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WOMEN'S AUTONOMY IN NONDISCLOSURE AGREEMENTS FOR SEXUAL MISCONDUCT CASES

Rachel L. Wagner*

I. Introduction

The #MeToo movement exposed many women's issues, with nondisclosure agreements ("NDAs") taking center stage. Harvey Weinstein, the now disgraced media mogul, thrust the #MeToo movement into the national limelight in 2017 when numerous famous women accused him of rape.[1] But the original 'me too' movement began over a decade ago.[2] Since its inception, the 'me too' movement has helped survivors of sexual violence, particularly Black women and girls and other young women of color from low-wealth communities, find pathways to healing.[3] This movement set out to address "the dearth in resources for survivors of sexual violence and to build a community of advocates, driven by survivors, who will be at the forefront of creating solutions to interrupt sexual violence in their communities."[4] The movement helps survivors find the right resources for their unique healing journey.[5] A solution for some survivors is to enter into nondisclosure agreements with their perpetrators. Although the origins of the original 'me too' movement were rooted in survivor autonomy, in the wake of #MeToo, many states have passed laws severely restricting the use of NDAs in sexual misconduct cases.[6] These laws undermine survivor autonomy and decrease the number of choices available to survivors.

The NDAs referenced in the following sections are contractual clauses included within sexual misconduct settlement agreements that carry the threat of legal ramifications if a survivor talks about their experience to anyone. Sexual misconduct, as referenced here, encompasses sexual assault and sexual harassment. A survivor is an individual who has been subjected

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1. Sarah Almukhtar, Michael Gold & Larry Buchanan, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. Times, Feb. 8, 2018, https://perma.cc/4U77-QUJG.

2. Tarana Burke, *Get to Know Us*, The 'me too.' Movement, https://perma.cc/5ZHZ-M4GC (last visited Apr. 20, 2021).

3. Tarana Burke, *History & Inception*, The 'me too.' Movement, https://perma.cc/H54Z-DY6X (last visited Feb. 20, 2021).

4. Joanne N. Smith & Tanara Burke, *The 'Me Too.' Movement Lives at Girls for Gender Equality: A Joint Letter*, Girls for Gender Equality (June 7, 2018), https://perma.cc/H7QC-SY8T.

5. Burke, *supra* note 3. R

6. National Conference of State Legislatures, *Legislation on Sexual Harassment in the Legislature*, NCSL (Feb. 11, 2019), https://perma.cc/JN9P-4JRL.

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to sexual misconduct. This term is used to reflect the theme of autonomy in the original 'me too' movement.[7]

Recently, laws restricting the use of NDAs in sexual misconduct cases have gained widespread support.[8] Supporters of these laws argue that NDAs protect serial abusers from being discovered and prosecuted, thus enabling further abuse.[9] Supporters also argue that restricting NDAs forces more transparency and accountability on employers, while also enabling survivors to speak out about their experiences.[10] However, in actuality, banning NDAs in sexual misconduct cases reinforces the lack of survivor autonomy, an essential component of the original 'me too' movement and contract theory.

A comparison of two state laws illustrates the role, or lack thereof, that a survivor's autonomy and individual choice play in NDA-related legislation. One on hand, California was the first state to pass a law limiting the use of NDAs in sexual misconduct cases, passing one of the most restrictive laws of its kind in 2018.[11] Senate Bill 820, codified as Code of Civil Procedure § 1001, voids any settlement agreement entered into on or after January 1, 2017 that prevents disclosure of factual information about claims of sexual assault, sexual harassment, or harassment or discrimination based on sex.[12] If the settlement agreement does not comply with the restrictions, it is void as a matter of public policy.[13]

In comparison, New York adopted N.Y. Civil Practice Law and Rules § 5003–b in 2018, prohibiting NDAs in sexual harassment agreements unless the confidentiality provision is the survivor's preference.[14] New York's law contains a mechanism giving the survivor twenty-one days to consider the nondisclosure clause and, once signed, seven days to revoke the agreement.[15] Other states should consider adopting laws much like New York's, consciously drafted to both support survivor autonomy and choice, and to serve the public interest of holding serial abusers accountable.

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7. Tanara Burke, *Vision and Theory of Change*, THE 'ME TOO.' MOVEMENT, https://perma.cc/3WJT-BET5 (last visited Feb. 20, 2021).

8. In 2018, legislation restricting use of NDAs in sexual misconduct cases was introduced in Alaska, Arizona, California, Florida, Indiana, Kansas, Maryland, New York, New Jersey, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and Washington. Suzanne Hultin, *Addressing Sexual Harassment in the Workplace,* 26 LEGIS. BRIEF 17 (2018), https://perma.cc/7AGZ-LRHA.

9. Senator Connie M. Leyva, *SB 820 Protects Victims by Eliminating 'Curtain of Secrecy'*, California State Senate (Aug. 24, 2018), https://perma.cc/5TKF-77UL.

10. Scott Altman, *Do Non-Disclosure Agreements Hurt or Help Women?* THE HILL, Nov. 12, 2019, https://perma.cc/JL9B-86H3.

11. CAL. CIV. PROC. CODE § 1002 (West 2020).

12. *Id.*

13. *Id.* § 1002(c)–(d).

