SILENCE FOR SALE

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In the battle between freedom of contract and freedom of speech, contract almost always wins. Recently, nondisclosure agreements (NDAs)—contracts that censor speech—have come under intense scrutiny for cloaking wrongdoing, and scholars have not entirely confronted the harm that contractually enforced silence unleashes on free expression. Prompted by the #MeToo movement, and especially the devastating success of NDAs that prohibit victims of sexual harassment and assault from speaking out, this Article argues that freedom of contract should not always trump freedom of speech. NDAs are ubiquitous in our lives and they can serve important individual and social interests. But some NDAs also conflict with cardinal free speech values. After articulating the significant threats that NDAs can present to the dominant free speech values (truth, democracy, and agency), this Article contends that courts should tap into the common law doctrine voiding contracts against public policy. Especially in the late eighteenth and early nineteenth centuries, the common law did not enforce contracts that contradicted fundamental constitutional principles. Drawing on this doctrine, the Article concludes that courts should not enforce NDAs that violate the public policy of free expression by reference to two well-known examples.

INTRODUCTION

A few months before he died of a sudden heart attack in October 1946, Leroy Gardner, director of the prestigious Saranac Laboratory, received a visitor. The visitor, trailblazing industrial toxicologist Harriet Hardy, found Gardner distressed. The manufacturers who funded his research forbade him from publishing his animal studies, in which mice and cats exposed to asbestos developed cancer.[1] The asbestos industry enforced its contractual veto over publication—"one of many instances where asbestos corporations manipulated and influenced the scientific literature to protect their vested interests."[2] Fifty years later, the disgraced movie producer Harvey Weinstein built a "complicity machine" to quiet allegations of years of abuse. Victims of Weinstein's predation were contractually bound to stay mum.[3] Bill O'Reilly, the former Fox News

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1. Harriet Hardy & David Egilman, *Corruption of Occupational Medical Literature: The Asbestos Example*, 20 AM. J. INDUS. MED. 127, 128 (1991).

2. David S. Egilman & Harriet L. Hardy, *Manipulation of Early Animal Research on Asbestos Cancer*, 24 AM. J. INDUS. MED. 787, 789 (1993); *see also* HARRIET L. HARDY, CHALLENGING MAN-MADE DISEASE 43 (1983); Hardy & Egilman, *supra* note 1; Bill Richards, *New Data on Asbestos Indicate Cover-Up of Effects on Workers*, WASH. POST, Nov. 12, 1978, at A1.

3. Megan Twohey et al., *Feeding the Complicity Machine*, N.Y. TIMES, Dec. 6, 2017, at A1.

host, silenced his own accusers by paying $45 million in confidential settlements.[4] Some of these bargains required not just silence but also, if the information ever became public, denial.[5] In the final months of his life, Ian Gibbons, a brilliant scientist who had the tragic misfortune of being hired by Theranos, could not confide in his wife because of the strict agreement he had signed.[6] And who could forget Donald Trump, whose attorney, in 2016, paid two women to remain silent over alleged affairs.[7]

The nondisclosure agreement (NDA) is the legal mechanism enabling silence to be sold, and a crucial pillar of many schemes to conceal information of vital public import. NDAs are everywhere because the need for confidentiality arises in "infinite and consequential circumstances."[8] President Trump himself helpfully tweeted that NDAs are "very common among celebrities and people of wealth."[9] In fact, they are very common, period. In the S&P 1500, about 87% of CEO employment contracts contain an NDA.[10] For everyone else, an NDA is a condition of employment "offered by employers on a take-it-or-leave-it basis."[11] Employment, dispute resolution, deals, the gig economy, journalism, intimacy—name a relational context, and some lawyer somewhere has regulated its information flow with an NDA. Indeed, NDAs are so common that companies automate their production. In 2017, the general counsel of Adobe Systems explained that 70% of their 2,000 NDAs executed annually do not require a lawyer.[12] Sometimes an NDA only needs "one click to generate"; otherwise, "a dynamic agreement . . . is built on questions and answers."[13]

Confidentiality agreements are valuable. They protect privacy. A victim is compensated for a promise of privacy, and a wrongdoer pays for the assurance that misconduct is hushed.[14] NDAs also protect commercially valuable information. Google's algorithms and Coca-Cola's formulae are closely guarded trade secrets. NDAs assure companies that such valuable secrets will not be

4. Emily Steel, *Settlement Agreements Reveal How O'Reilly Silenced His Accusers*, N.Y. TIMES, Apr. 5, 2018, at B3.

5. *Id.*

6. JOHN CARREYROU, BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP 146 (2018).

7. Michael Rothfeld & Joe Palazzolo, *Trump Lawyer Paid Porn Star*, WALL ST. J., Jan. 13, 2018, at A1.

8. RONALD GOLDFARB, IN CONFIDENCE: WHEN TO PROTECT SECRECY AND WHEN TO REQUIRE DISCLOSURE 156 (2009).

9. Donald J. Trump (@realDonaldTrump), TWITTER (May 3, 2018, 10:54:38 AM UTC), https://twitter.com/realDonaldTrump/status/991994433750142976.

10. Norman D. Bishara et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 4 (2015).

11. Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 384–85 (2006).

12. Mike Dillon, *How We Stripped Down NDAs*, CORP. COUNS. BUS. J. (Sept. 14, 2017), https://ccbjournal.com/articles/how-we-stripped-down-ndas-adobes-gc-wanted-nondisclosure-agreement-template-could-be.

13. *Id.*

14. Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 313 (2018).

freely passed along to competitors. Without NDAs, moreover, many negotiated deals would (and many settlements could) fall over. Major news stories might not materialize if confidentiality of sources could not be guaranteed. And so on.

Perhaps it is precisely because NDAs are so valuable that the assault on their enforceability has been piecemeal. Plaintiffs' lawyers have focused on Trump, who, as far as NDAs go, is an easy target: the unconstitutional-conditions doctrine prevents governments from censoring unclassified information by contract.[15] Or, they have focused on content-neutral doctrines that police all contracts, like unconscionability and duress.[16] There are avenues for attacking specific types of NDAs, including the National Labor Relations Act[17] and state legislation prohibiting NDAs when settling sexual-assault claims.[18] The scholarship, while thoughtful, has also failed to supply sufficiently robust conceptual resources to confront the entirety of the NDA problem. One scholar proposed regulations that target repeat offenders.[19] Another argued that NDAs should be subject to scrutiny on public policy grounds, but that argument was limited by its framing: NDAs analogous to those that protect trade secrets are valid, and NDAs analogous to those that conceal crime are not.[20] Still others argue that NDAs are unenforceable when they amount to unreasonable restraints of trade[21] or when they harm third parties.[22]

One of the profound social insights of the past three years is that all this private (more accurately, secret) ordering shapes public discourse. And yet, after this collective realization dawned, and in all the critical acid publicly poured over NDAs, one question remains: where is free speech? The First Amendment, we are told, is absent for two good reasons. One is the state-action doctrine. The Free Speech Clause and corresponding state guarantees apply only to governments, not to private parties. As a federal district court recently observed, there is no state action when a court "merely" enforces a private

15. *See* McGehee v. Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983); United States v. Marchetti, 466 F.2d 1309, 1313 (4th Cir. 1972).

16. *See, e.g.*, Emma J. Roth, *Is a Nondisclosure Agreement Silencing You From Sharing Your 'Me Too' Story? 4 Reasons It Might Be Illegal*, ACLU (Jan. 24, 2018, 9:45 AM), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/nondisclosure-agreement-silencing-you-sharing-your-me-too.

17. *See, e.g.*, Quicken Loans, Inc. v. NLRB, 830 F.3d 542, 545 (D.C. Cir. 2016) (denying a petition to review NLRB's determination that an employment contract forbidding employees from using or disclosing a vast ambit of personnel information or from criticizing the employer publicly violated the NLRA).

18. *E.g.*, CAL. CIV. PROC. CODE § 1002 (West 2009).

19. Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 74, 79 (2018).

20. Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 295 (1998).

21. Jodi L. Short, *Killing the Messenger: The Use of Nondisclosure Agreements to Silence Whistleblowers*, 60 U. PITT. L. REV. 1207, 1220 (1999).

22. David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 170 (2019).

contract.[23] "To hold otherwise," said the judge, "would mean that courts could never enforce non-disclosure agreements."[24]

The second is freedom of contract. In 1991, the Supreme Court said that a law that "simply requires those making promises to keep them" escapes First Amendment scrutiny, because any speech restrictions are "self-imposed."[25] Speech rights are voluntarily traded.[26] "Constitutional rights are waived every day," said Frank Easterbrook nearly forty years ago, and "[t]here is nothing special about the First Amendment."[27] Eugene Volokh argued that "it's proper to let speakers contract away their rights."[28] For Daniel Solove and Neil Richards, speech rights are "alienable," and the First Amendment should apply to a private law restriction on speech only if "the speaker cannot avoid accepting the duty."[29] Timothy Zick is partial to what he called an "autonomy approach."[30] Similarly, Erica Goldberg thought that NDAs get a free speech pass because "individuals voluntarily exchanged their ability to speak for compensation."[31]

The triumph of contract over speech was on full display during the Democratic Party's ninth presidential debate in Las Vegas on February 19, 2020. Doubtless prompted by #MeToo, Senator Elizabeth Warren challenged Michael Bloomberg to release women from NDAs they had signed to settle sexual-harassment and gender-discrimination complaints:

> Elizabeth Warren: . . . [A]re you willing to release all of those women from those nondisclosure agreements so we can hear their side of the story?
>
> Michael Bloomberg: . . . We have a very few nondisclosure agreements. . . . These would be agreements between two parties that wanted to keep it quiet and that's up to them. They signed those agreements and we'll live with it.
>
> . . .
>
> Elizabeth Warren: . . . [W]hen you say they signed them and they wanted them, if they wish now to speak out and tell their side of the story about what it is

23. Bronner v. Duggan, 249 F. Supp. 3d 27, 41 (D.D.C. 2017).

24. *Id.* (citing United Egg Producers v. Standard Brands, Inc., 44 F.3d 940, 943 (11th Cir. 1995)).

25. Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991).

26. G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 431, 479–80 (1993).

27. Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 346.

28. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1057 (2000).

29. Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1677, 1692 (2009).

30. Timothy Zick, *"Duty-Defining Power" and the First Amendment's Civil Domain*, 109 COLUM. L. REV. SIDEBAR 116, 119 (2009), https://columbialawreview.org/wp-content/uploads/2016/08/Zick.pdf.

31. Erica Goldberg, *Thoughts on Enforcing Non-Disclosure Agreements*, IN A CROWDED THEATER (Mar. 21, 2018), https://inacrowdedtheater.com/2018/03/21/thoughts-on-enforcing-non-disclosure-agreements/.

> they alleged, that's now okay with you? You're releasing them on television tonight?
>
> Michael Bloomberg: . . . Senator, no. . . . Senator, the company and somebody else . . . decided when they made an agreement that they wanted to keep it quiet for everybody's interests. . . . They sign the agreements and that's what we're going to live [with].
>
> . . .
>
> Elizabeth Warren: . . . [T]he question is, are the women . . . bound by being muzzled by you? And you could release them from that immediately.
>
> . . .
>
> Michael Bloomberg: . . . I've said, we're not going to end these agreements because they were made consensually and they have every right to expect that they will stay private.[32]

A remarkable feature of this exchange is the extent to which Warren and Bloomberg agree. The central premise of Warren's challenge to Bloomberg—one that enjoyed apparent consensus on the debate stage[33]—is that Bloomberg lawfully retained the contractual right to release the complainants from their nondisclosure obligations. No one suggested that the contracts themselves might be legally unenforceable.

The two responses which purportedly justify the absence of free speech—the state-action doctrine and freedom of contract—are red herrings. The state-action doctrine might explain the absence of the First Amendment, but it does not explain the absence of free speech. And reciting freedom of contract just begs the question: why does freedom of contract always trump freedom of speech? The answer cannot simply be waiver, promise, alienation, or some other synonym for "contract." The values and interests in enforcing NDAs must be actually weighed against the values and interests in free speech. Perhaps sometimes our silence should not be sold.

This Article embraces the opportunity presented by the NDA crisis to shake our instinctive, closely held faith that selling silence does not implicate free speech. It argues that NDAs present significant threats to the dominant free speech values (truth, democracy, and agency) and that courts should refuse to enforce some NDAs for violating the public policy of free expression. In establishing these claims, this Article makes three primary contributions. The first is an extensive account of the prevalence and value of NDAs. This Article shows that confidentiality agreements are crucial components of our social and legal lives. From arms-length commercial parties to intimate partners, NDAs temper the information flow and assure us that our confidences will be kept.

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32. *Democratic Debate Transcript: Las Vegas, Nevada Debate*, REV (Feb. 20, 2020), https://www.rev.com/blog/transcripts/democratic-debate-transcript-las-vegas-nevada-debate.

33. Joe Biden and Pete Buttigieg also implored Bloomberg to "release" the complainants. *Id.*

This Article highlights some important interests that NDAs serve: economy, privacy, the administration of justice, democracy, and national security.

Second, this Article articulates how NDAs threaten dominant free speech values. Consider, for example, agency. Even for speaker-centric agency accounts, NDAs are problematic. On these theories, free speech is crucial for self-expression or self-development.[34] NDAs destabilize these interests by curbing a confidant's ability to externalize her mental contents.[35] This is not a hypothetical concern: recall Ian Gibbons, the late Theranos scientist who felt he could not confide in his wife.[36] And at least one of the NDAs wielded by Harvey Weinstein required the victim to "use all reasonable endeavours not to disclose" Weinstein's name "during the course of receiving treatment" from her therapist.[37] For audience-focused accounts of agency, NDAs are equally problematic. NDAs limit audience autonomy if they deprive listeners of information they would otherwise have. Our agency decreases when information decreases. The secret ordering ordained by NDAs, therefore, undermines agency.[38]

The third contribution of this Article is to identify and break the First Amendment's monopoly over free speech. Since waking from its hibernation in the early twentieth century,[39] the Free Speech Clause has grown to mediate all our free speech discourse. It's now impossible to talk about free speech without also talking about the First Amendment. This is not the familiar complaint that the Free Speech Clause embodies a "first class" right,[40] or has been

34. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 50–51 (1989).

35. *See* SEANA VALENTINE SHIFFRIN, SPEECH MATTERS 113–14 (2014).

36. CARREYROU, *supra* note 6, at 146.

37. *Sexual Harassment in the Workplace Inquiry: Hearing Before the H. of Commons Women & Equalities Comm.*, 57th Parl 3 (2018) (supplementary written evidence from Zelda Perkins (SHW0058)) (extract from nondisclosure agreement between Perkins and Miramax) [hereinafter Perkins and Miramax Agreement], https://www.parliament.uk/documents/commons-committees/women-and-equalities/Correspondence/Zelda-Perkins-SHW0058.pdf; *see also* Twohey et al., *supra* note 3, at A20.

