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BOOK REVIEW

ALL THE NEWS THAT'S FIT TO HIDE: SEXUAL ASSAULT AND SILENCE IN HOLLYWOOD AND THE LAWYERS WHO LET IT HAPPEN

Catch and Kill: Lies, Spies, and a Conspiracy to Protect Predators. By Ronan Farrow. Little, Brown and Company. 2019. Pp. 464. \$26.99. ISBN-10: 0316486639; ISBN-13: 978-0316486637.

*Reviewed by Neil Fulton**

Hollywood stars and moguls, sexual misconduct and harassment, investigative journalism, espionage, and unethical lawyer conduct—all this and more is on display in Ronan Farrow's *Catch and Kill: Lies, Spies, and a Conspiracy to Protect Predators*. Working for NBC News and then *The New Yorker*, Farrow investigated allegations of serial sexual assault by Harvey Weinstein. He readily found women who said they had been assaulted by Weinstein, but getting those stories to the public required navigating an obstacle course of non-disclosure agreements, corporate legal departments, unethical conduct by Weinstein's legal team, and even being followed by spies. In the end, however, Farrow got these women's stories out and found serial sexual misconduct in other high-profile places. *Catch and Kill* provides a fascinating lens to think about professional responsibility, corporate governance, how the law responds to sexual misconduct, and the boundaries of contract law.

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I. INTRODUCTION

Ronan Farrow's book, *Catch and Kill: Lies, Spies, and a Conspiracy to Protect Predators*¹ ("*Catch and Kill*"), is the story of his investigation of Harvey Weinstein's pattern of sexual harassment and assault, the challenge of getting that story into print, and the other public figures whose similar misconduct subsequently came to light. One could ask why lawyers should be interested. Lawyers are central to the harrowing tale Farrow tells. In fact, the book largely demonstrates that without the involvement of lawyers, often acting at or beyond the boundary of ethical conduct, Weinstein and other predators would have been exposed years earlier. Nondisclosure agreements are also central to the story, helping the wealthy and powerful silence their victims, hide their misconduct, and continue their predatory patterns. Reading the book forces consideration of the role of lawyers as moral and ethical actors and whether nondisclosure agreements are contracts that should not be enforceable. In short, the book is one that lawyers should read and carefully consider. That consideration must begin with the underlying story Farrow tells.

II. CATCHING A PREDATOR

The story begins with Farrow working as an investigative reporter for NBC News.² His reporting uncovered suggestions that Weinstein, a massively successful and politically connected movie producer,³ had engaged in sexual harassment and even sexual assault.⁴ Beginning from the report by actress Rose McGowan that Weinstein raped her, Farrow interviewed many women who reported that Weinstein engaged in a pattern of sexual misconduct, ranging from harassment to rape.⁵ Once the surface was scratched, Farrow uncovered that Weinstein's history of sexually predatory conduct

1. RONAN FARROW, *CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS* (2019).

2. *Id.* at 4–5.

3. *Id.* at 9–12.

4. *Id.* at 29–33.

5. *Id.* at 56–59, 93, 128–32, 167–70, 238–42, 245–46, 300–03.

was widely known or at least suspected.⁶ However, attempting to expose these stories into the open posed several severe challenges.

First, Weinstein built walls of silence around his victims through non-disclosure agreements.⁷ Leveraging his power to make or break entertainment industry careers, Weinstein pushed victims to accept cash payouts paired with highly restrictive confidentiality clauses to remain silent.⁸ As a powerful example, Weinstein pressured Italian actress Ambra Gutierrez to sign a settlement agreement with a non-disclosure clause, which required her to: (1) not disclose that Weinstein groped her; (2) to destroy any and all copies of recorded admissions made by Weinstein; (3) to allow Weinstein's lawyers access to all her digital media; and (4) to sign a written statement—to be released if she breached—declaring that none of Weinstein's admitted conduct occurred.⁹ Gutierrez told Farrow that when she signed the agreement, she spoke limited English, had been subjected to attacks on her character by Weinstein, and had deep concerns about the potential damage to her and her family if she persisted in trying to hold Weinstein accountable for groping her.¹⁰ The power of these contracts to purchase silence was intensified through the inclusion of financially oppressive liquidated damage clauses for breach, and arbitration clauses that allowed confidential enforcement.¹¹ Breaking through these walls was challenging.

Second, Weinstein applied intense pressure on his victims and media outlets to prevent disclosure. He was dominant in the entertainment industry and would blacklist those who did not bend to his will.¹² His retaliation

6. *Id.* at 40–41, 52, 128–30, 251.

7. *Id.* at 47–48, 63–64, 219, 221, 233–40, 252.

8. *Id.* at 47–48, 63–64, 219, 221, 233–40, 252. These financial payouts were typically of minimal consequence to Weinstein's wealth, but had real consequences for young actresses and media executives who faced the prospect that, if they challenged Weinstein, they might not work again. *Id.* at 239–40.

9. *Id.* at 63–64.

10. *Id.* at 61–62. The media campaign waged by Weinstein was particularly vicious. It drummed up claims that she was somehow involved in the corruption of Italian Prime Minister Silvio Berlusconi who carried on a series of affairs. *Id.* It was, as Farrow accurately described it, purposeful “slut shaming” of Gutierrez through Weinstein's media influence. *Id.*

11. *Id.* at 72.

