

# SEMI-CONFIDENTIAL SETTLEMENTS IN CIVIL, CRIMINAL, AND SEXUAL ASSAULT CASES

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*Settlement is more likely if parties are free to set its terms, including a promise that these terms will remain secret between them. State sunshine-in-litigation laws work to defeat this incentive for confidentiality in order to protect third parties from otherwise unknown hazards. The intuition is that a wrongdoer should not be able to pay one plaintiff for silence at the expense of other victims. This Article begins by showing that the intuition is often wrong or overstated. A plaintiff who can assess a defendant's vulnerability to future claims can extract a large enough settlement to provide substantial deterrence, and at a much lower cost to the legal system. The argument does not transfer well to most criminal cases, where the defendant might pay, not to avoid other claims, but to avoid incarceration, which offers no direct benefit to the settling victim. It is further complicated in sexual assault cases, where the plaintiff might settle too quickly in order to protect her privacy. The discussion works toward the idea that in some settings semi-confidentiality—the disclosure of the substance of settlement but not the magnitude of monetary payments—is superior to both secrecy and transparency. The right amount of confidentiality is a function of the parties' interest in privacy, the likelihood that the wrongdoing is part of a pattern unknown to the settling plaintiff, and the accuracy of the litigation process that settlement seeks to bypass. We are able to identify cases where law ought to allow (even) criminal cases to be settled privately and confidentially, and also cases where even sexual assault victims should be steered away from confidential settlement and toward translucency.*

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## INTRODUCTION

To the extent that law is a public good, settlements—and for that matter any failure to pursue legitimate claims to trial and then all the way through an appeals process—are troubling. On the one hand, settlements and private arbitration proceedings can save costs, and so long as they are reached in the shadow of the law, they can accomplish most of what law aims to do. There is ample evidence that law not only respects parties' liberty to settle disputes but also encourages settlement.<sup>1</sup> Where it does not, it must recognize that parties can often come to an agreement before any legal claim is filed, and thus preempt law's involvement. Either way, settlements deprive the world of information that judicial decisions might convey, and, where settlement is secret, third parties may not even know of hazards or facts that are known to the settling parties but costly for others to rediscover.<sup>2</sup> Put this way, a part of our conclusion is already foreshadowed: it is sensible for law to allow some private settlements, but it is also prudent to put some constraints on confidentiality. But there is a countervailing factor. When a party seeks to settle a matter in confi-

<sup>1</sup> See Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 257–58 (1999).

<sup>2</sup> For the classic and wild position against settlement, in favor of more and more due process and judicial decisions, and by implication against turning the other cheek, see generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

dence, its counterparty can often extract a price that serves third-party interests. This novel point suggests that there are cases where law, counterintuitively, ought to allow or even welcome confidential agreements to settle disputes—even where the matter arises because one of the parties is a serious and repeat wrongdoer. Deterrence may be obtained in place of sunshine as a disinfectant. Information is valuable, to be sure, but the higher price a party pays for secrecy might deter misbehavior as successfully as any legal remedy, and the latter normally comes at a greater social cost. For example, this Article argues that an employer who catches an embezzling employee might be allowed to accept payments from the employee in return for not calling in the police. Similarly, but less controversially, an injured party can and should often be able to extract a larger settlement from a tortfeasor in return for confidentiality. Where a state’s “sunshine-in-litigation law” stands in the way,<sup>3</sup> it ought to be modified to provide for semi-confidentiality, or revelation of the subject matter but not the precise terms of settlement. A much harder question is whether the accused party in a university’s sexual assault disciplinary case ought to be able to bargain with the accuser to avoid the risk of expulsion from the university. When does a case belong to the victim, and how might a victim’s ability to extract payment for confidentiality advance the goals of the legal system?

A useful thought experiment is to imagine and compare legal systems that choose among the following rules: (1) the frequency and confidentiality of settlement, including arbitration proceedings, is entirely in the litigants’ hands; (2) confidentiality is restricted by courts or by statutory sunshine (in litigation) laws that require revelation of obvious hazards, like dangerous consumer products and intentional wrongdoers; and (3) nonpublic dispute resolution is permitted, but taxed—perhaps by legislating that payments made as part of completely confidential settlements are nondeductible. Finally, though the list could be longer, there is the possibility that (4) confidentiality is normally respected as to the amount of a settlement but not its subject matter. The first two of these options are prevalent, but this Article suggests that the last two—one presently unknown and the other barely seen<sup>4</sup>—are likely superior.

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<sup>3</sup> Florida was the first of some twenty states to prohibit confidentiality agreements that bring about the concealment of public hazards “that [have] caused and [are] likely to cause injury.” FLA. STAT. § 69.081(2) (2016).

<sup>4</sup> See *infra* notes 49–50 and accompanying text.

Part I develops the idea that confidentiality can promote deterrence, and that state sunshine-in-litigation laws may be misguided. Part II considers whether confidentiality can ever be desirable in criminal matters where the criminal might pay the victim to avoid incarceration. Part III assesses the problem of false claims when victims are paid for confidentiality and can therefore collect more than their losses. Part IV then applies the insights about deterrence and false claims to sexual assault cases decided on university campuses under the rules encouraged by the Department of Education. The discussion then turns in Part V to the advantages of semi-confidentiality. Third-party interests might be served even as wrongdoers are somewhat deterred by paying for translucency—secrecy with respect to the amount of a settlement but transparency as to its substance. Part VI generalizes the problem and describes the parameters of an optimal confidentiality rule.

## I

### IS THERE A PROBLEM WITH CONFIDENTIAL SETTLEMENTS OF CIVIL LAWSUITS?

#### A. Deterrence and the Price of Confidentiality

Why do defendants often seek confidentiality? At first blush it seems that a wrongdoing defendant and a willing, self-interested, knowledgeable plaintiff can collude to keep valuable information from other victims, and in the process compromise the deterrence function of law. In the case where a wrongdoer is a tortfeasor who may have injured a number of victims, a promise of confidentiality elicited from one settling victim might allow this defendant to continue to misbehave; the wrongdoer is under-deterred because, by hypothesis, similarly situated victims will not know that they can bring suits. The straightforward idea is that the public ought to know of dangers, and defendants must be deterred from repeat wrongdoing. The prospect of imitative, multiple lawsuits or judicially supervised class actions serves this purpose.

Note that the presence of a disadvantaged, ill-informed third party is not normally enough to bar confidentiality. The same defendant might also have breached a contract with a vendor, and then negotiated a payment to avoid suit by the disappointed vendor. Other vendors may benefit from knowledge of this breach and settlement,<sup>5</sup> but there is no require-

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<sup>5</sup> We call it a settlement whether or not it was preceded by the formal filing of a claim for breach of contract.

ment of disclosure. If the breaching party fears some reputational loss, it can ask for a confidentiality clause. Courts will respect and facilitate this agreement; if the vendor is found to have revealed the terms of settlement after agreeing to confidentiality, it may be forced by the terms of the clause to disgorge some or all of the compensation it received for the contractual breach.<sup>6</sup> Such confidentiality agreements are more common in tort cases than in contract cases, but in both settings courts will likely refer to the “public policy favoring settlements.”<sup>7</sup> This policy is supported by the commonly-held view that trials are expensive and hardly free of error.<sup>8</sup>

When settlement involves filed tort claims, some jurisdictions bar confidentiality if it will cover up information that is likely to help other people avoid serious injury.<sup>9</sup> Possible modification of these sunshine-in-litigation statutes is discussed in Parts IV and V. The statutes might also be motivated by the fear that likely defendants will know they can settle claims confidentially and therefore be under-deterred from taking proper precautions in the first place.

Closer analysis shows, however, that the connection between confidential settlements and the deterrence of antisocial behavior is more complicated. Confidentiality may, counterintuitively, enhance deterrence, or at least be inconsequential. Imagine, for example, that consumer A is injured by manufac-

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<sup>6</sup> See, e.g., *Gulliver Sch., Inc. v. Snay*, 137 So. 3d 1045, 1046–48 (Fla. Dist. Ct. App. 2014) (holding that the breach of a settlement’s confidentiality provision requires partial disgorgement of the settlement proceeds).

<sup>7</sup> *Hinshaw v. Super. Ct.*, 58 Cal. Rptr. 2d 791, 796 (1996). More generally, a presumption of liberty to contract allows a seller to make an offer conditional on confidentiality even though third parties suffer increased search costs.

<sup>8</sup> See Joshua P. Davis, *Applying Litigation Economics to Patent Settlements: Why Reverse Payments Should Be Per Se Illegal*, 41 RUTGERS L.J. 255, 256–57 (2009) (“Litigation can resolve the respective rights of the parties in an authoritative manner. But it is costly and risky.”); Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1939 (1997) (discussing how the negative public perception of civil jury trials—that such trials are unpredictable, expensive, and tend to either overcompensate or undercompensate plaintiffs—has led to the decline of the civil jury trial).

<sup>9</sup> See, e.g., ARK. CODE ANN. § 16-55-122(a) (West 2017) (providing that contracts or agreements that prohibit the disclosure of environmental hazards violate public policy and are not enforceable); FLA. STAT. § 69.081(3)–(4) (2016) (prohibiting courts from entering orders or judgments that conceal public hazards and providing that contracts or agreements that prohibit the disclosure of public hazards violate public policy and are not enforceable); LA. CODE CIV. PROC. ANN. art. 1426(D) (2017) (providing that contracts or agreements that prohibit the disclosure of public hazards violate public policy and are not enforceable); WASH. REV. CODE § 4.24.611(4)(b) (2017) (providing that confidentiality provisions are subject to a balancing test that must consider the potential risk of public hazards).

turer M's product, and suffers a loss of 100. A claims that the product was defective. There is the likelihood that 999 other consumers are similarly injured. An open trial pitting A against M, or a transparent settlement between the parties, will enable these other victims to bring claims against M. M's total liability will be 100,000, an accurate reflection of the harm caused by M and, ex ante, the right amount to guarantee that M, and other manufacturers, will be properly deterred in the first place. Absent information about the A-M lawsuit and settlement, these other injured consumers may not know that their injuries were caused by M's product or they may not know that the product is defective. The former seems plausible where, for example, a drug produced by M engenders a side effect that is not generally known to be associated with M's drug.<sup>10</sup> M is therefore eager to attach a confidentiality clause to the settlement with A in order to avoid further liability of 99,900. Confidentiality in this case seems socially undesirable.

The preceding analysis, with its conventional conclusion, ignores A's likely behavior, or bargaining ability, once A perceives that M values confidentiality. A, or A's experienced attorney, should in principle demand close to 100,000 in return for the confidentiality clause. If A can extract that entire benefit from M, then M is properly deterred, just as if M expected to pay damages to all 1000 injured consumers.<sup>11</sup> Indeed, the confidentiality provision may even be socially efficient because it obviates numerous lawsuits between M and other victims. To be sure, these other victims, who by hypothesis do not know to sue M, go uncompensated and may waste resources search-

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<sup>10</sup> In principle, adverse side effects must be reported under 21 C.F.R. § 314.80 (regulating post-marketing reporting of adverse drug experiences). However, reporting depends on the ability of patients and physicians to draw a connection between a side effect and the drug, and then some determination that the reported incident is plausibly traced to the drug. When a company fails to report an adverse drug experience (such as when it secretly settles a case), the FDA will pursue advisory action (such as issuing a warning letter), judicial action (including injunctions, civil damages, and criminal prosecutions), or administrative action (such as withdrawing drug approval or barring the company from submitting any future drug applications). See Stuart L. Friedel & Joseph A. Sena Jr., *Pharma Challenges: Adverse Event Reporting and Social Media*, BNA (Oct. 26, 2012), <https://www.bna.com/pharma-challenges-adverse-event-reporting-and-social-media/> [<https://perma.cc/9Z59-QN3R>].

