." Russell-Kraft, *supra.* Relatedly, proponents of confidentiality argue that plaintiffs' lawyers have an ethical duty to maximize their clients' recovery and, therefore, are bound to use secrecy as a bargaining chip. *See* Miller, *supra* note 76, at 489–90. However, banning confidential settlements may also result in increased "victim blaming" because victims' identities would become public. *But see* Shadd Maruna & Brunilda Pali, *From Victim Blaming to Reintegrative Shaming: The Continuing Relevance of* Crime, Shame and Reintegration *in the Era of #MeToo*, 3 INT'L J. RESTORATIVE JUST. 38, 42 (2020) (exploring how victims of sexual assault have begun publicly sharing their stories of abuse to project their "false" shame—generated by "victim blaming"—"onto the men who violated them" as an emotional coping mechanism and political project); Olabisi Adurasola Alabi, *Sexual Violence Laws Redefined in the "Me Too" Era: Affirmative Consent & Statutes of Limitations*, 25 WIDENER L. REV. 69, 76–77 (2019) (noting how participants of the #MeToo movement "broke their silence and publicly [said] what they dared not say for a long time due to shame or fear of consequences," which appears to be a response to a failure to prosecute sexual violence offenses). Banning confidentiality has also been viewed as burdening victims of sexual misconduct with the task of speaking out to end this practice, instead of imposing the burden on

confidential settlements is said to respect the private wishes of the parties.[98] As Arthur Miller argues, confidentiality protects plaintiffs from long-lost relatives, while also shielding defendants from frivolous claims.[99] Moreover, the justice system prioritizes its interest in resolving disputes over the public's "right to know" regarding discovery, settlement negotiations, and jury deliberations.[100] Similarly, privacy should trump transparency in settlements because the main goal "of the judicial system is to resolve private disputes, not to generate information for the public."[101]

Opponents of confidential settlements, in contrast, argue that secret settlements are especially risky when it comes to keeping information about public health and safety under wraps.[102] They worry that such settlements reduce the deterrent effect of tort litigation[103] by diminishing victims' ability to speak out against defendants.[104] Responding to confidentiality advocates, scholars in this camp highlight the lack of empirical evidence pointing to a potential decrease in settlement rates or a rise in frivolous claims resulting from limitations on confidentiality.[105] Furthermore, they argue, contract law

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perpetrators. *See* Debra S. Katz & Lisa J. Banks, Opinion, *The Call to Ban NDAs Is Well-Intentioned. But It Puts the Burden on Victims*, WASH. POST (Dec. 10, 2019, 2:59 PM), https://www.washingtonpost.com/opinions/banning-confidentiality-agreements-wont-solve-sexual-harassment/2019/12/10/13edbeba-1b74-11ea-8d58-5ac3600967a1_story.html (arguing that NDAs can provide victims with "adequate compensation and . . . closure after a traumatic experience," yet can also place the "burden of correcting harassers' behavior" on the victims by forcing them to make their experience public to protect others); Paulina Cachero, *Mike Bloomberg Promised to Release 3 Women from Their NDAs—but Many More Accusers May Still Be Legally-Bound to Remain Quiet*, BUS. INSIDER (Mar. 22, 2020, 6:43 AM), https://www.businessinsider.com/legal-experts-say-mike-bloomberg-accusers-misconduct-silenced-ndas-2020-2 [https://perma.cc/662L-XWB4]. In response to Bloomberg, Inc.'s statement that it would release women who signed NDAs, Gillian Thomas, a senior staff attorney with the ACLU's Women's Rights Project, stated, "It struck me as odd that even in this glimpse of transparency that the onus was put on the person who had the complaint in the first place, as opposed to reaching out to them and saying, 'I welcome you telling your story.'" Cachero, *supra*.

98. Miller, *supra* note 76, at 464.

99. *Id.* at 485.

100. *See id.* at 485–86.

101. *Id.* at 441. Miller acknowledges that in rare instances, some public access to information may be appropriate, but even then, according to his view, there is never a reason to make public the amount of a settlement. *Id.* at 484–86.

102. *See generally* Zitrin, *supra* note 3, at 119–21 (discussing several cases where secret settlement agreements kept information about dangerous products from the public).

103. *See id.* at 118.

104. However, confidential settlements might also result in more reports since victims can avoid publicity and secure a settlement with minimal investment.

105. *See, e.g.*, David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1225

already declines to enforce contractual terms that violate public policy,[106] much like professional responsibility rules prevent lawyers from increasing the amount of settlement by allowing their clients to contract to commit illegal acts.[107]

In response to this debate, scholars have attempted to offer solutions which will address the problem of confidential settlements. Ian Ayres suggested focusing on secret settlements that enable repeat misconduct by creating an "information escrow" which is released in the event that another complaint is

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("[T]here is no evidence that these differences among jurisdictions have translated into differences in settlement timing and/or settlement rates."); Zitrin, *supra* note 3, at 118 (noting that even where states have enacted restrictions on secret settlements, there was "no indication of a resulting court logjam, or even that settlement rates have gone down"). While few studies have been done in those states with sunshine legislation, the Association of Trial Lawyers asserts that the volume of litigation has decreased since Florida enacted its version of the law. Dana & Koniak, *supra* at 1225 n.18. The authors further note that "[t]he complete absence of any reports of studies suggesting a decrease in settlement rates following the enactment of restrictions on secret settlements is notable given the substantial resources of those interest groups that favor secret settlements, and their ability to fund research." *Id.* In contrast, the economic models of settlement generally maintain that having another term over which to bargain should increase the likelihood of settlement. *See generally* Moss, *supra* note 2 (explaining the economics of settlement); Bullock & Hersch, *supra* note 84.

106. *See* Dana & Koniak, *supra* note 105, at 1221; Hoffman & Lampmann, *supra* note 6, at 182.

107. Dana & Koniak, *supra* note 105, at 1220. Yet, public access proponents acknowledge that under current rules of ethics, if a lawyer rejected an advantageous settlement that the client wishes to accept because the defendant insists on secrecy, that lawyer's conduct would constitute an ethical violation. *See* Heather Waldbeser & Heather DeGrave, *A Plaintiff's Lawyer's Dilemma: The Ethics of Entering a Confidential Settlement*, 16 GEO. J. LEGAL ETHICS 815, 820–26 (2003) (finding no option for an attorney who opposes a confidential settlement, except perhaps to withdraw). Professional responsibility scholars have proposed rule amendments as a remedial measure, but they have been rejected by the ABA on the grounds that the issue was more appropriate for a legislative solution. *See* Dana & Koniak, *supra*, at 1217 n.1 (reporting that the ABA Ethics 2000 Commission rejected a proposed rule change on secret agreements and that grounds for rejection included belief that state legislative action would be more appropriate); Zitrin, *supra* note 3, at 115–17 (proposing amendment of ABA Model Rules of Professional Conduct); Richard A. Zitrin, *The Laudable South Carolina Court Rules Must Be Broadened*, 55 S.C. L. REV. 883, 904–06 (2004) (discussing Zitrin's proposed rule change for South Carolina); Kevin Livingston, *Open Secrets: Rough Road Ahead for Legislators and Legal Ethicists Who Want to Ban Secret Settlements*, RECORDER (S.F.), May 8, 2001, at 1, https://www.bloomberglaw.com/product/blaw/document/XCDKB3KS000000 [https://perma.cc/7UPC-YAGY] (discussing Zitrin's proposal to the ABA 2000 Ethics Commission and its rejection); Richard Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?*, 32 HOFSTRA L. REV. 1565, 1594 (2004) (detailing proposed amendment to the current ethical rules, which wrongfully encourage lawyers to engage in secret deals). Furthermore, lawyer networks may reveal information about confidential settlements. Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 966–67 (2010) (noting survey evidence that few attorneys found confidentiality clauses a barrier to learning about settlement behavior).

brought against the same offender.[108] Similarly, to keep the negative externalities of confidential settlements at bay, Saul Levmore and Frank Fagan argue that laws should require the disclosure of the substance—and not the amount—of the settlement, but only in extraordinary circumstances.[109] Offering a more restrictive model, David Hoffman and Erik Lampmann suggest that courts should in most instances deny enforcement of NDAs that "conceal misconduct of a sexual nature" through the public policy doctrine.[110] Finally, Minna Kotkin advocates for transparency through lawyers rather than judges, arguing they should seek their clients' agreement to refrain from signing NDAs before taking on representation.[111]

Ultimately, this debate highlights the thorny issues involved in confidential settlement, which are likely the reason that regulating this area has been challenging. These challenges emphasize the crucial need to study this issue from the perspective of plaintiffs themselves to tease out the area in which regulatory intervention is needed.

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108. Ayres, *supra* note 6, at 76 (arguing "that NDAs should only be enforceable if they meet" certain formalities, including "if they explicitly disclose the rights which the survivor retains . . . to report the perpetrator's behavior to the [EEOC]"); *see also* Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 145 (2012) (considering the concept of information escrows, a process that allows individuals to provide sensitive information to trusted intermediaries who will only disclose such allegations or suspicions of misconduct under specified circumstances).

109. Levmore & Fagan, *supra* note 17, at 311. Levmore & Fagan argue that in certain circumstances, attorneys could be required under professional responsibility rules to report NDAs to authorities or vulnerable third parties; courts could refuse to enforce such agreements; or jurisdictions could impose mandatory disclosure requirements as to some or all information concerning these agreements. *See id.* at 342–43. Such circumstances include, according to the authors, sexual misconduct cases, in which victims may compromise "too quickly and cheaply" to serve the deterrence goal of settlements. *Id.* at 334. This is because offenders know that victims value privacy, too, in such contexts. *Id.* Moreover, in cases of sexual misconduct, offenders often possess an information advantage over victims in identifying patterns of abuse. *Id.* at 333. At the same time, banning NDAs might lead to a chilling effect on victims' reporting due to a concern that they will not be able to withdraw their claims from being adjudicated. *Id.* at 335.

110. Hoffman & Lampmann, *supra* note 6, at 168–71. They provide three reasons for this focus: the impact on employees resulting from repeated sexual misconduct; greater turnover in organizations with repeated harassment; and uncertainty for new employees when NDAs keep sexual misconduct secret. *Id.* at 177–78.

111. *See* Kotkin, *supra* note 81, at 927–28. It is clear that plaintiff, defense, and in-house lawyers are key players in many confidential settlements. *See* Tom C.W. Lin, *Executive Private Misconduct*, 88 GEO. WASH. L. REV. 327, 371 (2020) (noting lawyers as a key constituency that should reexamine the impact of various issues—such as "existing assumptions about acceptable private behavior, the role of business in society, and the functions of business law"—on corporate governance, policies, and purpose). As mentioned below, future research should explore lawyers' attitudes towards NDAs.

D. The Missing Piece: Plaintiffs' Attitudes Toward Confidential Settlements

Joining together these three distinct bodies of literature—jurors' understanding of civil justice; lay people's perceptions of settlement; and the normative debate regarding confidential settlements—it is clear where the gap lies. We currently have almost no knowledge about how plaintiffs perceive confidential settlements and what factors affect their decision-making when faced with a settlement offer. That said, as detailed below, existing literature can help generate predictions for or interpret the findings of the present study.