38. A subsidiary contribution of this Article is that it establishes First Amendment pluralism. In other words, the First Amendment does not prioritize or privilege one free speech value over others. First Amendment monists—like Robert Post, who thought that the First Amendment accords lexical priority to participatory democracy—value doctrinal certainty and stability. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011). But this Article argues that First Amendment monism is itself inconsistent with our constitutional practice. Drawing on Philip Bobbitt's theory of constitutional interpretation, this Article notices a similarity between Bobbitt's modalities of constitutional argument (textual, historical, structural, doctrinal, prudential, and ethical) and our accepted modes of First Amendment argument (truth, democracy, and agency). PHILIP BOBBITT, CONSTITUTIONAL FATE 7 (1982). In short, the First Amendment consists in the practice of arguing that free speech serves these important values. First Amendment monism denies or depreciates the legitimacy of multiple First Amendment values.

39. *See generally* Vincent A. Blasi, *Rights Skepticism and Majority Rule at the Birth of the Modern First Amendment*, *in* THE FREE SPEECH CENTURY 13, 28 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019) (marking the early twentieth century as "the dawn of the modern era of First Amendment interpretation").

40. *See* Silvester v. Becerra, 138 S. Ct. 945, 950–52 (2018) (Thomas, J., dissenting from denial of certiorari).

weaponized[41] or "Lochnerized."[42] The point, rather, is that the Free Speech Clause has colonized every site of free speech discourse. Even state free speech guarantees, some expressed very differently than the First Amendment, often simply mimic the federal right.[43]

This Article busts the First Amendment's free speech monopoly at the altar of the common law doctrine voiding contracts against public policy. The public policy doctrine, as a branch of a state's common law of contracts, is one of the few areas of the law resistant to the First Amendment's claim to be the privileged source of free speech norms. This Article recovers a forgotten line of cases in which common law courts refused to enforce contracts because they were, in Lord Mansfield's words, "against the fundamental principles of the constitution."[44] The doctrine was embraced wholeheartedly in the fledgling United States. Election wagers were voided because they so corrupted the franchise that it "could not be regarded as the expressed will of an intelligent constituency."[45]

It turns out, then, that the doctrine voiding contracts against public policy is no stranger to public law principles. This Article cashes out the rediscovered doctrine in two examples. First, the NDA signed by Michael Cohen (Trump's attorney) and Stormy Daniels (an adult film actor and director) in the final days of the 2016 presidential election, designed to conceal information about an alleged affair between Trump and Daniels, should not be judicially enforced. By suppressing information of public concern about a presidential candidate, the contract kept the electorate in the dark. Courts should not be complicit in concealing information relevant to the democratic evaluation of a candidate for public office. Second, the NDA between Miramax (a company that Harvey Weinstein controlled with his brother) and Zelda Perkins (a former assistant to Weinstein) is void. Just as election wagers were invariably nixed because of their tendency to violate democratic principles, each NDA that conceals sexual harassment and abuse tends to damage free expression. Courts should recognize that enforcing sexual-misconduct NDAs makes the judicial process complicit in this collective harm.

The argument develops as follows. Part I first discusses exactly what an NDA is. It then proceeds to contextualize NDAs to illustrate their prevalence and the important values they serve. Part II argues for First Amendment pluralism and then articulates the significant free speech concerns posed by NDAs.

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41. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting).

42. This is the academic characterization *du jour*. *E.g.*, Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 179 (2018).

43. *E.g.*, City of W. Des Moines v. Engler, 641 N.W.2d 803, 805 (Iowa 2002). *See generally* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005).

44. Allen v. Hearn (1785) 99 Eng. Rep. 969, 971; 1 T.R. 56, 59.

45. Ball v. Gilbert, 53 Mass. (12 Met.) 397, 401 (1847).

Finally, Part III justifies the doctrine that contracts against the public policy of free expression are unenforceable. It analyzes a Trump NDA and a Weinstein NDA, arguing that free speech public policy voids both.

I. THE DNA OF NDAS

NDAs are important. This Part examines precisely what NDAs are: the legal rights and duties they generate; their prevalence in our commercial, social, and legal lives; and the values and interests they serve. Studying NDAs in their own right illustrates the need to be cautious, in Parts II and III, when considering whether free speech renders some of them unenforceable.

A. The Acontextual NDA

In an NDA, the confidant promises to refrain from speaking about a matter or from disclosing information in exchange for money or other consideration from the confider. NDAs are contextual: they are always embedded in the context of some legal or normative relationship between the parties. Utter strangers do not execute NDAs. Although sometimes parties to an NDA have not met, some background relationship must exist (or be contemplated) in which an NDA makes sense. An NDA may be part of, or may partly constitute, a discrete transaction or a long-term associational agreement.[46] That said, this Subpart will analyze an NDA as though it were executed between complete strangers: a bare promise by one stranger not to speak about some information in exchange for consideration from another stranger. Although artificial, the acontextual NDA serves as an analytical ideal. It permits us to analyze the obligations imposed and rights conferred by an NDA qua NDA. The next Subpart will contextualize promises of silence and ask how an NDA's context affects its strength.

1. Structure of an NDA

Suppose that Donald and Stephanie, two strangers, sign an NDA: Donald pays Stephanie money for her to remain silent about certain information. Assuming no other relevant circumstances like duress, Stephanie voluntarily created a binding legal obligation by her promise. That promise, like contract law generally, serves the value of individual autonomy, namely Stephanie's

46. This is true of all contracts. Contracts, "like other forms of human association[,] . . . are . . . embedded in conventions, norms, mutual assumptions and unarticulated expectations." Hugh Collins, *Introduction: The Research Agenda of Implicit Dimensions of Contracts*, *in* IMPLICIT DIMENSIONS OF CONTRACT 1, 2 (David Campbell et al. eds., 2003) (citing Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985)).

enhanced control over her life.[47] Her capacity to promise that she will waive her speech right expanded the range of available options open to her. It enabled her monetary gain. It is good that Stephanie can decide to legally undertake to not speak.

Stephanie's promise confers a legal right on Donald that the promise be kept.[48] The NDA provides Donald with legal assurance that Stephanie will keep her silence, since Stephanie voluntarily promised not to speak (assuming, again, no other relevant circumstances like duress), and Donald can enforce that obligation by arbitration or an action for damages. It is also likely that Donald has a legal power to release Stephanie from her promise at his discretion. Stephanie, of course, cannot terminate her legal duty merely because she believes her silence is no longer in Donald's interests. In most NDAs, the confidant voluntarily agrees to a continuing duty not to speak about relevant matters. Even if the information becomes public, Donald might wish that Stephanie not verify it.

There is a legal difference between waiving the right to speak and contracting with another to waive the right to speak. Consider the precontractual situation. Stephanie can waive her right to speak, and equally importantly, revoke that waiver at any time.[49] Her waiver—its existence and its breadth—is at her discretion. But as soon as Stephanie enters into an NDA, she is legally bound by her promise unless and until Donald releases her from the obligation. The contract confers on Donald a legal right that Stephanie keep her promise to waive her free speech rights. The duration and scope of the waiver is no longer up to Stephanie. The NDA secures Stephanie's promise to waive her right to speak about certain matters, the duration and scope of which is subject to Donald's say-so.

To summarize, the acontextual NDA between Donald and Stephanie consists in the following:

(a) Donald's payment of money to Stephanie (or some other consideration);

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47. Joseph Raz, *Is There a Reason to Keep a Promise?*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 58, 61–62, 67 (Gregory Klass et al. eds., 2014); *see also* Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 LAW & CONTEMP. PROBS. 19, 19 (2013).

48. This and subsequent claims in this paragraph rely on Raz, *supra* note 47. Raz's account of the normativity of promises is illuminating for the institution of contract law, which supports the social practice of promising. Normatively, Stephanie's bare promise to Donald (without payment) confers on Donald a right that the promise be kept and a right and power to waive his right, releasing Stephanie from her undertaking at any time and at Donald's complete discretion. *Id.* at 72. As Raz notes, Donald has a normative assurance that Stephanie will keep her silence: Stephanie voluntarily undertook to not speak (assuming, of course, no other relevant circumstances), Donald has power to terminate Stephanie's obligation to remain silent, and Stephanie cannot terminate her obligation on the ground that it is no longer in Donald's interest. *Id.* at 72–74.

49. The precontractual waiver of the right to speak is not like waiving due process rights, which completely depend on legal institutions for their exercise. Once a defendant waives a jury trial or a party waives an argument or a privilege, those rights are forever surrendered. The old saying is that a privilege waived is a privilege lost.

(b) Stephanie's promise to waive her right to speak about certain information;

(c) Stephanie's creation of a voluntary and binding legal (contractual) obligation to waive her right to speak;

(d) Stephanie's loss of her power to revoke her waiver at her discretion;

(e) Donald's right that Stephanie keep the promise to waive; and

(f) Donald's right to release Stephanie from the promise to waive.

2. Waiver, Not Alienation

There are a couple of related corollaries following from the conclusion that the essence of the NDA confidant's promise is a waiver of her speech rights. First, an NDA does not transfer the confidant's speech right. Regrettably, the literature is replete with talk of transfer and alienation. An NDA is said to transfer the confidant's right to speak on the specified matter to the confider. Kathleen Sullivan, in her work on the unconstitutional-conditions doctrine, adopts these metaphors.[50] So does Frank Easterbrook.[51] But the metaphors are unhelpful. An NDA does not transfer the confidant's free speech right; it secures the confidant's promise to waive that right.

Consider Frank Snepp. In 1977, after serving in the CIA for eight years, Snepp wrote a memoir criticizing the American evacuation of Saigon.[52] He did not submit the account for prepublication review by the CIA, as was expressly required by his 1968 employment contract.[53] The federal government successfully sued to enforce the contract, and the Supreme Court spent most of its time on the appropriate remedy.[54] But in a footnote, the Court suggested that, for many government employees, a similar prepublication requirement would not withstand First Amendment scrutiny.[55] For employees like Snepp, however, the agreement was a reasonable means of protecting vital national security interests.[56]

Sullivan agreed with the Court, characterizing the result as holding that Snepp's speech right was alienable: he was permitted to transfer his speech right to the federal government in exchange for employment.[57] For Sullivan, the problem with viewing Snepp's right to speak as inalienable is that it suggests

50. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1476–89 (1989).

51. Easterbrook, *supra* note 27.

52. *See generally* FRANK SNEPP, DECENT INTERVAL: AN INSIDER'S ACCOUNT OF SAIGON'S INDECENT END (1977).

53. Snepp v. United States, 444 U.S. 507, 507 (1980) (per curiam).

54. *Id.* The Court reinstated the trial court's judgment, which imposed a constructive trust on Snepp's profits. *Id.* at 509, 515–16.

55. *Id.* at 514–16.

56. *Id.*

57. *See* Sullivan, *supra* note 50, at 1503.

that Snepp *must* speak, because "making decisions inalienable creates duties."[58] Sullivan asked rhetorically: "If the right to divulge the secrets of government employment is deemed inalienable—for example, in order to prevent government from insulating itself from public criticism—is Snepp then obliged to speak?"[59]

The mischief of the metaphor of transfer or alienation is that it misguides. Possessing a legal right but not possessing the legal power to sell that right does not create a legal duty to exercise it. Consider the right to vote. Legally, I cannot sell that right for someone else to exercise it, nor can I accept money in exchange for exercising the right. It does not follow that I have a legal duty to vote. Confusion disappears once we discard talk of transfer and alienation. Snepp did not transfer his free speech right; rather, he promised to waive an aspect of it. He did not acquire a duty to speak as a consequence of promising to waive his right to speak. Snepp's promise to waive his speech right can be outweighed or defeated by other reasons. So the question is not whether free speech prohibits Snepp from alienating his speech right; rather, the question is whether free speech generates reasons that weaken or perhaps defeat Snepp's promise to waive his speech right.

3. Waiver, Not Exercise

The second corollary is that an NDA does not exercise the confidant's speech rights. This is important because it scuttles a popular argument that immunizes an NDA from free speech scrutiny. By entering into an NDA, the argument goes, the confidant exercises her right to not speak. It follows that the NDA exercises her free speech right, because the right to free speech includes the right not to speak at all. And there is nothing objectionable about paying a confidant to exercise her free speech rights. "One aspect of the value of a right," argued Easterbrook, "is that it can be sold and both parties to the bargain made better off."[60] On this view, selling a right exercises the right. If we believe that constitutional rights are valuable, then we "should endorse their exercise by sale as well as their exercise by other action."[61] This argument—an NDA cannot threaten free speech because it counts as an exercise of the free speech right itself—purports to justify the absence of free speech scrutiny of NDAs.

Undoubtedly the free speech right includes a right to not speak. Raz observed that free expression includes "the freedom not to communicate."[62]

58. *Id.* at 1486.

59. *Id.* at 1487.

60. Easterbrook, *supra* note 27, at 347.

61. *Id.*

62. Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303, 304 n.3 (1991).

Blocher characterized the free speech right embodied by the First Amendment as a "choice right": a right to do something and to *not* do something.[63] Doctrinally, the First Amendment right to not speak developed in the mid-twentieth century.[64] By 1977, Chief Justice Burger wrote for the Court in *Wooley v. Maynard* that the First Amendment protects "the right to refrain from speaking at all."[65] Blocher argued that "the value of speech would be degraded if people could be compelled to engage in it," because, for example, coerced speech undermines credibility and sincerity.[66] The absence of a right to not speak would undermine free speech values.

Problems arise when we examine the claim that an NDA exercises the confidant's right to not speak. Exercising the right to not speak, explained Blocher, gains freedom from coercion.[67] It resists compelled speech. If an NDA were an exercise of the confidant's right to not speak, then it would resist some directive, custom, or expectation that purported to compel speech. But that's not the typical NDA. Usually, a confidant signs an NDA to receive a benefit, not to resist coercion. In exchange for that benefit, the confidant promises to waive her speech rights. Such a waiver, explained Blocher, gives up freedom from restraint.[68] In short, an exercise of the right to not speak resists compelled speech, but a waiver suspends speech rights.

The justification for insulating an NDA from free speech scrutiny cannot rest on the argument that it exercises free speech rights. An NDA waives, and does not exercise, those rights.[69]

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63. Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 775–76 (2012).

64. *Id.* at 762–63. Interestingly, Blasi observed "the seventeenth-century notion that speech is special precisely because it is *not* a matter of conscious choice." Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 544–45 (1977). He explained that "[s]everal early advocates of toleration—most significantly John Locke and the Leveller William Walwyn—argued that people have no real control over their beliefs and hence should not be held legally accountable for them." *Id.* at 545 (citing LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 302–20 (1963)). Blasi also quoted Spinoza: "Not even the most experienced, to say nothing of the multitude, know how to keep silence." *Id.* at 545 (quoting BARUCH SPINOZA, A THEOLOGICO-POLITICAL TREATISE 258 (R.H.M. Elwes trans., Dover 1951) (1670)).

65. 430 U.S. 705, 714 (1977); *see also* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018) ("We have held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" (quoting *Wooley*, 430 U.S. at 714)).

66. Blocher, *supra* note 63, at 794, 811 ("[I]t is plausible to think that the value of speech would be degraded if people could be compelled to engage in it. Listeners would not know whether a speaker was sincere, and coerced speakers themselves might eventually lose the ability to determine and state their own 'true' positions. The right to *X* must therefore include the right to not-*X* because the values underlying the right could not be vindicated by the former alone.").

67. *Id.* at 771 (describing that waiver "relieves the government of a duty with regard to *X* rather than creating a duty with regard to not-*X*").