<sup>11</sup> More precisely, knowing that A or another plaintiff will extract such a payment for confidentiality, encourages M to take greater precautions at the outset. M knows that it is costly to pay out 1000 claims, but it can be just as costly to pay one claim enhanced by a huge premium for the confidentiality thought necessary to suppress the other claims. M will take into account the probability of at least one informed plaintiff filing suit.

ing for the source of their injuries. But the central point is that a confidential agreement between M and A surely does not entirely let M escape the consequences of its actions, and may even deter M just as well as any other tort-and-settlement regime. The key element here is that A perceives the value of confidentiality to M, and can extract roughly the same total payments M would have paid to other injured parties with good claims.

There are alternatives to the A-M settlement with a large premium for confidentiality. First, as already noted, the law might simply bar confidentiality. In some cases, A will refuse to settle without receiving a premium for confidentiality, and then A's public suit against M will stimulate many other individual suits. In other cases, however, M will be under-deterred, and perhaps entirely so, because plaintiffs like A face high legal costs and because M's wrongdoing is difficult to uncover.<sup>12</sup>

Alternatively, the legal system might favor a class action; A and A's attorney might succeed in serving as the class representative. In many situations this creates an inefficient race to be the first to file suit. Even if A discovers the connection between A's injury and M, once A files, other attorneys can seek to represent other members of the putative class. The process of assembling a class action is inconsistent with confidentiality.

A third approach is to allow A to recover the entire amount of M's gain from misbehavior, if that is substantial, or the entire amount of damages suffered by A and the 999 other victims. This remedy, drawn from the law of restitution and unjust enrichment, is not unlike one that allows A to extract a confidentiality premium from M, but it puts courts in the position of assessing the aggregate damage done by M or the benefit provided by A. Neither scheme necessarily creates a moral hazard; A is over-compensated, but A may not know in advance the connection between the other victims' injuries and M. That each victim can file likely creates an inefficient race, the way the promise of a patent can create duplicative efforts among inventors,<sup>13</sup> but again inasmuch as the task here is to encourage someone to uncover the connection between injuries

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<sup>12</sup> See, e.g., Andrew F. Daughety & Jennifer F. Reinganum, *Secrecy and Safety*, 95 AM. ECON. REV. 1074, 1074 (2005) (providing a model where firms reduce product safety over time when wrongdoing remains secret).

<sup>13</sup> On the inefficiency of patent law races, see Brian D. Wright, *The Economics of Invention Incentives: Patents, Prizes, and Research Contracts*, 73 AM. ECON. REV. 691, 693–700 (1983).

and M's behavior, and to deter M in the first instance, there is less of a risk of duplication.<sup>14</sup>

Finally, law could bar confidential settlements but reward A on a case-by-case basis, assessing the work A put into the search for the cause of A's (and others') injuries, and deploying a multiplier to offset the probability of failure. Courts are unlikely to be adept at the necessary calculations. Comparable rewards are used for salvage and rescue in admiralty law, but in that setting, factfinders can over time observe the state of the salvage industry. It would be far more difficult to calculate the risks that A assumes in searching for the cause of injury, and to know whether there is substantial over- or under-investment.

We leave for another day a complete analysis of these alternatives. For the purpose of this Article, it is enough to see that there are situations where A can extract a payment from M in return for confidentiality; where this premium can serve to deter M; and where this premium will not generate either a significant moral hazard or an inefficient race to be the first to file or extract. It is the method that promises the lowest legal costs and that leaves the least room for error in the legal system. To be sure, A's settlement is jarring because it does not provide compensation to the other 999 persons who remain in the dark about the source of their injuries. Nor is there a guarantee that A will guess correctly the amount of M's exposure, and thus extract an amount that provides proper deterrence. An idealized class action, as well as some other alternatives, can do better on these fronts. On the other hand, class actions and the other alternatives come with enormous legal costs. Our aim is to show that the deterrence value of confidential settlements has been under-appreciated, and then to explore the implications of this insight.

There are several important deficiencies in this optimistic story, and these shortcomings may explain why judicial decisions, legislative histories, and academic commentary have failed to notice or come to grips with this defense of confidential settlements. A, and even M, cannot be certain that other victims require the information provided by the settlement. Confidentiality is worth less to M (and therefore to A) the more other

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<sup>14</sup> Consider, too, that A and other victims cannot be sure that they are the first who have approached M—or that M will pay a premium for confidentiality. While the deterrence effect of secret settlements will decrease as knowledge of similarly-situated victims decreases, so does duplicative effort in chasing secrecy premiums.



claimants will discover M's legal vulnerability without knowledge of the A-M settlement. If, for example, G is injured because of a toy made by T, it is hard to see how other injured families require knowledge of the G-T agreement in order to identify T as the cause of their losses. The source of a child's injury will be obvious. In the wake of another child's injury, that family will easily develop a theory of the case resembling that which brought G to file a claim and then to settle with T. Potential claimants probably still gain something from knowledge of a G-T settlement; the dollar amount of that settlement, combined with information they may be able to obtain about the severity of G's injuries, reveals something about T's eagerness to avoid trial or T's prediction as to whether its toy will be found defective. To the extent that these arguments suggest that confidential settlements are at times poor substitutes for trials, they also show that confidentiality may not be terribly valuable to M. In turn, legal intervention against confidential agreements in these circumstances is of little value.

In other cases, as where A is convinced that his automobile malfunctioned and caused an accident, it is more likely that confidentiality is of value to M. Confidentiality will prevent wasteful strike suits from other consumers and lower M's costs—especially when A is unable to assess the extent to which the malfunction is a one-off event or something that other consumers would wish to know.<sup>15</sup> On the other hand, if the malfunction is real and widespread, M can take precautionary steps going forward—and M knows that other injuries will generate other plaintiffs. There is probably a spectrum across which confidentiality is more valuable to M as other claimants gain more from knowledge of an A-M settlement. It might be appropriate to say that there is an information asymmetry driving M's preference for confidentiality, but this deemphasizes both A's ability to extract value from the better-informed M as that asymmetry narrows, and the likelihood that such settlements come close to deterring M in reasonable fashion.

Even where confidentiality is very valuable to M, the parties will not normally know how many claims like A's are forthcoming. A might have enough data to estimate that M faces

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<sup>15</sup> Public agreements reveal information that can be leveraged in future strike suit negotiations, including a party's propensity to settle. Although defendants can discourage strike suits by litigating more often, pursuing this strategy is wasteful. Note that secrecy and a settlement with A might also keep other consumers from duplicating A's investigation and litigation costs, but again the question at this point in the discussion is whether A can extract, from M, a large part of the value of secrecy.

100,000 in liability because of the likelihood of side effects from its drug, but when A tries to extract something close to this sum in return for A's promise of silence, M will reason that there are a number of people in A's situation, and M must find it worthwhile to buy silence from all of them. M might pay up to 9000 to each of ten knowledgeable victims in return for confidentiality, but M will not pay much more than that, and A (and even perhaps M) does not know how many ways the pot must be divided in negotiations with M. Significantly—though again surprisingly absent from the settlement literature—is the observation that a confidentiality clause loses value when M is paying off a number of victims. The clause will provide that if A breaks the agreement, A must return the settlement amount, and courts can be expected to uphold this contract.<sup>16</sup> But what if both A and B independently extract settlements from M by agreeing to confidentiality, and then B blurts? B certainly forfeits his settlement, but it is unlikely that A will have agreed to a settlement that requires A to refund her settlement if B breaks his agreement with M. We have not seen such an agreement, calling for the return of settlement money when another party breaches a separate confidentiality agreement, and if there were such a contract, it is possible that courts would not enforce it against A. Moreover, as M divides the gains from confidentiality among several informed plaintiffs, like A and B, each has diminished financial incentive to uphold the confidentiality agreement. Again, this makes confidentiality less valuable to M, and therefore to all the parties. In turn, it becomes less clear whether payments for confidentiality provide the same deterrence as those required in numerous lawsuits or in a class action on behalf of those similarly situated to A. Sunshine laws or refusals to enforce confidentiality agreements can thus be understood as means of ensuring the appropriate level of deterrence. Of course, if M would rather go to trial than settle transparently, then the overall effect may be to discourage settlement. In turn, deterrence is a function of plaintiffs' ability to get to court and prevail in trials.

Although sunshine-in-litigation laws appear to be motivated by the fear that confidentiality will allow M to harm new victims, the better case for transparency is probably based on the second idea noted above: the level of deterrence. It seems unlikely that even with confidentiality M will continue to manu-

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<sup>16</sup> Note that M might collude with B to blurt when M no longer values the confidentiality agreed to by A. Courts might take this into account when evaluating confidentiality agreements.

facture dangerous products or allow them to continue to circulate, because every future injury creates a new claimant who may trace the problem to M without knowledge of A's lawsuit or settlement. In most cases, once M is informed of a hazard because of a lawsuit filed by A, M will evaluate the risk and, when appropriate, alter its product, issue a recall, or at least warn potential victims, because the precaution is less expensive than potential liability from further injuries that might be avoided. There are two kinds of cases in which this optimism is unsupported. The first is where M thinks that no one but A will see the connection A has made between the injury and M. Side effects of a pharmaceutical seem like the best example, although as a practical matter M is obligated by statute to report side effects and bad outcomes that come to its attention, and the penalty for noncompliant secrecy is high.<sup>17</sup>

The second category is where M does not believe that it has made a defective product,<sup>18</sup> or that A's injury truly derives from M's product, but M fears that news of A's claim will bring forth other claimants who also, but incorrectly, trace their injuries, real or imagined, to M. In these cases, M may settle with A because M fears irrationality and error within the legal system. M may also fear a disproportionate cost to its reputation. Thus, imagine a case in which A claims a side effect from a vaccine or from power lines made or installed by M even though there is overwhelming scientific evidence against the causal link claimed by A. M might pay A, subject to a confidentiality agreement, even though M thinks the claim baseless.

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<sup>17</sup> 21 C.F.R. § 314.80 (2016) (detailing the Food and Drug Administration's reporting requirements for adverse reactions to approved drugs). Depending on the circumstances of the reporting, the FDA might issue a warning at its discretion, or pursue legal action. Alternatively, a third party can take legal action. For example, New York Attorney General Eliot Spitzer initiated a civil suit under state consumer protection laws against GlaxoSmithKline for allegedly failing to disclose studies regarding the side effects of the drug Paxil, leading to fines of \$3 billion. See U.S. Dep't of Justice, *GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data*, OFFICE OF PUB. AFFAIRS NEWS (July 2, 2012), <https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report> [<https://perma.cc/5JND-P3YX>]; Katie Thomas & Michael S. Schmidt, *Glaxo Agrees to Pay \$3 Billion in Fraud Settlement*, N.Y. TIMES (July 2, 2012), <http://www.nytimes.com/2012/07/03/business/glaxosmithkline-agrees-to-pay-3-billion-in-fraud-settlement.html> [<https://perma.cc/7J49-VHXF>].

<sup>18</sup> Even if M thinks there is a defect, it might be of the kind that does not appear in all identical products. A few items on an assembly line might suffer from metal fatigue, or develop cracks, while the others are just fine.

## B. Pattern Recognition and Confidentiality

In some cases the plaintiff is at a bargaining disadvantage because it is difficult to assess the defendant's exposure. Imagine that a celebrity, C, sexually assaults W. W brings a civil suit<sup>19</sup> and C offers a settlement conditional on confidentiality. W does not know whether the value of a confidentiality agreement derives from the potential loss to C's reputation or whether C also has reason to fear that other complainants will come forward once they learn that their own experiences might be part of a pattern of sexual misbehavior. In contrast, A, the conventional tort victim, was able to assess M's exposure by analyzing its sales volume and bargaining for a confidential settlement that approaches the full deterrence value of claims against M in a transparent world. But W knows comparatively less than A, and C surely knows more about the existence of other complainants than does his accuser, W. The accused celebrity, C, might reason that others do not want to suffer the costs of coming forward if their chances of success are low. C, however, knows that if a number of women come forward, each is more likely to be believed, and consequently they will suffer lower costs. In short, W can extract some payment from C, but without information about whether C is in fact a serial wrongdoer, W is often unable to extract a high settlement. In turn, C, and others like him, is insufficiently deterred.

