

## **Ending the Use of Non-Disclosure Agreements to Silence Reporting of Sexual Harassment and Discrimination in US Higher Education**

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Molly Shanahan, PhD, is a choreographer, performer, dance educator, and advocate working at the intersection of movement, creative process, and advocacy for transparency and institutional accountability. She is the founder of the critically acclaimed Chicago-based company Molly Shanahan/Mad Shak and has received commissions, residencies, and awards nationally and internationally.

Shanahan holds a BA from Denison University, an MA from The Ohio State University, and a PhD from Temple University, where she was awarded a Presidential Fellowship and graduate awards in recognition of her scholarship and professional choreographic work.

She has been on the faculty at Northwestern University, Wayne State University, and Denison University, among others, and has served as a guest artist or visiting faculty member at Purdue University, University of Wisconsin-Milwaukee, Bryn Mawr College, Temple University, and the University of Chicago.

Along with Robert Leland, PhD, Shanahan is the co-founder of NDAFreeCampus, a grassroots campaign to end the misuse of non-disclosure agreements in U.S. higher education. Her work weaves embodied inquiry with a commitment to transparency, accountability, and the free exchange of ideas across academic and artistic communities.

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## **Abstract**

In this paper we consider the proper and improper use of non-disclosure agreements (NDAs), and the damage they do to the individuals who sign them, the institutions that use them, and the broader community. We describe and refute some of the myths used to justify and rationalize silencing with NDAs. We describe examples of NDA abuse in both the US and UK. Legislation preventing the abuse of NDAs has been growing on both the state and federal level, and we describe some of the legal landscape. We describe some of the organizations that have opposed silencing in both the US and UK, and introduce NDAFreeCampus, a campaign that seeks to end the misuse of NDAs in US higher education.

## **Introduction**

In almost every recent scandal, one feature has appeared over and over again, the non-disclosure agreement. The purpose of this practice paper is to examine the impact of silencing with non-disclosure agreements, the current legal landscape, and the movements to end their misuse in US Higher Education, including NDAFreeCampus.

Attorney Neil Mullin, who represented Gretchen Carlson in her lawsuit against Fox News, said “If you want to eradicate discrimination, harassment and sexual misconduct, you should let the light of day shine” [1]. The quote is from an article in the Michigan Daily concerning the use of NDAs by the University of Michigan [1]. The use of NDAs to silence survivors and whistleblowers stops that light from shining and keeps stakeholders and communities in the dark.

NDAs are properly used when they protect privacy, such as information covered by the Health Insurance Portability and Accountability Act (HIPAA) and the Family Educational Rights and Privacy Act (FERPA), as well as facilitating the investment in innovation by protecting the confidentiality of intellectual property under development. As such, they can be an important part of both engineering education and engineering practice. According to the National Society of Professional Engineers (NSPE) code of ethics III.4 “Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve” [2]. Keeping trade secrets confidential enables trust and facilitates communication between engineers and their employers and clients. It is extremely important to note that this confidential information is limited and there are exceptions to confidentiality for violations of the code, such as deceptive acts or harm to individuals or the public.

NDAs are misused when they prevent individuals from disclosing misconduct, including sexual assault, sexual harassment, discrimination or other harassment and bullying. Operationally, are they being used to protect properly confidential information, or are they being used to protect the reputation of an institution through a cover-up? Are they being used to prevent individuals from

disclosing their lived experience? As stated by the Irish equity minister Roderic O’Gorman, speaking in favor of an NDA bill recently signed into law: “No one should ever feel forced or obligated to hide their experiences”. “No one should ever be put under pressure to conceal harassment or discrimination to protect the reputation of an individual, institution or company” [3].

### **The Damage Done by NDAs**

Canadian and UK advocacy leaders Can’t Buy My Silence and their data partner Speak Out Revolution report extensive survey data showing NDAs were found to have negative mental health impacts on 93% of respondents who had signed NDAs. NDAs disproportionately impact women and people of color, particularly in cases of sexual harassment and discrimination. As such, NDA misuse represents a barrier to achieving better diversity and representation in the engineering profession [4]. An interview-based study by the Clayman Institute for Gender Research at Stanford University also showed significant mental health damage due to NDAs preventing employees from talking about their experiences with friends, family, colleagues and others. The misuse of NDAs contributes to career damage, and reduced prospects for employment, as those who sign NDAs are not able to speak truthfully about a previous job [5]. The UK Department for Business Energy & Industrial Strategy (BEIS) stated that NDAs that prevented the disclosure of wrongdoing or other workplace grievances often resulted in silenced individuals experiencing extreme feelings of isolation and negative mental health impacts [6]. This misuse of NDAs violates the first fundamental canon of the NSPE code of ethics, to “hold paramount the safety, health and welfare of the public” [2].