12. *Id.* at 238–40. A prominent example was Weinstein telling director Peter Jackson that he should not hire Mira Sorvino or Ashley Judd for *The Lord of the Rings* because they were “a

against actress Annabella Sciorra may have prevented her from working in film for three years.¹³ Weinstein also had deep political connections, particularly in New York.¹⁴ His connection to Bill and Hillary Clinton led to a staff member for Hillary pressuring Farrow against pursuing the Weinstein story.¹⁵ This was significant since Farrow had worked for Hillary Clinton at the State Department.¹⁶ Connections within Weinstein's team had more direct impact, as Manhattan District Attorney Cyrus Vance, Jr., who chose not to prosecute Weinstein for his sexual assault on Ambra Gutierrez, practiced law with and received significant campaign contributions from lawyers within Weinstein's team.¹⁷ Weinstein pressured executives at NBC to prevent Farrow from pursuing the story personally and through intermediaries.¹⁸ Weinstein eventually engaged in direct pressure through a variety of contacts, threats of litigation, and cease and desist letters from his legal team.¹⁹ He also personally contacted Farrow's sources to pressure them into silence.²⁰ The more Farrow pushed for the truth, the more Weinstein's machinery pushed back through licit and illicit channels.

nightmare to work with and we should avoid them at all costs." *Id.* When Rose McGowan told another studio that Weinstein had raped her, the studio promptly terminated her contract. *Id.* at 115.

13. *Id.* at 303–05.

14. *Id.* at 173–74. He had been a significant contributor to New York political figures George Pataki, Kirsten Gillibrand, Eric Schneiderman, and Andrew Cuomo—covering state and federal bases and both major political parties.

15. *Id.* at 11–12, 154–55.

16. *Id.* Clinton also became the only living secretary of state not to participate in an interview for a book on American foreign policy that Farrow was contemporaneously writing. *Id.* at 298–99.

17. *Id.* at 59–61.

18. *Id.* at 73–74, 108, 148–49, 178, 187–89. Weinstein's pressure on NBC took a variety of forms, including suggesting that Farrow had a conflict of interest because his father (film director Woody Allen) had allegedly sexually assaulted Farrow's sister and Farrow had supported her. *Id.* at 188–89. Weinstein deployed others to suggest to Farrow that Weinstein could "clear things up" and that he might be "taking action" in some fashion. *Id.* at 77–79.

19. *Id.* at 210–11, 213–15, 233–36.

20. *Id.* at 255–56.

Weinstein's pressure campaign was enabled by his ability to gather information about his victims and reporters through means of varying impropriety. Not least significant was his retention of the espionage firm, Black Cube, to conduct surveillance and investigate Farrow while he was investigating Weinstein.²¹ Black Cube agents, retained by Weinstein's law firm, Boies Schiller,²² spied on Farrow, other journalists, and Weinstein's victims.²³ Black Cube used agents operating under false names,²⁴ a "spy pen" to record conversations,²⁵ threats,²⁶ and programs to "strip-mine" cell phones.²⁷ For this work, the firm was paid more than \$1 million by Boies Schiller on behalf of Weinstein.²⁸ Black Cube, while the most nefarious, was not the only firm Weinstein used.²⁹ K2, another espionage firm that Weinstein used, conducted extensive background investigations of accusers, leveraging a "revolving door" of employees who moved from the Manhattan District Attorney's Office into private investigation work for wealthy clients like Weinstein.³⁰ Through this spying campaign Weinstein was able to track the investigation almost to the minute and maintain a relative information advantage.

21. *Id.* at 12–13, 310–21.

22. *Id.* at 95–96.

23. *See id.* at 314–15.

24. *See id.* at 319–20. This effort was particularly devoted to trying to get influence over Weinstein victim Rose McGowan to derail the release of her book, which would detail her allegations. *Id.* at 318.

25. *Id.* at 365–68.

26. *Id.* at 328–29.

27. *Id.* at 319.

28. *Id.* at 315.

29. *Id.* at 326–27.

30. *Id.*

Third, Weinstein employed a collection of connected and influential lawyers. This included David Boies,³¹ Rudy Giuliani,³² Herb Wachtell,³³ lawyers who had previously worked closely with Manhattan District Attorney Cyrus Vance, Jr.,³⁴ and Lanny Davis, long time legal “fixer” for Bill and Hillary Clinton.³⁵ Weinstein’s legal team also included civil rights lawyer Lisa Bloom.³⁶ Bloom’s involvement was noteworthy because she had represented several prominent sexual assault victims and was in regular contact with Farrow about his investigation, but never disclosed that she was retained by Weinstein.³⁷ This team of legal powerhouses sought to exploit reputations, connections, and use intimidation to prevent the Weinstein story from coming to light.³⁸

Fourth, Weinstein engaged other media contacts in the practice of “catch and kill,” which gave rise to Farrow’s book title. This worked most extensively through American Media Inc. (“AMI”), the parent company of tabloid newspaper *The National Enquirer*.³⁹ The “catch and kill” practice involves paying for a story, typically one damaging or critical of a public figure such as Weinstein or Donald Trump, known as the “catch,” and then not running it, known as the “kill.”⁴⁰ Weinstein worked with AMI to silence

31. *Id.* at 12–13.

32. *Id.* at 60–62.

33. *Id.* at 124.

34. *See id.* at 75–76, 164, 221–22.

35. *Id.* at 91–92. Davis’s shady reputation was captured by Farrow’s partner’s observation as to who might have a phone number for him, “I don’t know, Pol Pot?”

36. *Id.* at 234–37.

37. *Id.* at 71–74, 103–04, 120.

38. *Id.*

39. *Id.* at 16–20, 327–28.