14. N.Y. C.P.L.R. § 5003-b (McKinney 2019).

15. *Id.*

This article is organized as follows: Part I discusses the history of contract law, addresses how courts evaluate NDAs in sexual misconduct cases, and explores California and New York's statutes as two examples of how states restricted the use of NDAs in response to #MeToo. Part II focuses on concepts of autonomy in contract law and discusses how feminist legal scholars approach the idea of autonomy in the sexual domain. Part III applies traditional concepts of autonomy and incorporates feminist legal theory to analyze the impact of the California and New York laws on survivor autonomy. Part IV concludes by advocating for New York's more nuanced approach because it empowers survivors and synthesizes both traditional and feminist concepts of autonomy.

II. Background

A contract touches on both human relationships and the law. Contract law is unique because parties choose their obligations voluntarily and those obligations reflect the intentions of the contracting parties.[16] Contracts are about promises—created only through offer, acceptance, and consideration.

An offer is the manifestation of willingness to enter into a bargain so that another person understands his assent to the agreement.[17] To establish a contract, an offer must be met with an appropriate acceptance, characteristically "a manifestation of assent to the terms [of the offer] made by the offeree in a manner invited or required by the offer."[18] Further, the consideration doctrine adds a bargain requirement to contract formation. The Restatement (Second) of Contracts explains, "[t]o constitute consideration, a performance or a return promise must be bargained for" and adds "[a] performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise."[19]

Contract law "is distinct from both tort and fiduciary law in that contract involves essentially *chosen* obligations."[20] To reflect this component of choice, Samuel Williston noted he "[didn't] see why a man should not be able to make himself liable if he wishes to do so."[21] Additionally, other than the Restatement (Second) of Contracts' textual references to contractual parties as male actors, which was standard language at the time, this "free-

16. Daniel Markovits, *Theories of the Common Law of Contracts*, *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2015), https://perma.cc/6MPR-L9EE.

17. Restatement (Second) of Contracts § 24 (1981).

18. *Id.* § 50.

19. *Id.* § 71.

20. Markovits, *supra* note 16, at § 1. **R**

21. Markovits, *supra* note 16, at § 1. **R**

dom to contract principle" is purportedly neutral.[22] Freedom to contract neutrality encompasses "race, age, socio-economic status, sexual orientation and all other aspects of life by which we differ from each other."[23]

NDAs, also known as confidentiality provisions, are an example of how parties choose their obligations in a contract. NDAs are a common practice in business-related contracts and are frequently used in settlement agreements.[24] An NDA "in exchange of consideration or another promise," is a legally enforceable promise to keep silent about certain agreed-upon information.[25] NDAs aim to establish "a confidential relationship between a person who holds some kind of . . . secret and a person to whom the secret will be disclosed."[26] The general principles governing contract defenses, including unconscionability, duress, and public policy, among others, also apply to NDAs because NDAs are legally binding contracts. NDAs can be challenged on freedom to contract grounds as well. The freedom to contract is not absolute and may be modified by courts, either because the contract lacks an essential element, or for public policy reasons.

Despite being legally binding contracts, when it comes to NDAs involving sexual misconduct, an increasing number of survivors choose to breach these contracts to speak publicly against their abuser and for their own healing.[27] Legislators have responded to these NDA breaches by introducing laws purporting to protect survivors who seek to disclose information by preventing employers from keeping allegations of sexual misconduct from the public.[28] As of March 2020, more than sixteen states—most recently New Mexico—have adopted bills restricting NDAs in sexual misconduct cases.[29]

22. The gendered nature of contract law is because it historically pertained to market transactions, which, by law and custom, excluded women. *See e.g.*, Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1250–51 (1999).

23. HILA KEREN, *Feminism and Contract Law*, *in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 406, 414 (Robin West & Cynthia Grant Bowman eds., 2019).

24. Ann Fromholz & Jeanette Laba, *#MeToo Challenges Confidentiality and Nondisclosure Agreements*, 41 L.A. LAW. 12, 12 (2018).

25. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognize as a duty".).

26. Taishi Duchicela, *Rethinking Nondisclosure Agreements in Sexual Misconduct Cases*, 20 LOY. J. PUB. INT. L. 54, 62 (2018).

27. *Id*.

28. S. RULES COMM. OFF. OF S. FLOOR ANALYSES, UNFINISHED BUSINESS, S.B. NO. 820, at 3 (Ca. 2018).

29. National Conference of State Legislatures, *supra* note 6; Felicia O'Connor, *New Mexico Latest State to Prohibit NDAs for Sexual Harassment Claims*, JD SUPRA, LLC (Mar. 11, 2020), https://perma.cc/AA3D-MJ2G. R

A. Courts' Interpretation of NDAs in Sexual Misconduct Cases

As for the judiciary and its approach to enforcing NDAs, enforcement turns on who is attempting to validate or invalidate the NDA—namely whether it is the survivor themselves or a public agency. In making these decisions, courts mainly have focused on two doctrines: the "unconscionability" doctrine and the "public policy" doctrine.[30]

Under the unconscionability doctrine, if the contract's terms are "unconscionable," a judge may refuse to enforce all or portions of the contract.[31] Although jurisdictions have differed on the precise meaning of "unconscionable," it is generally defined as the lack of meaningful choice by one of the parties combined with contract terms which are unreasonably favorable to the other party or that are unduly oppressive to the weaker party.[32] The doctrine of unconscionability has both a procedural and substantive element, the former focusing on oppression or surprise because of unequal bargaining power, and the latter on overly harsh or one-sided results of the contract.[33] In practice, courts rarely invalidate sexual misconduct NDAs on this basis.