68. *Id.*

69. Voluntariness is essential to waiver. The Supreme Court recently held that the waiver of First Amendment rights "must be freely given and shown by 'clear and compelling' evidence." *Janus*, 138 S. Ct. at 2486. Waiver can be incentivized, and incentives can shade into coercion. The boundary between incentives and coercion is not our primary concern here. Contract law polices the boundary between voluntary waiver and compulsion through the unconscionability doctrine, etc.

B. Contextualizing NDAs

NDAs are always executed in the context of some background relationship between the parties. Because of their ubiquity, NDAs cannot be sorted into a comprehensive or exhaustive typology. They can, however, be contextualized in the background relationship; this relationship affects the strength of the rights and duties that an NDA creates. For example, in the wake of the Harvey Weinstein scandal, the Women and Equalities Committee of the United Kingdom House of Commons released a report on workplace sexual harassment.[70] The report distinguished between NDAs in employment contracts and NDAs in settlement agreements.[71] Employment and settlement are important, but they are not the only relational contexts in which NDAs are deployed. As this Subpart shows, NDAs are present in employment, dispute resolution, commerce, journalism, intimacy, and consumption.

1. Employment

NDAs are used at every stage of the employment relationship—when it begins, when it ends, and when it is ongoing. Prospective employees are often required to sign NDAs as a condition of employment. An analysis of 874 CEO employment contracts in the S&P 1500 between 1996 and 2010 found that 87.1% contained an NDA.[72] And these were highly negotiated contracts where both parties enjoyed significant bargaining power. For many employees, an NDA is nonnegotiable. It is a condition of employment "offered by employers on a take-it-or-leave-it basis."[73] In an anonymous poll of 10,242 tech workers, 15.3% of respondents agreed that an NDA had silenced them or their coworkers from speaking about important issues.[74]

Many employment NDAs are legitimate. Confidential and proprietary information, especially trade secrets, must be protected. The House of Commons Women and Equalities Committee "acknowledge[d] that NDAs have a legitimate use in employment contracts"[75] because they "are important to protect trade secrets that could otherwise undermine a company's competitiveness in the marketplace."[76] In an April 2018 letter to the *Financial Times*, a communications consultant cautioned that "we have to be careful not to demonise the use

70. WOMEN & EQUALITIES COMMITTEE, SEXUAL HARASSMENT IN THE WORKPLACE, 2017–19, HC 725 (UK).

71. *Id.* at 37–38.

72. Bishara et al., *supra* note 10, at 3–4.

73. Estlund, *supra* note 11, at 384.

74. Kyle McCarthy, *15 Percent of Tech Workers Silenced by an NDA*, BLIND WORKPLACE INSIGHT (Sept. 4, 2018), https://blog.teamblind.com/index.php/2018/09/04/15-percent-of-tech-workers-silenced-by-an-nda/.

75. WOMEN & EQUALITIES COMMITTEE, *supra* note 70, at 37.

76. *Id.* (quoting GOVERNMENT EQUALITIES OFFICE, WRITTEN SUBMISSION SHW0050 (2018)).

of NDAs."[77] In 2017, the general counsel of Adobe Systems revealed, "We . . . have pre-signed NDAs, and all are available to our employees in a very automated fashion . . . . We execute about 2,000 nondisclosure agreements a year at Adobe."[78] In fact, NDAs are so common that the noun "NDA" is often used as a verb.[79]

There are several overlapping categories of legitimate workplace NDAs. First, and most important, are NDAs that protect trade secrets. Firms routinely require NDAs from employees to protect information that derives independent economic value from not being generally known. In fact, for information to qualify as a trade secret, it must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[80] NDAs, therefore, not only protect trade secrets but also can partly constitute them.[81] These NDAs interlock with ongoing and independent obligations to protect trade secrets (fiduciary obligations, for example, or general employee duties).[82] Second, NDAs are often executed as part of noncompete clauses and indeed can shade into such clauses. In 2017, the South Carolina Court of Appeals invalidated an agreement, signed by an employee on his first day, as void against public policy "because the nondisclosure provisions operated as noncompete provisions."[83] Third, NDAs are required from employees and contractors for discrete projects. In fact, NDAs are now so widespread that they have infiltrated even mundane domestic affairs. Unknown tech executives are known to require NDAs from contractors who remodel their homes.[84]

Employment- and workplace-NDA litigation does surface in the courts. Trade-secret litigation, usually centering on a departing employee, is common,[85] as is litigation seeking to enforce the confidentiality aspects of noncompete agreements. There are also reported cases of plaintiffs suing former employers for providing damaging information to a prospective employer in breach of an

77. Gus Sellitto, Letter to the Editor, *We Must Be Careful Not to Demonise All Use of NDAs*, FIN. TIMES, Apr. 2, 2018, at 10.

78. Dillon, *supra* note 12.

79. John Winsor, *Victors & Spoils*, *in* PIONEERS OF DIGITAL 67, 72 (Paul Springer & Mel Carson eds., 2012) (quoting the founder of a crowdsourcing advertising agency as saying that for some projects "we put teams on it, usually around 10 people from around the world" and "[w]e NDA them and pay them up front").

80. UNIF. TRADE SECRETS ACT § 1(4)(ii) (UNIF. LAW COMM'N 1985).

81. NDAs are central to trade-secret law. Deepa Varadarajan, *The Trade Secret-Contract Interface*, 103 IOWA L. REV. 1543, 1556–63 (2018) (observing that NDAs play a key evidentiary role for establishing the existence of a trade secret and arguing that NDAs, therefore, serve an important notice function for recipients of trade-secret information); *see also id.* at 1556 ("[T]rade secret law itself encourages—and in many cases, seems to require—non-disclosure contracts as a condition of obtaining protection.").

82. Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 318 (2008) ("Even in the absence of an explicit contract, most employees are held to have a duty to protect their employers' interests in the employers' secret practices, information, and the like.").

83. Fay v. Total Quality Logistics, LLC, 799 S.E.2d 318, 322 (S.C. Ct. App. 2017).

84. Matt Richtel, *For Tech Titans, Sharing Has Its Limits*, N.Y. TIMES, Mar. 15, 2015, at BU4.

85. Lemley, *supra* note 82, at 318 ("Trade secret cases come up in three basic sets of circumstances: competitive intelligence, business transactions, and departing employees.").

NDA.[86] Courts typically take a commonsense approach and enforce workplace NDAs that are reasonable limits on the time and scope of disclosure. But these reported cases are probably not a representative sample of employment confidentiality disputes, which are likely settled or arbitrated—and typically subject to confidentiality agreements themselves—or informally resolved.

2. Dispute Resolution

NDAs are routinely deployed in dispute resolution, usually in two broad categories: settlement/arbitration and discovery. Indeed, nowhere has the effect of NDAs been more discussed than in the context of settlement. NDAs shroud countless settlements in secrecy.[87] Settlement is a "private, largely invisible, contractual phenomenon . . . requir[ing] only that the parties agree"[88] on "terms without judicial oversight or interference."[89] Settlement contracts often include enforceable confidentiality provisions, sometimes concealing the very fact of the existence of a dispute.[90] Since the early 1990s, secret settlements constantly have been the subject of news reporting and academic commentary.[91] The debate has raged about confidentiality in civil settlements and criminal settlements. Advocates of secrecy have been arguing since the very beginning that parties are more likely to settle if confidentiality is assured.[92] Critics respond with arguments centering on the public good of adjudication and the interest in access to information of public concern.[93] But the popular outcry and avalanche of scholarship have not dampened litigants' enthusiasm for confidential settlements.

Alternative dispute resolution mechanisms, most notably arbitration, are also regularly the subject of confidentiality clauses. Unlike in England, there is no implied obligation of confidentiality in arbitration in the United States.[94]

86. *E.g.*, Giannecchini v. Hosp. of St. Raphael, 780 A.2d 1006, 1009 (Conn. Super. Ct. 2000).

87. The empirical problem vis-à-vis confidential (or invisible) settlement has been recognized for many years. Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 962–67 (2006).

88. David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 697 (2006); *cf.* Blanca Fromm, *Bringing Settlement out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 706 (2001) ("Settlements might occur . . . under the shadow of confidentiality, but they are not invisible.").

89. Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407, 429 (2016).

90. STEPHEN C. YEAZELL, CIVIL PROCEDURE 548 (8th ed. 2012).

91. Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 463 (2006); Kotkin, *supra* note 87, at 945–50 (timing the public outcry earlier, from the late 1980s).

92. Levmore & Fagan, *supra* note 14, at 311; Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 484–86 (1991).

93. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

94. RESTATEMENT OF INT'L COMMERCIAL & INV'R-STATE ARBITRATION § 3.11 cmt. b (AM. LAW INST., Proposed Final Draft 2019); Baiju S. Vasani & Benjamin T. Jones, *Confidentiality in International Arbitration in the United States*, *in* INTERNATIONAL ARBITRATION IN THE UNITED STATES 125, 139–40 (Laurence

This means that explicit confidentiality clauses are common in arbitration agreements. Moreover, the "total privacy of the proceedings" is often touted as an important advantage of arbitration.[95] Confidentiality and arbitration, therefore, are commonly linked, at least in the public mind and to the chagrin of one arbitration scholar.[96] It is "the confidentiality provision, not the arbitration clause," wrote Christopher Drahozal, that permits large corporations to hide misconduct.[97] Absent an NDA, "arbitration is a private process, not a confidential one."[98] Although arbitration hearings are not open to the public and the arbitrator and administrator are under an obligation of confidentiality, "the parties generally are under no such duty."[99] "[I]nformation about disputes remains available," said Drahozal, "not from the court system but from the parties themselves."[100] (Of course, information held by courts is public; information held by the parties is not.) For Drahozal, our critical focus should be trained on confidentiality clauses, not on arbitration.

Discovery confidentiality agreements "have become routine."[101] "[W]hen a litigant uses discovery to obtain damaging information about an opposing party," noted Dustin B. Benham, "the [opposing] party will often pay money to avoid public disclosure through a confidentiality agreement."[102] Although these agreements are generally enforceable, many parties remain uncomfortable unless the discovery NDA is enshrined in a protective order.[103] Breach of an NDA that has been converted (however mindlessly) into a protective order is no longer a matter of private ordering; rather, it implicates judicial authority and subjects the breaching party to contempt.[104]

Shore et al. eds., 2018). English cases establish an implied obligation of confidentiality arising out of the nature of arbitration. *See* Emmott v. Michael Wilson & Partners Ltd. [2008] 2 All ER (Comm.) 193 (Eng.); Ali Shipping Corp. v. Shipyard Trogir [1999] 1 WLR 314 (Eng.); Dolling-Baker v. Merrett [1990] 1 WLR 1205 (Eng.).

95. 1 LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 1:4 (3d ed. 2003).

96. *See generally* Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ON ARB. & MEDIATION 28 (2015).

97. *Id.* at 29.

98. *Id.* at 30–31.

99. *Id.*

100. *Id.* at 47–48.

101. Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 631 (2018).

102. Dustin B. Benham, *Tangled Incentives: Proportionality and the Market for Reputation Harm*, 90 TEMP. L. REV. 427, 427 (2018).

103. Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 371 (2006).

104. *Id.*

3. Commerce

In business settings, "[t]he need for confidentiality . . . is extensive and palpable."[105] Parties to commercial arrangements commonly execute NDAs. At the outset of negotiations, participants know that sensitive or proprietary information likely will be shared. Two or more entities seeking to achieve a common objective or to establish a specific relationship must control the flow of information within the entities and externally to the market. Well-crafted NDAs protect that information and regulate its flow. They are, therefore, an important part of interfirm business transactions. A survey of typical commercial confidentiality agreements is useful, but what follows is not exhaustive.

NDAs are necessary in mergers and acquisitions; they are among the first contracts executed between putative buyers and sellers.[106] An NDA executed early in negotiations is a powerful signal that the parties are serious. Inevitably, nonpublic information (financial information and important contracts, for example) is shared among the parties. The very existence of negotiations can be actively concealed. If the target is a private company, then an NDA is usually required even for basic information. (For public companies, some information is already in the public domain.)[107] The target's release of information to the buyer might be staged: commencing with the disclosure of high-level financial data; followed by the buyer's access to management; then providing legal, accounting, and tax information; and concluding with the most sensitive material.[108] Confidentiality provisions are often coupled with nonuse terms, prohibiting the use of confidential information for any purpose other than evaluation and completion of the deal, and nonsolicitation terms, prohibiting poaching employees or other key players.

Commercial NDAs generally permit legally required disclosures (such as subpoena responses), but they also sometimes contribute to regulatory compliance. For example, Regulation Fair Disclosure (Regulation FD), adopted by the Securities and Exchange Commission in 2000, bans U.S. reporting companies from selectively disclosing material nonpublic information to analysts and other

105. GOLDFARB, *supra* note 8, at 157.

106. *See* Cathy Hwang, *Deal Momentum*, 65 UCLA L. REV. 376, 385 & n.26 (2018).

107. NDAs in mergers and acquisitions deals can contain "standstill" provisions, which restrict the buyer's ability to acquire, vote for, or dispose of stock in the seller. *See, e.g.*, Crane Co. v. Coltec Indus., Inc., 171 F.3d 733 (2d Cir. 1999). Standstill provisions prevent a potential buyer from launching a hostile bid and assure a successful buyer that prior potential buyers are contractually bound not to overbid. *See generally* Christina M. Sautter, *Promises Made to be Broken? Standstill Agreements in Change of Control Transactions*, 37 DEL. J. CORP. L. 929 (2013); Sasha S. Hahn, Note, *"Between" a Rock and a Hard Place:* Martin Marietta v. Vulcan *and the Rise of the Backdoor Standstill*, 65 HASTINGS L.J. 1393, 1396–97 (2014).

108. Daniel A. Zazove, *Confidentiality Issues Arising Under Section 363 of the Bankruptcy Code*, BUS. L. TODAY, Aug. 2015, at 2 ("Depending on the nature of the business, access to confidential information is frequently staged . . . .").

securities market professionals.[109] The final rule—which emerged from a worry that public companies were disclosing advance warnings of earnings results to a select few analysts and advisers—sought to level the informational playing field. Material information, if disclosed to one, must be disclosed to all. But Regulation FD's disclosure requirements do not apply if the recipient "expressly agrees to maintain the disclosed information in confidence."[110] An NDA may be necessary, then, for a public company to adhere to Regulation FD when it privately discloses material information to a credit-rating agency.[111]

Confidentiality agreements are necessary not only for mergers and acquisitions but also for joint ventures, alternative structures, financing, private placements, and many other transactions. The negotiation and closing of a syndicated loan[112] may require express confidentiality undertakings not only to protect sensitive financial information but also to comply with Regulation FD. Similarly, private placements or unregistered offerings—securities offerings exempt from registration with the SEC—are confidential. (General solicitation is prohibited, and the offering memorandum often includes confidentiality clauses.) And when public companies make private offerings (private investments in public equity), compliance with Regulation FD requires that potential investors enter into NDAs.