For example, if, as the literature on jury decision-making suggests, people tend to focus on the direct parties involved in the litigation, confidentiality shouldn't necessarily matter, as the balance between the parties can be restored without any need for a public trial or settlement. In contrast, publicity should matter if plaintiffs considering a settlement offer care about broader social goals such as general deterrence or sending a message about the defendant's behavior.

Furthermore, the results of this research can help establish where regulatory intervention is needed with respect to confidential settlements. Presumably, sunshine laws should only be put in place where the market fails to guarantee that settlement information of public interest will be public. My findings can point to where market failures occur. In particular, does the amount of settlement affect plaintiffs' incentives so as to deny the public access to such information?

II. METHODS AND RESULTS

A. Hypotheses and Experimental Design

To tease out which goals and circumstances plaintiffs consider when weighing a settlement offer, I surveyed a representative sample of Americans, asking about the extent to which they are likely to accept a settlement offer (the main dependent variable, or "DV").[112] Using a 2x2 factorial between-participant design, I experimentally manipulated two key dichotomous independent variables (or "IVs"): (1) *settlement confidentiality* (confidential/public), and (2) *repeat wrongdoing* (first-time

112. The study was pre-registered with Open Science Framework registries after data collection. Participants were recruited and data was gathered through the "Prolific" survey platform.

wrongdoer/repeat wrongdoer). Additionally, the experiment included three within-participant conditions detailed below.

Indeed, there are known limitations to a vignette design, "including limited external validity and potential unknown confounds."[113] In particular, there is concern of "cheap talk"; that is, that people behave differently when they are put on the spot than when they respond to surveys.[114] However, vignettes have been found effective in eliciting candid responses, especially when gathering data on awareness and attitudes.[115] In the particular context at hand, studying people's attitudes through a survey experiment putting participants in the shoes of plaintiffs is the "next best thing" to speaking to actual plaintiffs, which is extremely difficult to do.[116] Furthermore, to ensure that the vignettes represented a realistic scenario, emphasis was put on including as many details as possible about each situation described, such as gory details regarding the physical harm caused by the consumption of a defective product.

I expected a repeat wrongdoer defendant to decrease the likelihood of settlement ("H1"), given either a higher risk of future wrongdoing or more perceived blameworthiness.[117] H1 is also based on exploratory findings from a previous study, in which participants were asked to rate items of additional information they wished they had in order to assess the desirability of a secret settlement.[118] The most highly rated item was whether the wrongdoer has a pattern of sexually harassing his colleagues, with almost half of the participants (47%) rating it "very important."[119] This finding reinforced my expectation that repeat wrongdoing will constitute a significant factor in plaintiffs' decision-making regarding a settlement offer.

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113. Bachar, *supra* note 6, at 28 n.122.

114. On the gap between people's survey responses and actual behavior, see Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1987 (2019).

115. *See, e.g.*, Nancy E. Schoenberg & Hege Ravdal, *Using Vignettes in Awareness and Attitudinal Research*, 3 INT'L J. SOC. RSCH. METHODOLOGY 63, 64 (2000) (describing benefits of vignette-based research, including depersonalization that encourages an informant to think beyond his or her own circumstances, an important feature for sensitive topics).

116. *Id.*

117. Previous studies have shown that laypeople tend to attribute less severity to an act with more victims, a phenomenon dubbed "the Scope-Severity Paradox." *See, e.g.*, Loran F. Nordgren & Mary-Hunter Morris McDonnell, *The Scope-Severity Paradox: Why Doing More Harm Is Judged to Be Less Harmful*, 2 SOC. PSYCH. & PERSONALITY SCI. 97 (2011). But I do not expect to find a similar effect when it comes to prospective victims (rather than past victims). That is, I expect the risk of reoffending, which might result in harm to others, to generate concern about the implications of a settlement, and thus reduce the likelihood of settling.

118. *See* Bachar*, supra* note 6, at 30.

119. *Id.* at 37–38.

I also expected to find an independent effect for confidentiality such that plaintiffs would be less likely to accept a confidential settlement regardless of the type of dispute ("H2").[120] It is conceivable that the very restriction of one's freedom of speech entailed by signing an NDA will create an independent effect, such that confidentiality will decrease the likelihood of accepting a settlement offer.[121] Furthermore, if plaintiffs indeed pursue additional goals other than maximizing monetary compensation when bringing a tort claim, which I suspect is the case, then some of these goals might not be attainable through confidential settlements. In particular, any expressive goals would be harder to pursue when the settlement is kept confidential, as well as any information-forcing functions.[122] I also expected to find an interaction effect between confidentiality and repeat wrongdoing, such that confidentiality decreases plaintiffs' likelihood of settling their claims when the defendant is a repeat wrongdoer ("H3").

Alongside these key variables, the study examines three additional independent variables using a within-participant design as additional factors that might shape plaintiffs' decision-making regarding a settlement offer: (3) *the amount of the settlement*, (4) *the existence of a sanction against the wrongdoer* as part of the settlement terms, and (5) *the context of the scenario* (products liability/ sexual harassment). Following the theoretical literature on confidential settlements, particularly in the law and economics space,[123] I anticipated seeing an increase in the likelihood of settling both overall and specifically confidentially when subjects are offered more money ("H4").

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120. *See infra* Section II.B.

121. Such sentiments are reflected, for example, by lay opposition to content moderation in social media platforms like X, formerly known as Twitter. *See generally* Aileen Nielsen, *The Rights and Wrongs of Folk Beliefs About Speech: Implications for Content Moderation*, 27 UCLA J.L. & TECH. 118, 118–19 (2022) (presenting the results of an experiment exploring "the phenomenon of constitutionalized rhetoric about digital platforms and content moderation").

122. *See supra* Section III.B.

123. *See, e.g.*, Moss, *supra* note 2, at 878 (arguing that confidentiality might, by increasing the bargaining range, improve the likelihood of settlement); Andrew F. Daughety & Jennifer F. Reinganum, *Hush Money*, 30 RAND J. ECON. 661 (1999) (outlining a model which finds that for most parameter values, the extent of settlement is higher when confidentiality is permitted and plaintiffs prefer to have confidentiality option). In confidential settlements, the settlement premium the plaintiff can generate from the defendant can serve to deter them from settling; but confidentiality starts to become less valuable to the defendant the more other potential plaintiffs learn about the defendant's misconduct, independent of any knowledge of previous confidential settlements with prior plaintiffs. *See, e.g.*, Levmore & Fagan, *supra* note 17, at 317–19.

Previous work in both the civil and the criminal context has found that lay intuitions are more retributive than deterrence-oriented.[124] Thus, I expected plaintiffs to be more likely to settle—both generally and specifically under a confidentially condition—when the wrongdoer is sanctioned ("H5"). This hypothesis also resonates with previous work on lay perceptions of civil settlement, which found that laypeople tend to attribute responsibility to settling defendants.[125] As a result of such tendencies, I expected plaintiffs to be more inclined to settle when they see such culpable defendants suffer a sanction. H5 is also reinforced by findings from a previous study, in which participants indicated that they viewed information about whether the wrongdoer (a perpetrator of sexual harassment) was terminated from his job as a result of his behavior as important in their decision regarding a settlement offer.[126]

As for the scenario introduced to participants, I anticipated that the context of the scenario—products liability or sexual harassment—would lead to differences in settlement likelihood ("H6"). In other words, the type of scenario should influence whether participants are likely to settle or not. My hypothesis was that, given products liability's more transactional nature and no-fault liability regime as explained below, plaintiffs will be more inclined to settle such a dispute than a more contentious, morally blameworthy sexual harassment dispute. Finally, I examined whether attitudes toward settlement are associated with participants' preexisting opinions on settlement confidentiality, and/or demographic characteristics.

As explained below, for each of the two scenarios presented to participants, participants were divided into four groups. Each group was randomly assigned to one of four conditions,[127] which represented combinations of the two main independent variables:

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124. *See, e.g.*, Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, 40 ADVANCES EXPERIMENTAL SOC. PSYCH. 193, 204–05 (2008) (pointing out two important outcomes: (1) when people are placed in the position of assigning punishment, they seek out information relevant from a retributive perspective; and (2) even when people were instructed to be utilitarian and ignore the retributive factors, the moral severity of the offense "remained a significant predictor of the sentence"); Kevin M. Carlsmith, *The Roles of Retribution and Utility in Determining Punishment*, 42 J. EXPERIMENTAL SOC. PSYCH. 437, 442–43 (2006); Jonathan Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law,* 7 J. RISK & UNCERTAINTY 17, 17 (1993) (finding that the penalties people impose are "generally uninfluenced by their deterrent effect on future behavior").

125. Bregant et al., *supra* note 1, at 119–22 (finding such tendencies across a wide range of contexts, including #MeToo, policing, crime, regulatory enforcement, and tort).

126. *See* Bachar*, supra* note 6, at 38 (noting that such information item received a mean score of 2.8, and the standard deviation was 1.19).

127. As explained below, there were no statistically significant differences across the covariates in the four treatment groups.

- Confidential + First-time Wrongdoer
- Confidential + Repeat Wrongdoer
- Public + First-time Wrongdoer
- Public + Repeat Wrongdoer

In all conditions, participants read two fictional vignettes: one depicting a products liability scenario, and the other describing a sexual harassment scenario.[128] The goal of having the vignettes explore two different legal contexts was, first, to increase the robustness of the findings if they held across both scenarios, and second, to allow me to draw inferences from any differences between the findings in each scenario. To that end, though the vignettes described settlements in two different contexts, they were designed to mirror one another on each of the key variables examined.[129] The order in which the vignettes were presented was counterbalanced between participants. Participants were subsequently asked a series of questions regarding their likelihood of accepting a settlement offer.[130] To enhance reliability, the dependent variable was tested by using positive and negative statements which were then aligned through reverse-coding. The dependent variable score was calculated by using range of response and then averaging all ratings after reverse-coding.[131] Participants were also asked a question aimed at assessing the extent to which the repeat wrongdoing treatment was comprehensible to them.[132]

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128. There are of course differences between the liability regime in products liability (negligence/strict liability) and sexual harassment (negligence/intentional tort/civil rights suit). These are discussed below.

129. That said, there are obvious differences stemming from the fact that the harm is caused by the company in the products liability scenario, in contrast to the culpable manager in the sexual harassment scenario. The language of the two vignettes and the questions that followed them are reproduced in full below.

130. Answers were given on a five-point Likert scale for likelihood or agreement. A five-point scale was chosen because the responses were evaluated on a scale measuring one item (from high to low) rather than two different items. *See generally* Carolyn C. Preston & Andrew M. Colman, *Optimal Number of Response Categories in Rating Scales: Reliability, Validity, Discriminating Power, and Respondent Preferences*, 104 ACTA PSYCHOLOGICA 1 (2000).