Courts more commonly apply the public policy doctrine when deciding whether to invalidate an NDA. Under the public policy doctrine, a term of an agreement is unenforceable if either (1) legislation specifies that it is unenforceable, or (2) the interest in enforcement is plainly outweighed by a public policy against enforcing such terms.[34] In applying this doctrine, courts weigh the parties' justified expectations against the consequences of not enforcing the NDA.[35] When weighing public policy interests, courts look to existing legislation and how the contract connects to the policy interest.[36] In reality, while sexual misconduct NDAs may be void as a matter of public policy, the circumstances in which NDAs are voided for public policy reasons remain limited.

For example, sexual misconduct NDAs are void as a matter of public policy if the NDA prevents a survivor from filing criminal sexual assault charges or assisting the Equal Employment Opportunity Commission

30. D. Andrew Rondeau, *Opening Closed Doors: How the Current Law Surrounding Nondisclosure Agreements Serves the Interests of Victims of Sexual Harassment, and the Best Avenues for Its Reform*, 17 U. CHI. L.F. 583, 587 (2019).

31. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

32. Junkermier, Clark, Companella, Stevens, P.C. v. Alborn, Uithoven, Reikenberg, P.C., 380 P.3d 747, 756 (Mont. 2016); Leibrand v. Nat'l Farmers Union Prop. & Cas. Co., 898 P.2d 1220, 1227 (Mont. 1995); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

33. Baltazar v. Forever 21, Inc., 367 P.3d 6, 11 (Cal. 2016).

34. RESTATEMENT (SECOND) OF CONTRACTS § 178.

35. *Id.* § 178(2).

36. *Id.* § 178(3).

("EEOC") with its investigations.[37] As the First Circuit reasoned in *Equal Employment Opportunity Commission v. Astra U.S.A., Inc.*,[38] "the EEOC acts not only on behalf of private parties but also 'to vindicate the public interest in preventing employment discrimination.'"[39] Therefore, settlement agreements that prohibit employees from filing charges or assisting with investigations conducted by the EEOC could impede the enforcement of Title VII, thereby undermining existing legislation and the public interest. The First Circuit also explained, "[i]n many cases of widespread discrimination, victims suffer in silence. In such instances, a sprinkling of settlement agreements that contain stipulations prohibiting cooperation with the EEOC could effectively thwart an agency investigation."[40]

Yet when it comes to an individual's desire to invalidate a nondisclosure agreement on public policy or unconscionability grounds—as opposed to the goals of a state or federal agency—courts are decidedly less sympathetic. In *Victoria C. v. Cincinnati Bengals, Inc.*,[41] the Ninth Circuit upheld confidentiality provisions of a nondisclosure agreement even when the survivor—after being raped by fourteen members of the Bengals football team—presented evidence that she was suffering from post-traumatic stress disorder when she signed the release.[42] The survivor argued, in part,[43] that the NDA was obtained through undue influence and violated public policy.[44] Much like the First Circuit's reasoning in *Equal Employment Opportunity Commission*, the court held that, because the victim was not precluded from reporting the sexual assaults to law enforcement and was, instead, "merely prohibit[ed] [from] disclos[ing] . . . the terms of the release," the release did not violate public policy.[45]

However, it is not necessarily an individual's choice to determine the type of information that is ultimately confidential. In the interest of public policy, at least one court has compelled a survivor to respond to deposition questioning—despite the existence of a confidentiality clause in a settlement agreement—regarding allegations of sexual harassment filed against a former employer.[46] There, the employer moved to compel this information

37. 42 U.S.C. §§ 2000e–2000e-17 (2019).

38. 94 F.3d 738 (1st Cir. 1996).

39. *Id.* at 744 (quoting Gen. Tel. Co. of the Nw., Inc., 446 U.S. 318, 326 (1980)).

40. *Equal Emp't Opportunity Comm'n*, 94 F.3d at 744.

41. No. 93-35595, 1994 WL 727752 (9th Cir. 1994).

42. *Id.* at *5–6, 9.

43. *Id.* at *3, 5 (Crytzer argued, in addition to her public policy and undue influence claims, that the release was "ambiguous," its contents "not certain and definite," and the release lacked sufficient consideration).

44. *Id.* at *1.

45. *Id.* at *5.

46. Bonsal v. Borgman Crate & Pallet, Inc., No. 4:07CV3165, 2008 WL 731749 (D. Neb., Mar. 17, 2008).

from the plaintiff because it may have "reveal[ed] plaintiff's pattern and practice of raising sexual harassment allegations against employers."[47] Because the confidentiality clause did not prohibit the plaintiff from "disclosing the alleged circumstances and allegations underlying her actual or threatened legal action against [her employer], the names and titles of the individuals involved, or the approximate time frame of these events" and only prohibited disclosing the provisions of the settlement agreement, the employer's motion to compel was granted.[48]

Conversely, in *Perricone v. Perricone*,[49] the Supreme Court of Connecticut enforced a divorce settlement agreement that barred a well-known doctor's ex-wife from sharing his affairs with media sources.[50] There, the court limited voidable nondisclosure provisions to the following categories: terms that (1) restrict the "right to speak on matters of public concern," (2) restrict communication with a public agency regarding civil rights law enforcement, (3) require the "suppression of criminal behavior," (4) suppress information "important to public health and safety," or (5) impose confidentiality for the benefit of a "public entity or official."[51] These categories appear to benefit individuals who attempt to invalidate their NDAs. However, as the Connecticut Supreme Court noted, the public policy doctrine "should be applied with caution and only in cases plainly within the reasons on which that doctrine rests . . . ."[52] Thus, even if a term falls into one of these categories, it may not be enforced by a court.