NDAs are required in myriad commercial contexts outside financing and restructuring. Anchor tenants share confidential information with their landlords.[113] And recent decades demonstrate that NDAs are widespread in producing and selling goods, especially technology products. Software developers who license their platforms to customers normally include NDAs as part of the

109. SEC Regulation FD, 17 C.F.R. §§ 243.100–.103 (2018). Regulation FD "prohibits a corporation from making selective disclosures of nonpublic, material information by requiring public disclosure once the private disclosure has been made." J & R Mktg., SEP v. Gen. Motors Corp., 549 F.3d 384, 393 n.4 (6th Cir. 2008). It applies to issuers with a class of securities registered under § 12 or issuers required to file reports under § 15(d) of the Securities Exchange Act of 1934. 17 C.F.R. § 243.101(b). The Securities and Exchange Commission estimates that "approximately 13,000 issuers make Regulation FD disclosures approximately five times a year for a total of 58,000 submissions annually, not including an estimated 7,000 issuers who file Form 8-K to comply with Regulation FD." Securities and Exchange Commission, Submission for OMB Review; Comment Request, 83 Fed. Reg. 49,959, 49,960 (Oct. 3, 2018).

110. 17 C.F.R. § 243.100(b)(2)(ii).

111. When adopted, Regulation FD exempted communications to credit-rating agencies. 17 C.F.R. § 243.100(b)(2)(iii) (2001), *amended by* Removal From Regulation FD of the Exemption for Credit Rating Agencies, 75 Fed. Reg. 61,050 (Oct. 4, 2010). This exemption was repealed as required by § 939B of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010. Pub. L. No. 111-203, § 939B, 124 Stat. 1376, 1887–88 (2010) (Elimination of Exemption From Fair Disclosure Rule). Credit-rating agencies are now regulated as nationally recognized statistical rating organizations (NRSROs), which are specifically excluded from the definition of investment adviser (and are typically not covered recipients under Regulation FD). But not all credit-rating agencies are NRSROs, and where they are not, confidentiality agreements are necessary for compliance with Regulation FD.

112. A syndicated loan is a credit facility where "multiple banks 'syndicate' under a lead arranger, each holding only a portion of the loan." Loan Syndications & Trading Ass'n v. SEC, 882 F.3d 220, 223 (D.C. Cir. 2018).

113. *See, e.g.*, ALVIN L. ARNOLD & MYRON KOVE, 2 REAL ESTATE LEASING PRACTICE MANUAL § 80:1, Westlaw (database updated Mar. 2020).

terms of use. The Google Cloud Platform Agreement and the Amazon Web Services Customer Agreement, for example, both include confidentiality provisions.[114] For businesses licensing proprietary software, the failure to include robust contractual duties of nondisclosure can be costly.[115] Similarly, device manufacturers commonly require confidentiality in their supply chains. Apple, for example, maintains NDAs with its suppliers. During product development, Apple's NDAs are particularly onerous: Apple can audit the supplier's compliance with the nondisclosure terms, the supplier must only refer to Apple and the project by code names, and the supplier is subject to a $50 million liquidated-damages clause.[116]

One final commercial context, which hinges on confidentiality, is illustrative: NDAs signed by business advisers and consultants. McKinsey is perhaps the best-known example, but there are many others. As its lawyers put it in a recent court filing, McKinsey's "clients often require that McKinsey's involvement with their organizations remains confidential, so as not to affect their operations and business strategies adversely."[117] NDAs, therefore, are simply "[o]ne manifestation of McKinsey's commitment to maintaining the confidentiality of client names."[118]

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114. *AWS Customer Agreement*, AMAZON, https://aws.amazon.com/agreement/ (last updated Apr. 30, 2019) (setting out policies to protect its confidential information in sections 8.3, 8.4, and 13.9); *Google Cloud Platform Terms of Service,* GOOGLE CLOUD, https://cloud.google.com/terms (last modified Mar. 26, 2020) (setting out specific guidelines for protecting their intellectual property in sections 3.3 and 5.1 and their confidential information in section 8.1 of the agreement).

115. *See, e.g.*, Broker Genius, Inc. v. Zalta, 280 F. Supp. 3d 495, 517–18 (S.D.N.Y. 2017) ("Nevertheless, because [plaintiff] regularly disclosed its alleged secrets to each of its customers without notifying them of the information's confidential nature or binding them to confidentiality agreements, [plaintiff] is unlikely to be able to show that it undertook reasonable measures to protect the secrecy of its alleged trade secrets."); *see also* Convolve, Inc. v. Compaq Comput. Corp., 527 Fed. App'x 910, 915 (Fed. Cir. 2013) (noting that failure to issue a written confidentiality memorandum—as required by the negotiating NDA designed to "further[] a business relationship"—was fatal to claims for breach of contract and misappropriation of trade secrets).

116. *See, e.g.*, Apple Inc. Confidentiality Agreement (Aug. 24, 2012) (on file with author); Apple Restricted Project Agreement ¶ 4 (Oct. 31, 2013) (on file with author) ("You agree to allow Apple to verify that you are in compliance with . . . the NDA . . . by auditing your records and information systems, inspecting your facilities, and interviewing your personnel."); *Id.* at Attachments 2, 3 (requiring Apple and the project to be referred to by code names); Apple Inc. Statement of Work #1, § 6.2 (Oct. 31, 2013) (on file with author). An executive at Japan Display, Inc., one of Apple's suppliers, described Apple's NDA as "'tortuous,' saying he had never heard of others demanding so much." Tripp Mickle, *Jobs, Cook, Ive—Blevins? The Rise of Apple's Cost Cutter*, WALL ST. J. (Jan. 23, 2020, 1:26 PM), https://www.wsj.com/articles/jobs-cook-iveblevins-the-rise-of-apples-cost-cutter-11579803981.

117. Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Amended Complaint at 6–7, Alix v. McKinsey & Co., 404 F. Supp. 3d 827 (S.D.N.Y. 2019) (No. 1:18-cv-04141(JMF)).

118. *Id.* at 7.

4. Journalism

Journalists routinely promise to keep the identity of sources secret.[119] According to the *New York Times*, "many important stories in sensitive areas like politics, national security and business could never be reported if we banned anonymous sourcing."[120] These agreements are necessary for journalists to gather information of public concern. In 1982, Dan Cohen, a Republican supporting Wheelock Whitney's Minnesota gubernatorial campaign, offered information about a rival candidate to two newspapers.[121] A condition precedent of Cohen's offer was a promise of confidentiality from the newspapers.[122] He then supplied records of unlawful assembly charges (later dismissed) against, and a petit theft conviction (later vacated) of, Marlene Johnson, the Democratic candidate for lieutenant governor.[123] Breaking their promises, both newspapers named Cohen as the source.[124] He was promptly fired from his job at an advertising agency.[125] He sued the newspapers, and the Minnesota Supreme Court eventually held that he could recover damages under a promissory estoppel theory.[126]

An unmasked source who was promised anonymity rarely litigates. The few courts that have considered the issue generally hold that, without more, a journalist's promise to keep the source confidential is not an enforceable contract.[127]

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119. A content analysis of the front pages of the *Washington Post* and the *New York Times* from 1958 to 2008 found that anonymous sources peaked in the 1960s and 1970s and that reporters today provide more detail about their sources. *See generally* Matt J. Duffy & Ann E. Williams, *Use of Unnamed Sources Drops from Peak in 1960s and 1970s*, 32 NEWSPAPER RES. J., no. 4, 2011, at 6.

120. Philip B. Corbett, *How* The Times *Uses Anonymous Sources*, N.Y. TIMES: READER CTR. (June 14, 2018), https://www.nytimes.com/2018/06/14/reader-center/how-the-times-uses-anonymous-sources.html. The use of anonymous sources was historically criticized, though such use is now more accepted. *See* Matt J. Duffy, *Anonymous Sources: A Historical Review of the Norms Surrounding Their Use*, 31 AM. JOURNALISM 236, 236 (2014).

121. Cohen v. Cowles Media Co. (*Cohen 1*), 457 N.W.2d 199, 200 (Minn. 1990), *rev'd*, Cohen v. Cowles Media Co.(*Cohen 2*), 501 U.S. 663 (1991), *remanded to* Cohen v. Cowles Media Co. (*Cohen 3*), 479 N.W.2d 387 (Minn. 1992).

122. *Id.*

123. *Id.* at 200–01.

124. *Id.* at 201.

125. *Id.* at 202.

126. *Cohen 3*, 479 N.W.2d at 392. Initially, the Minnesota Supreme Court held that the newspapers' promise of confidentiality was not a contract. *Cohen 1*, 457 N.W.2d at 203. Of course, this state law holding was not reviewable in the U.S. Supreme Court. The Minnesota Supreme Court further held that "enforcement of the promise of confidentiality under a promissory estoppel theory would violate [the newspapers'] First Amendment rights." *Id.* at 205. This First Amendment holding, however, was the subject of federal court review. *See Cohen 2*, 501 U.S. at 665. The U.S. Supreme Court reversed, explaining that "the Minnesota doctrine of promissory estoppel . . . is generally applicable to the daily transactions of all the citizens of Minnesota" and "[t]he First Amendment does not forbid its application to the press." *Id.* at 670.

127. Ventura v. Cincinnati Enquirer, 396 F.3d 784, 791 (6th Cir. 2005); *See* Ruzicka v. Conde Nast Publ'ns, Inc., 939 F.2d 578, 584 (8th Cir. 1991); Pierce v. Clarion Ledger, 452 F. Supp. 2d 661, 665 (S.D. Miss. 2006); Steele v. Isikoff, 130 F. Supp. 2d 23, 31 (D.D.C. 2000); *Cohen 1*, 457 N.W.2d at 205.

But this conclusion is dependent on state law.[128] In every state, a written and negotiated agreement between reporter and source demonstrating privity of contract is likely enforceable.[129] And even where a journalist's promise to keep a source's identity secret is not an enforceable contract, other rights of action, such as promissory estoppel, might be available.

Press embargoes over new products—a common tactic of publishers, movie studios,[130] technology developers, and so on—are public relations exercises brought to you by time-limited NDAs.[131] In 2012, J.K. Rowling completed her first novel since *Harry Potter*. The publisher, bent on concealing details, required a reviewer to read the 512-page book in its New York office.[132] The reviewer also signed an NDA "whose first draft—later revised—had prohibited me from taking notes."[133] Other reviewers were asked to sign an NDA before the book was hand delivered; one clause sought to keep the existence of the NDA itself a secret.[134] Device manufacturers and software developers similarly strive to keep prelaunch details under wraps.[135] In mid-2018, a graphics processing unit manufacturer sent a standalone NDA, which included a nondisparagement clause, to several media outlets.[136] Another device manufacturer included terms forbidding reporters from calling competitors to discuss the product.[137] Insurance companies, too, have required journalists to sign NDAs when announcing prescription-drug plans.[138]

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128. *See, e.g.*, Doe v. Am. Broad. Cos., 543 N.Y.S.2d 455 (N.Y. App. Div. 1989); Anderson v. Strong Mem'l Hosp., 573 N.Y.S.2d 828, 831 (N.Y. Sup. Ct. 1991).

129. Huskey v. Nat'l Broad. Co., 632 F. Supp. 1282, 1292–94 (N.D. Ill. 1986); Doe v. Univision Television Grp., Inc., 717 So. 2d 63, 65 (Fla. Dist. Ct. App. 1998).

130. Jen Chaney, *The 'Girl With the Dragon Tattoo' Review Controversy*, WASH. POST (Dec. 5, 2011), https://www.washingtonpost.com/blogs/celebritology/post/the-girl-with-the-dragon-tattoo-review-controversy/2011/12/05/gIQAbcmXWO_blog.html; Marshall Fine, *Why Embargo Movie Critics' Reviews?*, HUFFPOST (May 12, 2013), https://www.huffingtonpost.com/marshall-fine/why-embargo-movie-critics_b_2859089.html.

131. Matthew Bell, *J K Rowling and the Publishers' Moan*, INDEPENDENT (Sept. 23, 2012), https://www.independent.co.uk/voices/comment/j-k-rowling-and-the-publishers-moan-8165843.html ("Embargoes are normal . . . .").

132. Ian Parker, *Mugglemarch*, NEW YORKER, Oct. 1, 2012, at 52, 54.

133. *Id.*

134. Bell, *supra* note 131; *see also* Jen Doll, *J.K. Rowling and the N.D.A of Secrets*, ATLANTIC (Sept. 26, 2012), https://www.theatlantic.com/entertainment/archive/2012/09/jk-rowling-and-nd-secrets/323203/.

135. Rob Pegoraro, *'NDAs': I Could Tell You, But I'd Have to Sue You*, WASH. POST: BUS., Apr. 14, 2000, at E01.

136. NVIDIA Non-Disclosure Agreement (on file with author). Section 3 provides, in part: "Recipient shall use Confidential Information solely for the benefit of NVIDIA . . . ." *Id.* § 3.

137. Adam L. Penenberg, *Embargoes, NDAs, and Tech Journalism's Way of Doing Business*, PANDO (Nov. 18, 2012), https://pando.com/2012/11/18/embargoes-ndas-and-tech-journalisms-way-of-doing-business/.

138. Ivan Oransky, *Are NDAs the New Embargo Agreements? Humana and Walmart Seem to Think So*, EMBARGO WATCH (Oct. 1, 2010, 12:21 PM), https://embargowatch.wordpress.com/2010/10/01/when-an-embargo-agreement-isnt-enough-use-an-nda-say-humana-and-walmart/.

5. Intimacy

Public figures sign NDAs with intimate partners to ensure discretion. The most salacious recent example is an NDA dated October 28, 2016, signed by adult-film actor and director Stormy Daniels, who alleges that she had an affair with President Trump from 2006 to 2007.[139] Trump denies the affair. He also denies signing the NDA[140] but admitted that he reimbursed his lawyer who did sign it;[141] the lawyer later told federal prosecutors that Trump personally directed the hush payment.[142] The terms of the NDA covered information about Trump's "children or any alleged children or any of his alleged sexual partners, alleged sexual actions or alleged sexual conduct or related matters."[143] In another example, Nicholas Perricone, a celebrity doctor,[144] signed a confidentiality agreement with his wife shortly after he commenced marriage dissolution proceedings in 2003.[145] The agreement recited that the parties "fully understand that the plaintiff and his business interests may be severely harmed by the public dissemination of defamatory or disparaging information," and it prohibited them from "disseminat[ing] to the public and the press any such disparaging or defamatory information."[146]

6. Consumers

Consumers may be subject to NDAs simply by consuming. Some platforms' terms of use, like ride sharing app Lyft and music service Spotify, include an NDA and an arbitration clause.[147] Apple iCloud—which is built into every Apple device and whose user base grew from 782 million in 2016[148] to about

139. First Amended Complaint at 2–4, Clifford v. Trump, No. 2:18-CV-02217-SJO-FFM, 2018 WL 8300107 (C.D. Cal. Mar. 26, 2018).

140. Notice of Motion and Motion of Defendant Donald J. Trump to Dismiss Plaintiff's Declaratory Relief Cause of Action for Lack of Subject Matter Jurisdiction at 1, Clifford v. Trump, No. 2:18-CV-02217-SJO-FFM (C.D. Cal. Oct. 8, 2018).

141. Donald J. Trump (@realDonaldTrump), TWITTER (May 3, 2018, 10:46:09 AM UTC), https://twitter.com/realDonaldTrump/status/991992302267785216.

142. Joe Palazzolo et al., *Trump Played Central Role in Payoffs, Despite Denials*, WALL ST. J., Nov. 10, 2018, at A1.

143. Declaration of Stephanie Clifford in Support of Plaintiff's Opposition to Defendant Essential Consultants, LLC's Motion to Compel Arbitration, Exhibit 1: Confidential Settlement Agreement & Mutual Release; Assignment of Copyright & Non-Disparagement Agreement § 4.1(a), Clifford v. Trump, No. 2:18-CV-02217-SJO-FFM (C.D. Cal. Mar. 26, 2018 C.D. Cal. Apr. 9, 2018) [hereinafter Settlement Agreement].