131. To assess the reliability of the dependent variable, a factor analysis was conducted as part of the pretest stage on responses to these questions. I pretested an additional statement which read: "I believe other people in my situation would have taken the settlement offer." Given weak correlation with the other statements (likely because participants interpreted this statement as asking something different), I did not include it in the full study.

Additional information regarding the question wording is included below.

132. That is, to enhance internal validity, the goal was to ensure that participants made the connection between the information they had regarding a history (or lack thereof) of wrongdoing on the part of the wrongdoer, and the chances that the wrongdoer will re-offend.

For each scenario, participants were then presented with variations to the original vignette, adjusting the amount offered as part of the settlement and whether the settlement agreement included a provision imposing sanctions on the wrongdoer. As for the settlement amount, at the pilot stage, which was conducted with two different age groups (younger and older participants), the amount was undisclosed. Pretest participants were asked to answer a follow-up question: "For how much money would you have taken the settlement offer?" The distributions of the amounts indicated were then analyzed, and the low (25th) and high (75th) percentile amounts plugged into the scenarios and into a variation question, respectively.[133] The amounts were $10,000 and $200,000 in the products liability scenario and $15,000 and $300,000 in the sexual harassment scenario.

Participants were also asked about their general views of settlement confidentiality using positive and negative statements, which were aligned through reverse-coding to create a 1–5 pro-NDA score for each participant. The ratings on each statement ranged 1–5. I then averaged the ratings to create the score. The order of these questions and the vignettes were counterbalanced between participants. The statements read:

- It is better for society if lawsuits are settled confidentially.
- In general, confidential settlement of lawsuits limits the public's right to know about important issues.

The goal of these questions was twofold. First, the questions were meant to assess the potential role of preexisting views about confidential settlements as a moderator of the independent variables' effect. Second, these questions were meant to ensure the internal validity of the study; in other words, to guarantee that the experiment is testing likelihood of accepting a settlement offer and not some other construct. A positive correlation between the answers to the general questions about settlement confidentiality and the likelihood of accepting a settlement offer which calls for confidentiality proves that this is the case. Such a positive correlation was indeed found in both scenarios, though it was relatively weak, indicating that participants were sensitive to the treatment rather than guided solely by their preexisting opinions. In particular, as noted below, preexisting views on NDAs had no effect on settlement likelihood in the products liability scenario.

Finally, participants were asked a series of demographic questions about their gender, age, household income, and education. These questions

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133. The analysis excluded outliers (very high amounts) which were likely indicated by participants who did not wish to take the settlement offer under any conditions.

appeared at the end of the survey to avoid order effects. The two scenarios are reproduced in full below, along with the questions asked on each scenario.

B. Sample

A power analysis indicated that a sample of approximately 350 participants is needed to have 80% power to detect the hypothesized effect, assuming an approximate effect size (Cohen's *d*) of 0.3.[134] However, based on size of population measures, the recommended sample size was at least 385 participants. As a result, a representative sample of 500 American adults (51.53% women, Mean age = 45.62 years old, *SD* = 15.91 years) was recruited to participate in an online study through the survey platform Prolific, reflecting the U.S. census race, age, and gender quotas.[135] The platform provided basic demographic data on the participants. In addition, as noted, participants were also asked a series of demographic questions.[136]

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134. Power analysis was based on a common 80% power, alpha = 0.05 and a small effect size of 0.3. Using a small effect size for the power analysis guarantees that even a small effect would be detected. *See* Marc Brysbaert, *How Many Participants Do We Have to Include in Properly Powered Experiments? A Tutorial of Power Analysis with Reference Tables*, 2 J. COGNITION 1, 5–7 (2019). It should be noted that the effect size found in pretest was not used to determine the sample size given the now established norm indicating that pilot studies are next to worthless to estimate effect size. *See id.*

135. As part of the analysis, I opted to not use attention checks to monitor meaningful completion of the survey due to concerns about introducing a selection bias. *See* William R. Darden et al., *The Role of Consumer Sympathy in Product Liability Suits: An Experimental Investigation of Loose Coupling*, 22 J. BUS. RSCH. 65, 78–79 (1991). Furthermore, research has raised concerns about the use of artificial intelligence (AI) to bypass attention checks. *See* Peri Weiping et al., *Attention Please: Your Attention Check Questions in Survey Studies Can Be Automatically Answered*, 2020 WWW '20: PROC. WEB CONF. 1182, https://dl.acm.org/doi/abs/10.1145/3366423.3380195 [https://perma.cc/LP7A-J85W]. In lieu of attention checks, I eliminated responses which recorded a response time of under two standard deviations below the mean (the mean response time was approximately five minutes). However, this does not eliminate growing concerns about bots in online surveys, which is a limitation of this study.

136. Level of education was coded as a categorical variable, on a four-category scale as detailed below. Data was also gathered about participants' party affiliation (which leaned Democrat, with 53.13% identifying as Democrats and only 15.98% as Republicans) but the data was not included in the analysis.

Table 1. Composition of Sample

	Percentage / Mean
Female	51.53%
Age	45.62 years
Race	
White	76.8%
Black	12.8%
Asian	6%
Mixed	2.4%
Other	2%
Education	
High school graduate or less	39.8%
Some college or Bachelor's degree	43.4%
Master's or Professional degree	14.6%
Doctorate	2.2%
Household Income	
Less than $25,000	14.8%
$25,000–$49,999	27.4%
$50,000–$99,999	33.4%
$100,000–$199,999 or more	24.4%

Note: $N = 500$; *N (Gender)* = 491. Regarding gender, the nine remaining participants self-identified as "other."[137]

I report my experimental findings for each of the scenarios separately by using a linear (or OLS) regression model.[138] I also ran a repeated measures ANOVA and a mixed-effects regression to account for any within-participant effects that participants being exposed to both scenarios might have had, and these yielded similar results reported in Section II.E below.

C. Scenario I: Products Liability

1. Method

Following the procedure described above, participants were randomly presented with one of four versions of the scenario included in full below

137. There were no statistically significant differences across the covariates in the four treatment groups.

138. It should also be noted that I chose to present the findings by using a regression analysis rather than an ANOVA, which is typical in 2x2 factorial designs because the linear regression allows the inclusion of additional control variables in the model—such as age, gender, education and the like—thus providing a more nuanced picture of the results. Further, regression coefficients also provide a direct point estimate of the effects, unlike the results of an ANOVA.

(alternative treatments are bracketed, with [] representing repeat wrongdoing treatment, and {} representing confidentiality treatment):

> Jupiter is a food manufacturer. Assume that several weeks ago, you purchased and consumed one of Jupiter's food products—canned chickpeas—and later became seriously ill. Specifically, you experienced three days of constant vomiting and diarrhea and had to miss work during those days. You are also at risk of developing an irritable stomach syndrome which can last up to a year.
>
> You then launched a complaint with Jupiter's customer service for selling a defective product. In response to your complaint, an internal investigation at Jupiter found that the canned chickpeas you consumed were indeed defective [but no other Jupiter products had that defect] / [and this is the third time Jupiter has sold a defective product to a customer].[139]
>
> You were then contacted by Jupiter's lawyers, who offered you a settlement: you will receive a check for $10,000,[140] {and} will waive all future claims against the company (that is, you will not be able to sue Jupiter in court), {and will sign a non-disclosure agreement, which requires you to never speak about the incident again} {You are free to speak about the incident, but are not required to do so}.
>
> If you decide to take the settlement offer, Jupiter will not be held legally responsible for what happened to you.
>
> If you decide to decline the settlement offer, you are free to file a lawsuit against the company and the court record will be available to the public. The lawsuit may take several years to be resolved and you have an estimated 50% chance of winning it.[141] If you end up winning the lawsuit against Jupiter, you will likely receive a larger amount of money than you were offered in the settlement offer.

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139. It should be noted that a three-times repetition was indicated in both scenarios. However, participants may have perceived this information as less severe in the products liability context than in the sexual harassment context.

140. As noted, dollar amounts were undisclosed during pretests. The amount included in the study was based on the distribution of amounts indicated by pretest participants. Interestingly, while pretests were conducted with both older and younger age groups, differences between the amounts indicated by both groups were insignificant.

141. This probability does not represent an actual evaluation of the plaintiff's case but rather is aimed at conveying the inherent risk involved in choosing a trial over a settlement. The goal was to reflect the risk in a way that would be clear to a lay person, at the expense of accurately evaluating the net present value of trial versus settlement. That said, participants may have assumed a significantly higher payout at trial which justifies the risk.

Participants were then asked about the extent to which they were likely to take the settlement offer (DV).[142] Participants were also presented with a question aimed at assessing their intuitions about the risk of the wrongdoer re-offending, considering the information they received regarding repeat wrongdoing. The question read: "How likely is it in your view that Jupiter will produce another defective product in the future?"

Finally, participants were asked to consider two variations on the scenario above. First, in terms of the settlement amount: "I would take the settlement offer if the amount of money offered was $200,000." As noted, this amount represented the 75th percentile in the distribution of amounts indicated by pretest participants. Second, in terms of a sanction against the responsible Jupiter executive: "Now assume that as part of the original settlement offer, in addition to the $10,000 you will receive, the Jupiter executive who was responsible for manufacturing the defective canned chickpeas will be fired."[143]

With these questions, too, answers were given on a five-point Likert scale.

2. Results

The first and most important result is that both independent variables—settlement confidentiality and repeat wrongdoing—had a significant negative effect on the dependent variable—likelihood of accepting settlement. In accordance with H1 and H2, and as shown in Figure 1 below, the introduction of a nondisclosure clause decreased the likelihood of participants accepting the settlement offer compared to a public settlement.[144] Independently, a repeat wrongdoer defendant also decreased the likelihood of participants accepting the settlement offer compared to a defendant who is a first-time wrongdoer.[145] In other words, a public settlement increased the mean likelihood of settlement in both the first-time wrongdoer and the repeat wrongdoer conditions. Similarly, a first-time wrongdoer treatment increased

142. The question was presented through a positive and a negative statement (later aligned through reverse-coding).

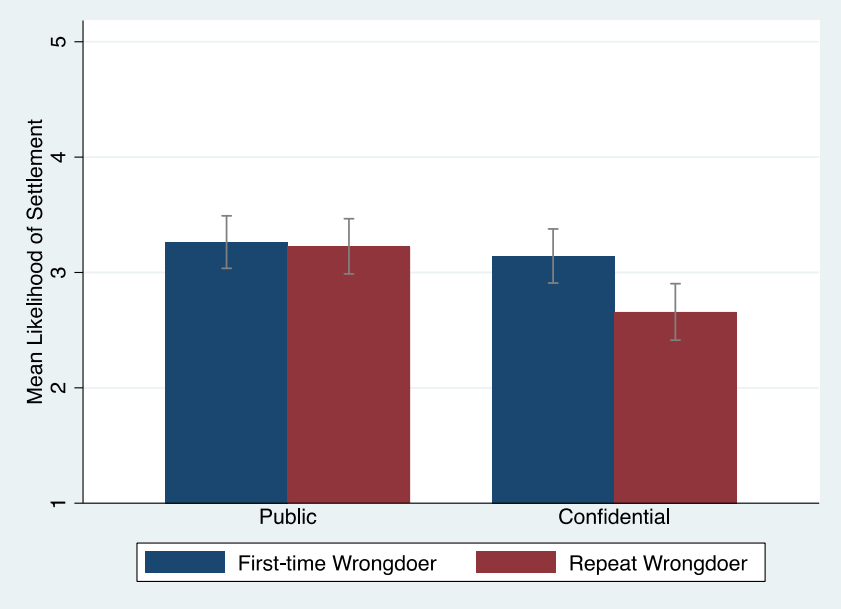
143. Pretest participants were also asked to share the underlying reasons for their answers regarding the amount of settlement and sanction against the wrongdoer. This was aimed at a preliminary assessment of the validity of these independent variables (which will require further testing in future studies).