Moreover, as shown by the previous cases, courts are hesitant to apply the public policy doctrine in private disputes. In *Bandera v. City of Quincy*,[53] a former employee of Quincy's Community Police Commission tried to invalidate a settlement agreement after her attorney allegedly threatened her into signing the agreement.[54] Bandera testified at trial that she experienced discriminatory treatment during her employment, including being "excluded from meetings, ridiculed, and subjected by male officers to graphic details of their sexual exploits."[55] The settlement agreement instructed that both the facts underlying the dispute and the terms of the settlement agreement would remain confidential.[56] The court determined a valid settlement agreement was established and reasoned, "Bandera's as-

47. *Id.* at *1.
48. *Id.*
49. 972 A.2d 666 (Conn. 2009).
50. *Id.* at 690–91.
51. *Id.* at 688.
52. *Id.* at 687.
53. 344 F.3d 47 (1st Cir. 2003).
54. *Id.* at 49.
55. *Id.*
56. *Id.*

serted subjective beliefs regarding the settlement likely do not bar enforcement," and no evident public policy reason existed to deny performance of the contract.[57]

As a whole, courts are hesitant to find NDAs unenforceable as a matter of unconscionability or as a matter of public policy, especially when the dispute is between private parties. Courts are more likely to find an NDA unenforceable where the settlement provisions undermine existing law, like where the alleged harasser is under investigation by the EEOC or the settlement agreement prevents the survivor from reporting a crime. And, contrary to current legislation in some states,[58] courts remain hesitant to factor in harm to the survivor, power dynamics between the survivor and the perpetrator, or the appropriate remedy to fully compensate the survivor. The above cases illustrate how courts are generally unwilling to stray from traditional notions of contract formation and struggle to consider the intricacies necessary to fully support survivor autonomy.

B. Legislative Action Surrounding NDAs in the Context of Sexual Misconduct Cases

Recently, a number of states have passed legislation restricting the use of NDAs in sexual misconduct cases.[59] California and New York are two states that have passed ambitious laws in the wake of #MeToo. California's law, California Code of Civil Procedure § 1002, states:

> (a) Notwithstanding any other law, a provision within a settlement agreement that prevents the disclosure of factual information related to the action is prohibited in any civil action the factual foundation for which establishes a cause of action for civil damages for any of the following:
>
> (1) An act that may be prosecuted as a felony sex offense
>
> . . .
>
> (4) An act of sexual assault, as defined paragraphs (1) to (9), inclusive, of subdivision (e) of Section 15610.63 of the Welfare and Institutions Code,

57. *Id.* at 52. The male founders of contract law, including Holmes, Langdell, and Williston, believed that objectivity was superior to subjectivity. Feminists have long criticized objectivity as a dominance preserving method, which is associated with rationality, neutrality, certainty, and efficiency. KEREN, *supra* note 23, at 421. Subjectivity, in contrast, is related to or based upon beliefs, attitudes, and opinions instead of verifiable evidence. *Subjective,* BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 11th ed. 2019). **R**

58. State legislators in California, New Jersey, New York, Tennessee, Vermont, Washington, and other states have adopted different laws to limit the use of NDAs. Erik Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?* AMERICAN BAR ASSOCIATION (May 8, 2020), https://perma.cc/R28Y-2XBG.

59. National Conference of State Legislatures, *supra* note 6. **R**

> against an elder or dependent adult, as defined in Sections 15610.23 and 15610.27 of the Welfare and Institutions Code.
>
> (b) Notwithstanding any other law, in a civil action described in paragraphs (1) to (4), inclusive, of subdivision (a), a court shall not enter, by stipulation or otherwise, an order that restricts the disclosure of information in a manner that conflicts with subdivision (a).[60]

When a court weighs whether to void an NDA as a matter of public policy, it considers "the strength of that policy as manifested by legislation."[61] Because of recently enacted legislation, like California's, courts in those jurisdictions will be more likely to find NDAs unenforceable as a matter of public policy. New York has taken a more nuanced approach to its legislation:

> Notwithstanding any other law to the contrary, for any claim or cause of action, whether arising under common law, equity, or any provision of law, the factual foundation for which involves sexual harassment, in resolving by agreed judgment, stipulation, decree, agreement to settle, assurance of discontinuance or otherwise, no employer, its officer or employee shall have the authority to include or agree to include in such resolution any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the plaintiff's preference. Any such term or condition must be provided to all parties, and the plaintiff shall have twenty-one days to consider such term or condition. If after twenty-one days such term or condition is the plaintiff's preference, such preference shall be memorialized in an agreement signed by all parties. For a period of at least seven days following the execution of such agreement, the plaintiff may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired.[62]

Courts generally embrace the freedom to contract principles inherent in the formation of a legal promise, and therefore they tend to hold parties accountable for their bargained-for exchange.[63] Under this simple framework, it logically follows that courts are hesitant to invalidate NDAs on the basis of unconscionability and prefer to do so on public policy grounds. However, upon closer inspection, the freedom necessary for autonomy requires individuals to be treated as ends in themselves, not as means toward the achievement of other public or private objectives. That is, using an individual to further the ends of a public agency on public policy grounds undermines the "freedom" essential to contract formation.

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60. CAL. CIV. PROC. CODE § 1002(a)–(b) (West 2020).