40. *Id.* at 346–47. Again, non-disclosure agreements are a key part of the formula. The purchase of stories was made exclusive and paired with agreements not to disclose. *Id.* at 332–36. Thus, AMI effectively owned reality, or key portions of it. *Id.* at 344–45. With this came significant influence over public figures. *Id.* at 16–19, 336–38. AMI overtly acknowledged engaging in “blackmail” to silence some stories to get to others. *Id.*

some stories and disseminate others to advance his ends.⁴¹ Weinstein became enormously confident in his ability to control media coverage.⁴²

Lastly, Farrow encountered resistance to his reporting from within NBC News itself. As his investigation progressed, NBC News and NBCUniversal (the parent company of NBC News), grew increasingly resistant to his reporting.⁴³ Resistance came in several forms. One instance was based on legal concerns such as tortious interference with contract claims based on reporting from sources who breached non-disclosure agreements.⁴⁴ Other concerns were cultural, as some executives in NBC News seemed resistant to creating controversy or complying with journalistic ethics.⁴⁵ NBC News resistance became so severe that Farrow was frozen out of additional work for the network, was quietly released from his contract, and had to take the Weinstein story elsewhere.⁴⁶ He eventually got the story into print with *The New Yorker*.⁴⁷ Lawyers for the magazine rejected as absurd arguments about tortious interference with contract and defamation that NBC News had capitulated to.⁴⁸ When Farrow's story eventually broke, NBC News was criticized for not maintaining good journalistic standards.⁴⁹

The problem at NBC News, however, ran more deeply. NBC News was severely compromised by the presence of sexual predators in its own

41. *Id.* at 54, 327–28.

42. *Id.* at 178, 231–32. Weinstein, after convincing NBC News to hold Farrow's story, bragged that he could certainly do the same with The New York Times which contemporaneously investigated Weinstein. *Id.* He also bragged to people around him about his ability to dictate media coverage he wanted. *Id.* at 108.

43. *Id.* at 64–65, 86–87, 118–19, 136–38, 141–43, 145–46, 153–54, 161–64, 179–80.

44. *Id.* at 65.

45. *Id.* at 176–78, 187–90, 197–99, 213–15, 275–77.

46. *Id.* at 228, 230–31.

47. *Id.* at 208–09.

48. *Id.* at 218–19, 234–36, 265–66.

49. *Id.* at 276, 289. Efforts Farrow made to not disparage NBC News broke down when Rachael Maddow, host of an NBCUniversal owned network show, pressed Farrow about the refusal of NBC News to run the story, and elicited the fact that the story had been ready and reportable but NBC News declined to air it. *Id.* at 290–93.

midst.⁵⁰ It had used non-disclosure agreements to hide sexual harassment and assault by Today Show host Matt Lauer, and executives involved with the Weinstein story.⁵¹ Weinstein leveraged knowledge of the culture of sexual impropriety at NBC News to prevent his story from coming to light.⁵² The network faced a mutually assured destruction situation which led them to put the brakes on Farrow's reporting. Ultimately, NBC News had a culture of sexual assault, compelled silence, and prioritizing business over journalism that made reporting the Weinstein story difficult.⁵³

Farrow's reporting, standing alone, presents a disturbing tale. It involves horrible crimes by sexual predators, cowardice and complicity by powerful figures, and failures of corporate integrity. Those realities alone make *Catch and Kill* an important read. It is the central role of lawyers, however, that makes it particularly important for them to read. The involvement of lawyers—both in failing to stop or affirmatively enabling misconduct—is a central aspect of the book.

III. WHO WATCHES THE WATCHMEN?

The ethical lapses by attorneys surrounding Weinstein were legion—many so glaring as to be impossible to be considered mere mistakes. Their first area of misconduct is one of the most basic: conflict of interest. Lisa Bloom and David Boies both had profound conflicts in the course of representing Weinstein.

Farrow knew Lisa Bloom because his sister, herself a victim of sexual assault, had been publicly defended by Bloom during her case.⁵⁴ Bloom had also appeared on Farrow's television show talking about sexual misconduct cases involving celebrities.⁵⁵ Farrow disclosed that he was investigating Weinstein when, while generally discussing non-disclosure agreements in

50. *Id.* at 370–74.

51. *Id.* at 372–77, 390–93. It is easy to grossly understate Lauer's misconduct. He had in fact anally raped a subordinate co-worker who had been drinking and pushed her to keep quiet about it. *Id.*

52. *Id.* at 395.

53. *Id.* at 398–400.

54. *Id.* at 71–73.

55. *Id.*

sexual abuse cases, Bloom told Farrow it would be useful to know who they were discussing.⁵⁶ The conversation went so far as Bloom mentioning names of potential lawyers to two of the victims Farrow had interviewed.⁵⁷ During his investigation, she periodically contacted Farrow with questions.⁵⁸ She also offered ideas on collateral stories and asked very specific questions about whether Farrow had seen non-disclosure agreements and how many witnesses he had.⁵⁹

When Farrow's story neared publication, he read a cease-and-desist letter from Weinstein lawyers with "a jolt."⁶⁰ Lisa Bloom was one of the lawyers representing Weinstein.⁶¹ When Farrow confronted Bloom she pointed out that she had mentioned that she knew Weinstein and David Boies.⁶² However, Bloom never said she was working for Weinstein while "confidentially" consulting with Farrow, and she had contemporaneously entered a book contract with Weinstein.⁶³ Even at this point she tried to manipulate Farrow, telling him, "you need to come in. I can help. I can talk to David and Harvey. I can make this easier for you."⁶⁴ Bloom also suggested that Rose McGowan, to whom she had previously provided names of possible counsel, was "crazy."⁶⁵ The former victim advocate acted as a public relations flack for Weinstein, seeking to portray him as the product of a different cultural time and place who had engaged in "mild indiscretions," not sexual assault.⁶⁶

56. *Id.*

57. *Id.* at 73. Rose McGowan contacted one of the lawyers Bloom identified.

58. *Id.* at 74, 103–04, 120.

59. *Id.* at 103–04, 120.

60. *Id.* at 233–36.

61. *Id.*

62. *Id.* at 237.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 270–71.