144. $\beta = -0.367$, $p = 0.003$, $R^2 = 0.0495$, $F(7,483) = 3.92$.

145. $\beta = -0.258$, $p = 0.034$, $R^2 = 0.0495$, $F(7,483) = 3.92$. The effect size (Cohen's d) for confidentiality was 0.254 and for repeat wrongdoing 0.2. According to the Cohen's convention, $d = 0.2$ is considered a "small" effect size, 0.5 represents a "medium" effect size and 0.8 a "large" effect size. *See* JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES 473–81 (2d ed. 1988).

the mean likelihood of settlement in both the confidential settlement and public settlement conditions.[146] Surprisingly, though, the interaction term between the two independent variables—confidentiality and repeat wrongdoing—was not significant at the 5% conventional level.[147] That is, a participant's reaction to a demand for confidentiality did not depend on whether the wrongdoer was a repeat or a first-time wrongdoer.

Figure 1. Settlement Likelihood by Confidentiality—Repeat Wrongdoing in Products Liability Scenario



Note: $N = 500$; 95% confidence intervals

To further probe these effects, alongside testing the effect of the two main independent variables, the OLS regression analysis allowed for a more nuanced understanding of the findings, testing the effect of other control variables. As shown in Table 2 below, the only demographic control that

146. *See infra* Figure 1.

147. $\beta = -0.447$, $p = 0.064$, $R^2 = 0.0319$. It is worth noting, because the interaction effect was on the verge of significant, that the direction of the interaction term offers suggestive evidence that a confidential settlement can increase the negative effect of repeat wrongdoing on settlement likelihood ($\beta = -0.447$), which is in accordance with H3. Since the interaction effect is not significant at conventional levels, it was excluded from the regression model to avoid a bias in the rest of the estimation. Specifically, when the interaction effect was included in the model it absorbed some of the independent effect of the main independent variables. As a result, it is omitted from the regression table below.

proved statistically significant was age, such that it had a small negative effect on settlement likelihood.[148] In other words, older participants were less likely to take the settlement offer. Household income and education were significant only at the 10% level ($p = 0.1$). Interestingly, neither participants' gender nor their preexisting views regarding NDAs (their "Pro-NDA Score") were statistically significant factors affecting settlement likelihood in the products liability case.[149]

Table 2. OLS Regression of Likelihood of Settlements in Products Liability Scenario

VARIABLES	Model 1	Model 2
Confidentiality	-0.344**	-0.367**
	(0.12)	(0.12)
Repeat Wrongdoing	-0.262*	-0.259*
	(0.12)	(0.12)
Favorable Views of NDAs		0.072
		(0.07)
Gender		0.144
		(0.12)
Age		-0.01*
		(0.00)
Level of Education		0.129
		(0.08)
Household Income		-0.095
		(0.06)
Constant	3.376	3.595
	(0.1)	(0.35)
Observations	500	491[150]
R-squared	0.0252	0.0495

Robust standard errors in parentheses
***$p < 0.001$, **$p < 0.01$, *$p < 0.05$

148. $\beta = -0.01$; $p = 0.011$.

149. $p > 0.1$. The lack of gender effect is surprising given prior research indicating such effect exists in the settlement context more broadly. *See, e.g.*, Christina L. Boyd, *She'll Settle It?*, 2 J.L. & CTS. 193 (2013) (finding that female judges fostered settlement in their cases more often and more quickly than their male colleagues, and arguing "these findings have broad implications for female decision makers" in other settings). This finding perhaps indicates that female decision-makers do not share such cohesive characteristics as individual plaintiff decision-makers. That said, it should be noted that when interacting gender and age, gender did become statistically significant ($p < 0.001$).

150. There are fewer observations in this model because gender was coded as a dichotomous variable while some participants indicated their gender was non-binary or other.

Further, as noted above, participants were also asked about their intuitions regarding the likelihood that the wrongdoer in question would reoffend in the future. As expected, a positive correlation was found between participants' intuitions regarding future wrongdoing and the repeat wrongdoing treatment they received,[151] confirming that participants tended to interpret the information they were given regarding past wrongdoing as indicative of the likelihood that the defendant will reoffend. That said, as discussed below, the moderate nature of the correlation indicates that other factors affected participants' intuitions about the risk of the defendant committing wrongdoing in the future. Similarly, as expected, participants' responses regarding the likelihood of settlement and a defendant's likelihood to reoffend were negatively associated.[152] However, the moderate strength of the relationship points to the fact that other factors likely play a role here too.

Finally, the effects of two additional independent variables on the dependent variable—settlement amount and sanction against the wrongdoer—were tested using a within-participants analysis. In accordance with H4, participants were overall significantly more likely to take the settlement offer when it included a larger payoff,[153] compared to the smaller amount included in the original scenario.[154] Interestingly, participants in the confidential settlement condition showed an even larger increase in their likelihood to settle from the original amount[155] to the larger amount,[156] compared to the public settlement condition. This finding indicated a pronounced tendency to agree to settle confidentially for a higher amount of money.[157] Rerunning the regression using the likelihood of settlement under the larger amount condition, I found that repeat wrongdoing still had a significant effect on settlement likelihood,[158] but confidentiality was no longer statistically significant ($p > 0.1$), meaning that the effect of confidentiality on participants' decision-making disappeared when offered a larger amount of money. In other words, there is evidence to suggest that at some point, the monetary incentive participants received "crowded out"

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151. $r = 0.36$, $p < 0.001$.

152. $r = -0.31$, $p < 0.001$.

153. Mean = 4.4, $SD = 0.98$.

154. Mean = 3.07, $SD = 1.36$, $p < 0.05$. *T*-tests were used to examine whether the differences between the DV before and after the treatment were statistically significant.

155. Mean = 2.9, $SD = 0.087$.

156. Mean = 4.34, $SD = 0.067$, $p < 0.001$.

157. The difference was not as big for participants in the public settlement condition, from Mean = 3.25 under the lower amount to Mean = 4.48 under the larger amount, but still statistically significant ($p < 0.05$).

158. $\beta = -0.19$, $p = 0.027$, $R^2 = 0.0227$, $F(6,484) = 1.68$.

whatever moral or other incentive they had to turn down a confidential settlement.[159]

However, contrary to H5, the existence of a sanction against the wrongdoer did not matter as much to participants, both overall and specifically to those in the confidential settlement condition. The differences between the likelihood of settlement in the original scenario and the sanction variation were not statistically significant at conventional levels, both for all participants and specifically for participants in the confidential settlement condition.[160]

D. Scenario II: Sexual Harassment

1. Method

Following the same procedure as described above for the products liability scenario, participants were randomly presented with one of four versions of the scenario included in full below (alternative treatments are bracketed, with [] representing repeat wrongdoing treatment, and {} representing confidentiality treatment). As noted, the order of the vignettes was counterbalanced, such that participants were randomly assigned to seeing the products liability vignette or the sexual harassment vignette first. Furthermore, all questions associated with the sexual harassment scenario were optional.[161]

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159. As a result, when the settlement amount increased, a *t*-test showed that the difference between confidential and public settlement became insignificant (Confidential: Mean = 4.34, *SD* = 1.07; Public: Mean = 4.48, *SD* = 0.88; $p > 0.05$). However, this finding is suggestive, as crowding out is overdetermined by the structure of the current experiment. For example, it is possible that confidentiality was worth less to some participants in the first place, thus eliminating the possibility of a crowding out effect. In contrast, others might care about confidentiality regardless of the amount. Further research is needed to substantiate this affect and consider these alternatives.

160. Here too, *t*-tests were used to examine whether the differences were statistically significant, which they were not ($p = 0.09$). However, it is worth noting that the results were consistent with the direction of H5, meaning that the introduction of the sanction increased the likelihood of settlement for participants overall and in the confidential settlement condition. In contrast, the introduction of the sanction produced the opposite direction—a decrease in likelihood to settle—for participants in the public settlement condition.

161. This procedure was adopted following the IRB approval of the study so that participants could opt out of that part of the study if they did not feel comfortable engaging with this context. No participants opted out.

> Assume that Sam is a department manager in the company you work for.[162] A few months ago, you applied for an internal promotion in Sam's department. You interviewed with Sam and after the interview exchanged a few text messages with Sam regarding the position. Late that night, Sam texted you, inviting you to come over to Sam's private residence to continue the interview. Throughout the meeting at Sam's place, Sam keeps making inappropriate advance towards you. The next day, you file a complaint for sexual harassment against Sam with the company. In response to your complaint, the company conducts an internal investigation, in which your allegations against Sam were found true. It was also found that [Sam has never harassed a co-worker before] [Sam has previously harassed several other co-workers]. Assume that since the incident you have switched jobs and no longer work for that company.
>
> The company then offers you a settlement: you will receive a check for $15,000, {and} will waive all future claims against the company (that is, you will not be able to sue the company in court), {and will sign a non-disclosure agreement, which requires you to never speak about the incident again} {You are free to speak about the incident, but are not required to do so}.
>
> If you decide to take the settlement offer, the company will not be held legally responsible for the incident, and neither will Sam.
>
> If you decide to decline the settlement offer, you can file a lawsuit against the company in court and the court record will be available to the public. The lawsuit may take several years to be resolved and you have an estimated 50% chance of winning it. If you end up winning the lawsuit against the company, you will likely receive a larger amount of money than you were offered in the settlement offer.

Participants were again presented with a series of statements to which they needed to respond on a five-point scale. These statements indicated the likelihood they would take the settlement offer (DV).[163] Here, too, participants were presented with a question aimed at examining intuitions regarding future wrongdoing given the information provided in the scenario. In this scenario, the question read: "How likely is it in your view that Sam will harass another colleague in the future?"

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162. The name "Sam" was intentionally chosen to indicate a gender-neutral name that can be assigned to whichever gender identity participants chose. To that end, no gender pronouns were included in the scenario. This was preferred over two variations of the scenario for male and female participants, which would have introduced a bias in the results.