The misuse of NDAs conceals abuse, harassment and discrimination, and allows these activities to continue undetected. This creates a toxic workplace that is, in all relevant ways, contrary to the mission of a university.

In addition, an institution may sign an NDA in settlement with an actual perpetrator, who then moves to another institution, and repeats the same behavior, thus compounding the harm by both hiding it and allowing it to continue.

### **NDA Myths**

A number of claims are made that NDAs are beneficial. A few of these are addressed below.

#### ***Myth 1: NDAs help people move on with their lives.***

A spokesperson for the University of Michigan, talking about their NDAs said: “It’s ... a way of being nice to each other, sort of being civil about this,” “It’s not meant to silence people; it’s meant to not get in a fight with people once they settle.” [1]. NDAs do silence people, and as noted above, they do harm. Two participants in the Stanford study said: “I wanted to speak out. And I was reminded—I signed an NDA and not to speak, not to disclose what happened.... I was already down. I was already devastated.” And: “I just kept [my feelings] in... [to] myself and just [thought] about it at home, but it felt like it was kind of ... consuming my mind” [5].

***Myth 2: NDAs lead to larger settlements.***

It appears to be very rare for a plaintiff to be offered two options, one with and one without an NDA. Typically the institution wants silence. In 2017, prior to any US NDA legislation, there was a settlement rate of 81% for sexual harassment cases filed and resolved by the EEOC. In 2022, after 9 states, representing 18% of EEOC sexual harassment cases, passed legislation restricting NDAs, the settlement rate had increased to 92.1% [7]. Likewise, data analysis of the impact of California's Stand Together Against Non-Disclosure (STAND) Act that addresses NDAs in cases of sex discrimination, harassment and abuse, showed there was no effect on the number of filings, and cases were not prolonged or intensified. Contrary to Myth 2, interviews with attorneys indicated that settlement amounts had not decreased [8]. Apart from a few high-profile cases, most of these settlements are small, perhaps due to power disparities between institutions and individuals. A study of EEOC cases showed an average award of \$24,700 in cases of sexual harassment. Less than one percent of awards were greater than \$100,000 [9]. Employees facing termination are sometimes offered fairly small severance amounts, but need to accept these modest settlements to pay their bills. In one striking example of a university placing a distinct price tag on silence, Sarah Mays, Jane Doe 15 at Liberty University, was originally offered \$5000, and later a final offer of \$35,000 related to the mishandling of her sexual assault if she signed an NDA, which she refused [10], [11].

***Myth 3: NDAs help institutions to move on.***

NDAs can protect perpetrators and harmful practices, and allow these situations to fester. At Baylor University, NDAs were used to cover up sexual assault, and the consequences, including continuation of a horrible situation from 2011 to 2014, resignation of the president and damage to its reputation, were much greater than would have been the case if Baylor had responded with transparency and accountability [12]. In a recent Title IX training session attended by one of the authors, the audience was told to "Google Baylor" implying that Baylor provides an example of what can go wrong when institutions fail to respond properly to misconduct. NDAs also contribute to a broader campus culture of intimidation and silencing, which is damaging to the mission of a university, in that it erodes the free flow of knowledge and open exchange of information.

***Myth 4: NDAs protect the privacy of survivors.***

There is no need to silence a survivor to protect their privacy. Settlements can be written to protect the privacy of a survivor and provide remedies, such as funds needed to pay for counseling, without silencing. The absence of an NDA never implies that a survivor must share their experiences publicly.

## **Examples of NDAs**

Liberty University claimed to be the safest place in Virginia, while silencing victims of violent crime, including sexual assault. Sarah Mays, the survivor mentioned above, who was gang-raped, was threatened and offered \$35,000 if she would sign an NDA. Similar offers with NDAs were made to other students [10], [11]. Scott Lamb, Liberty's Senior Vice President for Communications, was fired after raising concerns about sexual assaults, and offered a severance package with an NDA, which, like Mays, he refused [13]. Contributing to an atmosphere of fear and silencing, student journalists at Liberty were required to sign NDAs saying they would not talk about "editorial or managerial direction, oversight decisions or information designated as privileged or confidential" [14]. Liberty was fined \$14 million for violating the Clery Act and misrepresenting the incidence of violent crime.