Bloom's conduct was as unethical as it was inexplicable. Bloom consistently failed to disclose that Weinstein was a client while advising and soliciting information from Farrow. She did not disclose her role when she suggested lawyers to represent Weinstein accusers. This failure violated her obligation not to imply, or at minimum, correct a clearly erroneous impression that she was disinterested.⁶⁷ Bloom also had an obligation not to be untruthful in assisting Weinstein to advance his fraudulent and criminal conduct.⁶⁸ At a more general level, her communications with Farrow involved acts of dishonesty, fraud, deceit, and misrepresentation.⁶⁹

Weinstein's primary lawyer, David Boies, likewise engaged in unethical conduct. He too labored under conflicts of interest, using the espionage firm Black Cube to try and stop *The New York Times* from publishing a Weinstein exposé while his firm represented the newspaper.⁷⁰ This was a direct conflict among current clients, a clear ethical violation.⁷¹ Retention of Black Cube by the Boies Schiller firm was also ethically suspect given that an expert Farrow interviewed said: "It's impossible to do what they do without breaking the law."⁷² At the direction of Weinstein's lawyers, Black Cube operatives used illegal means and violations of privacy rights to obtain information about his victims and investigators.⁷³ This constituted fraud upon

67. MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 2018).

68. MODEL RULES OF PROF'L CONDUCT r. 4.1 (AM. BAR ASS'N 2018).

69. MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2013). Her conduct was potentially prejudicial to the administration of justice by preventing information of accusers from coming to light and impeding the expeditious prosecution of Weinstein. *Id.* at r. 8.4(d).

70. FARROW, *supra* note 1, at 314–15.

71. MODEL RULES OF PROF'L CONDUCT r. 1.7(a) (AM. BAR ASS'N 2013). Although less certain on its face, it seems improbable that Boies could deploy an espionage firm against The New York Times to disrupt the Weinstein reporting without using confidential information to its disadvantage. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 1983) (prohibiting disclosure of confidential client information except in limited circumstances); MODEL RULES OF PROF'L CONDUCT r. 1.8(b) (AM. BAR ASS'N 1983) (prohibiting use of information relating to client disadvantage without written consent).

72. FARROW, *supra* note 1, at 315. Another Israeli based private intelligence firm told Farrow that "[m]ore than fifty percent of what they do is illegal." *Id.*

73. *See* MODEL RULES OF PROF'L CONDUCT r. 4.4(a) (AM. BAR ASS'N 1983).

third parties,⁷⁴ dishonesty, illegality, and general misconduct.⁷⁵ Those violations were not obviated by the fact that they were conducted by third parties working for Weinstein's lawyers.⁷⁶ It also appears that improper conduct by Boies in relation to sexual predators was not limited to his work for Weinstein.⁷⁷

Lawyers also facilitated suppression and destruction of evidence regarding Weinstein.⁷⁸ The case of Ambra Gutierrez is a central example of this. Gutierrez reported her 2015 sexual assault by Weinstein to police.⁷⁹ Working with New York police, she obtained a recorded admission by Weinstein that he had groped her.⁸⁰ Despite this, Gutierrez was subjected to grilling by prosecutors who eventually announced that the case would not be prosecuted, much to the displeasure of the investigating officers.⁸¹ When

74. MODEL RULES OF PROF'L CONDUCT r. 4.1 (AM. BAR ASS'N 2018).

75. MODEL RULES OF PROF'L CONDUCT r. 8.4.

76. See MODEL RULES OF PROF'L CONDUCT r. 5.3(c)(1) (AM. BAR ASS'N 1983); MODEL RULES OF PROF'L CONDUCT r. 8.4(a).

77. See Jessica Silver-Greenberg et al., *Jeffrey Epstein, Blackmail and a Lucrative 'Hot List'*, N.Y. TIMES (Nov. 30, 2019), <https://www.nytimes.com/2019/11/30/business/david-boies-pottinger-jeffrey-epstein-videos.html> [<https://perma.cc/Z8AR-N2NL>]. Ironically, *The New York Times* reporting suggests that Boies engaged in later acts of questionable ethics in order to try and rehabilitate his image after representing Weinstein. See *id.* Boies and John Stanley Pottinger intended to obtain footage produced by Jeffrey Epstein of sexual misconduct to submit demand letters to prominent targets to leverage settlements with payments to charitable foundations. See *id.* Doing so would involve pursuing claims of some questionable merit. MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 1983). It also arguably constitutes extortion. Stuart P. Green, *Theft By Coercion: Extortion, Blackmail, and Hard Bargaining*, 44 WASHBURN L.J. 553, 573–74 (2005).

78. FARROW, *supra* note 1, at 285.

79. *Id.* at 56–57.

80. *Id.* at 57–58.

81. *Id.* at 59–60. Police described the questioning by prosecutors as being in line with what they would have expected from Weinstein's defense lawyers. *Id.* The Manhattan District Attorney at the time was Cyrus Vance, Jr., who had extensive connections to Weinstein lawyers, including Boies. *Id.* at 60–61.

Farrow pursued her story, a line prosecutor reported that nothing in the investigation suggested Gutierrez was anything but truthful.⁸²

Additionally, key evidence from the case inexplicably vanished. As part of a settlement, Gutierrez had to surrender all copies of the Weinstein confession to his lawyers.⁸³ Law enforcement was not subject to that agreement, but the recording somehow vanished from the district attorney's office file.⁸⁴ The recording was explicitly referenced in the investigation reports, but missing.⁸⁵ When Farrow sought comment from Weinstein, he was incredulous and outraged that a copy of the confession still existed.⁸⁶ Weinstein's team asserted that there was an agreement with the district attorney's office that all copies of the tape would be destroyed; district attorney's office personnel denied that claim.⁸⁷ Whether an agreement was reached or not, it is indisputable that Weinstein believed that there was a tape and that the tape was not in the file. It is tough to find a more telling reflection of the arrogance and moral rot surrounding Weinstein than this angry and open assertion that a deal for the destruction of evidence of his criminal conduct was not being honored.