163. Two statements, positive and negative, were later aligned through reverse-coding.

Finally, participants were asked to consider two variations of the scenario above. First, in terms of the settlement amount: "I would take the settlement offer if the amount of money offered was $300,000." As noted, this amount represented the 75th percentile in the distribution of the amount indicated by pretest participants. In addition to the information derived from the pretest distribution, the amount was also adjusted to account for federal caps on damages for sexual harassment.[164] Second, in terms of a sanction against Sam, the harassing manager: "Now assume that as part of the original settlement offer, in addition to the $15,000 you will receive, Sam will be fired from the company."[165]

With these questions, too, answers were given on a five-point Likert scale.

2. Results

Similar to the results of Scenario I, both independent variables—settlement confidentiality and repeat wrongdoing—had a significant negative effect on the dependent variable—likelihood of settlement—thus confirming H1 and H2 in the sexual harassment scenario. Specifically, requiring confidentiality significantly decreased the likelihood of settlement.[166] Similarly, participants who received the version of the scenario in which Sam was a repeat wrongdoer were significantly less likely to take the settlement offer than those who read a scenario in which Sam was a first-time wrongdoer.[167] In other words, in the sexual harassment scenario, much like in the products liability scenario, a public settlement increased the mean likelihood of settlement in both the first-time wrongdoer and the repeat wrongdoer conditions. In the same vein, a first-time wrongdoer increased the mean likelihood of settlement in both the confidential settlement and public settlement conditions (see Figure 2 below). However, the interaction term between the two independent variables—confidentiality and repeat wrongdoing—was not statistically significant,[168] meaning that the reaction to

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164. *See generally* Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1 (2006) (analyzing a set of 232 cases in which plaintiffs won some positive amount of compensatory damages from trial and appellate court decisions at the state and federal levels from 1982 to 2004).

165. As with Scenario I, pretest participants were asked to share the underlying reasons to their answers regarding the amount of settlement and sanction against the wrongdoer. This was aimed at a preliminary assessment of the validity of these independent variables (which will require further testing in future studies).

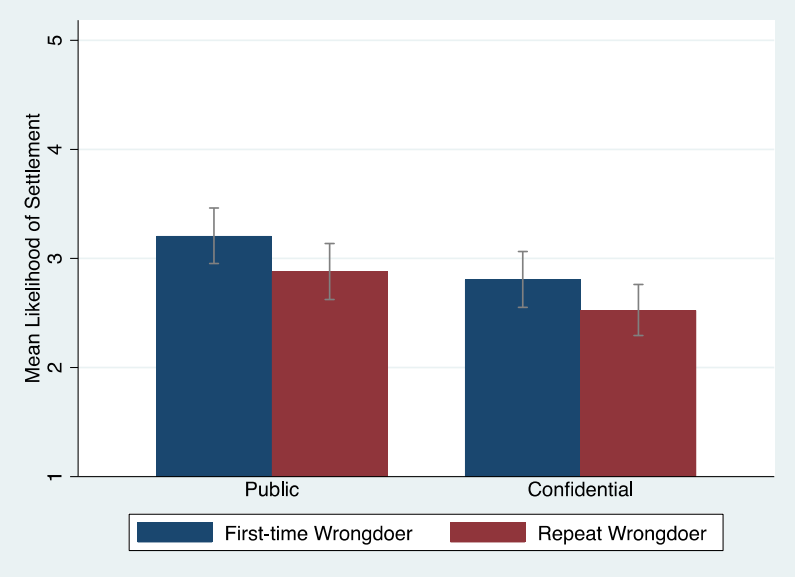
166. $\beta = -0.38$, $p = 0.003$, $R^2 = 0.049$, $F(7,483) = 3.77$.

167. $\beta = -0.3$, $p = 0.017$, $R^2 = 0.049$, $F(7,483) = 3.77$.

168. $p > 0.1$.

repeat wrongdoing in participants' settlement decision-making did not depend on whether the settlement was going to be confidential or public.

Figure 2. Settlement Likelihood by Confidentiality; Repeat Wrongdoing in Harassment Scenario



Note: $N = 500$; 95% confidence intervals

Here, too, I conducted an OLS regression analysis to test whether any of the control variables affected the likelihood of settlement. While most control variables did not have a significant effect over the likelihood of settlement,[169] here, unlike Scenario I, a significant effect was found for participants'

169. This includes age which, as noted, did have a statistically significant (if small) effect on likelihood of settlement in the products liability context. However, when rerunning the regression interacting age and gender, gender became statistically significant ($\beta = -0.5$; $p = 0.009$, when *Female* = 1, *Male* = 0), in line with research reflecting differences in perceptions of workplace harassment between older and younger women. *See, e.g.*, Marita P. McCabe & Lisa Hardman, *Attitudes and Perceptions of Workers to Sexual Harassment*, 145 J. SOC. PSYCH. 719 (2005) (finding that, in samples derived from two different companies, individual factors—including age, gender, and gender role, but also past experiences of sexual harassment, and perceptions of management's tolerance of sexual harassment—predicted attitudes toward sexual harassment). One way to explain the lack of independent effect for gender in the sexual harassment context is that, especially when considering the confidentiality variable, gender may pull in different directions. That is, some women may prefer to settle to receive some measure of justice and compensation, while others might seek punishment or public accountability, thus preferring trial. For further discussion on these competing instincts, see *infra* Section III.B.

preexisting views on NDAs, such that favorable views of NDAs increased the likelihood of settlement.[170]

Table 3. OLS Regression of Likelihood of Settlements in Sexual Harassment Scenario

VARIABLES	Model 1	Model 2
Confidentiality	-0.376**	-0.381**
	(0.13)	(0.13)
Repeat Wrongdoing	-0.304*	-0.306*
	(0.13)	(0.13)
Favorable Views of NDAs		0.177*
		(0.08)
Gender		0.048
		(0.13)
Age		0.000
		(0.00)
Level of Education		-0.129
		(0.09)
Household Income		-0.068
		(0.06)
Constant	3.196	3.135
	(0.11)	(0.36)
Observations	500	491
R-squared	0.0282	0.0489

Robust standard errors in parentheses
***$p < 0.001$, **$p < 0.01$, *$p < 0.05$

It also bears mentioning that here, like in Scenario I, there was a positive, moderate correlation between the repeat wrongdoing treatment which participants received (first-time or repeat wrongdoer) and their intuitions regarding the likelihood that the wrongdoer will reoffend,[171] confirming that participants likely perceived the information they were given in the original scenario regarding Sam's history of wrongdoing (or lack thereof) as indicative of the likelihood that Sam will reoffend in the future. As was the case in the products liability scenario, a negative moderate correlation was found between participants' responses to the likelihood they will take the settlement and their assessment of the likelihood that the defendant will commit wrongdoing in the future.[172]

170. $\beta = 0.177$, $p = 0.02$.
171. $r = 0.377$, $p < 0.001$.
172. $r = -0.454$, $p < 0.001$.

One more set of important results should be mentioned. Such results were found regarding the additional two independent variables, settlement amount and the introduction of a sanction against the wrongdoer as part of the settlement. First, a larger settlement amount significantly increased the mean likelihood of settlement both overall[173] and specifically with regard to participants in the confidential settlement treatment group.[174] The latter finding was consistent with H4, indicating that, based on a within-participant analysis, participants were significantly more likely to take the settlement when offered more money, including in the confidentiality condition. I again re-ran the regression using the likelihood of settlement under the larger amount condition as the dependent variable. In contrast to Scenario I, in Scenario II both repeat wrongdoing and confidentiality remained statistically significant.[175] That is, in the sexual harassment scenario, participants continued to be influenced by not only the wrongdoer's history of wrongdoing but also the confidentiality of the settlement, even when offered a larger amount of money to settle.[176]

Second, in contrast to the finding reported in the products liability scenario and in accordance with H5, participants seem to have also been significantly influenced by the imposition of a sanction on Sam, the wrongdoer, when deciding whether to take the settlement. Overall, introducing a sanction as part of the settlement increased the likelihood of settlement compared to the original scenario, and the differences were statistically significant.[177] Furthermore, within the confidential settlement group, the imposition of a sanction on the defendant as part of the settlement significantly increased participants' mean likelihood to settle.[178]

E. Effect of the Scenario

As noted, the scenario each participant saw was an additional within-participant independent variable. Though the order of the scenarios was randomized to counterbalance any order effects, the fact that each participant

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173. From Mean = 2.86, *SD* = 0.064; to Mean = 4.22, *SD* = 0.052; $p < 0.001$.

174. From Mean = 2.67, *SD* = 0.09; to Mean = 4.12, *SD* = 0.08; $p < 0.001$.

175. $\beta = -0.25$, $p = 0.016$; and $\beta = -0.21$, $p = 0.043$, respectively. $R^2 = 0.0337$; $F(6,484) = 2.92$

176. That said, a *t*-test showed that the difference between the mean likelihood for public and confidential settlements under the larger settlement amount was only marginally significant (Confidential: Mean = 4.12, *SD* = 1.24; Public: Mean = 4.32, *SD* = 1.07; $p = 0.054$). This indicates that the larger amount swallowed much of the difference that confidentiality made in participants' decision-making.

177. From Mean = 2.856, *SD* = 0.064; to Mean = 3.566, *SD* = 0.06; $p < 0.001$.

178. From Mean = 2.668, *SD* = 0.88; to Mean = 3.5, *SD* = 0.87; $p < 0.001$.

read one version of each of the two scenarios allowed me to test the effect that the context of the dispute described in each scenario had on participants' likelihood to settle. I thus ran a repeated measures ANOVA to examine the effect that the context of the scenario (IV5) had on settlement likelihood (DV).[179] The ANOVA revealed that, in accordance with H6, the context of the scenario introduced to participants lead to statistically significant differences in mean settlement likelihood.[180] Specifically, the mean settlement likelihood in the products liability scenario was higher than in the sexual harassment scenario and the differences were statistically significant.[181] That said, we should keep in mind that the settlement amounts were not identical in both scenarios, and thus I cannot rule out the possibility that participants in the sexual harassment scenario assumed they would be able to collect higher amounts of damages at trial.[182]

With this caveat in mind, I also ran a mixed-effects regression, using the scenario as an independent variable and grouping the treatments of each of the scenarios together for the two main IVs. This analysis yielded similar results, with both confidentiality and repeat wrongdoing having a significant effect on settlement likelihood,[183] as did the scenario and preexisting views regarding NDAs.[184] The full results of the mixed effects regression are in the Appendix.

III. TORT SETTLEMENTS, CONFIDENTIALITY, AND THE GOALS OF TORT LAW

This Part discusses the findings of both scenarios, considers their implications to our understanding of what ordinary people view as the goals of tort law, and addresses the distinction between the two legal contexts of products liability and sexual harassment.

But first, some limitations. There are well-known limitations to an online vignette design such as the one used here, including limited external validity

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179. The two main between-subject IVs were excluded from this analysis.

180. $F(1,499) = 10.06$, $p = 0.0016$.

181. Mean = 3.072 and Mean = 2.856, respectively.

182. As noted, the settlement amounts were calibrated using the distribution of pretest responses, which may capture some of the difference in moral preferences between the two scenarios.