144. Alex Witchel, *Perriconology*, N.Y. TIMES MAG., Feb. 6, 2005, at 28.

145. Perricone v. Perricone, 972 A.2d 666, 671 (Conn. 2009).

146. *Id.*

147. *Lyft Terms of Service*, § 18 (Confidentiality) (last updated Nov. 27, 2019), https://s3.amazonaws.com/api.lyft.com/static/terms.html; *Spotify Terms and Conditions of Use*, § 24.2.5 (Feb. 7, 2019), https://www.spotify.com/us/legal/end-user-agreement/ (Spotify's NDA is part of the arbitration clause).

148. John Gruber, *"They Might Be Giants' with a Spanish Accent," with Special Guests Eddy Cue and Craig Federighi*, ACAST (Feb. 12, 2016) at 32:57, https://play.acast.com/s/thetalkshowwithjohngruber/ep-146-they-might-be-giants-with-a-spanish-accent-with-special-guests-eddy-cue-and-craig-federighi.

850 million two years later[149]—requires users to agree that it "contains proprietary and confidential information" and that they must "not use such proprietary information or materials in any way whatsoever except . . . in compliance with this Agreement."[150] Consumers also agree not to use iCloud to "disclose any trade secret or confidential information in violation of a confidentiality, employment, or nondisclosure agreement."[151]

Other software platforms with millions of users reserve NDAs for businesses rather than consumers. Confidentiality provisions are present, for example, in the terms for Google Cloud[152] but not for the consumer search engine Google[153] and in the terms for Amazon Web Services[154] but not for the Amazon retail platform.[155] The Microsoft Product Terms include a benchmarking clause (that prohibits users from publishing benchmark test results) only for server-side products.[156] These benchmarking clauses, named DeWitt clauses after the computer science professor who dared to publish benchmark results for an Oracle database product in 1982, seem to have the most bite in business-to-business software licenses.[157]

Small categories of consumers actively agree to NDAs. Eager gamers voluntarily test "closed beta" versions of games, which require explicit assent to an NDA.[158] Sometimes, bank customers who fall victim to fraud are required to sign NDAs before the bank will attempt to recover funds.[159] Finally, it should be noted that consumers are routinely subject to forced arbitration, which keeps information out of the public domain. Financial products and services (like credit cards) can require consumers to submit disputes to arbitration,[160] as do

149. Jordan Novet, *The Case for Apple to Sell a Version of iCloud for Work*, CNBC (Feb. 14, 2018, 3:30 PM), https://www.cnbc.com/2018/02/11/apple-could-sell-icloud-for-the-enterprise-barclays-says.html.

150. *Welcome to iCloud*, APPLE: LEGAL, § VI.A, https://www.apple.com/legal/internet-services/icloud/en/terms.html (last updated Sept. 19, 2019).

151. *Id.* § V.B.e.

152. *Google Cloud Platform Terms of Service*, *supra* note 114.

153. *Google Terms of Service*, GOOGLE: PRIVACY & TERMS, https://policies.google.com/terms (last modified Oct. 25, 2017).

154. *AWS Customer Agreement*, *supra* note 114.

155. *Conditions of Use*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=201909000 (last updated May 21, 2018).

156. MICROSOFT, PRODUCT TERMS 8 (2020), http://www.microsoftvolumelicensing.com/Downloader.aspx?documenttype=PT&lang=English.

157. *See generally* Genelle I. Belmas & Brian N. Larson, *Clicking Away Your Speech Rights: The Enforceability of Gagwrap Licenses*, 12 COMM. L. & POL'Y 37 (2007).

158. Josh Zimmerman, *Psyche and Eros: Rhetorics of Secrecy and Disclosure in Game Developer–Fan Relations*, *in* COMPUTER GAMES AND TECHNICAL COMMUNICATION: CRITICAL METHODS & APPLICATIONS AT THE INTERSECTION 141, 149 (Jennifer DeWinter & Ryan M. Moeller eds., 2014).

159. Sarah Krouse, *After Scams, Banks Trade Help for Silence*, WALL ST. J., Feb. 1, 2020, at B5.

160. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY § 2 (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

ride sharing platforms like Uber,[161] dating apps like Tinder,[162] hospitality companies like Airbnb,[163] and newspapers like the *Wall Street Journal*.[164]

C. NDA Values

Despite the ubiquity of NDAs, it's difficult to empirically assess their effectiveness. If NDAs work, then they remain hidden.[165] The inference is certainly open that NDAs are effective because they are so common and because they are comparatively rarely litigated. And anecdotal evidence strongly suggests that they are extremely potent. The Adobe general counsel observed that in 2012:

> I held an all-hands meeting where I asked everyone to raise their hand if they had ever negotiated an NDA or prepared one. It was about 90 percent of the room. And then I asked them to raise their hand if in all those thousands of NDAs we collectively had worked on, any of them had been the subject of a dispute or litigation. I think only two people raised hands.[166]

Similarly, recent news reports marshalled evidence that NDAs were a crucial pillar of Harvey Weinstein's "complicity machine."[167] And one can hardly imagine a cottage industry of NDA start-ups sprouting if the basic product was worthless.[168]

This Subpart makes explicit what the previous Subpart suggests: NDAs serve a plurality of interests. Like all contracts, NDAs can serve autonomy and efficiency interests. I dare not enter here the debate raging in contract theory over the ultimate value or values of contract.[169] Instead, I will focus on the

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161. *U.S. Terms of Use*, UBER § 2, https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=united-states&lang=en (last modified Mar. 17, 2020). Uber does not enforce the arbitration clause for individual claims of sexual assault or harassment against drivers. *Id.*; *see also* Daisuke Wakabayashi, *Yielding to Critics, Uber Eliminates Forced Arbitration in Sexual Misconduct Cases*, N.Y. TIMES: BUS., May 16, 2018, at B3.

162. *Terms of Use*, TINDER § 15, https://www.gotinder.com/terms/us-2018-05-09 (last revised June 11, 2019).

163. *Terms of Service*, AIRBNB § 19, https://www.airbnb.com/terms (last updated Nov. 1, 2019).

164. *Subscriber Agreement and Terms of Use*, WALL ST. J., https://www.wsj.com/policy/subscriber-agreement (last updated June 27, 2018).

165. Andrea Contigiani et al., *Trade Secrets and Innovation: Evidence from the "Inevitable Disclosure" Doctrine*, 39 STRATEGIC MGMT. J. 2921, 2922 (2018) (noting that empirical trade secrecy scholarship is "understandably sparse" because "observability [is] a prerequisite for empirical analysis" and "managers have an economic incentive to keep trade secrets secret"); *id.* at 2938 ("Trade secrecy is an inherently difficult phenomenon to study empirically . . . .").

166. Dillon, *supra* note 12.

167. JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT 65–68, 249 (2019); Twohey et al., *supra* note 3.

168. *See, e.g.*, EVERYNDA, https://www.everynda.com (last visited Jan. 23, 2020); NDA LYNN, https://www.ndalynn.com (last visited Jan. 23, 2020); PERFECTNDA, https://www.neotalogic.com/product/perfectnda/ (last visited Jan. 23, 2020).

169. For a recent iteration of this debate, see generally Hanoch Dagan & Michael Heller, *Why Autonomy Must Be Contract's Ultimate Value*, 20 JER. REV. LEGAL STUD. 148 (2019).

concrete connection between NDAs and the values they serve, while remaining agnostic on whether any of those values truly is ultimate. NDAs can promote economic interests, privacy, the administration of justice, democracy, and national security. There is no doubt there are others. Although this Subpart highlights that NDAs can promote these goods, it is equally important to realize that NDAs can undermine these goods too. NDAs are like the curate's egg: partly good, partly bad.

1. Economy

NDAs can serve private economic interests. When two firms enter into a confidentiality agreement, they share valuable information that enables, or partly comprises, a transaction. The confidentiality provisions are designed to maximize the parties' joint gains (or "contractual surplus," in the argot of an influential contract theory).[170] Similarly, a party to a settlement agreement who is indifferent to the secrecy of its terms may extract a higher price for a confidentiality undertaking. An employer may require its employees—or a product developer its suppliers—to execute NDAs to maintain a competitive advantage (trade secrets, research and development, and so on). NDAs prevent competitors from free riding on information that was costly to acquire.[171]

The relationship between NDAs and public economic interests is unstable. On the one hand, the flow of market-sensitive information can be controlled by judiciously deploying NDAs. Regulation FD shows that NDAs can contribute to market integrity by preventing the misuse of private information. On the other hand, management consultants use NDAs to perpetuate an information monopoly. Secrecy is the management consultant's "most sacred promise."[172] While promising secrecy, consultants, in fact, are corporate executives' "primary source of interorganizational knowledge."[173] "[T]he accumulation and sharing of privileged knowledge," said John Gapper in the *Financial Times*, "is integral to how it works."[174] As Christopher McKenna put it, consultants exploit "economies of knowledge" by providing clients "access to crucial

170. *See* Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 928 (2010); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 550–56 (2003).

171. Lynn Sharp Paine, *Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger*, 20 PHIL. & PUB. AFF. 247, 254–55 (1991); *see also* H.R. Rep. 104-788, at 4 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4021, 4023 ("For many companies [confidential] information is the keystone to their economic competitiveness. They spend many millions of dollars developing the information, take great pains and invest enormous resources to keep it secret, and expect to reap rewards from their investment.").

172. Walt Bogdanich & Michael Forsythe, *How We've Reported on the Secrets and Power of McKinsey & Company*, N.Y. TIMES (Feb. 19, 2019), https://www.nytimes.com/2019/02/19/reader-center/mckinsey-hedge-fund-reporting-investigation.html.

173. CHRISTOPHER D. MCKENNA, THE WORLD'S NEWEST PROFESSION: MANAGEMENT CONSULTING IN THE TWENTIETH CENTURY 20 (2006).

174. John Gapper, Opinion, *McKinsey Model Springs a Leak*, FIN. TIMES, Mar. 10, 2011, at 13.

organizational knowledge through their previous consulting assignments," thereby "transfer[ring] knowledge between rival organizations without incurring regulatory sanctions."[175] "The consultant," concluded Gapper, "is a broker who attempts to amass so much knowledge that each company has to hire him, no matter how uncomfortable that feels."[176]

Similarly, NDAs have a contestable relationship with the public economic good of innovation.[177] Trade-secret owners claim that NDAs encourage firms to innovate: firms are incentivized to pour money into research and development if NDAs can protect the output.[178] In an economy where "innovation is increasingly characterized by a high degree of collaboration" and "external cooperation," trade secrets "facilitate flows of knowledge" by "establish[ing] secure channels for exchanges of know-how."[179] But it might not be that simple. If innovation consists in "new combinations," as Joseph Schumpeter famously wrote, then strong trade-secret protection might limit idea recombination across firm and industry boundaries.[180] Employees might be less inclined to innovate if trade-secret law limits their mobility.[181] Indeed, there is some empirical evidence suggesting that the inevitable-disclosure doctrine—where courts prohibit employees from joining their employer's competitors if the employer can establish that the employee would inevitably disclose trade secrets in the new role—negatively affects innovation quality.[182] In sum, if trade-secret protection is too strict, then "market institutions for idea circulation may remain underdeveloped, but if it is too lax, firms lose their ability to protect themselves and their employees from excessive appropriation."[183]

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175. MCKENNA, *supra* note 173, at 24–25.

176. Gapper, *supra* note 174.

177. Scholarship typically investigates the connection between trade secrets and innovation. NDAs are crucial to the existence of trade secrets: "trade secrets arise in the bilateral context of confidentiality duties." Oren Bar-Gill & Gideon Parchomovsky, *Law and the Boundaries of Technology-Intensive Firms*, 157 U. PA. L. REV. 1649, 1675–76 (2009).

178. Thomas Hellmann & Enrico Perotti, *The Circulation of Ideas in Firms and Markets*, 57 MGMT. SCI. 1813, 1821 (2011) ("If firms could not protect any trade secrets at all, incentives for innovation would be severely stunted.").

179. JENNIFER BRANT & SEBASTIAN LOHSE, TRADE SECRETS: TOOLS FOR INNOVATION AND COLLABORATION 12 (INT'L CHAMBER OF COMMERCE, INNOVATION & INTELLECTUAL PROP. SERIES, RESEARCH PAPER 3, 2014).

180. JOSEPH A. SCHUMPETER, BUSINESS CYCLES 84–86 (1939); JOSEPH A. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT 66–67 (1934); *see also* John Hagedoorn, *Innovation and Entrepreneurship: Schumpeter Revisited*, 5 INDUS. & CORP. CHANGE 883, 885–88 (1996). *See generally* Mark Dodgson, *Exploring New Combinations in Innovation and Entrepreneurship: Social Networks, Schumpeter, and the Case of Josiah Wedgwood (1730–1795)*, 20 INDUS. & CORP. CHANGE 1119 (2011); Heinz D. Kurz, *Schumpeter's New Combinations: Revisiting His* Theorie der wirtschaftlichen Entwicklung *on the Occasion of Its Centenary*, 22 J. EVOLUTIONARY ECON. 871 (2012).

181. Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 578 (1999).

182. Contigiani et al., *supra* note 165, at 2929.

183. Hellmann & Perotti, *supra* note 178, at 1821 n.13.

2. Privacy

Confidentiality agreements are important privacy devices. Corporate entities do not have an intrinsic interest in privacy; a firm values privacy only if it is instrumental to the firm's assessment of its own economic interest.[184] Natural persons, however, often have intrinsic privacy interests that NDAs can protect. Intimates and former intimates, especially those in the public gaze, sign NDAs to protect the closely held details of their private lives. Similarly, confidential discovery agreements and secret settlements ensure that the parties' personal facts do not "leave the room." In jurisdictions where there is no right to privacy, an NDA is an enforceable legal tool that guarantees at least some legal assurance and protection of privacy.

3. Administration of Justice

The relationship between NDAs and the administration of justice is contingent. Today, the law's default position is that agreed-upon secrecy in litigation encourages "quicker, more informal, and often cheaper resolutions for everyone involved."[185] Confidentiality promotes settlement and arbitration, which eases the burden on public institutions.[186] NDAs, therefore, are good for the administration of justice. It was not always thought so. Before 1925, courts did not order specific performance of contracts privatizing dispute resolution, partly because arbitration diverted disputes from public courts to private

184. Trade secrets are sometimes posited as part of a firm's privacy. *See, e.g.*, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 487 (1974) ("A most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable . . . ."). But the harm of trade-secret misappropriation is economic, not dignitary. "A corporation," wrote Chief Justice Marshall for the Court in 1819, "is an artificial being, invisible, intangible, and existing only in contemplation of law." Tr. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819). "Being the mere creature of law," he continued, "it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Id.* As two justices of the High Court of Australia put it, "this artificial legal person lacks the sensibilities, offence and injury to which provide a staple value for any developing law of privacy." *Austl Broad Corp v Lenah Game Meats Proprietary Ltd* (2001) 208 CLR 199, 256 (Gummow & Hayne JJ). More pithily: the corporation "is a *persona ficta*, a 'legal fiction' with 'no pants to kick or soul to damn.'" CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 3 (1975).

185. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018). Justice Gorsuch, for the Court, was writing about arbitration. But arbitration and confidentiality often go hand-in-hand. As Justice Ginsburg observed in dissent, "[a]rbitration agreements often include provisions requiring that outcomes be kept confidential." *Id.* at 1648 (Ginsburg, J., dissenting).

186. *See* Levmore & Fagan, *supra* note 14, at 312–13.

tribunals.[187] Criticism persists: a chorus of scholars and journalists argues that secrecy in litigation is too much administration and not enough justice.[188]

4. Democracy

NDAs can both promote and erode democracy. Confidentiality agreements between journalist and source, which courts occasionally characterize as ethical promises rather than enforceable contracts,[189] insulate the source from discovery and therefore encourage full and frank disclosure. Some of the most significant political reporting in modern history relied on journalists agreeing to keep source identities confidential. The best-known example is Mark Felt, Bob Woodward's confidential source on Watergate.[190] There are many other examples,[191] and a mass of scholarship focuses on the newsperson's privilege.[192] Of course, doubts about the motives of anonymous sources and the accuracy of their information will never subside; still, the argument for protecting the confidentiality of government sources is particularly strong.[193]

5. National Security

The link between confidentiality and national security has long been recognized. But it is only in the last twenty years that policy makers have explicitly connected private NDAs to national security. In 1996, "against a backdrop of

187. "Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes." *Epic Sys.*, 138 S. Ct. at 1621; *accord id.* at 1642 (Ginsburg, J., dissenting). Riding circuit in 1845, shortly before his death, Justice Joseph Story wrote that "a court of equity ought not to compel a party to submit the decision of his rights to a tribunal, which confessedly, does not possess full, adequate, and complete means, within itself, to investigate the merits of the case, and to administer justice." Tobey v. County of Bristol, 23 F. Cas. 1313, 1320 (Mass. Dist. Ct. 1845). Importantly, courts would not enforce agreements to arbitrate before an award was made; once made, however, arbitral awards were enforced. *Id.* at 1320–21.

188. *See supra* Part I.B.2.

189. *E.g.*, Ruzicka v. Conde Nast Publ'ns, Inc., 939 F.2d 578, 581 (8th Cir. 1991). Mark Felt told Bob Woodward: "The relationship was a compact of trust; nothing about it was to be discussed or shared with anyone." Bob Woodward, *How Mark Felt Became 'Deep Throat,'* WASH. POST, June 2, 2005, at A1.

190. *Id.* In 2005, Bob Woodward recalled that Mark Felt insisted on utter confidentiality. In Woodward's telling, Felt was

> relatively free with me but insisted that he, the FBI and the Justice Department be kept out of anything I might use indirectly or pass onto others. He was stern and strict about those rules with a booming, insistent voice. I promised, and he said that it was essential that I be careful. The only way to ensure that was to tell no one that we knew each other or talked or that I knew someone in the FBI or Justice Department. No one . . . . He beat it into my head: secrecy at all cost, no loose talk, no talk about him at all, no indication to anyone that such a secret source existed.

Id.

191. *See generally* NORMAN PEARLSTINE, OFF THE RECORD: THE PRESS, THE GOVERNMENT, AND THE WAR OVER ANONYMOUS SOURCES (2007).

192. *E.g.*, Christina Koningisor, *The De Facto Reporter's Privilege*, 127 YALE L.J. 1176, 1180–85 (2018) (collecting some of the literature).

193. Blasi, *supra* note 64, at 606.

increasing threats to corporate security and a rising tide of international and domestic economic espionage," Congress passed the Economic Espionage Act.[194] The Act created the federal crime of wrongfully copying or otherwise controlling trade secrets with intent to benefit a foreign government.[195] The House Report recited that "the development of proprietary economic information is an integral part of America's economic well-being" and that "threats to the nation's economic interest are threats to the nation's vital security interests."[196] Because NDAs are often partly constitutive of trade secrets, indictments under the Economic Espionage Act frequently allege that defendants breached private confidentiality agreements. For example, a recent indictment alleges that a Huawei engineer twice emailed photographs of a proprietary T-Mobile robot in violation of signed NDAs.[197] And of course, private NDAs can threaten national security. In 2017, for example, ZTE admitted to asking employees to sign NDAs that would hide its violations of Iranian sanctions.[198]

II. SELLING SILENCE, SELLING OUT SPEECH

Given that NDAs serve important values, both generally (autonomy, for example) and concretely (privacy, say), courts willingly enforce them. And yet the public gaze is intensely focused on NDAs and their impact on public discourse. Wrongdoers weaponize NDAs to silence victims and conceal potential criminality. Public officials and candidates for public office deploy NDAs to bury information of public concern. The capacity of NDAs to distort public discourse demands critical attention. The extent to which a society enforces NDAs is relevant to the free speech rights of its members. This Part argues that NDAs can conflict with many of the values and interests that justify free speech. Some NDAs pose real challenges to our most basic free speech commitments. The goal here is to shake our faith that freedom of contract always trumps freedom of speech. Selling silence sometimes sells out free speech.[199]

194. United States v. Hsu, 155 F.3d 189, 194 (3d Cir. 1998).

195. Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (codified as amended at 18 U.S.C. §§ 1831–39 (2018)).

196. H.R. Rep. 104-788, at 4 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4021, 4023.

197. Indictment at 4, 5–6, 9, 21, United States v. Huawei Device Co., No. 2:19-CR-00010-RSM (W.D. Wash. Jan. 16, 2019).

198. Factual Resume at 21, United States v. ZTE Corp., No. 3:17-CR-0120K (N.D. Tex. Mar. 7, 2017).

199. This Part is focused on free speech theory. There is a distinction between free speech and a right to free speech. The Free Speech Clause of the First Amendment might embody a theory of free speech, which finds some institutional expression in the courts (and other social institutions). Whether free speech serves certain values or interests is a question distinct from, but related to, what regulation is legally permitted. Free speech theory cannot provide a comprehensive account of a free speech right. Raz, *supra* note 62, at 305–06. The boundaries of the right to free expression in the United States and in the United Kingdom are different because the institutional expression of the right is different. *Id.* ("[S]o far as the core justification of the right goes, there is a flexible range of permissible or acceptable boundaries; the choice between them turns on their suitability for the institutional arrangements in the different societies.").

A. How We Talk About Free Speech

The usual argument for free speech is that it serves some other value: truth, democracy, and agency. The interminable bouncing around of a discrete set of values characterizes free speech theorizing, and these values constitute our free speech grammar. Kent Greenawalt called them free speech justifications and divided them into consequentialist and nonconsequentialist justifications.[200] On the one hand, consequentialist justifications assert an empirical connection between free speech and good consequences, or between censorship and bad consequences.[201] To argue that free speech makes government more accountable is to adopt a consequentialist position. Nonconsequentialist justifications, on the other hand, say that free speech is good and censorship is bad, regardless of consequences.[202] On these views, censorship is a wrong in itself. Thomas Nagel maintained a similar distinction between instrumental and intrinsic justifications.[203] These distinctions are sometimes useful but it can be hard to tell "where the intrinsic nature of the act stops and consequences begin."[204]

Remarkably, the structure of free speech argumentation has not changed much since John Milton published the *Areopagitica* in 1644. Milton's dazzling poetic brilliance anticipated many of the modern arguments for free speech,[205] particularly the argument from truth later developed by John Stuart Mill.[206] The *Areopagitica's* form and classical allusion presaged the argument from democracy[207] that is now associated with Alexander Meiklejohn.[208] Milton addressed his invective to Parliament, urging repeal of the Licensing Order of 1643 while referring to Isocrates's speech *Areopagiticus* written in 355 B.C., which, in Milton's words, was a "discourse to the parliament of Athens [Areopagus] that persuades them to change the form of democracy which was then established."[209] Milton also suggested an autonomy-based argument by noting that prepublication licensing is not only a "manifest hurt" that "distrust[s] the judgment and the honesty" but also "the greatest displeasure and indignity to a free

200. Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 127–30 (1989).

201. *Id.* at 130–47.

202. *Id.* at 147–54.

203. Thomas Nagel, *Personal Rights and Public Space*, 24 PHIL. & PUB. AFF. 83, 86 (1995).

204. Greenawalt, *supra* note 200, at 129.

205. *See generally* Vincent Blasi, *A Reader's Guide to John Milton's* Areopagitica*, the Foundational Essay of the First Amendment Tradition*, 2017 SUP. CT. REV. 273.

206. JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* 18 COLLECTED WORKS OF JOHN STUART MILL 213, 228–59 (J. M. Robson ed., 1977).

207. *See generally* Eric Nelson, *"True Liberty": Isocrates and Milton's* Areopagitica, 40 MILTON STUD. 201 (2001).

208. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

209. JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENS'D PRINTING, TO THE PARLIAMENT OF ENGLAND (1644), *reprinted in* THE ESSENTIAL PROSE OF JOHN MILTON 175, 177 (William Kerrigan et al. eds., 2013).

and knowing spirit."[210] "He who is not trusted with his own actions," said Milton, "has no great argument to think himself reputed, in the commonwealth wherein he was born, for other than a fool or a foreigner."[211]

First Amendment scholars, then, typically work with the values that constitute our free speech grammar. But recently, First Amendment "Lochnerism" has seized the academic imagination.[212] The law professoriate observes the powerful resemblance between *Lochner*-era invalidation of economic regulations and the First Amendment's deregulatory turn.[213] The consequences of First Amendment Lochnerism have been trenchantly criticized; the quest for a progressive First Amendment has begun.[214] One of the most interesting responses to First Amendment Lochnerism is Leslie Kendrick's analysis of "special rights."[215] On this view, free speech is a special right if it is sufficiently distinct (analytically independent from other rights and activities) and robust (protective of the activity).[216] For a special right of free speech, neither distinctiveness nor robustness is especially demanding. On distinctiveness, speech cannot be subsumed in a larger category of activity but it also need not be distinct from *all* other activities. On robustness, it is not necessary that protected speech enjoy stringent safeguards or even greater protection than that afforded by a general liberty principle. Kendrick's analysis might usefully clarify the strands of anti-Lochnerism woven through First Amendment scholarship. For example, anti-Lochnerism likely endorses a more stringent distinctiveness requirement by presumably insisting that a New York law forbidding merchants from imposing a surcharge for credit-card use is not a regulation of speech—contrary to a recent Supreme Court decision.[217]

Suffice it to say that this Article treats free speech as a special right because that is our social and constitutional practice. Kendrick focuses on conceptual distinctiveness but says that "a right may be distinctive not conceptually but purely as a matter of social practice."[218] The First Amendment singles out the freedom of speech, and this "explain[s] . . . the existence of a special right."[219]

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210. MILTON, *supra* note 209, at 194–95.

211. *Id.* at 195.

212. Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 331 (2018) (referring to "the growing literature on First Amendment *Lochnerism*"); *id.* at 331 n.57 (collecting literature).

213. *See, e.g.*, Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015).

214. The *Columbia Law Review*'s 2018 symposium was called, "A First Amendment for All? Free Expression in an Age of Inequality." Symposium, *A First Amendment for All? Free Expression in an Age of Inequality*, 118 COLUM. L. REV. 1953–2249 (2018).

215. *See generally* Leslie Kendrick, *Free Speech as a Special Right*, 45 PHIL. & PUB. AFF. 87 (2017).

216. *Id.* at 91–110.

217. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017).

218. Kendrick, *supra* note 215, at 92.

219. *Id.* ("Perhaps a society has a constitutional text that mistakenly singles out a certain activity and for all practical purposes cannot be amended. Such circumstances would explain, and perhaps justify, the existence of a special right in that society.").

An argument that subsumes free speech within a more general liberty right[220] flies in the face of our constitutional practice. John Rawls thought that freedom of political speech was of "great significance . . . to any fully adequate scheme of basic liberties."[221] Raz pointed to "the great importance of free expression" and "the need to make freedom of expression a foundational part of the political and civic culture of pluralistic democracies."[222] Our social and constitutional practice treats free speech as a special right.

B. Monism and Pluralism

Free speech pluralism argues that there are several values that justify free expression, and that none is privileged over others. T.M. Scanlon is the most articulate free speech pluralist, questioning a search for unity and doubting whether free speech values "can be helpfully subsumed under any single label."[223] Raz, too, advocated free speech pluralism, noting that "[t]here is no reason to think that just one consideration can provide a complete account of the right."[224] Raz pointed out that his argument (that free expression is valuable because the public portrayal of forms and styles of life is validating) "joins three other arguments to form the foundation of a liberal doctrine of free expression."[225]

Free speech monism contends that there is one value that best justifies free speech or is prior to (or more important than) other values. It's useful to distinguish between free speech monism and First Amendment monism. It is one thing, said Robert Post, to note that there are many values contributing to a justification of free expression; "[i]t is quite a different question, however, whether constitutional doctrine should express each of these different reasons."[226] Post is a First Amendment monist because he argued that the Free Speech Clause, not free speech generally, is rooted foremost in participatory democracy. He insisted on the "lexical priority" of "the principle of democratic participation."[227] This monism is grounded in institutional reasons: "pragmatic simplification, which is exemplified by my effort to develop a lexically

220. *See, e.g.*, Tara Smith, *Just Sayin'—How the False Equivalence of Speech with Action Undermines the Freedom of Speech*, 11 DREXEL L. REV. 467 (2019).

221. JOHN RAWLS, POLITICAL LIBERALISM 343 (expanded ed. 2005).

222. Raz, *supra* note 62, at 324.

223. T.M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 VA. L. REV. 541, 543–45 (2011).

224. Raz, *supra* note 62, at 308.

225. *Id.* at 324. According to Raz, "[t]he other three are: (1) freedom of expression as a prerequisite of a democratic government; (2) freedom of expression as vital for the prosperity of a pluralistic culture; (3) freedom of expression as a crucial element in controlling possible abuses and corruption of power." *Id.*

226. Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 619 (2011).

227. *Id.* at 618; *see also* Post, *supra* note 38, at 489.

fundamental purpose for First Amendment doctrine."[228] "Constitutional doctrine," said Post, "must be formulated in a way that serves the need of the legal system to develop relatively simple, clear, and consistent lines of precedent capable of guiding lower courts and governmental actors."[229] These are claims about law and its institutions, not about free speech theory.

Post, then, is a First Amendment monist; he is not a free speech monist. Democratic participation supplies "the best possible account of our actual historical principles,"[230] but "Americans have many diverse and disparate reasons for valuing freedom of expression."[231] Similarly, James Weinstein acknowledged that "a multiplicity of underlying values" and "multifarious norms" animate free speech theory,[232] but there is no "common ground for judging the relative normative appeal of these contending theories."[233] "What uniquely qualifies participatory democracy as the core free speech norm," he concluded, "is that it is the only contender that the case law does not massively contradict."[234] For both Post and Weinstein, doctrinal fit is an overriding concern.[235]

Seana Shiffrin is a free speech monist. She argued that "a thinker-oriented approach to freedom of speech offers a stronger foundation for freedom of speech protections than competing theoretical approaches."[236] In Shiffrin's view, the "pitched battle" among competing free speech values is puzzling.[237] Rather than add another value to the list, Shiffrin argued that "a deeper connection unifies them."[238] Traditional free speech values like truth and democracy assume the existence of "a developed thinker behind the scenes," and "[r]easoning from the standpoint of the thinker and her interests can yield a more comprehensive, unified foundation for freedom of speech protection."[239] Shiffrin asserted a hierarchy where the moral agency of a free thinker underwrites all other free speech values.[240]

First Amendment monism is a mistake (put to one side the question of free speech monism). First Amendment monists are preoccupied with doctrinal fit,

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228. Post, *supra* note 226, at 617.