Again, it appears that lawyers associated with Weinstein worked to violate the law and, by extension, their ethical obligations.⁸⁸ More specifically, it appears that Weinstein's lawyers may have worked with prosecutors to avoid a legitimate prosecution and destroy evidence of that crime.⁸⁹

Moving one step beyond the outright destruction of evidence, Weinstein's lawyers systematically facilitated hiding evidence through oppressive non-disclosure agreements. The settlement agreement with Gutierrez

82. *Id.* at 55.

83. *Id.* at 63–64.

84. *Id.* at 66–67.

85. *Id.*

86. *Id.* at 285.

87. *Id.* Specifically, Weinstein's representative asserted that the agreement was between the district attorney's office and "our law firm that the tape police had would be destroyed." *Id.*

88. *See* MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2013).

89. *See* MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 1983) (explaining that lawyers shall not "destroy or conceal" items of evidentiary value).

provided for destruction of all evidence she possessed of Weinstein's confession.⁹⁰ Weinstein explicitly referenced a non-disclosure agreement with one accuser to pressure Farrow against releasing his story.⁹¹ Weinstein's many agreements intended to keep evidence of his misconduct from ever making its way into the world.⁹² In addition to these non-disclosure agreements, lawyers around Weinstein facilitated "catch and kill" contracts to spike negative stories.⁹³ While not illegal, these agreements suppressed access to evidence on a systematic basis. Because Weinstein's accusers were contracted into silence, law enforcement and journalists were precluded from gathering evidence due to that silence and threats of legal action by Weinstein. This too was an ethically questionable preclusion of access to evidence by his lawyers.⁹⁴

A final ethical lapse by lawyers was the failure of corporate lawyers to push back on cultures of sexual abuse and silence at Weinstein's company and NBC News.⁹⁵ Outsiders identified "a large corporate conspiracy" to cover up Weinstein's misconduct.⁹⁶ Board members pushed back on Weinstein and attempted to bring his abuses to light, but lawyers, including the ubiquitous David Boies, successfully resisted on his behalf for Weinstein.⁹⁷ Likewise, at NBC News, the corporate machine was able to hide patterns of misconduct by prominent on-air personalities and executives.⁹⁸ This included using non-disclosure agreements to hide sexual harassment claims against executives who suppressed the Weinstein story and news of Matt

90. FARROW, *supra* note 1, at 62–64.

91. *Id.* at 285.

92. *Id.* at 47–48, 63–64, 219, 221, 233–40, 252.

93. *Id.* at 54, 327–28.

94. MODEL RULES OF PROF'L CONDUCT r. 3.4(a).

95. *See* MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N 1983).

96. FARROW, *supra* note 1, at 291.

97. *Id.* at 273–74.

98. *See id.* at 290–91.

Lauer's rape of a co-worker.⁹⁹ Enabling this culture of silence pitted lawyers directly against the openness and integrity expected of a journalistic outlet and the best interests of the company.¹⁰⁰ In the course of seeking to suppress Lauer's misconduct and that of others, NBC lawyers leveraged linguistic technicalities to not admit settlements,¹⁰¹ intimidated victims with non-disclosure agreements,¹⁰² and pursued secrecy rather than openness and remedial action at the corporate governance level.¹⁰³ NBC lawyers even tried to pressure Farrow's publishers to prevent the release of his unrelated foreign policy book.¹⁰⁴ When it involved one of their own, NBC News executives and lawyers seemed to value protecting on-air talent, their careers, and avoiding public embarrassment of the NBC brand more than journalism. NBC lawyers and journalists seemed to be occupying very different cultures when push came to shove.

What does this depressing litany of lawyer misconduct tell us? Some important things, actually.

First and foremost, it reiterates the responsibility lawyers have as members of a profession that regulates itself. Professional responsibility begins with individual lawyers knowing the rules and following them. When considerations like big fees, pleasing famous or powerful clients, or having public prominence are given primacy over ethical behavior, lawyers engage in misconduct. The profession suffers as a result. It is impossible to say if these concerns motivated Bloom, Boies, or NBC lawyers, but their lapses are impossible to ignore. They are a cautionary tale to all lawyers to place professionalism first.

Compliance begins with individual lawyers; enforcement begins with the profession. Lawyers themselves enforce the rules, including the

99. *See id.* at 174–75, 213–14, 375–77, 384–85.

100. *See id.* at 372–73 (recounting NBC counsel telling reporters that it would help NBC if “the press” would stop covering Lauer's misconduct); *id.* at 394–95 (recounting Weinstein efforts to blackmail NBC News to suppress his story by threatening to expose Lauer).

101. *Id.* at 375.

102. *Id.* at 379.

103. *See id.* at 394–95.

104. *Id.* at 402–03.

obligation to report serious misconduct.¹⁰⁵ In the case of the Weinstein lawyers, however, the profession failed. No record of public discipline exists for any of them.¹⁰⁶ At some level, the failure of the profession to sanction patterns of misconduct by lawyers, particularly prominent lawyers for the rich and powerful, is a systemic failure as disturbing as the systemic predation of Weinstein and others. If professional responsibility—and the collective enforcement of it—breaks down in favor of secondary concerns, the legal profession risks being lost. If for no other reason, wrestling with this question makes *Catch and Kill* a worthy read for any lawyer.

Second, the conduct of these lawyers reflects a failure to consider themselves as moral actors and leaders. Lawyers facilitating the conduct of sexual predators through their work raises the question of their moral, not merely legal, responsibility.¹⁰⁷ Lawyers can take the view that their moral responsibility is limited to their role, meaning that the lawyer need only comply with the client's wishes and is not a moral actor beyond that.¹⁰⁸ Certainly lawyers around Weinstein and others appear to have limited their moral responsibility to carrying out the directives of their clients within the outermost boundaries of the law. The results demonstrate that when lawyers abdicate moral responsibility, others can pay the price.