61. RESTATEMENT (SECOND) OF CONTRACTS § 178(3)(a) (1981).

62. N.Y. C.P.L.R. § 5003-b (McKinney 2019).

63. Victoria C. v. Cincinnati Bengals, Inc., No. 93-35595, 1994 WL 727752 (9th Cir. 1994); Perricone v. Perricone, 972 A.2d 666 (Conn. 2009); Bandera v. City of Quincy, 344 F.3d 47 (1st Cir. 2003).

Many states reexamined their approach to NDAs in response to the #MeToo movement by passing legislation restricting NDA use in sexual misconduct cases on public policy grounds.[64] The most restrictive legislation, like California's law, refuse to recognize the voluntary exchange of promises between parties, while more nuanced legislation, like New York's law, promote freedom by enabling the survivor to choose whether the settlement remains confidential.[65] New York's law further promotes survivor autonomy through a mechanism that gives a survivor twenty-one days to consider the NDA and, after signing, seven days to revoke the agreement.[66] This mechanism attempts to address what the courts have been unwilling to see—a survivor may lack meaningful choice at the time she agreed to the confidentiality provision. However, the law does not strip the survivor of the freedom to ultimately choose her obligations.

III. Principles of Autonomy in Contract Law

Autonomy is an essential component of modern contract law. Foundationally, the freedom to enter into contracts is a basic right reserved to the people under Article I, Section 10 of the United States Constitution. One of the main goals of contract law is to "empower individuals to pursue their own vision of a distinctively human life."[67] Thus, contract law is grounded in the will of the parties, and courts recognize this "freedom to contract" principle.[68]

A. Concepts of Autonomy

There are many different conceptions of autonomy. Traditionally, autonomy centered on an individual's freedom to be a rational person. However, some have defined autonomy by looking at external constraints, while others focus on autonomy through a lens of the whole. This subsection examines each of these conceptions in turn.

Autonomy can include the lack of outside control or pressure by others and the government.[69] This form of autonomy has been articulated as an "opportunity concept" because it views freedom in terms of the options that remain available rather than foreclosed.[70] It focuses on the absence of exter-

64. *See generally* National Conference of State Legislatures, *supra* note 6. **R**

65. Cal. Civ. Proc. Code § 1002(a)–(b); N.Y. C.P.L.R. § 5003-b.

66. N.Y. C.P.L.R. § 5003-b.

67. Jan M. Smits, Advanced Introduction to Private Law 115 (2017).

68. *Id.*

69. Eugene F. Miller, *Hayek's The Constitution of Liberty: An Account of its Argument*, at 42 (Inst. of Econ. Affairs 2010).

70. Charles Taylor, *What's Wrong With Negative Liberty*, *in* 2 Philosophy and the Human Sciences: Philosophical Papers, 211, 213 (Cambridge University Press 1985).

nal constraints—not internal constraints, such as inadequate information, internalized standards, or fear. This "opportunity concept" is also purportedly value neutral because it centers on being free from interference by other people, not on discriminating between "more or less significant freedoms."[71] Under this theory, when a person is coerced, she no longer determines her own ends or plans her own life, but must act according to ends or goals that are imposed by someone else.[72] However, when external constraints, like coercion, are absent, individuals must bear the consequences of their actions.[73]

In contrast, classical utilitarianism is concerned not with the separateness of individuals but with promoting "welfare."[74] It focuses on discovering which actions and policies maximize the well-being of the relevant group.[75] To determine the well-being of a group when an action or policy is adopted, the sum of the benefits the members of the group would experience is compared to the total losses. The well-being of the group is simply the total of the interests of all its members. But this type of intervention does not differentiate between individuals—it prioritizes the whole.[76] As Kant famously articulated, true freedom requires that individuals be treated as ends in themselves, not as means toward the achievement of other public or private objectives.[77] Utilitarianism is unable to give individuals this true freedom.

Utilitarianism does not view measures intended to promote the well-being of all humans, or other paternalistic government measures, as respecting individual freedom.[78] A state may not compel a person to do or to refrain from certain action because it will make her happier, or because, "in the opinions of others, to do so would be wise, or even right."[79] While these might be good reasons to *persuade* an individual to take certain actions, it does not justify *compelling* a person to do so.[80] Constraints on individual freedom can only be warranted on a limited basis, such as preventing harm to others.[81]

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71. *Id.* at 219.

72. MILLER, *supra* note 69, at 39–40. **R**

73. *Id.* at 41.

74. Hiro N. Aragaki, *Does Rigorously Enforcing Arbitration Agreements Promote "Autonomy,"* 91 IND. L.J. 1143, 1149 (2015–2016); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 105 (1979).

75. Posner, *supra* note 74, at 111. **R**

76. JOHN RAWLS, A THEORY OF JUSTICE 187 (1971).

77. MILLER, *supra* note 69, at 47. **R**

78. Aragaki, *supra* note 74, at 1149. **R**

79. JOHN STUART MILL, ON LIBERTY 13 (1859).

80. *Id.*

81. Aragaki, *supra* note 74, at 1149–50. **R**

Autonomy has traditionally been used to denote freedom in terms of self-realization, self-mastery, or self-determination.[82] This conception of autonomy focuses on the capacity of an agent to be a rational, independent-thinking person who determines the course of her own life "rather than have it be determined for her by tradition, peer pressure, or the force of habit."[83] Thus, an individual who is capable of reflecting on their desires is also capable of making decisions that promote autonomy.