The preceding intuitions about deterrence and pattern recognition are encouraged by asking what law's response is and should be to private settlements of claims where there is no special pattern problem. In the civil context, one-off cases do not normally cause defendants to offer anything for confidentiality. Setting aside cases where there is a privacy interest, it is the pattern potential that makes the information valuable to others and costly to the settling party. In criminal cases, and perhaps with respect to most intentional torts, there is more of a sense of bad types and good types. The legal system gathers information about prior arrests and convictions because it finds the information useful; private settlements may be particularly undesirable.

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<sup>19</sup> The lack of evidence may have convinced W that no criminal prosecution would succeed. Alternatively, the statute of limitations for a criminal suit, but not for a civil suit, may have been tolled.

## II

## PRIVATE SETTLING OF CRIMINAL WRONGDOING

Imagine that a storekeeper, S, suffers an armed robbery at the hands of AR. S is prepared to call the police and show incontrovertible video evidence, but AR, discovering that the robbery was filmed by a hidden camera, contacts S or even returns to discuss matters and offers \$5000 to settle the matter if S will agree to complete confidentiality. Most legal systems assign a monopoly power over criminal law to the state, so that the nascent criminal complaint might not seem like something that S can settle, but it can be difficult for the state to learn of a crime or to obtain a conviction without S's (uncompensated) cooperation and then testimony at trial. As a matter of legal doctrine, if S extracts a payment much greater than the value of what AR has taken, S runs a risk, albeit more in theory than in practice, that she will be open to a charge of extortion for having taken more than her "claim of right" allowed.<sup>20</sup> The doctrine seems aimed at cases where the victim of a theft tracks down the thief and repossesses her belongings. If the victim enters the thief's property, for instance, the former cannot take for herself as many things as she likes, and if she does so she is a thief or robber herself.

In practice, if the armed robber and storekeeper bargain for a payment in return for a confidentiality agreement, law's problem is more likely to be the under-deterrence of the robber than the storekeeper's enrichment or "crime" of extortion, and especially so if AR initiates the bargain. Put in terms of deterrence, S's ability to extract a settlement from AR is thought to be insufficient to deter AR in optimal fashion inasmuch as S does not internalize the cost of future robberies by AR. This feature of criminal or intentional wrongdoing is not new. In the legal code found in Exodus, both intentional wrongs and negligence generate remedies, but only the penalties set down for negli-

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<sup>20</sup> See generally Kristine Cordier Karnezis, Annotation, *Robbery, Attempted Robbery, or Assault to Commit Robbery, as Affected by the Intent to Collect or Secure Debt or Claim*, 88 A.L.R. 3d 1309, § 4[a] (1978) (noting that when acting within a claim of right, the one who takes lacks the intent to steal). The discussion here assumes that the same is true for extortion rather than behavior that looks like a robbery. A criminal claim against S seems especially unlikely where AR initiates the private bargain, as it become hard to describe S as an extortionist. Finally, if AR promises future payment, or S accepts payment and then later decides to report AR to the police, there is the question of whether law will enforce the AR-S contract. It is easy to imagine a refusal to enforce, as refusal falls far short of labeling S a criminal. On the other hand, nonenforcement in the event of breach rewards S, though it is likely to deter a subset of these private settlements in the future.

gence are described as avoidable through settlement between the private parties.<sup>21</sup> For example, when an ox that was known by its owner to have gored and caused injury on a previous occasion gores again and kills a human, the penalty applied to the owner who failed to restrain his animal is severe, but the family of the victim could accept monetary payment in lieu of the remedy provided by law.<sup>22</sup> Similarly, in Hammurabi's Code, when a doctor negligently injured or killed a patient, the legislated "eye for an eye" approach was apparently and widely avoided by negotiated payment.<sup>23</sup> In contrast, we have no textual statement or evidence that robbery or murder could be privately settled under those early codes. Those wrongs are regarded as crimes against the community, and that label may capture the idea that a criminal is likely to strike again, while the mistakes made by a builder or owner of oxen are one-off events. An alternative explanation is that the builder and oxen owner are thought to be deterred by monetary payments, while intentional wrongdoers are more often thought to be out of control and undeterrable except by removal from the community. Both distinctions track the idea that an injured party and alleged tortfeasor, like A and M, can settle their tort suits, perhaps secretly yet still in the shadow of the legal system, but the robber and storekeeper should not.

Another way to think of the matter is that the modern legislature has decided to deter and punish the robber with incarceration rather than financial assessments. With some misdemeanors, as with securities fraud, antitrust claims, and white-collar crime more generally, the legislature or the prosecutor offers the wrongdoer a choice between paying a fine and imprisonment.<sup>24</sup> Violent crimes, or perhaps simply those asso-

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<sup>21</sup> See Exodus 21–22 (Revised English Bible); see also Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235, 266–73 (1986) (discussing negligence and strict-liability rules in Exodus).

<sup>22</sup> Exodus 21:28–30 (Revised English Bible):

When an ox gores a man or a woman to death, the ox must be put to death by stoning, and its flesh is not to be eaten; the owner of the ox will be free from liability. If, however, the ox has for some time past been a vicious animal, and the owner has been duly warned but has not kept it under control, and the ox kills a man or a woman, then the ox must be stoned to death, and the owner put to death as well. If, however, the penalty is commuted for a money payment, he must pay in redemption of his life whatever is imposed upon him.

<sup>23</sup> See Levmore, *supra* note 21, at 263.

<sup>24</sup> See, e.g., 15 U.S.C. § 1 (2012) (providing fines or imprisonment for certain anti-trust violations); 15 U.S.C. § 78ff (2012) (providing fines or imprisonment for certain types of securities fraud); KY. REV. STAT. ANN. § 534.040 (West 2017) (providing that "a fine may be levied in lieu of imprisonment" for misdemeanors).

ciated with many low-income perpetrators, do not come with that choice.<sup>25</sup> Given this decision, a private party like the storekeeper should not be able to choose for the robber that which the state has ruled out.

But there are other perspectives. Perhaps the state would offer a choice, or would much prefer to attach financial penalties to many crimes, if only to save on incarceration costs, but is stymied by the fact that so many convicted wrongdoers do not have the means to pay. The law finds it unseemly, or politically impossible, to incarcerate the poor while allowing more affluent wrongdoers to buy their way out of prison. It is barely possible that the law would allow the storekeeper and robber to bargain privately if it thought that the latter could be as effectively deterred by monetary payments as by incarceration—so long as the ability of some wrongdoers to pay their way out of prison is hidden from view. In any event, it is plain that the typical robber's financial circumstances mean that the storekeeper will be unable to extract a high settlement. The storekeeper might selfishly prefer a modest payment over the wrongdoer's incarceration, but the state's deterrence interest requires that the storekeeper and robber not be allowed to bargain out of sight of the law and certainly not for some trivial amount that will fail to deter wrongdoers.

Intuitions might change in the case where the storekeeper bargains not with a robber but with an employee, EM, who is caught embezzling. Again, imagine that wrongdoer and victim, EM and S, bargain to avoid calling in the police and to allow EM to continue as an employee after making amends. There are several reasons why confidentiality-for-pay should be more acceptable in this situation than where AR and S bargain. First, the employed embezzler has the means to make substantial payments, and money might serve as an efficient deterrent. Second, by continuing to employ the wrongdoer, the store-

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<sup>25</sup> Serious white-collar crimes are often resolved by the state's extraction of very large penalties from wrongdoers accused of securities fraud and other such matters. See, e.g., Peter MacKenna, *Financial Institutions Fraud*, 54 AM. CRIM. L. REV. 1333, 1357–59 (2017) (detailing several billion dollar settlements in securities fraud cases). We might set these aside because the state does the extracting and there is certainly no extra payment for confidentiality. Indeed, the large fine, or settlement, is advertised as a deterrent to wrongdoing. But there is room to argue that these are simply cases where the law recognizes that financial payments can deter just as well as incarceration, and with much lower social cost. Law does not offer conventional robbers a choice between making large payments and incarceration because it is politically and morally difficult to allow the wealthy to “buy their way” out of prison. In the case of securities fraud, there are few poor people to ruin the visual landscape.

keeper internalizes a good part of the cost and danger associated with a serial wrongdoer whose pattern would be revealed and perhaps halted but for the confidentiality agreement. In principle, a potential embezzler is deterred because he knows that apprehension leads either to imprisonment or, through bargaining, to a significant financial loss. The employer extracts payment but also keeps the wrongdoer close at hand; he or she absorbs the cost of monitoring this employee; and he or she will be the most likely to suffer from further wrongdoing. If this second feature is missing, and the employer extracts payment but discharges the employee, law must count on the deterrence provided by the payment extracted from the wrongdoer. It would be unsurprising if it were in just such cases that law regarded the employer as illegally extorting from the employee, though this is hard to imagine in cases where the embezzler initiated the bargain.<sup>26</sup>

A third option is for S and EM to bargain—but to be required to report their bargain to the state. If the problem with a confidential agreement is that the storekeeper gives insufficient consideration to third-party interests, then perhaps the state should be offered the opportunity to veto the private bargain. It might normally approve the private bargain—as it does the settlement of contract and tort claims—both because it saves the costs of further investigation and incarceration, and also because it has no good means of forcing employers to report crimes in the first place. Law might recognize that the employer's extraction serves to deter embezzlers. In theory, the state could condition its approval on the continued employment of the wrongdoer for a period of years. This sort of servitude can create a risk of exploitation by the employer, but at least here the employee can quit and risk criminal charges.

Disclosure of private bargains with criminals is hard enough to encourage and even require; an opportunity for the state to approve or veto such private bargains is completely impractical. To make an evaluation, the state needs to know the identity of the wrongdoer, and this identification is an important part of what the accused will pay to avoid.<sup>27</sup> One possibility is for the state to permit private bargains involving first-

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<sup>26</sup> For one thing, the employer might claim that he or she was afraid to turn down the embezzler's offer. Moreover, claim-of-right cases always involve initiation and action by the victim; here the alleged extortionist would be the respondent.

<sup>27</sup> The state could promise to record for the purpose of identifying repeat offenders, but not to use the information for other purposes. The accused would pay to avoid this list as well.



time offenders and to require disclosure simply to separate repeat and one-off offenders. A first-time wrongdoer might then pay more for nondisclosure to avoid classification as a repeat offender, so that the system must rely on the employer's security concerns in order to motivate the employer to report the transaction. Few employers want to hire serial embezzlers. The employer may not be ready to accept payment in return for nondisclosure because the employer wants to know if this is truly a first-time offender or because the wrongdoer may later on have reason to reveal that the employer did not disclose when law required disclosure.<sup>28</sup>

Generally speaking, it is in victims' self-interest to report criminal wrongdoing to the police when there is reason to fear further harm from the wrongdoer, where there is a decent prospect that the police will catch the wrongdoer and law will force the return of lost property or other restitution, or where the victim hopes to collect from an insurer. Where there is an ongoing relationship, crimes are often unreported; an employer who suspects or discovers low-level embezzlement or theft will often dismiss but not report the employee.<sup>29</sup> A call to the police brings on costs, and especially so where the accused doubles down and makes a counterclaim—which law might resolve incorrectly. In these cases, the law ought to welcome private bargains between victim and wrongdoer, as this option provides more reliable deterrence. In any event, it seems clear that what motivates the bargain between a storekeeper and an armed robber or embezzler is objectionable; the parties seek to substitute private profit for criminal prosecution and incarceration.

We do not suggest that criminal law should be reconfigured to allow or even encourage private agreements between armed robbers and storekeepers. Unlike the case of A and M's tort settlement, victims of armed robberies are unlikely to extract sufficiently large settlements from financially distressed criminals. The very reason that the modern state resorts to incarceration is likely to stand in the way of obtaining sufficient

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<sup>28</sup> The situation resembles legal attempts to combat bribery by making it a crime on just one side of the transaction. If, for example, it is a crime to receive a bribe, then the bribed party must worry that the bribing party will later on report the bribe, or threaten to do so. See *infra* note 53.