So too when lawyers fail to accept their responsibility as leaders.¹⁰⁹ When lawyers fail to act as leaders, moral rot can occur around the clients they represent and highly negative consequences follow.¹¹⁰ Lawyers must

105. MODEL RULES OF PROF'L CONDUCT r. 8.3(a) (AM. BAR ASS'N 1983) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

106. Many jurisdictions provide for private reprimand or other confidential disciplinary measures. It is possible that this took place.

107. See Robert J. Muise, *Professional Responsibility for Catholic Lawyers: The Judgment of Conscience*, 71 NOTRE DAME L. REV. 771, 795–96 (1996).

108. See *id.*

109. See, e.g., ANTHONY C. THOMPSON, DANGEROUS LEADERS: HOW AND WHY LAWYERS MUST BE TAUGHT TO LEAD 3–4 (2018) (noting that lawyers have an obligation to lead by speaking up to clients about the possible impacts of decisions).

110. See *id.* at 72–75.

bring moral conduct to their work for clients.¹¹¹ But all too often, moral action is abdicated by lawyers.¹¹² Lawyers have the ability to take responsibility and address the consequences of actions by their clients, manifesting true leadership in doing so.¹¹³ Alas, the lawyers around Weinstein and NBC News utterly failed to do so. They facilitated the worst impulses of their clients when they could have been moral leaders. Their failure makes clear the need for lawyers to be moral leaders and the enormous harm that can come when they do not.¹¹⁴

IV. SHOULD SILENCE BE FOR SALE?

Farrow's book is also a lens to look at the ongoing validity of non-disclosure agreements. Those agreements have had profoundly negative consequences for victims of sexual misconduct. They allowed the conduct of Weinstein,¹¹⁵ Matt Lauer,¹¹⁶ President Trump,¹¹⁷ and other powerful men to be hidden from view. They allowed media companies like AMI to gain blackmail power over public figures and affect public events as a result.¹¹⁸ *Catch and Kill* raises the question of whether these contracts should be allowed.¹¹⁹

111. DEBORAH L. RHODE, *LAWYERS AS LEADERS* 84–85 (2017).

112. *See id.* at 90–91.

113. *Id.* at 127–28.

114. THOMPSON, *supra* note 109, at 55–56.

115. FARROW, *supra* note 1, at 47–48, 63–64, 219, 221, 233–40, 252.

116. *Id.* at 372–77, 390–93.

117. *Id.* at 346–47.

118. *Id.* at 16–19; *id.* 336–38.

119. It may be argued that preventing such contracts prevents parties to disputed claims from keeping potentially embarrassing information to themselves. Parties who believe they will be embarrassed or upset by the disclosure of information can simply choose to remain silent. For most private citizens, this will likely be enough to maintain confidentiality. It is more complicated with public figures, however. There is a greater interest to know about their private conduct, some positive and some simply prurient. Even in the context of public figures, however, if the parties keep the matter to themselves it is very likely that no one else will hear of it. Contrast the negative effects of some public figures having their misconduct disclosed with the ability of public figures

It is well settled that contracts can be unenforceable for reasons of being illegal or contrary to public policy.¹²⁰ For contracts not made expressly illegal by positive law, the question is whether the interest in their enforcement is outweighed by public interest against enforcement.¹²¹ Under the common law doctrine the “public interest” of enforcing a contract is considered in the context of the values of the time and place, as well as the facts and circumstances of the particular case.¹²² In different times and places the doctrine has been used to invalidate contracts for gambling, prostitution, interference with business requirements or voting rights, divorce, or other transgressions of “public morality.”¹²³ The doctrinal touchstone has been that if enforcing a contract hurts the public, it will not be.¹²⁴

An increasing number of courts and scholars have wrestled with the question of enforcing non-disclosure agreements in the context of sexual misconduct.¹²⁵ Beyond common law development, some legislatures have considered or adopted statutes making non-disclosure agreements

to hide their misconduct on a systematic basis. The public harm of the use of widespread nondisclosure agreements outweighs the potential impact on individuals in their unavailability.

120. Sandra S. Baron et al., *Tortious Interference: The Limits of Common Law Liability for News Gathering*, 4 WM. & MARY BILL RTS. J. 1027, 1031 (1996).

121. Myanna Dellinger, *Trophy Hunting Contracts: Unenforceable for Reasons of Public Policy*, 41 COLUM. J. ENVTL. L. 395, 424–25 (2016) (citing RESTATEMENT (SECOND) OF CONTRACTS § 778 (AM. LAW INST. 1939)).

122. *Id.* at 425–26.

123. *Id.* at 426–27.

124. *Id.* at 426.

125. See, e.g., Ryan Philp, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL L. REV. 845, 870–73 (2003) (discussing various scholarly treatments of non-disclosure agreements and proposed balancing tests to determine their enforceability). It has also been suggested that such agreements should be assessed for reasonableness to determine enforceability, much like agreements in restraint of trade are; Joan C. Williams et al., *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 198–201 (2019) (discussing application of “reasonableness” test to determine if non-disclosure agreements are enforceable in employment settings). Such a test would evaluate the scope of the agreement, the context and purpose of disclosure, and the interests of employers, employees, and the public to determine enforceability; *id.* at 205–15. Certainly, given Farrow’s discussion of many Weinstein non-disclosure agreements as significantly power imbalanced transactions, almost contracts of adhesion, there is a serious question if they would hold up under such a reasonableness review for enforceability.

unenforceable against sexual assault victims or whistleblowers.¹²⁶ At a critical juncture, the greatest contribution of *Catch and Kill* may be providing a high profile demonstration of the enormous public costs of these agreements, which can advance that debate. The costs are visible in several concrete ways.

First, and most obviously, these agreements allow wealthy predators to go undetected and unpunished. If not forever, certainly for the time necessary to add to their list of victims. Weinstein did.¹²⁷ Lauer did.¹²⁸ NBC News executives did.¹²⁹ The grim reality that purchasing silence is purchasing additional opportunity to offend is a heavy public cost which weighs against allowing non-disclosure agreements regarding sexual misconduct to be enforceable.¹³⁰ By showing the public and policy makers how these agreements allow predators to hide, *Catch and Kill* provides an important contribution to the development of contract law.