183. $\beta = -0.38$, $p < 0.001$; and $\beta = -0.28$, $p = 0.002$, respectively.

184. The scenario ($\beta = -0.2$, $p = 0.02$, where *products liability* = 1, *sexual harassment* = 2) and preexisting views regarding NDAs ($\beta = 0.123$, $p = 0.017$) affected settlement likelihood, while household income ($\beta = -0.08$, $p = 0.051$) was significant only at the 10% level.

and potential unknown confounds.[185] The research thus needs to be replicated to enhance robustness. Further, while the survey experiment was administered to a nationally representative sample in terms of race, gender, and age, the sample may not necessarily be representative in other respects. That said, while the implications suggested below should be taken with a grain of salt given these limitations, they still offer important new insight which, if confirmed by future studies, will help build the body of knowledge on plaintiffs' attitudes toward settlement.

I first address findings that held across the two scenarios and then discuss key differences in the results of each scenario.

A. Repeat Wrongdoing Decreases Settlement Likelihood

As noted, one of the key findings in both scenarios was the independent negative effect that repeat wrongdoing had on likelihood of settlement. Information about the defendant being a repeat wrongdoer significantly decreased the likelihood of settlement, regardless of a demand for confidentiality or lack thereof. In other words, participants were less inclined to settle with a repeat wrongdoer than they were with a first-time wrongdoer. Two alternative (though not mutually exclusive) theories might explain this finding: punitive and expressive. According to the *punitive* theory, plaintiffs interpret information about the defendant's repeat wrongdoing as indicating blameworthiness.[186] Since plaintiffs may assume that more culpable defendants will not only pay more at trial, but will also suffer a more significant reputational sanction as a result of trial (even compared to a public settlement), they show a preference toward holding such defendants accountable at trial rather than "letting them off the hook" through settlement (at least at this point in time).[187] Of course, this intuition might also reflect a prediction that the plaintiff's payout at trial will be higher when it comes to a repeat wrongdoer. Plaintiffs' perception might be that a trial will allow for a

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185. However, as noted, vignettes have also been found more effective than opinion surveys in eliciting candid responses, especially when gathering data on awareness and attitudes. *See, e.g.*, Schoenberg & Ravdal, *supra* note 115.

186. *See generally* Ehud Guttel & Alon Harel, *Matching Probabilities: The Behavioral Law and Economics of Repeated Behavior*, 72 U. CHI. L. REV. 1197, 1220–21, 1221 n.74 (2005) (describing the rationale for punitive damages based on this view: that repeat offenders create repeat harms, which in turn "justify the award of 'exemplary damages'" (quoting Gila Water Co. v. Gila Land & Cattle Co., 249 P. 751, 754–55 (Ariz. 1926))).

187. An important caveat is that some participants may assume that a settlement might be available at a later stage and might be more attractive at that point (that is, rejecting the settlement doesn't necessarily mean unequivocally choosing trial).

more accurate assessment of a repeat defendant's just deserts,[188] or at the very least will impose a more significant reputational sanction by dealing them "a public 'loss.'"[189]

According to the *expressive* theory, while individual deterrence can be accomplished through settlements by making the defendant pay, broader goals of publicly holding the defendant accountable and declaring that the defendant wronged the plaintiff are far more readily available at trial.[190] This interpretation is consistent with broader theories about the expressive function of law,[191] indicating the important role such an expressive function might fulfill in settlement decision-making. This perception may also be related to a popular understanding of the information-forcing function of tort law,[192] leading plaintiffs to perceive trials as an opportunity to unearth and make public information about a wrongdoer. Such a function may be all the more crucial with respect to a repeat wrongdoer.

Relatedly, plaintiffs who learn that their wrongdoer has previously wronged others may wish to convey this information to a wider audience, including past and future plaintiffs. Indeed, the extent to which plaintiffs reject settlement with a repeat wrongdoer due to concerns about future victims merits further discussion. The results of both scenarios indicate that

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188. Such assessments are often heavily influenced by popular media, which tend to misrepresent various aspects of civil justice. *See, e.g.*, Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419 (1996) (finding that, compared to objective data on tort cases, the media considerably overrepresented the frequency of controversial forms of litigation, how often cases are resolved by trial, how often plaintiffs win, and the median and mean jury awards).

189. Robbennolt et al., *supra* note 66, at 522. This argument is related to the expressive theory of punishment. *See* Kenworthey Bilz, *Testing the Expressive Theory of Punishment*, 13 J. EMPIRICAL LEGAL STUD. 358, 358–92 (2016); Jessica Bregant et al., *Crime Because Punishment? The Inferential Psychology of Morality and Punishment*, 2020 U. ILL. L. REV. 1177–1208.

190. Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1, 2 (2017). For more on the idea that torts are wrongs, see John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

191. *See, e.g.*, Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1652–54 (2000); Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039, 1039–66 (1999); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021–53 (1995).

192. *See generally* Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693 (2007) (discussing the information forcing function of tort litigation in product liability); Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 WAKE FOREST L. REV. 293 (2018) (identifying similar goals in automobile accidents); Elizabeth Chamblee Burch & Alexandra D. Lahav, *Information for the Common Good in Mass Torts*, 70 DEPAUL L. REV. 345 (2021) (delineating the information forcing function of tort law in mass torts, treating information unearthed in mass torts litigation as a "common good").

while there was certainly a positive relationship between the information participants received regarding the defendant's past wrongdoing and the perceived risk that defendants will reoffend, the correlation was merely moderate.[193] This finding thus points to other factors which may have determined participants' assessment of the risk of reoffending, including, for example, the deterrent effect of "getting caught" and being held accountable, be it through settlement or trial.[194] This finding also indicates that participants' tendency to reject a settlement with a repeat wrongdoer did not exclusively result from concerns about future wrongdoing, and the assumption that trial would be more likely to prevent harm to future victims. In this sense, future work should further probe the perceived relationship between past and future wrongdoing, in light of the results of this research. That said, it bears mentioning that a positive correlation was also found in both scenarios between the likelihood of settlement and participants' assessment of future wrongdoing. This relationship was stronger in the sexual harassment scenario. This finding, if confirmed by future work, may too suggest that perceived risk of future wrongdoing influences plaintiffs' tendency to reject a settlement with a repeat wrongdoer.

Interestingly, the preference for trial over settlement when it comes to a repeat wrongdoer—whether resulting from an aspiration for a more significant "sanction," for a public forum to hold the defendant accountable, or for something else—at first glance seems to somewhat contrast with the tendency to attribute less severity to the actions of a perpetrator who has wronged a larger number of victims.[195] However, a closer look indicates that the tendencies are actually consistent.

The tendency to attribute less severity to the actions of a perpetrator who has wronged a larger number of victims, denoted in the literature as the "scope-severity paradox," has been documented in jury verdicts.[196] It has largely been attributed to a lack of identifiability with respect to a larger group of victims, as part of a broader phenomenon known as "the identifiable victim

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193. *See supra* Sections II.C.2, II.D.2.

194. *But see* Joanna C. Schwarz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2009) (arguing that the limited information available to police officers about civil rights lawsuits confines their deterrent effect).

195. *See* Nordgren & McDonnell, *supra* note 117 (documenting the phenomenon through three studies, in which participants were asked to evaluate various scenarios of wrongdoing and recommend a punishment for the perpetrator).

196. *Id.* at 101 (affirming the jury verdicts' conformance with the scope-severity paradox and noting that "juries have historically compensated each victim less in tort cases when there are more victims").

effect."[197] According to this well-documented effect, people are more willing to spend resources in order to help identified victims than they are to aid unidentified or statistical victims.[198] The results of the present study are consistent with the identifiable victim effect, in the following sense. One way to explain the psychological mechanism underlying this effect is that people perceive identifiable victims as those who are more likely to be saved.[199] In a similar vein, the repeat wrongdoer effect found in this study might stem from an assessment of prospective risk of harm to additional victims when it comes to a repeat wrongdoer. Unlike those victims who have already been harmed, plaintiffs perhaps assign more severity to acts which might harm future victims who can still be saved. In other words, it is plausible that plaintiffs perceive the risk of future harm to others as more severe—and thus calling for public adjudication—than harm that has already been inflicted on multiple victims.

B. Confidentiality Decreases Settlement Likelihood

A second key finding to expound upon is the independent negative effect of confidentiality on settlement likelihood in both scenarios. First, the independent effect of confidentiality confirms that this treatment registered with participants, indicating that they did not assume, as other research has shown, that settlements are necessarily or by default confidential.[200] Instead, whether the settlement was confidential or public mattered in participants' decision-making regarding the settlement offer. Furthermore, this finding provides support to an initial result from a previous study, which found that, overall, laypeople acting as neutral observers were more likely to reject a secret settlement than to accept it.[201] Adding to this descriptive finding from

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197. *Id.* at 99 (concluding that this result is likely dictated by the degree of victim identifiability). *See generally* Daphna Lewinsohn-Zamir et al., *Law and Identifiability*, 92 IND. L.J. 505, 505 (2017) (explaining "the identifiability effect" is generally how "people react either more generously or more punitively toward identified individuals than toward unidentified ones").

198. *See generally* Karen E. Jenni & George Loewenstein, *Explaining the Identifiable Victim Effect*, 14 J. RISK & UNCERTAINTY 235 (1997) (discussing the effect and empirically testing four possible causes underlying it).

199. *Id.* at 238–39.

200. *See* Robbennolt et al., *supra* note 66, at 506–07 (describing findings of their survey study, which pointed to a prevalent assumption that most settlements include at least a demand for partial confidentiality).

201. Bachar, *supra* note 6, at 33 ("An analysis of the data revealed that across the four conditions, a larger percentage of participants (58.21%) rejected the secret settlement (M=0.417; SE=0.02, coded as 0=rejection; 1=endorsement).").

previous work, this study found a causal relationship between confidentiality and a decrease in settlement likelihood.

Moreover, as noted, the present research placed participants in the position of plaintiffs, thus simulating a more realistic situation people might encounter when involved in a legal dispute.[202] This effect, which was even stronger in the sexual harassment scenario than the products liability scenario,[203] also lends support to the argument that NDAs do not necessarily reflect the preference of plaintiffs, thus undermining a key argument often put forward by proponents of NDAs.[204] As Julie Macfarlane argues in the context of sexual harassment settlements, plaintiffs may view nondisclosure clauses as a gag, feeling pressured into them rather than bargaining for them as part of the settlement negotiation process.[205] They might view a demand to sign an NDA as an imposition on their freedom of speech, regardless of any characteristics pertaining to the defendant.[206] Or, at the very least, plaintiffs may acknowledge the value that confidentiality holds for defendants, despite the fact that it is not worth as much to plaintiffs. In the latter case, plaintiffs might be strategically resisting a demand for confidentiality. Though the present study cannot confirm which of these options is the most plausible, future work could attempt to tease them apart.