At Goldsmiths, University of London, sexual harassment of female students by faculty and staff had become a serious problem. In 2016 Professor Sara Ahmed resigned in protest over the university's allowing sexual harassment to become what she described as "normalised and generalised." A number of staff left after female students lodged complaints, however there was no discussion of *why* due to NDAs, meaning the harassment was covered up, as was the reason for the employees' departure. Goldsmith's had paid out about £200,000 for NDAs. Plainly stated, sexual harassment of students by university staff was hidden by non-disclosure agreements [15], [16]. In 2022 Goldsmiths chose to embrace change and signed the Can't Buy My Silence University pledge, promising not to misuse NDAs to cover up sexual misconduct, harassment or bullying [17]. The pledge promoted by NDAFreeCampus, described below, is based on that CBMS pledge.

In 2010 Prof. Edward St. John was fired from his teaching position at the University of Michigan, and given 24 hours to notify his students. He believed this was due to disagreements with his dean on university policies. He challenged his firing in court, alleging that the University denied him due process. St. John received settlement offers, but all of them contained confidentiality clauses (NDAs) and non-disparagement clauses, which he refused. Michigan wanted silence, even if it meant not settling the case, and this was not isolated: the university had paid \$1.26 million in 6 months in 2018-2019 on NDAs. Attorney Sarah Prescott, who negotiated agreements with the university said "Non-disparagement agreements prevent the public from knowing (of) all kinds of harassment and discrimination." [1].

## **The Legal Landscape**

### ***National Labor Relations Act***

The National Labor Relations Act, section 8(a)(1) forbids an employer from preventing an employee from disclosing the terms and conditions of their employment, which is a Section 7 right, associated with protected concerted activity. The recent NLRB ruling, McLaren-Macomb, reversed a previous Trump-era ruling and established that employers cannot require employees to waive their rights under the NLRA in severance agreements. It should be noted, underscoring why it is so important to address this issue in higher education, that private university faculty are

considered management and not labor (Yeshiva), so they are not covered by the NLRA. The NLRB also does not exercise authority over religious institutions to avoid First Amendment entanglements. The NLRA does not apply to state universities, where state laws will determine labor law. Note: These statements do not represent legal advice, and readers are encouraged to consult an attorney for the current interpretation of the NLRA and the laws of their state.

### ***Speak Out Act***

The Speak Out Act, promoted by Gretchen Carlson and Julie Roginsky of Lift Our Voices makes unenforceable pre-dispute NDAs in cases of sexual assault or sexual harassment. This act was approved by unanimous consent by the US Senate in 2022, an extremely rare bipartisan action. The Speak Out Act primarily addresses instances where a new employee signs an NDA as part of the onboarding process, then finds out later that they cannot disclose what has been done to them during their employment.

### ***State laws***

Over 20 states have approved laws either banning NDAs or making them unenforceable under various conditions, such as sexual assault, sexual harassment, retaliation, or discrimination, and multiple bills are in legislative process. Washington's Silenced No More Act, sponsored by Representative Liz Berry and referenced below, is exemplary, and requires the party trying to enforce an NDA to pay a \$10,000 fine and cover the other party's legal expenses. Listings and brief descriptions of state laws are published by Lift Our Voices [18] and Can't Buy My Silence [19].

### ***Lack of awareness of state and federal law***

In 2019, New Jersey passed one of the first laws restricting NDAs, S. 121, which bans NDAs for discrimination, retaliation, and harassment claims and renders them unenforceable:

“A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment (hereinafter referred to as a “non-disclosure provision”) shall be deemed against public policy and unenforceable against a current or former employee (hereinafter referred to as an “employee”) who is a party to the contract or settlement.”

Mark Gough interviewed New Jersey based employees, employers, and labor law attorneys generally representing defendants or generally representing plaintiffs to determine awareness of New Jersey's law [20]. Gough found that, generally, neither employers nor employees were aware of it. Employees liked the law once they heard about it. Employers were unaware because they did not use NDAs. However attorneys, both those who represented employers and those who represented employees, were well aware of S. 121, reflecting the need to raise awareness in the legal profession and empower attorneys not to use or encourage their clients to sign NDAs that violate this law.

### ***American Bar Association***

In August 2024, the American Bar Association passed Resolution 508 calling for an end to NDAs that “limit an employee’s ability to disclose information underlying claims of workplace harassment, discrimination or statutory workplace rights violations” [21],[22]. The resolution also encourages legislation prohibiting or limiting the use of NDAs that prevent the disclosure of workplace violations [21], [22].

### ***Federal Tax Cuts and Jobs Act 2017***

The Federal Tax Cuts and Jobs Act, passed in 2017, renders legal expenses and settlement payments non-tax deductible in cases of alleged sexual misconduct [23].