Second, some of these contracts extended to conduct that was criminal. While some of Weinstein's accusers alleged "mere" sexual harassment, others alleged rape. Lauer's victim described an anal rape.¹³¹ Criminal misconduct typically cannot be the basis of an enforceable non-disclosure agreement in any context.¹³² There is a valid question of why rapists should be allowed to contract away evidence of their crimes. Stated differently, does society want to allow contracts for conspiracies of criminal silence, particularly when that allows the underlying criminal activity to continue?

Third, these agreements have a significant deterrent effect on those who might bring sexual abuse to light. Weinstein forcefully leveraged his agreements against NBC News, *The New Yorker*, and other media outlets to

126. David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 167–68 (2019) (discussing debate in New York and other jurisdictions).

127. FARROW, *supra* note 1, at 47–48, 63–64, 219, 221, 233–40, 252.

128. *Id.* at 372–77, 390–93.

129. *Id.* at 375–76, 398–400.

130. Hoffman & Lampmann, *supra* note 126, at 173–75.

131. FARROW, *supra* note 1, at 385.

132. Baron et al., *supra* note 120, at 1031.

suppress reporting his misconduct.¹³³ It certainly had a chilling effect on Farrow's reporting at NBC.¹³⁴ Scholars conclude that tortious interference claims against the media for reporting information subject to non-disclosure agreements are probably not viable.¹³⁵ Regardless of whether those cases ultimately prevail, their threat can significantly deter reporting on sexual misconduct as it did in the Weinstein case. Non-disclosure agreements appear to also have interfered with law enforcement in the Ambra Gutierrez case.¹³⁶ *Catch and Kill* documents how private non-disclosure agreements can undermine the public right to know and obtain evidence of crimes brought forward for prosecution. This weighs strongly against the enforceability of such agreements.

Fourth, use of these agreements as part of the “catch and kill” system allows unscrupulous media outlets to obtain enormous leverage over public figures.¹³⁷ For example, AMI expressly acknowledged the blackmail power this provided.¹³⁸ The detrimental impact to the public can be seen in AMI's attempt to swing the 2016 presidential election by helping Michael Cohen catch and kill the story of Stephanie Clifford's affair with Donald Trump.¹³⁹ Allowing elections or other important public events to be disrupted by the intentional suppression of information has a destructive effect on the public. By purchasing stories to control them, AMI could leverage individuals, highlight or hide stories based on how it helped the company, and control what the “truth” is. These agreements let certain outlets gain an enforceable monopoly on stories. Paired with an impulse to leverage rather than report them, it gives stunning power to those outlets. The possibility to abuse such contracts is enormous and apparent. This too is a reason that “catch and kill” agreements should not be enforceable.

133. FARROW, *supra* note 1, at 214–15, 217.

134. *Id.*

135. Baron et al., *supra* note 120, at 1032–35.

136. FARROW, *supra* note 1, at 285.

137. *Id.* at 16–19; 336–38.

138. *Id.* at 346.

139. *Id.* at 353.

There are other public costs to enforcing these types of agreements. They lead to increased employment turnover.¹⁴⁰ They promote insecurity in the workplace for other employees.¹⁴¹ The resulting culture can embolden abusers and discourage victims.¹⁴² The social costs of such agreements are, in short, very high. As a result, courts and some legislators have rejected them.¹⁴³ *Catch and Kill* is not presented against a blank slate. What should be done with it?

Courts should recognize the void against public policy doctrine in this context and apply it consistently. Appellate courts should synthesize and clarify application of the doctrine. Practitioners and academic lawyers should continue to raise awareness of the limited enforceability of agreements that seek to hide evidence of criminal conduct or whistleblower reports. Practitioners should consider if they are valid provisions to include in contracts going forward. Lastly, legislatures should consider passing additional laws expanding and clarifying the limits on these agreements. *Catch and Kill* is a valuable contribution because it shows in graphic and jarring terms the importance of doing so. Lives are genuinely at stake.

V. UNHAPPILY EVER AFTER IN HOLLYWOOD?

It might seem surprising that a page-turner about Hollywood misconduct can usefully discuss a lot of practical issues that lawyers face. But *Catch and Kill* does just that, and as a result, is an important book for lawyers to read. It presents difficult issues of professional responsibility, leadership and moral action, and contract law in stark fashion. Lawyers who read it will be challenged to think about how to respond as individuals and as a profession to challenges of professional regulation, client management, and maintaining personal values. Any lawyer can use *Catch and Kill* to consider the role of lawyers and the law as moral forces in business and society.

All these important questions are presented in a gripping, well-written tale. A thinking lawyer's page-turner is worth the time and effort. *Catch and Kill* is such a book. Lawyers—and those with interest in the legal profession—would do well to take note.

140. Hoffman & Lampmann, *supra* note 126, at 178.

141. *Id.*

142. *Id.* at 178–79.

143. Philp, *supra* note 125, at 872–74; Baron et al., *supra* note 120, at 1032–34.

EPILOGUE: THE WEINSTEIN CONVICTION AND SENTENCE

On February 24, 2020, a Manhattan jury convicted Harvey Weinstein of first-degree criminal sexual act and third-degree rape.¹⁴⁴ He was immediately remanded to custody.¹⁴⁵ Weinstein was sentenced to serve twenty-three years in prison after unrepentantly telling the court that his experience was like those blacklisted in the communist scares of the 1950s.¹⁴⁶ Separate prosecution for rape and sexual assault awaited Weinstein in Los Angeles.¹⁴⁷ The verdict, Weinstein's sentence, and how they were arrived at is a necessary coda to any consideration of *Catch and Kill*.