<sup>29</sup> See Paul Bonny et al., *Revisiting Employee Fraud: Gender, Investigation Outcomes and Offender Motivation*, 22 J. FIN. CRIME 447, 452 (2015) ("For a variety of reasons, organisations are not readily disposed towards reporting employee fraud, instead resolving instances of offending by terminating the employment relationship.").

deterrence through private extractions. On the other hand, the state has difficulty encouraging or even compelling some victims to come forward.<sup>30</sup> If it pays them directly, their credibility is often reduced—though no one seems to object to restitution. There will, therefore, be cases where private agreements provide more deterrence than the criminal law, and it is for this reason that the law ought to tolerate some experimentation with private agreements in lieu of criminal charges. The employer-embezzler case is a potential example because the victim is in a position to internalize third-party harms. Meanwhile, the claim-of-right doctrine needs rethinking.<sup>31</sup> The more serious concern is that the victim will collect too little to deter the wrongdoer.<sup>32</sup>

### III

#### FALSE CLAIMS AND MORAL HAZARDS: CRIMINAL AND CIVIL CASES

When a victim profits from the identification of a criminal, there is the problem of moral hazard. If an employer can extract payments from an embezzling employee, as suggested in Part II, then an employer might wrongfully accuse an employee of embezzlement or tempt the employee by entrusting him with bundles of cash. An unprincipled employer might have an eye on profiting from a misstep by the employee followed by accusation and negotiation in the shadow of the criminal law. Simple restitution, which is what law normally provides alongside criminal punishment, avoids this moral hazard because it does not leave the accuser better off than before the alleged crime. It offers a reward for coming forward, because the victim might be

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<sup>30</sup> Cf. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BJS BULL. NO. NCJ 238536, SPECIAL REPORT: VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006–2010, at 2 (2012) (reporting percentages of victimizations that were not reported to police and reasons victims gave for not reporting violent crime victimizations).

<sup>31</sup> The doctrine is at its best when it discourages a second round of violence between the original criminal and victim. If the law allows the victim to overcollect, the victim may be tempted to pursue the criminal or look for the criminal's property. In turn, the criminal will prepare for this attack. The conventional limitation on "hot pursuit" addresses this problem, though it is aimed at the question of physical harm inflicted after a property crime. The doctrine is probably misguided if applied to peaceful bargains between the parties.

<sup>32</sup> In principle, private and public remedies can be combined. The employer and embezzler, for example, might gain the state's consent to their negotiated payments so long as the wrongdoer serves a short time in prison. We do not pursue such combinations in part because of the intuition that one major benefit of settlement is the cost savings derived from avoiding trial and involving the criminal law system.

made whole with the help of the law, but it does not enable the victim to earn a tidy profit.

We do not mean to put excessive weight on this moral hazard risk. Employers who falsely accuse their employees risk counterclaims and a loss of employee morale. There are, after all, other situations where employers might gain from falsely accusing and then discharging an employee. For example, an employee might be on the verge of earning an accumulated bonus or vacation time; an employee might be paid more than his marginal product, but protected from discharge by age discrimination law. In these situations, there is a moral hazard, but it does not seem sufficient to tempt widespread misbehavior by employers. Nevertheless, in cataloguing the advantages and disadvantages of confidentiality agreements or of agreements to avoid the criminal law, if deterrence (with attendant savings of trial and incarceration costs) is on the positive side of the ledger, it is appropriate to note that false claims ought to be placed on the negative side.<sup>33</sup>

Returning to civil cases, moral hazard is again a concern—but not a showstopper—wherever the victim can collect more than compensatory damages. When the tort victim, A, bargains with M, A does not know in advance that M will pay handsomely for silence; M may opt for trial or already face other plaintiffs with similar claims. Second, M has reason to investigate the circumstances of A's injury and to turn suspicions about self-injury into a claim that A was comparatively negligent. Third, where personal injury is involved—and this seems to be the focus of sunshine-in-litigation statutes—law often contemplates punitive damages and thus seems to discount the moral hazard problem in favor of deterrence or strongly expressive remedies; confidential settlements thus have good, or at least familiar, company. A deterrence perspective offers a fourth reason to be untroubled by moral hazard. Even if A manufactures a claim against M, when M pays for confidentiality it is often because M thinks that A's claim will resonate with juries and encourage other claims. Allowing a payment that produces profit for A is, in the end, likely to deter M in the first place, and that is a major accomplishment. Finally, M can always go to trial, so that there is an upper limit on A's power to extract.

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<sup>33</sup> The false claims problem does not alone explain much. A storekeeper may have incontrovertible evidence of AR's crime, but law will still reject private settlement for reasons discussed earlier. See *supra* Part II.

Nevertheless, if victims or even witnesses are to be rewarded for coming forward to report wrongdoing, it is probably better for the payment to come openly from the legal authority than for it to come secretly from the accused, who hopes that a confidential agreement will keep the police and criminal law system at bay. Private payments offer deterrence, as we have stressed, but without the safeguards of criminal procedure and the ability to counterclaim for defamation and other causes of action, they risk generating false claims. This preference for public over private resolution is clearest where the costs of public law are low. Thus, if tort suits could be greatly streamlined, law would (and should) be less likely to favor settlements of the kind we depicted between A and M. The more efficient a legal system, the less is the social gain from avoiding it by way of confidential settlement agreements.

If the legal system can be counted on to be reliable and relatively free of interest-group corruption, then confidential settlements might be accepted only where they preempt legal actions that are likely to end in money payments between the settling parties. A settlement between A and M, the injured victim and presumed tortfeasor, is in the shadow of a trial with the same adversaries. A may be hoping for payments that substitute for those that would be made to other injured parties, but it is not obvious that law should object so long as the defendant is properly deterred. In contrast, the storekeeper who seeks payment from a robber or embezzler is at least in part capitalizing on the fact that incarceration is very costly to the wrongdoer and of no direct benefit to the victim, whose testimony is essential for conviction. If the law wanted to offer financial motivation to victims and other witnesses, it could simply offer payments, as it occasionally does with whistleblowers. When it does not, it is because it fears that private enrichment will decrease credibility or even bring about false claims, and that these costs exceed any additional deterrence that could be availed. Note that the law's disinclination to sort robbers according to their ability to pay in order to avoid incarceration is not much of an explanation; paying for testimony is surely less expensive than paying for incarceration. In sum, it is easy to understand an aversion to confidential agreements between armed robbers and their victims against a background in which the state generally declines to award financial inducements to victims.

False claims and moral hazards can also be assessed by way of the time-honored distinction between negligence and

intentional wrongdoing. Law seems most comfortable allowing a victim to collect multiple damages when the defendant is an intentional wrongdoer and the evidence of his or her wrongdoing is out of plaintiff's control.<sup>34</sup> If so, then there is a kind of precedent for high-priced confidentiality agreements. If M\* is an intentional wrongdoer who places a high value on staying out of court, the injured party, A, can extract a high settlement.<sup>35</sup> The concern is not that A will profit but rather that A will extract too little. A high settlement, like punitive damages, deters wrongdoers like M\* in contexts where moral hazard is unlikely because the wrongdoer who acts intentionally rarely injures a victim who contributes to the problem. Put differently, there is an intuition that intentional wrongdoing is worse than negligence, so that the legal system should be called in and not bypassed by confidential agreements. But an alternative view is that intentional wrongdoing is less likely to generate or interact with moral hazard problems, so that high, confidential settlements—in the manner of punitive damages—are relatively tolerable, if not attractive.

The distinction, if any, between negligent and intentional wrongdoing can be tested by returning once again to our storekeeper, S, and considering her transactions with customers whose checks are rejected for insufficient funds. Retail stores often give notice that they will charge twenty-five dollars or even fifty dollars for a returned check. Some states have laws barring charges above a specified amount.<sup>36</sup> The normal fee is greater than the average fee that a bank would charge to the depositor, but it is probably not more than that fee plus the value of the time spent by the store employee tasked with contacting the customer and obtaining payment. If S has reason to think that the bad-check writing was intentional, and thus criminal fraud, then S is also likely to find that the customer will not quickly make good on the check and fee. In that case, S has reason to contact the police. Cases in which companies

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<sup>34</sup> Cf. Doug Rendleman, *Commercial Bribery: Choice and Measurement Within a Remedies Smorgasbord*, 74 WASH. & LEE L. REV. 369, 445–49 (2017) (suggesting that in some cases, multiple damages serve to deter intentional wrongdoers).

<sup>35</sup> A law and economics approach favors punitive, or multiple, damages when defendants think they can often escape detection or lawsuit. Law does not seem to reflect this insight, so the case for high and confidential settlements is not as close as it could be to punitive damages.

<sup>36</sup> In Missouri, for example, an institution may add a service charge of no more than twenty-five dollars. See MO. REV. STAT. § 570.120.1 (2016). Some states, such as California, also allow legal action for bad checks, though certain conditions must be met and the maximum recovery is \$1500. See CAL. CIV. CODE § 1719 (West 1998).

profit handsomely by collecting fees from bad-check writers seem to involve collection companies rather than storekeepers, so there is no indication of a false claim or moral hazard problem.

#### IV

#### SEXUAL ASSAULT CASES AND UNIVERSITY DISCIPLINARY PROCESSES

Sexual assault cases outside of university disciplinary systems can find their way into civil and criminal courts. In these forums, as in university disciplinary settings, many victims are eager to preserve their privacy and are therefore at a bargaining disadvantage. The level of deterrence that might be expected in most tort cases is unlikely to be met here because defendants who would otherwise pay for confidentiality know that their adversaries also value privacy. The balance of power is indeterminate, though frequent withdrawals of claims, or even private settlements, are to be expected. Sexual assault victims are encouraged to come forward in the criminal system by a (limited) promise that they can remain (publicly) unidentified, though in a tightly-knit community this is often impossible. States might enable privacy either by statute or by way of judges deciding to keep some part of a record sealed.<sup>37</sup> Ideally, the promise of privacy—often supported by journalistic conventions<sup>38</sup>—encourages meritorious claims. It is apparent that both sides might be willing to pay for privacy, but law is inclined to enable only one side's anonymity.

Sexual assault cases processed on university campuses are like fraud and employment discrimination matters in civil courts, not only because of the recently imposed preponderance-of-the-evidence standard,<sup>39</sup> but also because the pattern problem is paramount, and because there is an information

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<sup>37</sup> For example, the Crime Victims Protection Act amended Florida law to make all court records that could reveal the victim's identity exempt from public disclosure. Crime Victims Protection Act of 1994, FLA. STAT. § 119.071(2)(h) (2016) (amended 2000). However, states cannot always suppress disclosure of victims' identities. *See, e.g.,* Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989) (holding that the First Amendment protects a newspaper against a claim for damages under state law where the newspaper truthfully but accidentally revealed the victim's identity).

<sup>38</sup> *See, e.g.,* Fla. Star, 491 U.S. at 528 (noting The Florida Star's internal policy against publishing the names of sexual offense victims).

<sup>39</sup> *See* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 901 (2016) (stating that universities "must investigate and adjudicate student sexual assault cases to fulfill their Title IX obligations," and the process must use a preponderance-of-the-evidence standard).

asymmetry between the parties who might bargain to preempt decisions by the authorities. The asymmetry is not relevant in all cases, because a serious claim need not be a part of a pattern, but in many cases, the accused knows better than the accuser whether there is a pattern of wrongful behavior that can come to light if multiple accusers come forward. A given victim cannot easily discern the value of confidentiality to the accused. In contrast, the tort plaintiff, A, may not know how many others have linked M to their injuries, but A has some idea of M's sales volume and an expert can help A assess M's exposure in preparation for reaching a confidentiality agreement. Even an employer often has a good sense of the incarceration risk his employee-embezzler faces,<sup>40</sup> though perhaps not of the latter's subjective valuation of liberty. None of this is true for the victim of sexual assault—and any advertising or public search for other victims will expose the offender in a way that makes it harder for the victim to extract payment for confidentiality. The victim can offer confidentiality only by foregoing a search for a pattern of misbehavior. We do not mean to imply that the victim is eager or even willing to extract payment from the perpetrator; indeed, campus cases involve victims who seem to place high value on emotional and institutional support as well as the removal of an offender from campus. The storekeeper and tort victim encountered in the earlier Parts of this Article are likely to place much lower value on institutional support and removal; their defendants are likely to have an easier time bargaining for confidentiality. Nevertheless, it is instructive (and of practical interest) to consider confidentiality agreements between victims and those they accuse of sexual assault—as well as other matters adjudicated on campuses.