B. Traditional Concepts of Autonomy in Contract Law

As discussed, courts apply traditional notions of contract doctrine when deciding whether to invalidate an NDA in a sexual misconduct case. In some ways, this honors survivor autonomy at a fundamental level. For one, according to Charles Fried, the promise principle in contract advances autonomy because it links contractual obligation to "self-imposed" obligations.[84] When a court chooses not to interfere with a private agreement between two parties, it honors the individual as separate from society and respects the individual's autonomy.[85] Thus, by enforcing promises, contract law advances individual freedom.[86] Thus, courts' interpretations of NDAs rely on a survivor's self-imposed commitment, thereby advancing principles of autonomy.

Autonomy also requires that individuals be free from external interference. Fried emphasizes that contracts are private in origin; as such, the law should not impose external public restraints that interfere with individual choice but, instead, should enable the agreement on a neutral basis.[87] Fried is critical of those who are willing to overlook the explicit terms of the contract to achieve notions of fairness or policy concerns.[88] Thus, basing contract law in individual choice is favorable and would "lead to conclusions profoundly different from those that would result from any attempt to rest contract law on other social policies . . . ."[89] Essentially, Fried does not

82. *Id.* at 1150.

83. *Id.* at 1150–51.

84. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 2 (2d. ed., 1981). Charles Fried is a Professor of Law at Harvard Law School, where he has been teaching since 1961. He was also the Solicitor General of the United States from 1985 to 1989 and argued numerous cases in front of the United States Supreme Court. He has authored many books on moral and political theory, including *Anatomy of Values*, *Right and Wrong*, *Modern Liberty*, *Contract as a Promise*, and *Saying Where the Law Is*.

85. *Id.*

86. *Id.*

87. *Id.* at 3.

88. *Id.* at 2.

89. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 498 (1989).

think external standards should intrude into a private contract.[90] Because the source of an obligation rests on the promise itself, Fried rejects those who "fashion[ ] contractual obligation as a way to do justice between . . ." the parties.[91]

Fried's work emphasizes the importance of personal autonomy. Fried asserts that, if we respect individuals as free persons, then we should, in turn, respect the choices that they make. In fact, Fried argues that, when we fail to respect an individual's promises, "[w]e infantilize him."[92] Thus, when a court invalidates an NDA on public policy grounds, it is not honoring survivor autonomy.

C. #MeToo and the Influence of Feminist Perspectives of Autonomy in Contract Law

While traditional contract law prioritizes individual choice, some feminist legal theorists believe women are unable to freely consent under the patriarchal laws that ban confidentiality provisions in NDAs reflect the concerns of feminist legal theorists. Some feminist legal theorists argue that traditional contract law doctrine is not appropriate when evaluating NDAs in sexual misconduct cases.[93] Despite current court precedent, some feminist theorists, like Catherine MacKinnon, argue that traditional legal doctrines and theories incorporate male-skewed norms and values, leaving contract law interwoven with male-dominated hierarchies of power and influence.[94] Consequently, they argue the law has failed to capture the impact of power in the sexual domain.[95] For example, a survivor is not exercising free choice by entering into a settlement agreement because she is actually surrendering to male dominance under oppressive patriarchal norms.[96] Thus, as an extension of the patriarchal structure, current court precedent reflects—in both process and result—inherently biased contract doctrines and theories that erode victim autonomy and choice.

Conversely, other feminist legal theorists argue that autonomy must acknowledge that women have a central role in decision making, rejecting the view that women are inherently subordinate and cannot consent freely.[97] Feminist legal scholar Robin West has proposed that autonomy in the con-

90. FRIED, *supra* note 84, at 3. **R**

91. *Id.*

92. *Id.* at 21.

93. KEREN, *supra* note 23, at 414. **R**

94. *See generally* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

95. *Id.*

96. *Id.* at 182.

97. *See generally* Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 96–97 (1987).

text of consent does not always mean choosing an alternative that fits one's self-interest.[98] West argues that sometimes "consent arises from an effort to increase the pleasure or satisfy the desires of others," thus perhaps benefiting the world in some way, even if the women themselves do not benefit.[99] West articulates many different forms of consent, from the pursuit of something that one truly desires, a choice that is the lesser of two evils, or even the endurance of "unpleasant, unwanted, nonmutual, and nonetheless fully 'consensual' sex."[100] Consent, and thus autonomy, is flexible and reflects the distinctiveness of women's lives.

While West and MacKinnon's arguments primarily involve consent in the context of sex, the arguments are directly applicable to contract law, particularly in the nexus between contract law and the lack of consent involved in sexual misconduct. Further, although the limits of consent are recognized through modern defenses against contract enforcement, like duress, undue influence, and unconscionability, courts are hesitant to invalidate contracts on these grounds.

Additionally, some feminist theorists have criticized a dominant theory within contract law—objectivity.[101] Sam Williston, along with other classical contract theorists, believed in the superiority of objectivity over subjectivity in contract law.[102] This is evident by the Restatement (Second) of Contracts' insistence on "manifestations of mutual assent" and the requirement of consideration.[103] These concepts help solidify and objectify the intent behind a contract.

Some feminist theorists believe objectivity is inherently biased and serves as a dominance-preserving method.[104] Many feminist theorists argue objectivity does not truly exist and is falsely presented as neutral concept.[105] They argue, "[a]s long as we live in a society where men dominate women, objectivity will be by definition male."[106] These feminist scholars believe that, rather than look at the contract on its face, courts should seriously evaluate the inequality of bargaining power between the parties.[107]

98. *Id.*

99. *Id.* at 92.

100. *Id.* at 144.

101. LINDA MULCAHY, *The Limitations of Love and Altruism–Feminist Perspectives on Contract Law*, *in* FEMINIST THEORY IN CONTRACT LAW 2 (Linda Mulcahy & Sally Wheeler eds., 2005).