An inevitable, if simplistic, question about an event like this is: What does it mean? What Weinstein's conviction and sentence mean probably depends on the perspective from which they are assessed.

For Harvey Weinstein, it means that a predator was finally brought to justice (if incompletely, given that most of Weinstein's victims were not part of the case).¹⁴⁸ Given that he was sixty-seven years old at the time of his conviction, and had significant health issues almost immediately after being sentenced, it may also mean that Weinstein spends the rest of his life in prison.¹⁴⁹ But it did not bring Weinstein to a point where he chose to apologize to anyone for anything.¹⁵⁰

144. See Alan Feuer, *5 Takeaways From the Weinstein Verdict*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/nyregion/harvey-weinstein-rape-guilty.html> [<https://perma.cc/7VF9-GLJB>].

145. *See id.*

146. Jan Ransom, *Harvey Weinstein's Stunning Downfall: 23 Years in Prison*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/nyregion/harvey-weinstein-sentencing.html?referringSource=articleShare> [<https://perma.cc/4NPZ-Q5MB>].

147. *Id.*

148. *Id.* The sentencing judge noted that “[a]lthough this is a first conviction, it is not a first offense. There is evidence before me of other incidents of sexual assault involving a number of women all of which are legitimate considerations for sentence.” *Id.*

149. *Id.*

150. *See id.*

For Weinstein's victims, his conviction and sentence bring some level of closure,¹⁵¹ with his status as a sexual predator now a matter of record. But that closure is not for all his victims nor without substantial costs.¹⁵² Pursuing justice against powerful predators was not easy for these women, nor does the conviction of one predator alter the power equation for victims of sexual assault by powerful men.¹⁵³

For Manhattan District Attorney Cyrus Vance, the verdict adds to a mixed legacy. Indisputably, the Weinstein prosecution and conviction pushed the envelope of prosecuting powerful predators.¹⁵⁴ It may pave the way for more prosecutions of high-profile predators in the face of complex evidentiary and legal issues,¹⁵⁵ for which Vance's office deserves praise. However, the verdict necessarily revives questions about why Vance's office did not previously prosecute Weinstein on the force of the recordings obtained by Ambra Gutierrez and why the office dismissed other high-profile sexual assault cases.¹⁵⁶ For Vance, the conviction adds layers of complexity.

Weinstein's conviction following a complicated investigation and trial puts front and center the societal response to sexual assault and harassment.¹⁵⁷ Several accusing witnesses had sexual relationships with Weinstein after their assaults.¹⁵⁸ Slut shaming survived the trial, even thrived actually, as Weinstein's lawyer Donna Rotunno argued that a conviction would promote "a universe that strips adult women of common sense, autonomy and

151. Megan Twohey & Jodi Kantor, *With Weinstein Conviction, Jury Delivers a Verdict on #MeToo*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/us/harvey-weinstein-verdict-metoo.html?referringSource=articleShare> [https://perma.cc/36SM-RD8D].

152. *Id.*

153. Rebecca Solnit, *The Harvey Weinstein Verdict Is a Watershed—and a Warning*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/opinion/sunday/harvey-weinstein-verdict.html> [https://perma.cc/9T8P-HLWX].

154. Feuer, *supra* note 144.

155. *Id.*

156. *Id.*

157. Solnit, *supra* note 153.

158. Feuer, *supra* note 144.

responsibility.”¹⁵⁹ That trope was rejected by the jury, however, and may be losing social acceptance.¹⁶⁰ On the other hand, women are not now simply believed without reservation. The accusers in Weinstein’s trial were not uniformly accepted, and the testimony of actress Anabella Sciorra, key to getting Weinstein’s actions into public view, was particularly undercut on cross-examination as she could not recall months or even years of key events.¹⁶¹ Human recollection and communication remain uncertain dances, particularly in the fraught environment of sexual relationships. Ongoing questions of consent, power, dynamics, and relationships that alternate between consensual and abusive remain complicated, and fact specific questions. It also remains a reality that sexual relationships, workplaces, and gender perceptions in society involve complex questions of psychology, sociology, and human nature. While Weinstein’s conviction may be a watershed moment in the #MeToo movement, it is hard to say that it is the pivot point after which these questions become clear or easy for anyone.¹⁶²

Lastly, this is not the end of powerful men using their power for sexual gratification or to impose silence on victims. Several other credibly accused men in the entertainment and news industries remain free, if largely banished.¹⁶³ Former New York City Mayor Mike Bloomberg’s entry into the Democratic primary ensured that the use and enforceability of nondisclosure agreements would be a significant issue in the second presidential election in a row.¹⁶⁴ Weinstein’s verdict was an individual conviction, not a societal resolution.

159. Twohey & Kantor, *supra* note 151. Ms. Rotunno previously argued publicly that she had never been a victim of sexual assault because she had the wisdom to never put herself “in that position.” *Id.*

160. *Id.*

161. Feuer, *supra* note 144.

162. Twohey & Kantor, *supra* note 151.

163. Nicole Sperling, *Harvey Weinstein Is Gone, but Hollywood is Still a Man’s World*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/business/media/harvey-weinstein-hollywood.html?referringSource=articleShare> [<https://perma.cc/LU4V-Q3KZ>].

164. Amber Phillips, *Bloomberg Now Says He’ll Release Women From Nondisclosure Agreements. Here’s How Those Work*, WASHINGTON POST (Feb. 21, 2020, 1:51 PM), <https://www.washingtonpost.com/politics/2020/02/20/warren-bloomberg-debate-nondisclosure-agreements/> [<https://perma.cc/U6G4-2GME>].

In the end, Weinstein's conviction and sentencing is perhaps the moment at which his movie begins to end. But for lawyers and society at large, disturbing issues of sexual assault, abuse of power, unethical and unprofessional conducts, and espionage (both corporate and personal) are not a movie. Even with this outcome, there is no "happily ever after," at least not yet.