Imagine that Y engages in sexual activity with X when X is unable to provide true consent. Subsequently, X initiates a complaint against Y within a university's disciplinary system. After the Title IX investigator questions the parties, Y (in an unusual move, to be sure) offers X a monetary settlement that includes a confidentiality agreement,<sup>41</sup> and X then withdraws her complaint. The argument for respecting the confidentiality

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<sup>40</sup> Having rejected confidential agreements in typical criminal cases, like ARS, we do not consider repeat offender ("three strikes") statutes, which can obviously influence these bargains. A strong argument against confidentiality there, is that the police have much better information than does the storekeeper about the criminal's past and future career plans. The employer in the text's example is unlikely to continue employing a repeat offender.

<sup>41</sup> If the university has imposed a no-contact order, as is common, the parties can bargain through their attorneys.

agreement and withdrawal is that future victims may be less inclined to file complaints if they discover that, once initiated, they cannot be halted. But given that the penalty Y faces within the disciplinary system does not inure to X's direct benefit, and is likely intended to provide a measure of campus safety (in addition to deterrence and retribution), it seems imprudent for the university to enable Y to pay X in order to end the matter. Even if financial consequences can deter Y from sexual misbehavior, deterrence requires that X extract a substantial settlement from Y. This seems unlikely because Y knows that X is not eager to recount her experience to strangers and subject herself to questioning. Put differently, even if we do not analogize the case to that involving the storekeeper and armed robber, because we think that the victim of sexual assault identifies more with other similarly situated victims than does the typical victim of a robbery, there is reason to fear that X will not extract enough, in return for a promise of confidentiality, to deter Y. X might well reason that Y faces suspension from the university and will pay a good deal for X to withdraw her claim, but at the same time Y knows that X wants to avoid the emotional costs attached to a hearing. X also may not know whether her complaint against Y enables other victims to succeed with similar accusations.<sup>42</sup> In short, because the accuser in these cases is likely to value privacy far more than plaintiffs in most civil and criminal suits, accusers may settle too quickly and cheaply to serve the deterrence goal.

A very different argument against confidential settlement is that there is a danger of false claims. As in the claim against the alleged embezzler, and unlike that against the armed robber, there is rarely incontrovertible evidence against the wrongdoer. The prospect of profit as well as protection of (the complainant's) privacy raises the danger of a false claim.

Note also that the conventional reason for allowing and enabling confidential settlements—that they save on trial and error costs—is very weak here. These hearings are short affairs, so they are not associated with high costs, at least not of the conventional kind. To be sure, the parties may anticipate significant emotional costs, but that is true for accused criminals and prosecution witnesses in many criminal cases, and it is rarely taken to be a separate argument in favor of plea bargains.

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<sup>42</sup> See *supra* subpart I.B for our earlier discussion of sexual assault cases against celebrity defendants.



An important countervailing argument, as expressed at the outset of this discussion, is that victims may hesitate to bring claims (even more than they do at present) if they learn that they cannot withdraw from the adjudicatory process. The question for Title IX officers and university counsel is whether this single argument outweighs the others, or whether Title IX should be read to grant the complainant the right to withdraw a claim.<sup>43</sup> We suspect it does not and, indeed, that if a university were certain that the accused, Y, had paid cash to the accuser, X, it would proceed with a disciplinary hearing and try to man- age with the evidence at hand. It might even choose to disci- pline any student who failed to appear at a hearing.

It can be useful to compare these claims to other matters that come before similar disciplinary boards. Familiar cases pit a student against the university because of alleged misbe- havior such as vandalism or plagiarism. The university is a party as well as a provider of law. Financial settlements are inappropriate not because of under-deterrence, but either be- cause of the danger that wealthy students will buy their way out of disciplinary charges or because the university's impar- tiality will be questioned if it stands to gain money in a system with no appeals. In cases involving academic dishonesty, a student or faculty member might accuse a student of violating a university rule; neither state nor federal courts are inclined or well-suited to these claims.<sup>44</sup>

Imagine that a faculty member accuses a student of plagia- rism, and the university begins to investigate and schedules a disciplinary hearing. Now the faculty member withdraws the

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<sup>43</sup> Title IX is silent with respect to a right to withdraw a complaint, though universities sometimes provide for withdrawal. See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012); see, e.g., Eastern Va. Med. Sch., *Title IX/Sex Discrimination Reporting and Complaint Process*, at Section III.G., [http://www.evms.edu/about\\_evms/leadership/general\\_counsel/legal\\_and\\_compliance/legalcompliance\\_policies\\_information/title\\_ix/complaint\\_process/](http://www.evms.edu/about_evms/leadership/general_counsel/legal_and_compliance/legalcompliance_policies_information/title_ix/complaint_process/) [https://perma.cc/C29D-XQ66] (“The Reporting Party may withdraw a Re- port or Grievance at any time. EVMS may, however, still have a duty to investigate matters (to the extent possible without the Reporting Party’s coopera- tion) and take appropriate action.”).

<sup>44</sup> When a disappointed party challenges the university’s procedures and determinations, courts are generally deferential to the university’s rules and norms. See, e.g., *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 244 (D. Vt. 1994) (concluding that a disciplinary action or procedure is “fundamentally un- fair, arbitrary or capricious” if it deviates from established university rules); *Holert v. Univ. of Chi.*, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) (holding that a disci- plined student is “entitled only to those procedural safeguards that the [u]niversity agreed to provide”); *Boehm v. Univ. of Pa. Sch. of Veterinary Med.*, 573 A.2d 575, 578 (Pa. Super. Ct. 1990) (holding that there was no basis for interfer- ing with the right of a private school to impose its own punishments for cheating).

allegation and says that she and the student have settled the matter. Would the university dismiss the case? If the faculty member insists that after some recent discussion with the student she realized that her assignments had been unclear regarding the use of various sources, and the student simply misunderstood the rules, then there would be little point in pursuing the charge previously brought against the student. But what if the faculty member says nothing of the sort and there is suspicion that the student paid the faculty member, perhaps because a wealthy parent had traveled to campus and met with the instructor? Alternatively, what if the student, once charged, files a claim of harassment against the faculty member, and then the two bargain and agree to the mutual withdrawal of all claims? The startling possibility of payment offers some deterrence, and it seems objectionable to allow the parties to convert into cash or avoid a remedy determined by the authority. It would be objectionable if the instructor announced that she and the student had agreed that the charge would be withdrawn on condition that the student's family donates a specified amount to a given charitable cause, and it is certainly objectionable if the payment profits the instructor. Indeed, the university's suspension and expulsion remedies ought to be less convertible to cash than the penalties faced by a robber or embezzler because it is implausible that the most efficient and politically acceptable penalties are fines. In contrast to the university, which prefers suspension and similar remedies, it is likely that with respect to many crimes the state regards its principle remedy, incarceration, as a second-best remedy. Note that the faculty member, like the storekeeper, gains nothing when the student is disciplined in the conventional, nonmonetary fashion. If faculty and students can bring claims of academic dishonesty against one another and then settle privately, there is a distinct problem of false claims because the claimant suffers no injury and yet stands to profit from the accused's fear of conviction, trial costs, or loss of reputation. It seems unwise to respect a confidential agreement in this context; it converts a university's chosen remedy, such as suspension or expulsion, into a private monetary payment.<sup>45</sup>

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<sup>45</sup> The situation is not quite like the storekeeper-robber negotiation. In that case, even with incontrovertible evidence, we do not want to allow private parties to convert the state's chosen remedy into cash. But here, the university might be willing to offer a choice between payment and suspension for some violations, but it is inhibited by its inability to separate credibly its judicial and other functions.

To be sure, in this case, as in the sexual assault context, we are unlikely to know whether the accused actually bought his way out of a nonmonetary remedy. But the prospect of confidentiality, or private settlement itself, surely encourages payments in both settings.<sup>46</sup> If settlement is acceptable for sexual assault claims but not for plagiarism, it is again because of the great preference given to rules that encourage victims to report and bring claims of sexual assault in the first place. A further distinction is that few sexual assault cases can proceed intelligibly without the participation of the complainant and respondent, while many cases of academic dishonesty could go forward on the basis of the written evidence available to the adjudicator.

An interesting feature of these university cases is that while the parties may bargain for confidentiality, and even agree not to discuss the case and not to denigrate one another, the university has acquired enough information to watch for patterns of misbehavior. In the tort case between A and M, unless the parties go to trial, it is difficult to know whether there is any merit to A's claim. The same is true for a sexual assault case against a celebrity, as discussed in subpart I.B. But here the university's own investigator has interviewed the parties and has often questioned witnesses and friends of the protagonists. The university cannot know whether a disciplinary committee would have found the respondent responsible under the prevailing preponderance-of-the-evidence standard, but it has much more information than does the legal authority in most tort, assault, or embezzlement cases. We might regard the private agreement as *semi-confidential* because the university knows everything but the terms of the settlement. Similarly, even if the university chooses to cease prosecution of the academic dishonesty case sketched above, the university has information about the behavior of the student who was accused. It would be unfair to say that the accused is essentially convicted without a hearing—because no university discipline is meted out—but if another claim is brought against the same

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If there were incontrovertible evidence of wrongdoing, private payments might be acceptable.

<sup>46</sup> See generally Gregg Stevens & Lorin Subar, *Confidentiality in Settlement Agreements Is a Virtual Necessity*, 29 GP SOLO 24 (2012), [https://www.americanbar.org/publications/gp\\_solo/2012/november\\_december2012privacyandconfidentiality/confidentiality\\_settlement\\_agreements\\_is\\_virtual\\_necessity.html](https://www.americanbar.org/publications/gp_solo/2012/november_december2012privacyandconfidentiality/confidentiality_settlement_agreements_is_virtual_necessity.html) [<https://perma.cc/PDJ9-9GLS>] (discussing reasons why plaintiffs and defendants find confidentiality to be worth the cost and virtually a requirement of settlement).

accused, the university is sure to take into account the earlier case, though it was dismissed. This semi-confidentiality, expanded upon in the next Part, should not distract us from the concern about insufficient deterrence. That concern is heightened in the campus sexual assault case by the observation that victims bear costs in adjudication and might therefore not extract as much from—or deter—their wrongdoers as do settling victims of other wrongs.

In these campus cases, the accused might well be willing to pay more for the promise of full confidentiality, but that requires bargaining with the accuser before any complaint is reported to the Title IX investigator. Moreover, as a practical matter, victims are unlikely to want to communicate with those they accuse; one consequence of beginning the disciplinary process is the (oft desired) benefit of a no-contact order between the parties.<sup>47</sup> In turn, the accused is often caught by surprise. Many sexual interactions take place close to the consent/no-consent line,<sup>48</sup> and it is unlikely that many people are sufficiently confident that they will be accused as to cause them to initiate bargains for payment in return for confidentiality. Where the sexual interaction ends badly and a party does have reason to think that an accusation is forthcoming, the best defense is likely to be a quick departure, silence, or apology. An offer of settlement is insensitive and unwise—unless it is simply an offer to stay far away from the other party, a homemade no-contact agreement.

Settlement is more likely in cases where each party has brought a claim against the other. X accuses Y of nonconsensual sex, but Y accuses X of the same, claiming both parties were inebriated, or Y accuses X of harassing him by filing a false claim in the wake of a collapsed relationship. Each party may firmly believe the truth of his or her allegations, and each avoids the emotional costs and risk of unfavorable judgment by settling the case and withdrawing the complaint. Their settlement may have a monetary component, especially where lawyers' fees are involved, but the important motivation is (apt to be the desire) to steer clear of university discipline, and perhaps also to avoid the emotional toll of a hearing. If the university allows the withdrawal, it is because it is impractical to proceed without the parties, because to disallow withdrawal risks chilling future claims, and because the university has

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<sup>47</sup> The order is a private one with no state involvement. A party who violates the order risks further discipline by the university.