229. *Id.* at 619–20.

230. Post, *supra* note 38, at 477.

231. Post, *supra* note 226, at 619.

232. James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 650 (2011).

233. *Id.* at 635.

234. *Id.* at 643.

235. This is particularly true of Weinstein. *See, e.g.*, *id.* at 635 ("[I]f doctrinal coherence and the pragmatic benefits that such coherence brings are to be given any significant weight, then among normatively appealing theories the one with the better doctrinal fit should be judged the best overall theory.").

236. SHIFFRIN, *supra* note 35, at 80.

237. *Id.* at 83.

238. *Id.* at 84.

239. *Id.* at 84–85.

240. Free speech monism does not entail the view that the value underwriting free speech monism is exhaustive. Shiffrin says, "I do not mean to suggest that the connection between freedom of speech and moral agency exhausts the significance of freedom of speech." *Id.* at 80; *see also* Raz, *supra* note 62, at 305.

even while they acknowledge the doctrine to be multifocal. In my view, the First Amendment achieves administrable coherence by treating free speech as exhausted by several different argumentative archetypes. These archetypes correspond to the most influential free speech theories: arguments from truth, democracy, and agency. The First Amendment consists in these conventional argumentative practices.

This is Philip Bobbitt's constitutional theory writ smaller.[241] Bobbitt argued that constitutional law consists in, and is "legitimated by, certain conventional argumentative practices."[242] The so-called modalities of constitutional argument are historical, textual, structural, prudential, doctrinal, and ethical. Bobbitt contended that there is no grand hierarchy that integrates these modalities into a coherent whole, and he rejected any attempt to justify constitutional law by reference to external criteria alien to that practice.[243] A grand hierarchy would need to be explained by some external justificatory criteria, but such justification cannot claim the legitimacy of constitutional law because it would not proceed according to the modalities constituting that law.[244]

Just like there are modalities of constitutional argument, there are modalities of First Amendment argument. These free speech modalities—truth, democracy, agency—constitute our First Amendment grammar, and they comprise the First Amendment's theoretical resources. A judge enforces the First Amendment when she and her colleagues engage in the conventional argumentative practices constituting the First Amendment. Every First Amendment problem that arises is analyzed according to these conventional forms of argument. In an arresting passage, Bobbitt said:

> If you were to take a set of colored pencils, assign a separate color to each of the kinds of arguments, and mark through passages in an opinion of the Supreme Court deciding a constitutional matter, you would probably have a multi-colored picture when you finished. Judges are the artists of our field, just as law professors are its critics, and we expect the creative judge to employ all the tools that are appropriate, often in combination, to achieve a satisfying result.[245]

The same is true for First Amendment cases. The rich American free speech tradition reflects and embodies aspects of all its argumentative archetypes, not just one. Although often posited as rivals, these theories are not necessarily inconsistent; they are overlapping and sometimes mutually supporting. Of course, the scope of each theory's limitation on government regulation of speech varies.

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241. *See generally* BOBBITT, supra note 38.

242. Philip Bobbitt, Youngstown*: Pages from the Book of Disquietude*, 19 CONST. COMMENT. 3, 4–5 (2002).

243. *Id.*

244. *Id.*; BOBBITT, *supra* note 38.

245. BOBBITT, *supra* note 38, at 93–94.

The First Amendment aesthetic is the uneasy embodiment of these sometimes consistent, sometimes opposing theories.

The primary case for First Amendment monism leans heavily on two institutional arguments. The first is a perceived need for "ease of explanation and comprehension" and "feasibility of implementation in an imperfect institutional environment."[246] This is really a set of aspirations that begs the questions: how do we know when a doctrine is sufficiently comprehensible and institutionally feasible? If privileging participatory democracy is institutionally feasible, why not participatory democracy *and* truth? Why not First Amendment dualism? The incomprehensibility of First Amendment doctrine is unlikely to be because there is more than one animating value. It's probably because the judicial articulation of the discrete set of free speech values is deficient. Winnowing free speech values down to one is not going to remedy that deficiency, especially when each traditional free speech value is multifaceted and subsumes subsidiary and competing values itself.[247]

The second argument for First Amendment monism is that the preferred value—for Post and Weinstein, participatory democracy—fits best with our constitutional practice. But First Amendment monism itself does not fit with our constitutional practice. Prioritizing participatory democracy, or any other major free speech value, chronically undersells the First Amendment. It ignores vast swathes of our constitutional canvas. One needs to grapple with the argument from truth, for example, on its own terms to provide a plausible account of our First Amendment tradition.[248]

The cost of privileging one free speech value over others when applying the First Amendment would be borne by our constitutional culture. First Amendment monism, instead of producing doctrine shot through with the multicolors of intellectual diversity and ideological variety, is a recipe for doctrinal stasis and monotony. Do we really prefer Meiklejohn to Milton? Would a focus on participatory democracy have denied us Justice Holmes's marketplace of ideas? Or Justice Brandeis's rhapsodizing on character? Indeed, First Amendment monism works an irony. It stultifies the development of other values in First Amendment doctrine, as if to censor them. Nearly 400 years ago, Milton wrote about free speech environmentalism and the importance of inquisitive energy, the "musing, searching, revolving new notions and ideas" and "fast

246. Post, *supra* note 226, at 617 (quoting with approval Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 VA. L. REV. 531, 531 (2011)).

247. For example, Vincent Blasi pointed out that the argument from democracy embraces not only a participation rationale but also constituent-service, informed-voter, and checking rationales. Blasi, *supra* note 246, at 536 ("It is by no means obvious that the normative appeal of participation as a rationale for free speech is greater than that of the constituent-service, informed-voter, or checking rationales, each of which also derives from the foundational commitment to democracy.").

248. *Id.* at 538 ("Any explanatory analysis of either the case law or the public understanding of the freedom of speech needs to address the pervasiveness and durability, even to the extent of gaining traction in popular culture, of the marketplace-of-ideas figure of speech.").

reading, trying all things."[249] We should be wary of a First Amendment monism that threatens this culture.

C. Free Speech Values and NDAs

Whether a certain practice threatens free speech depends on "the normative theory" adopted.[250] Consistent with First Amendment pluralism, this Subpart will argue that NDAs conflict with many of our First Amendment values. The analysis here gathers a variety of theories under three values: truth, democracy, and agency. No doubt there is reason to cavil with these labels. I acknowledge that the classificatory regime adopted here is neither stable nor exhaustive. But these represent our foundational commitments to free speech, and if NDAs pose a substantial threat to even one of them, then there is reason to worry.[251]

1. Truth

Poetically voiced by Milton,[252] analyzed by Mill,[253] and rhetorically repurposed by Holmes,[254] the argument from truth is popular and intuitively powerful. It says that ideas converge to truth only when they are subjected to, and refined by, the continual examination and criticism entailed by free speech. Of truth, Milton famously said: "Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter . . . ."[255] There are echoes of Milton in Mill's assertion that truth "has to be made by the rough process of a struggle between combatants fighting under hostile banners"[256] and in Holmes's celebrated maxim that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[257]

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249. MILTON, *supra* note 209, at 205.

250. Leslie Kendrick, *Use Your Words: On the "Speech" in "Freedom of Speech,"* 116 MICH. L. REV. 667, 695, 699–702 (2018).

251. In a recent article, Jeremy Waldron takes a similar methodological approach when arguing that free speech values do not require the suppression of heckling. Jeremy Waldron, *Heckle: To Disconcert with Questions, Challenges, or Gibes*, 2017 SUP. CT. REV. 1, 15–21.

252. MILTON, *supra* note 209, at 209–10.

253. MILL, *supra* note 206, at 228–59.

254. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

255. MILTON, *supra* note 209, at 200–01.

256. MILL, *supra* note 206, at 254.

257. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). The text adopts the customary link between Holmes's *Abrams* dissent and the argument from truth. A better, but not yet standard, reading of the dissent extracted "a Darwinist concern for intellectual adaptation" that "rests . . . on the historical acceptance of the political principle of legitimate opposition." Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 25–26, 45. Free speech is valuable, on this view, because it "holds various forms of incumbent authority accountable to standards of performance." *Id.* at 46. As Frederick Schauer noted, this looks more like an argument from democracy than an argument from truth. Frederick Schauer, *Constitutions of Hope and Fear*,

It is impossible to do perfect justice to this theory (or its detractors[258]) here, but a few observations may be made. First, the argument from truth is focused primarily on audience and third-party interests, namely, their interest in approaching truth by exposure to the competition between ideas.[259] Second, it is a process-oriented theory.[260] It is not fixated on evaluating the substantive rightness or wrongness of an idea; rather, the validity of an idea is judged on its capacity to survive or adapt under critical stress. Third, it is an instrumental or consequentialist theory of free speech.[261] Free speech, on this view, is not intrinsically valuable but only valuable to the extent that it contributes to the emergence of truth. Fourth, the argument from truth rests, at least for Mill, on human fallibility.[262] Because we could be wrong, maybe partially, about any of our beliefs, suppressing the contrary view might impede our path to truth. Finally, this theory permits expression of false beliefs because they challenge us to fasten our true beliefs to the most secure foundation. "A man may be a heretic in the truth," said Milton, "and if he believe things only because his pastor says so, or the Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy."[263]

An NDA removes information or views from the public domain. As far as the argument from truth is concerned, that is a harm. Regardless of the substantive rightness or wrongness of the information or view, its absence impedes our path to the truth. That is not to say, of course, that there may not be independent reasons for executing an NDA. Google's search-engine algorithm is a valuable trade secret; Google employees sign NDAs to keep the algorithm under wraps. But the argument from truth is not responsive to the value of the information suppressed. It is only concerned with our capacity to arrive at the

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124 YALE L.J. 528, 541 n.45 (2014) (reviewing ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION (2014)).

258. *See, e.g.*, Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 3 (1996) (criticizing the claim that the authors label MMTP, for "the Market Maximizes Truth Possession," which holds that "[m]ore total truth possession will be achieved in a free, unregulated market for speech than in a system in which speech is regulated"). Ronald Dworkin highlighted "Mill's doubtful epistemology." Ronald Dworkin, *Foreword* to EXTREME SPEECH AND DEMOCRACY vii (Ivan Hare & James Weinstein eds., 2009). Similarly, Frederick Schauer criticized the argument from truth because it is alien to our actual processes of truth acquisition. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 33–34 (1982). I am less concerned here with the validity of those theories. Whether we like it or not, the argument from truth has a prominent place in our First Amendment tradition and forms part of our First Amendment grammar.

259. T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 528–29 (1979).

260. SCHAUER, *supra* note 258, at 19–20.

261. Greenawalt, *supra* note 200, at 130.

262. David Dyzenhaus, *John Stuart Mill and the Harm of Pornography*, 102 ETHICS 534, 547–48 (1992).

263. MILTON, *supra* note 209, at 200; *see also* Brian Leiter, *Justifying Academic Freedom: Mill and Marcuse Revisited*, *in* MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 113, 120 (Heidi M. Hurd ed., 2019) (expressing Mill's argument that "even if we believe what is true already, being challenged by false beliefs insures that we hold our beliefs for sound reasons, not just dogmatically").

truth by continual disputation. Without Google's algorithm, the state of artificial intelligence and the mechanism of information dissemination are obscure, and we cannot adjust or test our beliefs on these matters.

NDAs are a problem for the argument from truth, but not all harms to the "marketplace" are created equal. A single NDA may not pose a systemic threat to the argument from truth. Collectively, however, it is a different matter. Thanks to President Trump's Twitter feed, we know that NDAs are "very common among celebrities and people of wealth" and are routinely enforced in arbitration proceedings.[264] Vast numbers of employees sign NDAs.[265] These agreements cover a large quantity of information that is suppressed by an opaque decision-making system. No doubt an employee is chilled from discussing even information that is not covered by her NDA. And an injunction against an employee threatening to disclose information operates as a prior restraint. The enormous number of NDAs coupled with large-scale arbitration presents a serious threat to free speech, when the value of free speech is understood as instrumental to the emergence of truth over time.

That said, it is possible to argue that NDAs actually serve the argument from truth. Some NDAs suppress falsehoods. Consider the rapid settlement of a frivolous claim. Rather than risk the cost of a potential reputational hit, the defendant might prefer to quietly and swiftly settle the claim with an NDA to silence the plaintiff. Trump maintains that hush payments were made to silence false information. In this guise, NDAs might protect the marketplace of ideas from distortion by reducing the currency of falsity and preventing unnecessary harm. The difficulty with this view is that the argument from truth celebrates its protection of falsity. It does not itself supply criteria to decide whether information is true or false; falsity is valuable because it "serve[s] to polish and brighten the armory of Truth."[266]

2. Democracy

The argument from democracy or self-government is a genus of theories where Meiklejohn is the dominant species.[267] Meiklejohn, sometimes dismissed as sonorous and impressionistic,[268] argued that freedom of expression is necessary to meaningfully exercise the right to vote.[269] Unless criticism of public

264. Trump, *supra* note 9.

265. Bishara et al., *supra* note 10, at 4; Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change.

266. MILTON, *supra* note 209, at 212.

267. *See generally* MEIKLEJOHN, *supra* note 208.

268. JEREMY WALDRON, THE HARM IN HATE SPEECH 173, 267 n.1 (2012); Jeremy Waldron, *The Conditions of Legitimacy: A Response to James Weinstein*, 32 CONST. COMMENT. 697, 697–98 (2017).

269. MEIKLEJOHN, *supra* note 208, at 88–89.

officials and candidates for public office is "uninhibited, robust, and wide-open,"[270] voters will not be sufficiently informed about their electoral choice. This "informed voter" species of the argument from democracy assumes that the people are sovereign and paradigmatically exercise that sovereignty at the ballot box. The exercise of their sovereign powers requires free examination of candidates and policies and free communication among the people.[271]

Another important species of the argument from democracy is Vincent Blasi's articulation of the checking value of the First Amendment.[272] According to Blasi, "free speech, a free press, and free assembly can serve in checking the abuse of power by public officials."[273] In the 1960s and 1970s, the First Amendment "facilitat[ed] a process by which countervailing forces check the misuse of official power": witness the Civil Rights Movement, peace marches, Vietnam, and Watergate.[274] Although the checking value is a species of the argument from democracy, Blasi positioned it as deriving from "the democratic theory of John Locke and Joseph Schumpeter, not that of Alexander Meiklejohn."[275] The "role of the ordinary citizen," on this view, "is not so much to contribute on a continuing basis to the formation of public policy as to retain a veto power to be employed when the decisions of officials pass certain bounds."[276] A professional, organized, and financed commentariat is necessary to ensure citizens can exercise that veto power.[277] Notably, Blasi did not argue that the checking value grounded First Amendment monism; rather, he intended "to further the understanding of one basic value which has been underemphasized" and which "should be a significant component in any general theory of the First Amendment."[278]

Another version of the argument from democracy posits that "freedom of speech is not just instrumental to democracy but constitutive of that practice."[279] Ronald Dworkin grounded this argument in political legitimacy, claiming that it is illegitimate for the state to enforce an official decision against dissenters who were forbidden from expressing their objection to the decision before it was taken.[280] The state, said Dworkin, must treat each individual as a

270. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

271. James Madison, Virginia Resolutions (Dec. 21, 1798), *reprinted in* 17 THE PAPERS OF JAMES MADISON 185, 189–90 (David B. Mattern et al. eds., 1991) (protesting the Alien and Sedition Acts for conferring "a power which more than any other ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right").