### ***Washington’s Silenced No More Act 2022***

The Silenced No More Act, referenced above and authored by Representative Berry, is one of the strongest laws against NDA abuse. It renders it “unlawful for employers in the state to require, *or even request*, that workers sign NDAs or non-disparagement provisions that restrict workers' right to talk openly about illegal discrimination, harassment, sexual assault, retaliation, wage and hour violations, or any other breaches of public policy” [19]. The law also requires employers to pay a \$10,000 fine and legal expenses if they try to enforce an NDA. The law applies retroactively.

### ***California’s Silenced No More Act 2019***

In 2018 California passed Senate Bill 820 Stand Together Against Non-Disclosure (STAND) Act prohibiting NDAs restricting disclosure of sexual assault, sexual harassment, retaliation, or discrimination. In 2021 California passed the Silenced No More Act that expands the protections of the STAND act and applies retroactively [23]. The Silenced No More Act was co-sponsored by Ifeoma Ozoma, who broke her NDA with Pinterest to expose discrimination at the corporation [24].

An excellent review of state and federal laws regarding NDAs and the need for further legislation can be found in [23].

## **Organizations Addressing NDAs**

### ***Lift Our Voices (USA)***

Gretchen Carlson and Julie Roginsky founded Lift Our Voices (LOV) after being sexually harassed by Roger Ailes at Fox News and being silenced with NDAs. Although movies have been made about them, Carlson and Roginsky are still subject to these NDAs and therefore do not “own their own stories.” LOV has successfully promoted federal legislation to restrict forced arbitration and make unenforceable pre-dispute NDAs in cases of sexual assault or sexual harassment, through the passage of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA) and the Speak Out Act. Forced arbitration frequently has the effect of silencing survivors. In addition, LOV publishes resources for survivors, initiates research, and educates legislators on toxic workplace issues. LOV recently established the Where You Work

Index to grade Russell 3000 companies on how they use forced arbitration and NDAs, as a tool to aid job seekers in seeking safe and healthy workplaces. Lift Our Voices has kindly endorsed NDAFreeCampus.

### ***Can't Buy My Silence (UK, Canada, international)***

Can't Buy My Silence (CBMS) was founded by Dr. Julie Macfarlane, law professor emerita and member of the Order of Canada and Zelda Perkins, the first woman to break her NDA with Harvey Weinstein, the disgraced movie mogul currently serving a prison term for his predatory behavior that was kept secret across more than a decade through NDAs and secret settlements. CBMS participated in recent legislation in Ireland restricting NDAs and is involved in similar legislation in Australia and Canada. CBMS is seeking to end the misuse of NDAs to cover up abuse and misconduct through legislation, education and promoting a voluntary pledge for universities, businesses and faith-based organizations. At this time, 98 universities in the UK and four in Canada have signed the University Pledge. CBMS participated in recent legislation in Ireland restricting NDAs and is involved in similar legislation in Australia and Canada. NDAFreeCampus is advised and encouraged by Macfarlane, and is promoting a similar pledge in U.S. higher education. NDAFreeCampus has been kindly endorsed by Can't Buy My Silence.

### ***People's Parity Project (USA)***

"The People's Parity Project is a movement of law students and attorneys organizing for a democratized legal system which empowers working people and opposes subordination in any form" [25]. PPP currently has chapters in law schools on 24 campuses. PPP was founded in 2018 by four students at Harvard Law School who became aware that summer interns were being forced to sign mandatory arbitration agreements and NDAs by major law firms. They consider both mandatory arbitration and NDAs to be coercive contracts and oppose their use, especially in cases of harassment or discrimination [26], [27].

### ***The Purple Campaign (Method) (USA)***

Also founded in 2018, the Purple Campaign, now The Purple Method, seeks to end sexual harassment in the workplace, and has called out the use of NDAs that cover it up. They do both advocacy and corporate training [28].

### ***Lioness (USA)***

Lioness is a public relations organization that helps whistleblowers and survivors tell their stories effectively. They connect people with a network of journalists, attorneys, therapists, digital and personal safety/security needed to tell their story. They work with an attorney who provides advice for those who have signed NDAs [29].

### ***Psst (USA)***

Psst serves whistleblowers who are government employees or technology workers. Founded by three people, including one of the cofounders of Lioness, Psst provides a secure depository for whistleblowers to tell their stories, get legal and other critical advice, and network with others with similar stories. Whistleblowers maintain control over their information which is encrypted.



As someone with a similar story is matched, they can be connected, go public if they choose, and approach journalists as a cohort, rather than as more vulnerable individuals [30].