<sup>48</sup> See Gersen & Suk, *supra* note 39, at 889–90.

already obtained enough information about the interaction to assess a pattern of wrongdoing or a threat to “campus safety,” both now and in the event of another accusation against one of the parties.

## V

### BETWEEN CONFIDENTIALITY AND TRANSPARENCY

#### A. Translucency in Civil Cases

In the torts context, there are some cases where it is the victim who prefers privacy—apart from the possibility of using privacy as a means of extracting a greater settlement—and others where it is the defendant who prefers anonymity or other forms of confidentiality. There are several reasons why the defendant may value confidentiality, especially with regard to substantial settlements. It might raise litigation costs for (other) plaintiffs; it hides the signal about the substantive claim from other parties who have not connected their injuries to defendant’s behavior; it keeps defendant’s assessment of its exposure in court hidden from other plaintiffs who might negotiate or litigate differently if they were well informed; and it protects the firm’s reputation.

There are certainly cases where defendants are happy to advertise large settlements. Thus, a defendant enmeshed in litigation over an oil spill is dealing with a substantive matter that is already known to the public. A large payment might enhance rather than detract from its corporate image, and it might satisfy regulators and legislators who would otherwise prepare to impose further burdens on the identified polluter. In contrast, a law firm that settles a discrimination claim initiated by a female partner might prefer confidentiality for all the reasons noted above. Publicity might hurt the firm when it recruits new employees; it might dissuade some clients from engaging the firm; it might suggest to other women at the firm that the firm has indeed discriminated against women, and they ought to file or threaten to bring claims; and it might cause women who think they were the victims of discrimination by the firm to make or increase demands because they now perceive the firm’s vulnerability or inclination to settle. The discussion in Part I emphasized that the firm’s gains from confidentiality might translate into a higher payment to the first complainant in this case; in turn, if she agrees to confidentiality, the firm is further deterred by the prospect of such a larger payment. Ideally, if she can extract something close to the full value of confidentiality, there will be a social gain because of

the savings in trial and negotiation costs with other plaintiffs. The first successful complainant is rewarded for discovering a key fact or cause, and for giving the firm reason and opportunity to change its ways and protect against future losses.

The preceding description may be too optimistic, but it is unlikely to be entirely misguided. It suggests the possibility of a middle ground; the defendant firm might pay for some confidentiality (and thus be deterred to a degree), but it might be prevented from keeping everything hidden from other possible victims. We have applied the term semi-confidential to agreements in which the precise settlement terms of sexual assault cases are secreted by the parties, but where the convening authority is aware of the original claims and testimony of the parties. Indeed, the authority in those campus cases has about all of the information it needs to discern a troubling pattern of behavior. In most civil cases, however, the legal authority has not undertaken any investigation, and so it has no information. A compromise, or semi-confidential, approach must aim to liberate some information that is useful to third parties or the state while still encouraging the defendant to settle—at a price that packs some deterrence punch.

The most obvious compromise is to allow the amount of settlement to be confidential, but not its subject matter. There are certainly other compromises between transparency and confidentiality; the parties' locations or identities might be withheld, as they are in some countries,<sup>49</sup> or confidentiality could be limited to the subject matter—rather than the amount of settlement. But the intuition behind the suggestion that law support semi-confidentiality, or *translucency*, with respect to the amount of settlement, is that doing so might minimize error costs while retaining the deterrence value of disclosure. The defendant firm pays to keep evidence of its vulnerability secret; its reputation and other interests might also be preserved if third parties are in the dark about the settlement amount. After all, many firms make modest payments to avoid litigation, and news of a very large settlement is usually required to at-

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<sup>49</sup> In France, for example, litigant identity is protected in divorce proceedings; criminal prosecution involving sexually transmitted diseases or nursing of children; some defamation claims; and cases involving minors, victims of sexual assault, or persons who have been the subject of plenary adoption. See Salomé Cordier & Marie Castagné, *L'Anonymisation des Décisions de Justice*, LE PETIT JURIST, Section II.A.1, <https://www.lepetitjuriste.fr/wp-content/uploads/2011/05/L%E2%80%99anonymisation%20des%20d%C3%A9cisions%20de%20justice.pdf> [<https://perma.cc/DY8A-G9SM>].

tract attention and trigger presumptions of bad behavior.<sup>50</sup> Confidentiality regarding settlement amount is normally of greater value to the defendant, and thus to the settling plaintiff, because news of a settlement amount sets a floor for later settlements with other plaintiffs. Disclosure's effects, however, operate along several dimensions, and the suggestion that secrecy as to the monetary component of confidentiality agreements may correctly balance deterrence and error is not easy to justify. But it is certainly possible that allowing complete confidentiality, both for settled cases and for payments in return for releases before claims are filed, has negative effects on uninformed third parties *and* under-deters wrongdoers because victims do not recognize how much they can extract. This Article's suggestion is that in these cases, law should encourage translucency; defendants (even in the pre-filing stage) should be encouraged to disclose information but not asked to disclose the amount of payment to a settling party. This translucency proposal presupposes that a plaintiff cannot adequately assess the total liability the defendant faces in the event that other plaintiffs are fully informed; the plaintiff, therefore, will not extract the full value of secrecy to the defendant, and may not extract enough to properly deter this and other defendants. Translucency rewards plaintiffs in proportion to their injuries and encourages all of them to come forward with their individual claims. On the other hand, by keeping the amount of settlement secret, plaintiffs base their claims more on information related to their injuries and less on information related to the settling behavior of the defendant. Note, too, that inasmuch as strike suit plaintiffs are encouraged by blockbuster settlements, translucency may reduce their incentives to file.<sup>51</sup>

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<sup>50</sup> If disclosure of settlement amounts raises costs (errors) more than benefits (deterrence or correctly aimed compensation), then greater secrecy is desirable. This conclusion assumes a kind of monotonicity or single-peaked preference such that it is not yet better to have total transparency.

<sup>51</sup> While various translucency proposals can require disclosure, or allow secrecy with respect to any number of settlement features, our distinguishing subject matter from the amount of settlement focuses directly on gaining deterrence while minimizing error. In most cases, other features of litigation and settlement—including jurisdiction, presiding judge, parties' attorneys, and length of negotiations—impact deterrence and error weakly and unevenly. Essential claims and bargaining outcomes are far more important. Similarly, our proposal for translucency in sexual assault cases, discussed *supra* Part IV and *infra* Part V, is based upon the observation that privacy is of special importance to the parties in these cases, and is likely to affect the incentive to bring a claim. There may be other specialized settings where effective translucency proposals might revolve around particular settlement features in order to optimize deterrence and error.

Any disclosure requirement, whether partial or complete, runs the risk of driving bargains earlier in time or further underground. But there are ways to encourage translucency. One of these is to make it a requirement of professional responsibility; the same rules that allow attorneys to withhold some information from their present clients because of prior confidentiality agreements to which the attorneys were privy could require attorneys to disclose information to the authorities or to third parties of whom they are aware. A second strategy is to refuse to enforce agreements that violate the disclosure requirement. The defendant who seeks confidentiality might be expected to withhold payments until the end of the quiet period, and now the plaintiff will fear that payment will not be made as promised. This is a weak strategy because the parties can resort to third-party intermediaries. A third strategy is to attach a penalty to any failure to abide by sunshine laws and, in this case, to partial sunshine requirements, for it stands to reason that our suggestion is that sunshine laws be trimmed to require disclosure of the substance but not the terms of settlements where there is reason to think that serious third-party injury is at stake.<sup>52</sup> The penalty for nondisclosure might carry with it a free pass for any party that reveals the other's violation.<sup>53</sup> A fourth strategy is simply to make it clear that courts will not enforce full confidentiality agreements; if M values confidentiality, M is counting on the settling plaintiff, A, not to disclose out of fear that A will then have breached the contract

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<sup>52</sup> In the sexual assault context, translucency encourages victims to bring claims by allowing them to keep their identities secret. In the tort context, translucency discourages strategic suits while information about the substance of a claim is shared for the benefit of third-party safety.

<sup>53</sup> A similar set of strategies pertains to anti-bribery laws. See, e.g., OECD, *THE CRIMINALISATION OF BRIBERY IN ASIA AND THE PACIFIC* 44 (2011) (noting that in the Philippines, an offer or solicitation of bribery constitutes attempted bribery, and carries a significantly lower penalty than the full offense); see also *id.* at 43 (noting that a number of Asia-Pacific countries carry lower penalties for offering rather than receiving a bribe); OECD, *THE OECD CONVENTION ON BRIBERY: A COMMENTARY* 247–48 (Mark Pieth, Lucinda A. Low & Peter J. Cullen eds., 2007) (noting the same for a number of European countries). In the United States, the Department of Justice provides incentives for corporations to self-report any violations of the Foreign Corrupt Practices Act (FCPA), trading a reduction in punishment for cooperation with investigators. See U.S. Dep't of Justice, *Criminal Division Launches New FCPA Pilot Program*, OFFICE OF PUBLIC AFFAIRS ARCHIVES (Apr. 5, 2016), <https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program> [<https://perma.cc/G6H7-QCX7>]. Reducing the penalty for self-reporting companies is crucial to the enforcement of anti-bribery laws. In an OECD study of 427 bribery cases, 31% were detected through self-reporting compared to only 13% discovered by law enforcement. OECD, *OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN PUBLIC OFFICIALS* 15 (2014).



with M and be required to forfeit the amount received from M as specified in the confidentiality agreement. This remedy is not as powerful as it first seems because A does not usually gain from disclosure.

A novel strategy to promote translucency (or transparency for that matter) is to use the tax code. Payments by businesses can be allowed as deductible only if the substance or topic of the settlement has been disclosed in accord with the policy of translucency. Note that it will be hard for parties to hide and take deductions for large payments unless the settling claimant is a vendor or other party to whom the firm might make ordinary and necessary payments in the course of business. In principle, payments made under agreements that violate state sunshine laws might in any event not be deductible under federal law because tax law allows deductions only for ordinary and necessary expenses and not for fines or illegal payments, as determined by state (or local or federal) law.<sup>54</sup> Thus, a delivery firm may reimburse its drivers for speeding tickets or even for fines payable because they drove recklessly or under the influence of alcohol, but these payments are nondeductible for both the drivers and the firm. Similarly, at least the premium paid by M to A in return for confidentiality ought not to be deductible by M, if the confidentiality violates sunshine laws or the translucency standard suggested here.

Most extant sunshine laws, it should be noted, do not stop at translucency; they aim for transparency where a defendant has engaged in a pattern of wrongdoing that individual victims have trouble discerning on their own. They are also useful or best understood as corrective deterrents aimed at cases where a defendant, like M, believes that no one but the settling plaintiff, A, will see the connection A has made between the injury and the defendant's behavior. M must also count on professional responsibility rules to prevent rather than require A's attorney from sharing information with other clients.<sup>55</sup> At the

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<sup>54</sup> See 26 U.S.C. § 162(f) (2012) ("No deduction shall be allowed [as a business expense] for any fine or similar penalty paid to a government for the violation of any law."); *id.* at § 165(c) (noting that fines and penalties are not deductible as "losses of individuals").

<sup>55</sup> But thus far the rules encourage settlement, and do not require an attorney to do his or her best with respect to a subsequent client's case. See MODEL RULES OF PROF'L CONDUCT r. 1.6(c) (AM. BAR ASS'N 2016) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," which includes information learned during settlement negotiations); *see, e.g.*, D.C. Bar, Eth. Op. 335 (2006) (advising that settlement provisions prohibit a party's lawyer from disclosing the amount and terms of the settlement); *see also*

same time, we have suggested that M often has reason to fear false claims by plaintiffs who might imitate A. Mandatory transparency, as required by some sunshine laws, likely goes too far because news of A's claim will bring forth claimants who erroneously, irrationally, or strategically believe M injured them. M may already be optimally deterred, or justly and retributively sanctioned, but now transparency generates further, unsupported claims. To the extent that they mandate full disclosure, sunshine laws implicitly suppose that the social benefits of additional lawsuits, which may or may not include more payments to victims, exceed the costs of additional litigation and greater error in the legal system. Translucency offers a compromise between confidentiality and sunshine laws, and the translucency proposal advanced here extends to agreements beyond the reach of sunshine laws to payments made before any claims are filed. In fact, Texas's sunshine law instructs courts not to seal documents, including pre-filing settlement terms, where there is reason to guard against "any probable adverse effect that sealing will have upon the general public health or safety," but specifically excludes "all reference to any monetary consideration."<sup>56</sup> The Texas statute has received attention because of the litigation it has spawned, though the translucency feature seems unnoticed by courts and commentators.<sup>57</sup>

Note that the enforcement tool offered by tax law allows many interpersonal claims to go untouched, and this is fitting because they are rarely indicative of patterns of wrongdoing.