102. RESTATEMENT (SECOND) OF CONTRACTS § 63 (1981); KEREN, *supra* note 23, at 421 **R**

103. RESTATEMENT (SECOND) OF CONTRACTS §§ 3, 17, 18, 22, 23, and 24.

104. *See generally* Mary Joe Frug, *Rescuing the Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029 (1992); Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 190 (2008).

105. MULCAHY, *supra* note 101, at 2. **R**

106. A.W. Phinney III, *Feminism, Epistemology, and the Rhetoric of Law*: *Reading* Bowen v. Gilliard, 12 HARV. WOMEN'S L.J. 151, 176 (1989).

107. *See, e.g.*, Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247 (1999).

California's law reflects the influence of dominance feminism—the concept that male-skewed norms and values are inherent in traditional contract law and doctrine. Under this theory, women are incapable of exercising free choice in the face of an oppressive patriarchal structure. However, New York's law reflects a more nuanced approach to a valid feminist concern. New York's law promotes survivor autonomy by enabling women to make choices consistent with their own goals and priorities, while also restoring the bargaining power in settlement negotiations through a built-in revocation mechanism.[108] Although recent legislation reflects the work of feminist legal scholars, the challenge remains for most states to craft laws restricting the use of NDAs in sexual misconduct cases in ways that honor survivor autonomy while also preserving the integrity of the freely chosen obligations that validate contract law.

IV. The Impact of the California and New York Laws on Survivor Autonomy

A. State Laws that Ban Confidentiality Provisions in NDAs Undermine Survivor Autonomy Because They Deprive Women of the Choice to Utilize Important Tools

State laws that void NDAs containing confidentiality provisions—like California's—reinforce sex inequality and women's inferiority by suggesting that, because of their subordinated status, women are incapable of making rational choices in the face of sexual harassment, and, therefore, must rely solely on the judgment of the legal system. These laws disempower women who have been subjected to sexual misconduct by denying them the opportunity to use legal tools, like confidential settlements, to obtain a financial remedy for their harm. California's law reinforces the very power structures it purports to undermine.

The California legislature reinforces female subordination by using its societal power to erode survivor choice and autonomy. As evidenced by the law, once again "men control women by perpetuating a legal system that reinforces gender inequality. . . , keeping women financially and legally powerless."[109] In its committee report, the California legislature asserted that NDAs "keep the details of cases from being revealed and end up silencing victims from speaking about their experiences."[110] The report expressed a concern that settlements could be "used to allow serial harassers—espe-

108. N.Y. C.P.L.R. § 5003-b (McKinney 2019).

109. Andrea Mazingo, *The Intersection of Dominance Feminism and Stalking Laws*, Nw. J. L. & Soc. Pol'y 335, 337–339 (2014).

110. Assemb. Comm. on Judiciary, Settlement Agreements: Confidentiality, Ca. B. Analysis S.B. 820, 242nd Reg. Sess. (Ca. 2018).

cially those with significant financial resources—to escape criminal prosecution and continue their behavior unchecked."[111] Citing public policy reasons in support of banning "secret settlements" in matters involving "particularly vulnerable victims" and an interest in preventing conduct that presents an "ongoing hazard,"[112] the report explicitly compared women survivors to children "who ought to receive special protection."[113] California's law infantilizes women by acting as an oppressive force on survivors of sexual misconduct, reinforcing inherent power structures and undermining survivor autonomy.

California's law explicitly illustrates how the state both creates and justifies society, remaining legitimate under the guise of being objective, while preserving the state's position as a mirror of society.[114] Further, California's law reflects the dominant patriarchal view that women are inferior and incapable of rational choice. The structure of the law is hierarchal in nature and controls social order by "embodying and ensuring male control over women's sexuality at every level."[115] Laws that severely restrict a survivor's ability to enter into NDAs in sexual misconduct cases have the effect of maintaining the dominant power structures. Curiously, the laws passed in response to #MeToo have been immune from feminist critique, perhaps because even feminist scholars are unable—or unwilling—to recognize how these laws undermine female empowerment and autonomy.

Laws prohibiting confidentiality provisions in NDAs assume that all women who have experienced sexual misconduct are "victims," stereotyping them as vulnerable, fearful, and easily controlled and manipulated, rather than seeing the complexity of and differences among them.[116] This view is different from the survivor-driven mission of the original 'me too' movement. Stereotyping women as vulnerable victims misses, for example, that the experiences of black women may be in stark contrast to those of white women, or that the experiences of poor women will vary from those with more financial resources or power. These laws deny women the ability to define for themselves, based on their unique experiences, what to include in a confidentiality provision, and instead categorize all women as victims needing legal protection. California's law improperly assumes that all women wish to speak out against their perpetrator and that all women priori-

111. *Id.*

112. *Id.*

113. *Id.*

114. Beth Ann Headley, *Feminist Theories of Autonomy and Their Implications for Rape Law Reform*, 437 SCHOLARWORKS U. MONT. 1, 13 (2007).