Tying this finding to previous work in the area of procedural justice,[207] it raises the question of whether there is a distinct "procedural justice of settlement" or rather a more general psychology of procedural justice, which manifests in plaintiffs' evaluations of both trial and settlement. It is conceivable that there are certain ways in which ordinary people think similarly about trial and settlement (e.g., confidentiality is unjust or undesirable), but because our system tends to reflect different features in each (e.g., confidentiality typically appears in settlement, not trial), it might appear that there is a special psychology of settlement. To further probe this question, future work should attempt to more explicitly assess plaintiffs' perceptions of confidentiality in both settlements and trials.

Surprisingly, the slight but noticeable distaste for confidentiality was not tied to the defendant's history of wrongdoing or any predicted risk of future wrongdoing. Instead, participants expressed a stand-alone tendency to reject

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202. Indeed, this was one of the shortcomings of the previous study. *See id.* at 29 n.119 ("This aspect of the study should be pursued in future research.").

203. *See supra* Table 2 and Table 3 (respectively).

204. *See supra* Section II.C.

205. Macfarlane, *supra* note 70.

206. *See supra* Section III.A.

207. *See generally* Darley, *supra* note 44; LIND & TYLER, *supra* note 54; Tyler & Darley, *supra* note 44.

a confidential settlement, even when it comes to a first-time wrongdoer. At least in the sexual harassment context, we might attribute some of this effect to the advocacy against NDAs in the wake of the #MeToo movement, which encouraged people to expose their experience with sexual harassment and misconduct more broadly.[208] While people may not be aware of legislative efforts to ban or limit NDAs, they might be affected by the public advocacy which prompted these policy changes. However, as explained below, this finding is somewhat tamed by the next finding, which points to the relationship between the likelihood of settlement and the amount of money offered in the settlement.

C. More Money Increases Settlement Likelihood—Including When Confidential

A third key finding relates to a within-participant result, found in both scenarios, which indicated that the mean likelihood of settlement significantly increased when participants were offered more money. This finding held across participants in all treatment groups, and specifically across participants in the confidential settlement condition in both the products liability and the sexual harassment scenarios. Thus, despite the tendency noted above to reject a settlement offer when the proposed settlement required confidentiality, offering a larger amount eliminated much of that preference. While in the sexual harassment scenario the effect of confidentiality remained significant under the larger amount condition, it shrunk too, pointing perhaps to better financial incentives crowding out any competing incentives to avoid a confidential settlement.

This finding, if confirmed by future research, might not only lend support to economic models arguing that confidentiality generally increases the amount of settlement,[209] but also push them forward. Indeed, as the law and

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208. *See, e.g.*, Stephanie E.V. Brown & Jericka S. Battle, *Ostracizing Targets of Workplace Sexual Harassment Before and After the #MeToo Movement*, 39 EQUAL. DIVERSITY & INCLUSION 53 (2019) (arguing that the birth of the #MeToo movement lessened the impact of ostracism—which historically prevented individuals from disclosing workplace abuse—empowering victims to report their abusers); Tippett, *supra* note 89, at 267 (reviewing legal implications of the movement, including shifting the discourse on NDAs).

209. *See, e.g.*, Andrew F. Daughety & Jennifer F. Reinganum, *Informational Externalities in Settlement Bargaining: Confidentiality and Correlated Culpability*, 33 RAND J. ECON. 587 (2002) [hereinafter Daughety & Reinganum, *Informational Externalities*] (introducing model which explores externalities that arise when multiple parties are harmed by same defendant); Andrew F. Daughety & Jennifer F. Reinganum, *Economic Theories of Settlement Bargaining*, 1 ANN. REV. L. & SOC. SCI. 35 (2005) (surveying recent scholarship regarding economics of

economics literature has shown, a payoff to an early plaintiff might be increased by confidentiality because it reduces publicity surrounding the suit between that plaintiff and the defendant, thus reducing the likelihood of later lawsuits.[210] However, confidentiality may start to become less valuable to a defendant—thus reducing the premium a plaintiff can extract by agreeing to it—the more other plaintiffs learn about the defendant's misconduct, independent of any knowledge of previous confidential settlements with prior plaintiffs.[211] Further, as Scott Moss notes, because of the reputational costs a defendant faces when it comes to lawsuits, defendants' preference for secrecy will widen the settlement range with the plaintiff.[212] Of course, the extent to which a plaintiff can extract more money from a defendant by filing a claim depends on the plaintiff's actual willingness to litigate and the strength of their claim.[213]

Future research should seek to quantify how much the motivation for a public settlement is worth to plaintiffs, to the extent a "crowding-out" effect in fact exists. Such work should use a between-participant analysis, examining the extent to which a larger amount affects settlement likelihood and whether there is an interaction effect between the amount of settlement and settlement confidentiality. Based on the results of this research, it is already safe to say that plaintiffs' preference for publicity is flexible and depends on the amount offered in the settlement. At the very least, plaintiffs may realize that confidentiality is valuable to defendants and thus require a premium to agree to it. Future research should explore the price that plaintiffs place on NDAs, and whether some plaintiffs are unwilling to sell their claim confidentially for any amount whatsoever.

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settlement); Daughety & Reinganum, *supra* note 123 (outlining model which finds that for most parameter values, extent of settlement is higher when confidentiality is allowed and plaintiffs prefer to have confidentiality option).

210. Daughety & Reinganum, *Informational Externalities*, *supra* note 209, at 596, 600 (noting implications and propositions of model and detailing implications of confidential settlement with early plaintiff to future plaintiffs).

211. *See* Levmore & Fagan, *supra* note 17, at 317–19 (explaining relationships between confidential settlements and amount of such settlements and noting that the settlement premium the plaintiff can generate from the defendant can serve to deter defendants).

212. Moss, *supra* note 2, at 874, 879 (highlighting claim that since verdicts and public settlements produce reputational costs, defendant will pay more for confidential settlements than for open settlements).

213. *See* Alison Lothes, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433, 449–57 (2005) (reviewing the literature, detailing reconciliation of two competing economic frameworks of secret settlements and arguing that there are important differences between various types of open settlements).

D. Products Liability and Sexual Harassment Scenarios Compared

Beyond increasing robustness by testing the research hypotheses in two different scenarios, the design of this research provides another important benefit. It allows me to compare the results of the two scenarios and draw inferences from the differences found between them.[214] As noted, the scenario context was a within-participant independent variable (IV5), which had a statistically significant effect on settlement likelihood, such that a products liability context increased participants' likelihood of settling compared to a sexual harassment context. But what accounts for this effect? And in what other ways might plaintiffs perceive a products liability and a sexual harassment settlement offer differently?

1. The Liability Regimes

Before diving into discussing the key differences between the results, a few words are in order regarding the distinct liability regimes each of the scenarios represents. As for products liability, Scenario I, describing the canned chickpeas incident, indicated what was likely a manufacturing defect, rather than a design or warning defect. As Mark Geistfeld explains, this area of products liability still largely adheres to strict liability, following the approach set out by the (at the time) groundbreaking *Restatement (Second) of Torts* § 402A.[215] This is in contrast to other areas of products liability, in which courts have adopted the risk-utility test of the *Restatement (Third) of Torts*, which is similar to the cost-benefit analysis used in negligence.[216]

The sexual harassment scenario, in contrast, is governed by a number of different regimes. When plaintiffs are sexually harassed by a colleague, they may bring a civil rights claim of sexual discrimination against their employer pursuant to Title VII of the Civil Rights Act of 1964.[217] Under traditional tort law, a victim may also bring claims—including battery and negligence—

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214. As noted, the scenarios were intentionally designed to mirror each other with regard to each of the variables tested, to allow for such inferences.

215. Mark A. Geistfeld, *Strict Products Liability 2.0: The Triumph of Judicial Reasoning over Mainstream Tort Theory*, 14 J. TORT L. 403, 406–07 (2021).

216. *See generally id.* (explaining that courts have transformed strict products liability into what he calls "strict products liability 2.0," a more comprehensive regime which integrates consumer expectations into the risk-utility test); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. g (AM. L. INST. 1998) (discussing the defective design of products).

217. Martha Chamallas, *Will Tort Law Have Its #Me Too Moment?*, 11 J. TORT L. 39, 56 (2018) (explaining that though Title VII has "softened some barriers to recovery," it is by no means a panacea for such claims).

against both the employee and the employer, but this path presents several challenges. As Martha Chamallas notes,

> [A] main obstacle to successful prosecution of a sexual battery or assault tort claim against the offender is application of an outdated and inhospitable doctrine of consent. The Restatement (Third) of Intentional Torts continues to endorse a very thin version of consent that finds actual consent whenever an individual acquiesces to the actor's conduct or invasion, presuming consent when the victim is silent or passive.[218]

Furthermore, courts generally refuse to hold employers liable for the sexual misconduct of their employees through the doctrine of vicarious liability, which does not require any additional fault on the part of the employer.[219] That said, plaintiffs can bring their claims against an employer based on a negligence theory, pointing to a failure to take precautions to prevent the misconduct—such as better supervising the harassing employee.[220] According to Chamallas, such negligence cases are generally more successful.[221] Thus, unlike a product defect like the one described in Scenario I, which does not require any fault on the part of the defendant, a sexual harassment claim is much more commonly rooted in fault-based claims, ranging from negligence to battery.

With this background in mind, I now turn to discussing the key differences found between the results of the two scenarios.

2. The Preexisting-Views Effect

A first important distinction was found in the effect that preexisting perceptions about NDAs had on the likelihood of settlement. Whereas in the products liability scenario this control variable was not statistically significant, a higher pro-NDA score was found to significantly increase the

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218. *Id.* at 52.

219. *Id.* at 54 ("My study of vicarious liability cases, however, found that courts are apt to treat cases of rape and sexual assault committed by their employees differently from cases of negligence or even non-sexual intentional torts."); *see also* Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133 (2013) (elaborating on what she dubs the "sex exception" to vicarious liability, which emphasizes the different approach courts take on vicarious liability—generally interpreted quite generously to plaintiffs—when it comes to sex-related torts).

220. Chamallas, *supra* note 217, at 55.

221. *Id.*

likelihood of settlement in the sexual harassment scenario.[222] This indicates that plaintiffs might be more influenced by their pre-conceived notions of confidentiality when it comes to settling sexual harassment cases.[223] This result might once again represent the impact that the #MeToo movement, and specifically its campaign against NDAs, has had on the public's perceptions of settlements—including confidential settlements.[224] An alternative way to explain this finding is that plaintiffs may have a harder time forming opinions about sexual harassment scenarios than they do about a less controversial situation, such as a defective product, and as a result, tend to fall back on their preexisting views regarding confidential settlements.[225]

3. The Sanction Effect

As mentioned, participants were overall more likely to settle the products liability dispute than they were the sexual harassment dispute. Building on the above analysis regarding the relationship between settlement likelihood and blameworthiness, the study allowed me to further probe this difference and the extent to which it is related to punitive tendencies. One of the most intriguing findings was the difference found between the two scenarios in the effect that imposing a sanction on the wrongdoer as part of the settlement had on the likelihood of settlement. As noted, while adding a sanction clause to

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222. It should be noted that the interaction effect between the confidentiality treatment and participants' preexisting views of NDAs was not statistically significant, neither in the products liability nor the sexual harassment scenario, meaning that the effect of confidentiality on settlement likelihood did not depend on participants' preexisting views regarding NDAs as expressed in the survey.