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MODEL RULES OF PROF'L CONDUCT r. 1.8(b), r. 1.9 (establishing a duty not to reveal information relating to the representation of current and former clients). Such restrictions do not put the attorney in conflict with the duties owed to future clients. Note that, under these rules, a second client will be no better off going to another unconflicted attorney.

<sup>56</sup> TEX. R. CIV. P. 76a (2016).

<sup>57</sup> See generally Robert C. Nissen, *Open Court Records in Products Liability Litigation Under Texas Rule 76a*, 72 TEX. L. REV. 931 (1994) (examining the legislative history, structure, strengths, weaknesses, case law, and effect of Rule 76a). Texas's courts have held that settlement amounts are not the proper subject of discovery. See *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 649 (Tex. 1995). But see *In re Cont'l Ins. Co.*, 994 S.W.2d 423, 428 (Tex. App. 1999) (permitting discovery of settlement amounts when they may negate or offset insurance carrier's liability). Courts and commentators seem to think it is unfair or unproductive to force the disclosure of settlement amounts, because a subsequent settling plaintiff will take the prior settlement amount as a starting point, thus freeriding on it after a fashion. Perhaps no plaintiff will want to settle early. See Andrew D. Miller, Comment, *Federal Antisecrecy Legislation: A Model Act to Safeguard the Public from Court-Sanctioned Hidden Hazards*, 20 B.C. ENVTL. AFF. L. REV. 371, 373-78 (1993) (suggesting that the secrecy of settlement agreement terms prevents future plaintiffs from gaining an unfair advantage).

Thus, when individuals D and E have a minor road accident, and D is apparently at fault, small and even modest claims are often settled without any notice given to the police or to either driver's insurer.<sup>58</sup> D seeks to avoid higher insurance premiums, inasmuch as drivers are experience rated, and may also seek to avoid attention if there are outstanding arrest warrants for D, if D is an undocumented immigrant, if D is driving without a valid license, or if D is on a trip that D's employer or spouse would find objectionable. In these cases, common intuitions track the argument in this Article. Few people regard E as immoral if E senses D's reluctance and bargains for a homespun remedy that gives E somewhat more money than it will cost to repair E's automobile. The overcompensation deters D in a manner that creates no moral hazard risk because E cannot identify vulnerable drivers in advance. Moreover, the legal system shares in the savings associated with avoiding trial. D's payments would not be deductible in any form, so it is inconsequential but also untroubling to note that under the proposal advanced here, D cannot deduct the payment to E.

There is, however, no logical connection between deductibility and translucency, and the former is simply one way of encouraging the latter. Law could try to penalize complete confidentiality in a variety of ways, and it can encourage translucency or transparency with direct rewards, as it does for whistleblowers, or with indirect rewards, as it does when it offers reductions in penalties or favorable plea bargains in return for cooperation in criminal cases.

## B. Translucency for Misdemeanors

A useful comparison is to shoplifting. Shopkeepers do not always report those they have caught, but we have never heard of a shoplifter and storekeeper agreeing to a payment beyond restitution to settle the matter confidentially.<sup>59</sup> It may be that

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<sup>58</sup> Most auto insurance contracts require immediate notification of all accidents, but the remedy for breach is that the insurer can choose to terminate the contract. In most cases, the insurer does not know of the breach and, in any event, if it wants to terminate the contract, it can usually find some reason to do so. Similarly, when the contract is renewed, or the insured moves to another insurer, the new contract is entered into with the insurer unaware of the unreported accident. Substantial accidents involving personal injury, fatality, or property damage of more than \$1500 (in Illinois, for example) must by statute be reported to the police. See 625 ILL. COMP. STAT. 5/11-406(a) (2016). The threatened remedy for nondisclosure is that the state can suspend the non-discloser's driver's license, but this is rare.

<sup>59</sup> Homespun remedies are not unknown for other misdemeanors. A young vandal might agree to work in the victim's store as a way of making amends, much

the shopkeeper who does call in the police demonstrates a sort of irrationality; the profit-maximizing strategy is probably to free ride on other merchants and not to waste time reporting and testifying. Shopkeepers may fear that if they seek to extract payment, they will be accused as extortionists or robbers who have exceeded their claims of right. This is unfortunate; it is plausible that something resembling a fine, payable to the victim-reporter, is the best available deterrent. The criminal law system does not seem well-suited to misdemeanors when the wrongdoer has limited means. We would certainly advise someone who was caught shoplifting and who risked arrest to offer supercompensation, perhaps in the form of purchases in the store, in return for a promise not to call the police. Law's plausible goals seem better served by this remedy than by episodic processing in the formal legal system—and all the more so where overreaction by the police is a social concern. If confidentiality in this case is troubling then, again, a kind of translucency seems superior; the shopkeeper reports the wrongdoer in the interest of pattern recognition, and might even be rewarded for doing so by law's allowing a fraction of the penalty payment to go unreported on the storekeeper's tax return. If the shopkeeper demands a truly extortionary payment, the shoplifter can always take his chances and refuse to pay, knowing that the police might be called. A central reporting system might also be translucent in the sense that records could be expunged after a specified period, because the purpose of the record keeping is to allow future victims (and the legal authorities) to react differently if the wrongdoer they face is a serial criminal of the sort best handled not through private apology, restitution, and rehabilitation, but through professional monitoring and punishment.

We have already discussed the possibility and danger of confidentiality agreements with respect to more serious criminal wrongdoing, where in the absence of a bargain the victim is quite likely to call the police. If there are settings where confidentiality agreements are imaginable, as was arguably the case regarding the embezzler discussed in Part III, law might decide that translucency is the superior rule. It allows the employer to deter the embezzler with a financial incentive, but would also

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as deadbeats of yesteryear stayed to wash dishes in the restaurant's kitchen. Monetary payments, however, are rare. We can find no sign of a shopkeeper announcing *ex ante* that shoplifters who are apprehended by the store's security guards will be required to pay a multiple of the value of anything taken—or the police will be called.

allow the state to gather useful information and protect others from a serial wrongdoer. Law could encourage partial reporting by guaranteeing a kind of transactional immunity, providing that information about confidential settlements will not be used to pursue wrongdoers, or at least not one who was party to the agreement.

### C. The Translucency Ideal

Assume, then, a rule of translucency requiring A and M to disclose only the precise subject matter of their agreement, which will often be a restatement of the legal claim filed by A. As discussed, M might be motivated by a variety of inducements, including the prospect of deducting payments made to A.<sup>60</sup> Think, for example, of claims that the prescription medication Viagra causes blindness by restricting blood supply to the optic nerve. If A and M (in this case, Pfizer) settle a claim, the disclosure might be: “The claim filed by A against M for damages, in the form of loss of sight, that A believes he suffered as a result of taking Viagra, has been settled. The parties have agreed not to discuss the terms of settlement.” Potential claimants can see the connection A has made between his injury and M’s behavior, and they are free to follow or conduct further research on the matter. Pfizer is free to point out that the few men who developed blindness had diabetes or other preexisting conditions, so that it is hardly clear that Viagra has this dangerous side effect. Moreover, consumers who contemplate using Viagra, whether by prescription or in the active aftermarket, might rethink the matter and avoid the drug. Translucency as expressed through a neutral and searchable website provides more information than these users could have obtained from newspaper stories or the initial filing of lawsuits alone. They now know that Viagra’s manufacturer paid at least a modest settlement to one plaintiff. Other plaintiffs may also

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<sup>60</sup> The notion of encouraging settlements but requiring some information for third parties could be advanced by allowing the parties to secret only the amounts of large settlements, whether pre- or post-filing, such as those exceeding \$10,000. This exemption serves to lower administrative costs. Under current law, while the application of sunshine laws varies by state, even broadly construed sunshine laws often require a weighing of the parties’ interests and the public interest, thus limiting their application to larger claims that can be said to affect the public as a whole. See, e.g., WASH. REV. CODE ANN. § 4.24.611(4)(b) (West 2017) (requiring that when determining whether information surrounding product liability suits should be divulged to the public, a “court shall balance the right of the public to information regarding the alleged risk to the public from the product or substance . . . against the right of the public to protect the confidentiality of information” with trade secrets.).

have received settlements and simply decided to keep their medical condition, performance anxiety, or newly acquired wealth private. A confidentiality agreement would have required filing in order to be enforceable. Note, in passing, that neither transparency nor translucency need go so far as to sacrifice a plaintiff's reasonable preference for privacy. Most of A's identifying characteristics are of little interest to other parties.

In all of these cases, the fact of settlement and the nature of the underlying claim provide different information than does the amount of settlement. If B learns that A extracted a settlement from M far in excess of what might be expected from the injuries A is known to have suffered, then B is on notice that M is paying to keep people like B from coming forward. M seeks to avoid numerous trials and reputational loss. On the other hand, if B knows only that M has paid some nontrivial amount to A, B has useful information about the likelihood that his own injuries are connected to M's behavior in a way that might make litigation or negotiation worthwhile. M might only have compensated A, or paid a fraction of A's actual losses. The point is that knowledge of the substance of A's settlement with M may help B discover the cause of his own injury and facilitate a payment from M. But knowledge of the amount of the A-M settlement probably adds less socially useful information than it encourages strategic suits and wasteful litigation. Much depends on the nature of M's business and the variety of its products and services. In some cases, disclosure of the settlement amount would be more useful to B than disclosure of the substance of the A-M settlement. In other cases, the reverse is true. In both cases, the less that is revealed to B and to others, the greater the expected (confidential or translucent) payment to A. This payment serves as a deterrent. Plaintiffs like B have private information about their own claims, including medical costs, property losses, and emotional losses, and these do not depend on the wrongdoers' settlements with prior plaintiffs. If A underestimates the connection between M and other victims, or otherwise fails to drive a hard bargain, M can purchase silence from A for less than its full deterrent value. Translucency drives up the costs of settlement, whether A underestimates its value or not, and can deter M *ex ante* or provide compensation to individual victims *ex post*.<sup>61</sup>

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<sup>61</sup> A further distinction is that secrecy can encourage multiple plaintiffs to search for valuable settlements in a way that is wastefully duplicative and can encourage M to take socially inefficient precautions. A may be able to discern

Still, there are cases where complete confidentiality or complete transparency is preferable to translucency. The simplest of these cases is where even modest disclosure is expected to unleash so many strategic or misguided lawsuits that M is induced to take precautions, including product recalls, that are in fact socially inefficient. M may now be induced to recall a product in order to prevent further injuries and lawsuits that would arise only because of the disclosure.<sup>62</sup> M calculates that the cost of additional care is worthwhile simply to reduce its litigation costs; M would have preferred to pay for confidentiality in order to discourage baseless but costly lawsuits, and confidentiality would have been socially efficient. At the other extreme are cases where anything less than full disclosure protects M from socially efficient suits, and encourages M not to take socially efficient precautions to prevent further injuries. The inefficiency can also be of the *ex ante* kind; the inability to enter into binding and complete confidentiality agreements might cause M to take greater but inefficient precautions at the outset. In contrary cases, the prospect of secreting some information causes M to take insufficient precautions at the outset. The central idea is that confidentiality, translucency, and transparency may each have their moments, but law must ordinarily choose a rule, or at least assign one rule to types of cases as the sunshine laws have sought to do. This Article has suggested that the deterrence power of payments for confidentiality is underappreciated, so that a move away from the transparency of sunshine laws to something a little more respectful of private bargains is worth trying. Translucency is a compromise that aims to deter defendants with higher settlements but provide enough disclosure to encourage socially efficient precaution-taking as well as fewer wasteful, strategic claims.