115. MACKINNON, *supra* note 94, at 644. **R**

116. Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 85 (2008).

tize safety and perpetrator accountability. However, women have many different goals when they decide to enter into a settlement agreement.[117]

The California legislature inappropriately assumed banning NDAs would enhance safety and women who have been victims of sexual harassment would choose safety over autonomy. The committee rejected arguments that banning NDAs would "interfere with the settlement of claims alleging sexual harassment or assault, by forcing companies to trial in order to preserve their public imagine/brand," opting instead to pass the law on public policy grounds.[118] Yet, there does not appear to be evidence that California's law will enhance safety,[119] and settlement agreements that prevent a survivor from reporting a crime have always been void as a matter of public policy. Further, by assuming that women who have been subjected to sexual misconduct would choose public safety over autonomy, the legislature fails to consider women have unique reasons to enter into settlement agreements. And, for some, entering into a confidential settlement agreement is the safest option.[120]

While it is likely a law banning NDAs will promote traditional notions of public safety and justice, it is equally likely banning NDAs will interfere with settlement claims involving sexual misconduct by encouraging companies to litigate in order to preserve their public image. Accordingly, the law could have the effect of subjecting victims to unwanted public scrutiny, trauma, and financial drain. As a result, survivors may be less likely to come forward with their experiences, and the threat of litigation will have a disproportionate impact on women with fewer resources and less societal power. Thus, California's law is an external influence on survivors of sexual misconduct that erodes autonomy and choice. Put simply, laws like California's reinforce the power structures that subordinate women.

B. New York's Law Empowers Women and Promotes Survivor Autonomy by Supporting the Individual Choices of Women

New York's law recognizes and serves the individual choices of survivors by allowing a settlement regarding sexual misconduct, so long as the

117. For example, some women choose to enter into settlement agreements to avoid the stress of litigation. For other women, they choose to prioritize their privacy and avoid disclosure of the sexual misconduct to family members, future employers, or the public. Gloria Allred, *Opinion: Gloria Allred: Assault Victims Have Every Right to Keep Their Trauma and Their Settlements Private*, L.A. Times, Sept. 24, 2019, https://perma.cc/ZPU5-24HK.

118. Assemb. Comm. on Judiciary, *supra* note 110. **R**

119. *See, e.g.*, Goodmark, *supra* note 116. **R**

120. Marissa Ditkowsky, *#USTOO: The Disparate Impact of and Ineffective Response to Sexual Harassment of Low-Wage Workers*, 26 UCLA Women's L.J. 69, 98 (2019) (stating that employees may want an NDA to avoid damage to their reputation, retaliation, and lack of recourse, particularly those with fewer resources).

survivor prefers it, makes an informed decision in signing, and does not revoke it.[121] Under the New York approach, the freedom of choice granted to the survivor restores that party's bargaining power in a settlement negotiation. New York promotes victim choice by abandoning its "protection of those who would discriminate and sexually harass in the workplace" and focusing on "recogniz[ing] and serv[ing] victims of discrimination."[122] New York's law recognizes that victimization and autonomy are not mutually exclusive. The law places the power in the hands of the women, taking a more nuanced approach and furthering the goals of the original 'me too' movement. Therefore, survivors of sexual misconduct are able to exercise autonomy in making choices consistent with their own goals and priorities.

The New York law contains a mechanism granting the survivor twenty-one days to decide whether she wants to prevent the disclosure of any underlying facts and circumstances of the claim.[123] Moreover, upon execution of the agreement, the law gives the victim at least seven days to revoke the agreement,[124] thus recognizing the complexity and differences in the decision-making process for each woman. New York's law, while not a perfect solution, respects the rights of individual women to choose whether and how to use the civil legal system, therefore promoting autonomy and agency.

The choices women make to keep settlement agreements confidential may have some negative consequences for society. Perpetrators may be able to continue their behavior without direct social consequences, and other women may become victims as a result. Some women will be coerced, threatened, and revictimized through the process of entering into a settlement agreement. However, allowing individuals to choose is essential to their autonomy. Even though some women will experience harm from these choices, others will be empowered by the ability to make choices for themselves in the context of their own lives, rather than having the legal system impose decisions upon them based on what they "should" want or out of a state-perceived need for protection. Women have the right to make decisions many will disagree with, dislike, or even fear. Thus, New York's law promotes survivor autonomy because it allows women to choose whether to utilize important tools, like confidentiality provisions, while also providing a critical mechanism to address situations where such choice is compromised.

121. N.Y. C.P.L.R. § 5003-b (McKinney 2019).

122. N.Y. COMM. REPORT, RELATES TO INCREASED PROTECTIONS FOR PROTECTED CLASSES AND SPECIAL PROTECTIONS FOR EMPLOYEES WHO HAVE BEEN SEXUALLY HARASSED, 2019 N.Y. A.B. 8421, 242nd Reg. Sess. 1 (N.Y. 2019).

123. N.Y. C.P.L.R. § 5003-b.

124. *Id.*

V. Conclusion

Creating space for individual choice honors the differences between women, recognizing that race, class, sexual orientation, disability status, and many other variables inform a woman's response to their experience of sexual misconduct. New York's law enables women subjected to sexual misconduct to decide how they will engage with the legal system by respecting their autonomy and allowing them to take part in building the solutions they perceive are the best to meet their goals, whether those goals are safety, perpetrator accountability, a financial remedy, or keeping their experiences private.

To further the public's interest in holding abusers accountable, while also supporting victim autonomy, states should adopt laws like New York's. First, the law holds perpetrators accountable by giving a victim twenty-one days to consider the NDA clause, and, after signing, seven days to revoke the agreement. This mechanism provides a buffer from the coercion, threats, and situational trauma the courts have been unwilling to consider, but that many victims still experience at the time of signing a settlement. Second, the law supports victim autonomy and choice through this unique mechanism and by allowing the victim to decide whether to keep information related to the underlying claim confidential.

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