223. This finding corroborates a similar finding from a previous study I conducted. *See* Bachar, *supra* note 6, at 36 ("[F]avorable views of NDAs had a statistically significant positive effect on secret settlement approval.").

224. *See generally* Brown & Battle, *supra* note 208 (citing literature which points to the impact of the movement, including in inducing legal reform).

225. Though not tested in this study, such a theory tends to explain the relationship between acceptance of sexual harassment myths and attitudes toward sexual-harassment-related matters. *See* Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCH. 217, 218–19 (1980) (using a similar indicator in the context of rape myths and analyzing hypotheses founded in social psychological and feminist theory purporting that the acceptance of rape myths can be predicted from attitudes such as sex role stereotyping, adversarial sexual beliefs, and sexual conservatism). More generally, sexual harassment disputes are emotionally charged, which could lead to more unexpected responses. *See, e.g.*, Alder Vrij & Hannah R. Firmin, *Beautiful Thus Innocent? The Impact of Defendants' and Victims' Physical Attractiveness and Participants' Rape Beliefs on Impression Formation in Alleged Rape Cases*, 8 INT'L REV. VICTIMOLOGY 245, 246 (2001) (reporting that people who endorse "rape myths" demonstrated more favorable tendencies toward victims and defendants who were physically attractive in an alleged rape case scenario).

the settlement did not significantly alter participants' likelihood of accepting the settlement in the products liability case, such a significant effect was found in the sexual harassment scenario. In other words, when considering a settlement offer, the defendant suffering a sanction mattered more to sexual harassment plaintiffs than it did to products liability plaintiffs. Why might plaintiffs show more punitive intuitions in the former than the latter?

One plausible way to explain the differences might be that while the sanctions in both scenarios were imposed on individuals (the executive responsible for the defective chickpeas in Scenario I and the harassing manager in Scenario II), plaintiffs may view the perpetrator of sexual harassment as more individually culpable. This assessment of blame may be due to lay intuitions regarding the nature of the tort involved as described above—intentional tort or negligence versus no-fault—even though ordinary people are likely ignorant as to the legal differences between intentional, negligence, and no-fault torts. Viewing the products liability dispute as more transactional in nature, and thus less morally blameworthy, participants may have intuitively attributed more blame to the defendant in the sexual harassment case, which was perceived as more morally "wrong."

Relatedly, participants may have been allocating at least some of the blame in the products liability case to the company or to other employees involved in the manufacturing process, rather than to the responsible manager. In the sexual harassment scenario, in contrast, participants may have viewed Sam, the harassing manager, as the sole culpable party. To unpack these observations, we should summon knowledge regarding jurors' perceptions of punitive damages, which provide a window into the public's punitive intuitions in torts.[226] María Guadalupe Martínez Alles identifies a distinction between the moral outrage experienced by juries toward a wrongdoer with "wanton disregard for the victim's status as a moral equal," and a sense of betrayal aversion "where corporations are felt to have abused consumer trust by the deliberate imposition of risk of great harm."[227] Transitioning into the settlement context, accidental harm by a corporation,

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226. *See generally* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2008) (describing research on how juries make decisions regarding punitive damages and what it can teach us about how people think about money and punishment more generally); Steven Garber, *Product Liability, Punitive Damages, Business Decisions, and Economic Outcomes*, 1998 WIS. L. REV. 237 (discussing and assessing the extent to which product liability and punitive damages serve a deterrent effect); Daniel Kahneman et al., *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49 (1998) (describing the results of an experimental study of punitive damage awards among jury-eligible participants).

227. María Guadalupe Martínez Alles, *Moral Outrage and Betrayal Aversion: The Psychology of Punitive Damages*, 11 J. TORT L. 245, 257 (2018).

as described in the products liability scenario, may seem less blameworthy than intentional harm caused by an individual, as depicted in the sexual harassment scenario.[228] As a result, imposing a sanction may not affect plaintiffs' decision regarding a settlement offer in a case involving behavior perceived as less blameworthy or even blameless. In contrast, in the sexual harassment context, the imposition of a sanction on the culpable manager may have partially made up for the reduced reputational and likely monetary sanction suffered through settlement compared to trial, thus encouraging settlement.

Tying this finding to the relationship between repeat wrongdoing and settlement likelihood, a punitive or even vindictive intuition may be at play in the sexual harassment case, regardless of any deterrent effect that the sanction might have either on the defendant alone (in the confidential condition) or on others (in the public condition). As Benjamin Zipursky explains,

> A plaintiff seeking to redress a willful injury may deliberately act with intentions beyond self-restoration; she is entitled to act with the intention of inflicting injury upon the defendant, just as the defendant did to her, so long as this is done within the civil legal system. . . . [T]he plaintiff may want to "show who's boss."[229]

Applying Zipursky's private law-based theory of punitive damages and the notion of moral outrage to the settlement context, a willful or wanton infliction of injury, unlike a negligent or no-fault cause of harm as part of a more transactional interaction, may evoke a response that is not only self-restorative (or compensation-maximizing as the economists would have it) but also punitive in nature. This emotional response might call for the imposition of a sanction on the defendant in the sexual harassment case, even if such a sanction is kept confidential. This theory can help explain the greater tendency to settle with a sexual harassment defendant, whether publicly or confidentially, when the defendant is "punished."[230]

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228. That said, the harm caused in the sexual harassment case is largely emotional, in contrast to the physical harm resulting from the defective chickpeas, which could have tilted the results in the other direction if the type of harm mattered more than the act or the underlying intent.

229. Benjamin C. Zipursky, Palsgraf*, Punitive Damages and Preemption*, 125 HARV. L. REV. 1757, 1778 (2012) (describing the "private redress" conception of punitive damages); *see* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 168–74 (2020) (discussing punitive damages in light of their theory of damages as redress).

230. This resonates with a corrective justice account of torts. As tort law is understood to be a matter of private rather than public redress, these punitive goals can certainly be achieved through settlements. *See* Gilat Juli Bachar, *A Duty to Disclose Social Injustice Torts*, 55 ARIZ. ST.

Finally, the sanction might have also been perceived as a measure to prevent harm to future victims, at least at the existing organization if not at other workplaces. This finding could reflect another way for participants to express a concern for future victims as part of the settlement.

This finding might suggest another point of bargaining in settlement negotiations. Indeed, defense lawyers attempting to reach a settlement deal in a sexual harassment case should consider introducing a sanction against the wrongdoer as a way to persuade plaintiffs to accept a settlement offer, within the limits of what due process requires. Companies might even consider a similar course of action in the pre-lawsuit stage, which could obviate the need for a legal process for a punishment-seeking victim. At the very least, this finding indicates that creative settlement terms might allow some plaintiffs to vindicate their non-monetary goals as part of a settlement deal rather than be forced to choose trial over settlement.

IV. CONCLUSION

Tort law can promote a variety of goals, including restoring a victim, declaring wrongdoing, punishing a wrongdoer and deterring harmful actions. Though traditionally people's intuitions regarding such goals were explored empirically through jury decision-making, jurors take on a professionalized role. If we care about the social understanding of justice in the tort context, it is crucial to study the goals plaintiffs intuitively pursue when *settling* cases, which is how the overwhelming majority of civil cases are resolved. As this Article explained, knowledge regarding plaintiffs' attitudes is needed not only to increase the legal system's legitimacy in the eyes of the public and further democratize it, but also because plaintiffs are themselves the decision-makers when it comes to accepting or rejecting settlement offers. Settlement offers presented before a lawsuit has been filed—when consumers or employees often haven't yet consulted a lawyer—are particularly susceptible to plaintiffs' attitudes. Furthermore, examining attitudes toward settlements allows us to survey the gap between the normative and the actual, assessing whether current sunshine-in-litigation laws that limit confidential settlements

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L.J. 41, 65 (2023) ("[T]ort 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." (quoting 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))).

truly track the public's values and helping to design laws that will effectively shape plaintiffs' behavior.

This Article was the first to examine the extent to which a confidentiality clause affects plaintiffs—both as consumers and as employees—when weighing a settlement offer and how information about the defendant's history of wrongdoing shapes this decision. I argue that the tendency to reject a settlement offer when it is confidential, as well as when the defendant is a repeat wrongdoer, suggests that there is more to this decision than a desire for self-restoration or to maximize the monetary payout a claim produces. Instead, the findings show that the line between private and public is much blurrier in the eyes of plaintiffs, for whom legal and social concepts about compensation and punishment intermingle. In particular, the punitive intuitions revealed in the sexual harassment context emphasize such additional goals. But even the initial urge to reject a settlement with a company that repeatedly manufactures defective products might indicate that plaintiffs intuitively wish to pursue broader social goals. These could include goals that appear more readily available through trial, such as disseminating information to past and future victims or dealing a reputational blow to defendants. Plaintiffs might be willing to forgo the opportunity to achieve closure and a measure of justice for themselves through settlement in order to seek such results, at least when the amount they were offered was relatively modest. But confidentiality has a price, and it might vary depending on the context of the case. These findings thus provide important predictive data for practitioners and policymakers operating in this space, who have so far been forced to rely on abstract theories regarding plaintiffs' settlement behavior.

This Article has also created a baseline for future research in the psychological study of settlement. Future research should further probe the relationship between the key variables examined in this study and plaintiffs' willingness to settle a claim in additional contexts and conditional variations, as well as explore more variables which might impact settlement decision-making. In particular, research should explore the price plaintiffs place on confidentiality and whether some are unwilling to sell their silence for any price. Furthermore, the lawyer's role should be explored, both in terms of its effect on litigants and in terms of lawyers' own attitudes toward settlement. Such sorely missed empirical research will help deepen our knowledge about plaintiffs' intuitions toward settlement in general and confidential settlement in particular. Given the central role of settlements in the U.S. legal system, continuing to study the extent to which they allow us to fulfill the system's perceived goals is needed more than ever.

APPENDIX. MIXED EFFECTS REGRESSION OF LIKELIHOOD OF SETTLEMENTS IN BOTH SCENARIOS

VARIABLES	Model
Confidentiality	-0.38***
	(0.09)
Repeat Wrongdoing	-0.28*
	(0.09)
Scenario (Products Liability/ Sexual Harassment)	-0.2*
	(0.09)
Favorable Views of NDAs	0.12*
	(0.05)
Gender	0.09
	(0.09)
Age	-0.005
	(0.003)
Level of Education	0.00
	(0.06)
Household Income	-0.08
	(0.04)
Constant	3.67
	(0.28)
Observations	982[231]
Wald Chi-Square	50.83

Robust standard errors in parentheses
***$p < 0.001$, **$p < 0.01$, *$p < 0.05$

231. The number of observations is doubled in this model because the data was reshaped from wide to long form, thus generating two observations for each participant.