Translucency (or even full transparency) is easiest to defend where it helps reveal a pattern of misbehavior, as observed in the claim against the serial sexual assaulter, and as is likely to be the case in many discrimination claims. Employees who have suffered discrimination, like victims of sexual assault and harassment, may perceive that it is costly to bring claims. If, however, they can easily learn not only of the existence of other

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some of the value of secrecy to M, but not its full amount. To the extent that translucency reveals the true value of secrecy, duplicative search costs for inefficient confidential settlements are reduced.

<sup>62</sup> If the assumption about M's behavior is correct, then a recall or other precaution is socially inefficient and undertaken simply to prevent baseless lawsuits. If M's behavior is imperfect, then disclosure of the substance of the settlement might stimulate desirable precautions.

claims but also of their settlement for nontrivial sums, they may come forward in search of similar compensation, and help reveal a pattern of wrongdoing.<sup>63</sup>

The more the law requires disclosure, the fewer settlements there will be, and in civil cases—unlike the criminal context—the longstanding policy appears to be in favor of settlement rather than in favor of reporting to law enforcement authorities. If law wanted to discourage confidential agreements, it could make the payments by M nondeductible; payments that arise out of tort suits or in settlement of these suits are generally deductible because they substitute for (deductible) precaution costs rather than for fines or other penalties where the aim is to discourage the underlying behavior entirely. This tax treatment would discourage settlement because, on the margin, M knows that transparency followed by other suits that will settle or go to trial generate costs, but deductible costs.

## VI

### TOWARD A GENERAL MODEL: PATTERNS, PRIVACY, AND ADJUDICATION ACCURACY

As we have seen, the beneficial effects of permissible secrecy depend on context. This Article has identified specific cases where law should prefer translucency, transparency, or secrecy; we now offer a general framework that incorporates these examples and facilitates analysis of new cases.

Consider a policymaker who wishes to maximize the social value of settlements. There are four categories of benefits and costs: (1) the deterrence value of settlement—which must always be compared to the deterrence value of trials and judgments; (2) the related value of plaintiffs' incentives to bring claims; (3) the cost of false claims; and (4) the cost of administering law. Note that the social value of deterrence is analytically identical to the concept of efficient precautions in tort law.

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<sup>63</sup> Imagine a claim for back wages by an employee who claims that the discriminatory practice of her employer prevented her promotion and higher earnings. These higher earnings would have been deductible to the employer as an ordinary and necessary business expense. In turn, payment in settlement of the claim, or payment as the result of a judgment, would also be deductible. Now assume that law requires translucency or more. One way to encourage compliance is to refuse to enforce confidentiality agreements that are not disclosed as required. Defendants would pay less because they would know that a settling employee who breached the agreement would not be required by law to return the settlement amount. The text suggests that another means of discouraging confidentiality would be to disallow deductions for payments made following undisclosed agreements.



An efficiency-minded policymaker seeks to minimize the total cost of accidents. Precautions are encouraged with liability rules, but only when they are cost-justified. Similarly, the policymaker should require (or not require) disclosure of settlements so as to minimize the cost of antisocial behavior, including litigation, settlement, and administrative costs. Disclosure is costly, so it should be required only when cost-justified. It creates benefits (by deterring antisocial behavior) and costs (by chilling legitimate claims and encouraging false ones). Thus, parametric assumptions must be made in order to reach a conclusion about the value of a particular sunshine regime. This decision is simplified somewhat by the observation, discussed in subpart I.B and Part IV, that disclosure creates greater deterrence benefits when it reveals a pattern of antisocial behavior. In turn, pattern recognition encourages legitimate claims because it reduces private discovery costs. Victims can more easily identify wrongdoers and bring viable claims. Law must be on guard against false claimants, but the more there is a pattern of wrongdoing, and liability is difficult to assess, the more costly is secrecy of settlement between the wrongdoer and a victim.

When wrongdoing is episodic and not a predictor of future wrongdoing, transparent or translucent sunshine laws are of little value; if a defendant pays for confidentiality, it is because the defendant fears false claims or some reputational loss. The other two categories of benefits and costs fall out of the picture because, by hypothesis, the wrongdoing is a one-off event.<sup>64</sup> If the defendant pays handsomely for a confidential settlement, the payment itself provides a substantial deterrent. Without a pattern, legitimate follow-on claims cannot be chilled by secrecy because victims' ability to discern wrongdoing remains unchanged. On the other hand, public settlement may encourage strike suits to the extent that opportunistic plaintiffs are able to discern the settlement behavior of defendants. In legal domains that do not exhibit patterns of wrongdoing, law should therefore accommodate the parties' bargain for secrecy. This is especially so where the costs of administering law are high inasmuch as disclosure can encourage more lawsuits.

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<sup>64</sup> Plaintiffs who value privacy in episodic claims still retain bargaining power to adequately deter defendants who value their reputation and fear litigation.

	Deterrence	P Incentive	False Claims	Admin. Costs	Key Examples
Secrecy					
Pattern Y	Low	Sufficient	Low	Low	AR-S, Em-S, Generic A-M, X-Y
Pattern N	High	Sufficient	Low	Low	
Privacy H	High	Sufficient	Low	Low	
Privacy L	High	Sufficient	Low	Low	
Adj. Acc. H	High	Sufficient	Low	Low	
Adj. Acc. L	Lower	Indeterminate	Indeterminate	Low	
Transparency					
Pattern Y	High	Sufficient	High	Higher	A-M
Pattern N	High	Sufficient	Low	Higher	
Privacy H	High	Insufficient	High	Higher	X-Y
Privacy L	High	Sufficient	Low	Higher	
Adj. Acc. H	High	Sufficient	Low	Higher	
Adj. Acc. L	Low	Indeterminate	Indeterminate	Higher	
Translucency					
Pattern Y	High	Sufficient	Low	Lower	A-M
Pattern N	High	Sufficient	Low	Lower	
Privacy H	High	Sufficient	Low	Lower	Em-S. X-Y
Privacy L	High	Sufficient	Low	Lower	
Adj. Acc. H	High	Sufficient	Low	Higher	
Adj. Acc. L	Low	Indeterminate	Indeterminate	Higher	

FIG. 1: THE EFFECTS OF PATTERNS, PRIVACY, AND ADJUDICATION ACCURACY (ADJ. ACC.) ACROSS DISCLOSURE REGIMES.

*Inferior outcomes in bold.*<sup>65</sup>

The discussion in Part IV explained why pattern revelation in sexual assault cases is important for deterrence, but mandated disclosure in those cases may chill claims or lead to insufficient settlements that do little to deter wrongdoers. Our analysis suggests that a second parametric assumption is required for evaluating sunshine laws, that is, parties' valuation of privacy. When this value is high, and pattern recognition matters, a translucent approach that protects plaintiff's privacy leads to optimal deterrence. This is because translucency encourages victims to bring claims. Similarly, when the cost of

<sup>65</sup> AR-S and EM-S refer to the armed robber- and embezzler-storekeeper examples, discussed *supra* Part II; A-M refers to the consumer-manufacturer example, discussed *supra* subpart I.A; X-Y refers to the sexual assault example, discussed *supra* Part IV.

false claims is high (and pattern recognition matters), a translucent approach that partially protects defendant privacy maximizes the social value of settlements.<sup>66</sup> Disclosure of the claim's subject matter, and not its amount, reveals a pattern of wrongdoing that reduces private discovery costs but dampens plaintiff incentives to file non-viable claims. In particular, these incentives are reduced because less information is revealed about a defendant's settlement behavior than in a regime requiring transparency. Note that disclosure of the amount but not the subject of the claim would reveal less about patterned wrongdoing and more about settlement behavior. Disclosure of the number of claims, but not their subject matter or dollar amount, would produce the same inferior result.

Plaintiffs' capacity to assess defendants' exposure to liability, and thus drive a bargain that properly deters defendants, is the driving force in the argument for confidential settlement as deterrent. When that capacity is high, victims have less need for disclosure of prior settlements. Law can rely on settlements to deter wrongdoers, and law can enjoy lower administrative costs. A heightened ability to assess wrongdoing is thus an exception to the general result that where there is serial (or patterned) wrongdoing, law should disfavor secret settlements.<sup>67</sup> Still, as discussed in Part II, this optimistic conclusion requires that there be at least one victim who perceives the number of other victims and the extent of their injuries. Such a victim can extract a settlement that sufficiently deters the defendant. In the absence of an effective plaintiff of this sort, a wrongdoer is properly deterred only by multiple claims, or a class action, so that sunshine (on settlements) is desirable. Again, if the plaintiffs value privacy, translucency may be superior to transparency.

In addition to patterns and privacy, a third and final parameter is adjudication accuracy. When facts are difficult to discern, administrative costs are high.<sup>68</sup> In turn, (1) deterrence

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<sup>66</sup> We recognize that some case types may require an assumption that victim privacy is more socially valuable than injurer privacy. This is particularly so when the social benefits of deterrence exceed the social costs of false claims. The opposite is true when the competing quantities of both statements are reversed.

<sup>67</sup> While a more general approach would dispose of pattern recognition altogether and consider plaintiffs' ability to assess exposure in its stead, we think that the specificity gained through the discussion of patterns is analytically valuable. See *supra* subpart I.B.

<sup>68</sup> Where laws are difficult to discern and adjudication may, over time, produce accurate judgment, parties are likely to choose litigation. See George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 67–68 (1977).

is weak because parties are uncertain of legal outcomes; (2) plaintiffs can be chilled by high discovery costs—unless they perceive that defendants' costs are even greater; and (3) false claims will rise as plaintiffs play the litigation lottery, though the increase is offset somewhat by burdens and standards of proof. Unsurprisingly, this is the setting where private settlement is most beneficial, as it can provide deterrence at a lower cost than litigation, and in situations where litigation may fail to provide any deterrence at all. In turn, permissive confidentiality encourages these desirable settlements. A legal system that is accurate and efficient has little need for settlements, but as costs and inaccuracy rise, private settlement is attractive—and especially so once it is understood that the settling plaintiff can extract value in return for confidentiality, and thus contribute to law's deterrence goal.

#### CONCLUSION

This Article began by asking whether there is a problem with confidential settlements of civil lawsuits. The answer is nuanced—as it is for criminal and sexual assault cases—because each type of disclosure regime generates its own mix of identifiable benefits and costs. The plain observation that settlements reduce the cost of administering law provides a default regime of permissible secrecy, and has surely encouraged courts to favor settlement and therefore to allow confidentiality at the expense of third parties. Disclosure is most important when there is a pattern of wrongdoing that a settling plaintiff cannot assess. When a plaintiff's incentive to file is low and a false claimant's incentive to file is high, disclosure must be tempered with privacy protections that encourage legitimate claims and discourage false ones. On the other hand, deterrence may benefit from secrecy when the facts of a dispute are obscure and courts cannot adjudicate claims accurately.

The title of this Article is misleading, as it describes the back half of our discussion, aimed at readers who reject our first claim: that confidential settlements may be desirable because the price of confidentiality is a payment that promotes law's deterrence goals. In many cases, including most that involve tortfeasors and their victims (whether in a potential large-scale tort or in a two-party road accident), the strong intuition in favor of—and legislated sunshine laws requiring—disclosure aimed to benefit third parties is likely wrong. Lawyers like disclosure and the signals that it provides, but lawyers are professionally inclined to underestimate the costs and dis-

taste most people associate with trials. They are also inclined to think that legal procedures get at the truth, while laypeople are often fearful of legal errors, and thus eager to settle cases in ways that will bring on few others.

This Article has not insisted that by paying a premium for confidential settlements, wrongdoers are optimally deterred. Indeed, it has explained why the deterrence is imperfect. But even this imperfect deterrence is enough to suggest that law ought to be nudged away from transparency and toward translucency. This is clearest in civil cases where law and judicial behavior reflect a strong policy in favor of settlement. In criminal and university discipline cases, where there is no such policy, where a pattern of misbehavior might be hidden by confidentiality, and where the law might have reason for its remedies and not want private parties to convert them to cash, there are few cases where confidential settlement is warranted.