### **NDAFreeCampus (USA)**

In 2024, NDAFreeCampus.com was launched to address the misuse of NDAs in US higher education, with a pledge, similar to that of Can't Buy My Silence, adding the word 'discrimination' to better reflect the experience of people of color and recognize the work of Ifeoma Ozoma, mentioned above, who broke an NDA to expose discrimination at Pinterest [23]. The pledge reads as follows:

“(W)e [our president and board of trustees/board of regents] commit to not using Non-Disclosure Agreements to silence people who come forward to raise complaints of sexual harassment, abuse or misconduct, discrimination, or other forms of harassment and bullying” [31].

After a previous effort to address NDA misuse did not succeed, Robert Leland contacted Macfarlane of Can't Buy My Silence, and she introduced him to Molly Shanahan in 2023. We began meeting online, and decided to form an organization. We selected the name NDAFreeCampus and a logo with a speaker, symbolizing both the importance of preserving individuals' rights to their own stories and our intention to raise awareness of the issue of NDA misuse. We set up the website NDAFreeCampus.com, and recruited another colleague to join us.

The website features information on NDAs, the harm they cause, resources and organizations, including Can't Buy My Silence, Lift Our Voices, Lioness (PR firm for whistleblowers), Retaliation podcast with Julie Roginsky, End Rape on Campus, Center for Institutional Courage, Know Your IX, Clery Center, and AAUP.

Our core values, speaking to the values that NDA misuse puts at risk, are:

#### **Value of a Person**

Value of a person over the reputation of an institution.

#### **Transparency**

Transparency and fairness in addressing incidents of sexual abuse, harassment or misconduct, discrimination or other harassment or bullying.

#### **Safe environments**

Safe, non-toxic environments for all aspects of campus life.

#### **Fair Processes**

Fair and supportive processes for those who come forward with reports of sexual abuse, harassment or misconduct, discrimination or other harassment or bullying.

Ultimately, institutions that use NDAs to silence people from disclosing abuse, discrimination or misconduct are crossing a line, valuing reputation over a person.

A number of myths that are used to justify the use of NDAs are listed and refuted on the website, and in this paper as well. However, we are still hearing these myths repeated by university spokespersons.

We also established a Facebook page and an Instagram page to gradually build awareness.

We set up a Change.org petition, which has garnered over 690 signatures:

End the Misuse of Non-Disclosure Agreements (NDAs) in U.S. Colleges and Universities

*We the undersigned, stand together in calling for the end of non-disclosure agreements (NDAs) in United States higher education that silence people who come forward to raise complaints of sexual harassment, abuse or misconduct, or other forms of harassment and bullying.*

As we work for change, we are committed to connect with allies. We are continually advised and encouraged by Julie Macfarlane of Can't Buy My Silence. We also met with and maintain contact with Liz Berry, author of Washington's Silenced No More Act, the gold standard law that, as stated above, requires a party attempting to enforce an NDA in cases of abuse, or misconduct to pay the other party's legal expenses. We met with Lift Our Voices, and we keep in touch in mutual encouragement with Carlson and Roginsky. We met with representatives of the Clery Center, which promotes transparency on campus with respect to reporting violent crime, the Clayman Institute for Gender Studies at Stanford University, and many others.

After meeting with Liz Berry, she referred us to several Washington universities. In general the institutions we met with were not using NDAs, but the people we spoke with had to check, as there was no clear or public policy. Given the law in Washington, pledging not to misuse NDAs is not a big step. A few schools in Washington reported they were complying with the Silenced No More Act.

We are continuing to connect with allies and contact universities, and are tenacious about seeing progress, however slowly it comes. Ultimately the pledge provides a university with a vehicle to express its values and commitments. As Dr. William Lahey, president of University of Kings College in Canada said after signing the CBMS pledge: "It really was the Can't Buy My Silence movement that really gave Kings access to a ready mechanism to codify values of openness and transparency and accountability that Kings had put into practice" [32]. The pledge also provides a university with an opportunity to break with past misuse and move forward with truth and transparency.

### **Experience of Universities that have signed the Can't Buy My Silence University Pledge**

At present 98 universities in the UK, including campuses of Oxford and Cambridge, and 4 universities in Canada have signed the CBMS University Pledge, which the NDAFreeCampus pledge is based on. Of these, none have reported any challenges or problems to CBMS. In fact one university was considering adding financial misconduct to the pledge [33], indicating that the pledge is an opportunity to ensure ethical practices rather than a barrier or threat to reputation. This supports the crucial perspective that transparency protects the institution, rather than putting it at risk.

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