272. *See* Blasi, *supra* note 64.

273. *Id.* at 527.

274. *Id.*

275. *Id.* at 542.

276. *Id.*

277. *Id.* at 541–42.

278. *Id.* at 528.

279. Dworkin, *supra* note 258, at v.

280. *Id.* at vii.

free and equal member of the political community, and therefore must accord everyone the opportunity to express their political, moral, and cultural convictions, tastes, and prejudices.[281] Otherwise, it is illegitimate for the state to coerce individuals who dissent from the collective decision.[282]

For the informed-voter and checking-value theories, an NDA is problematic if it prevents individuals from contributing to the ongoing development of public opinion or from checking egregious abuses of public power. There are many reasons to think that the widespread use of NDAs could produce an electorate that is poorly informed on political matters and could debilitate the citizenry's power to veto a candidate or his policies. A culture of concealment nourished by NDAs will prevent the formation of public opinion, obstruct the checking of government malfeasance, and reduce diversity of viewpoint. Indeed, the capacity of NDAs to interfere with the informed-voter and checking-value theories is recognized by the unconstitutional-conditions doctrine. The normative basis of that doctrine is that the government cannot prohibit its employees from criticizing it. History shows that government employees who speak out are necessary for the healthy development of public opinion and for checking serious abuses of power. President Trump's requirement that White House officials sign NDAs was thus rightly criticized.[283]

It does not quiet concern to say that the NDA counterparty was a private entity and not the government. To be sure, the informed-voter and checking-value arguments from democracy regard NDAs with the government as presumptively questionable, because such NDAs blunt the capacity of the public to intelligently exercise the franchise or to control abuses of power.[284] But NDAs with private parties can be equally troubling. Consider the practice, known as "catch and kill," where media outlets purchase rights to, and then bury, stories critical of a public official or candidate.[285] If the information captured stunts the franchise or reveals official malfeasance, then these arguments from democracy say it should be released. Substituting the government for a

281. *Id.* at viii.

282. This argument is an outgrowth of the debate on the legitimacy of hate-speech laws. As with the other First Amendment values, my discussion here is incomplete. For more, compare Jeremy Waldron, *Hate Speech and Political Legitimacy*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH 329 (Michael Herz & Peter Molnar eds., 2012), with Ronald Dworkin, *Reply to Jeremy Waldron*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH, *supra*, at 346. *See also* WALDRON, *supra* note 268, at 173–97; Waldron, *supra* note 268, at 697–715; James Weinstein, *Hate Speech Bans, Democracy, and Political Legitimacy*, 32 CONST. COMMENT. 527, 532 (2017).

283. Julie Hirschfeld Davis et al., *Hoping What Happens in White House Stays in the White House*, N.Y. TIMES, Mar. 22, 2018, at A15; Ronan Farrow, *A Lawsuit by a Campaign Worker Is the Latest Challenge to Trump's Nondisclosure Agreements*, NEW YORKER (Feb. 25, 2019), https://www.newyorker.com/news/news-desk/a-lawsuit-by-a-campaign-worker-is-the-latest-challenge-to-trumps-nondisclosure-agreements; Ruth Marcus, Opinion, *Nondisclosure Agreements at the White House*, WASH. POST, Mar. 19, 2018, at A17.

284. Legitimate reasons (such as national security) can, all things considered, justify a circumscribed regime of nondisclosure (such as classified information).

285. Ronan Farrow, *Donald Trump, a Playboy Model, and a System for Concealing Infidelity*, NEW YORKER (Feb. 16, 2018), https://www.newyorker.com/news/news-desk/donald-trump-a-playboy-model-and-a-system-for-concealing-infidelity-national-enquirer-karen-mcdougal.

private party does not remove the free speech concerns, although perhaps it makes it less likely that the information suppressed is salient to the demos.

The argument that NDAs are problematic from the point of view of political legitimacy is structured differently. Dworkin suggested a distinction, developed by others,[286] between "upstream" laws and "downstream" laws.[287] Upstream laws are those that regulate the expression of individual views; downstream laws are those that are responsive to the views expressed by the speech regulated upstream.[288] The example used is hate speech. Laws against hate speech, plainly enough, are upstream. Laws against hate crimes and discrimination are downstream: they protect victims against the consequences of, or practices dependent on, the views expressed by hate speech. It seems plausible that the regulation of upstream speech will more effectively deal with downstream consequences. But Dworkin argued that is a mistake. The gist of his argument is that suppressing views upstream diminishes the legitimacy of laws downstream. In a crucial passage, Dworkin said:

> We must protect [minorities] against unfairness and inequality in employment or education or housing or the criminal process, for example, and we may adopt laws to achieve that protection. But we must not try to intervene further upstream, by forbidding any expression of the attitudes or prejudices that we think nourish such unfairness or inequality, because if we intervene too soon in the process through which collective opinion is formed, we spoil the only democratic justification we have for insisting that everyone obey these laws, even those who hate and resent them.[289]

Put differently, the state should stop people from acting on invidious views, but it should not stop them from expressing those views. Laws that censor hate speech prevent the expression of opposition to, and therefore delegitimize, antidiscrimination laws.

The question, then, is whether NDAs are sufficiently upstream—in the sense that they suppress the expression of individual views—to degrade the legitimacy of a downstream collective decision for which the suppressed views would be relevant. Two examples demonstrate that NDAs can damage the legitimacy of the election of a candidate for public office (a downstream collective decision). First, suppose the Democratic or Republican nominee for President purchases the silence of a former extramarital paramour. Rightly or wrongly, the former paramour's speech would have figured in the collective decision to elect the candidate. Suppose, second, a corporate entity formerly controlled by a public official purchased the silence of current employees about allegations of

286. WALDRON, *supra* note 268, at 177–81; Waldron, *supra* note 282, at 331–40; Weinstein, *supra* note 282, at 529–30.

287. Dworkin, *supra* note 258, at viii.

288. *Id.*; *see also* WALDRON, *supra* note 268, at 178–79.

289. Dworkin, *supra* note 258, at viii.

sexual harassment against the official. Such NDAs may not necessarily condemn a subsequent election but would, to some degree, delegitimize it.[290]

What matters is that NDAs can be upstream censors that degrade downstream collective decisions like elections. Elections that suppress all opposition speech are rightly stamped as illegitimate. The suppression of facts or empirical information that could form the foundation of ethical or normative opposition to a candidate must also impair the legitimacy of an election. A male candidate for President who purchases, through his agents, a woman's silence over an alleged extramarital affair robs the public of an empirical basis for ethical opposition to that candidate. The fact of the affair, if there was one, is no doubt important for some voters. But more important is the fact of the NDA itself—and its capacity to bury relevant information—in a political culture that peddles in Newspeak like "alternative facts," "fake news," and "post-truth."

3. Agency

Like other free speech justifications, the argument from agency is a broad church referring to theories centered on human autonomy or moral agency. By one count, autonomy grounds no less than six theories of free speech.[291] Scanlon, who supplied one such account in 1972[292] and later renounced it,[293] exhorts us to stop talking about autonomy because it covers too many varying interests.[294] Fair enough. But until our free speech theorists and First Amendment scholars, practitioners, and judges eradicate talk of autonomy, we are obliged to use the label. It is, as Greenawalt put it, one of "the subtle plurality of values that does govern the practice of freedom of speech."[295]

In 1972, Scanlon argued for what he called the "Millian Principle."[296] This holds that the justification for speech regulations cannot include two kinds of harms. The first is false beliefs that the speech would lead people to hold; the second is harmful consequences of actions that the speech would lead people to consider worthwhile.[297] Scanlon's argument for the Millian Principle was that autonomous citizens cannot accept such justifications. "To regard himself as autonomous," Scanlon wrote, "a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action."[298] An autonomous person cannot unquestioningly accept another's beliefs or reasons

290. For Waldron, legitimacy is a matter of degree. WALDRON, *supra* note 268, at 186–92.
291. Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312, 324 (1998).
292. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 214 (1972).
293. Scanlon, *supra* note 259, at 533–34.
294. Scanlon, *supra* note 223, at 546.
295. Greenawalt, *supra* note 200, at 119.
296. Scanlon, *supra* note 292, at 213.
297. *Id.*
298. *Id.* at 215.

for action; she must, in relying on another's judgment, "be prepared to advance independent reasons for thinking their judgment likely to be correct, and to weigh the evidential value of their opinion against contrary evidence."[299] If a person accepts the government's justification for speech regulation that certain beliefs are false or that certain actions supported by speech are, in fact, harmful, then he fails to regard himself as autonomous. Scanlon backed away from this view, but it remains influential.[300]

While the Millian Principle prioritized audience interests, other accounts of free speech that appeal to agency emphasize speaker interests as well. Seana Shiffrin, for example, focused on "the autonomy of the individual *mind*," arguing that free speech is necessary for us to externalize our mental contents and thus for our self-development and the development of meaningful relations with others.[301] This "thinker-based" approach to free speech says that the interests of individuals as thinkers justify free speech because speech and expression are uniquely capable of externalizing one's mental contents. Those interests include "capacities for autonomous deliberation and reaction, practical judgment, and moral relations."[302] Our practical capacity to express our mental contents, and to receive others' expression of theirs, is necessary for personal and interpersonal development. This makes free speech necessary for moral agency.

There is an interesting relationship between the agency theories and the democracy theories. Agency theorists assert that the argument from democracy presupposes that the informed voter, say, is an autonomous agent exercising political choice.[303] Shiffrin motivated her thinker-based approach partly because other "theories all presuppose, in one way or another, that there is a developed thinker behind the scenes."[304] Scanlon's autonomy theory, which he later repudiated, was, in fact, an attempt to generalize Meiklejohn's argument beyond political speech.[305]

The existence of this relationship is sometimes put as a challenge to democracy theorists: if the argument from democracy depends on the argument from agency, then there is no reason to limit free speech to political

299. *Id.* at 216.

300. He backed away from this view partly because of its breadth. The Millian Principle would condemn, for example, laws against deceptive advertising. It overvalued the audience interest in autonomy and precluded the inquiry of whether that interest could sometimes be advanced by restricting some expression. Scanlon's later view did not use autonomy to limit the set of legitimate justifications of authority, as the Millian Principle did, but instead regarded "autonomy, understood as the actual ability to exercise independent rational judgment, as a good to be promoted." Scanlon, *supra* note 259, at 533. The view Scanlon arrived at was "neither democracy-based, nor autonomy-based, but irreducibly pluralist." T.M. Scanlon, *Comment on Baker's Autonomy and Free Speech*, 27 CONST. COMMENT. 319, 325 (2011).

301. SHIFFRIN, *supra* note 35, at 85.

302. *Id.* at 88.

303. Weinstein, *supra* note 232, at 672–73.

304. SHIFFRIN, *supra* note 35, at 84.

305. Scanlon, *supra* note 259, at 530–31.

expression.[306] There are two responses. The first is that even granting the dependency, discussing agency at this level of generality does not yield meaningful insights about when we should view government regulations of speech suspiciously. The argument from democracy, pitched at a lower level of abstraction, crisply explains why a public official should be held to a higher standard when bringing defamation claims against those critical of his conduct. The structure of an argument based on agency lacks this directness and clarity. The second response distinguishes between values and evaluative presuppositions. Autonomy "is not an underlying *value* served by participatory democracy but rather a *presupposition* of that practice."[307] This view apparently derives from Raz's reconstruction of Hans Kelsen's argument that legal science presupposes the basic norm without morally committing to it (what Raz called a detached statement).[308] Similarly, it might be possible to argue that autonomy is an underlying normative presupposition for statements using the thick concept of democracy; arguing that free speech promotes democracy presupposes, but does not assert, autonomy.[309]

It is tempting to argue that NDAs do not infringe the argument from agency. If anything, NDAs reinforce agency because they permit speakers to sell their free speech rights whenever they wish.[310] But this mistakenly assumes that the free speech arguments from agency center solely on speaker interests. The basis of Scanlon's retracted autonomy theory was the audience-related Millian Principle. Shiffrin's thinker-based approach emphasized the ability to receive others' externalization of their mental contents as a necessary part of moral agency. To be sure, some autonomy accounts focus on the speaker. The best known is probably Baker's argument that the First Amendment's basic purposes are individual self-fulfillment and participation in social and democratic change.[311] Even then, however, audience interests are not absent; indeed, Baker acknowledged that the "listener, like the speaker, uses speech for self-realization or to promote change."[312]

For the agency theories that value audience interests at least as highly as speaker interests (early Scanlon and Shiffrin), the argument that NDAs infringe free speech is structurally similar to the argument that NDAs threaten the

306. Weinstein, *supra* note 232, at 672–73.

307. James Weinstein, *Fools, Knaves, and the Protection of Commercial Speech: A Response to Professor Redish*, 41 LOY. L.A. L. REV. 133, 165 n.129 (2007).

308. JOSEPH RAZ, THE AUTHORITY OF LAW 140–45 (2d ed. 2009); Joseph Raz, *The Purity of the Pure Theory*, 35 REVUE INTERNATIONALE DE PHILOSOPHIE [REV. INT. PHILOS.] 441, 451–55 (1981) (Belg.).

309. David Enoch & Kevin Toh, Legal *as a Thick Concept*, *in* PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW 257, 271–74 (Wil Waluchow & Stefan Sciaraffa eds., 2013).

310. In an otherwise very fine article, Solove and Richards take this view and (wrongly) consider Scanlon's early autonomy theory to be speaker-based. Solove & Richards, *supra* note 29, at 1687–88, 1687 n.186.

311. *See generally* BAKER, *supra* note 34.

312. *Id.* at 67.

informed-voter or checking-value theories. A community's routine enforcement of NDAs deprives agents of information necessary to decide for themselves what to believe and to weigh competing reasons for action. For example, a private actor who uses NDAs to conceal egregious or widespread criminality denies us access to reasons and evidence for our independent judgments. Deception or lack of information interferes with autonomy because it corrupts an agent's belief.[313] In sum, being kept ignorant is an obvious interference with autonomy.[314] NDAs, moreover, can infringe our capacity to form moral relations with one another. Suppose an employee wants to unburden himself to his spouse with information covered by an NDA. Even if the information is not scandalous but simply stressful, a prohibition on disclosure hampers the development of their moral relations—in particular, the capacity of the spouse to empathize or sympathize with, or simply to understand, the stress.[315]

NDAs are troubling, too, for the agency theories that value speaker interests at least as highly as audience interests (Shiffrin and Baker). It is common for NDAs to prohibit the disclosure of information to family members, friends, and associates. For example, an NDA that prohibits discussing injuries with family and friends would hinder coming to terms with those harms.[316] Both Shiffrin and Baker highlight the necessity of free speech to self-development, self-realization, and self-knowledge. NDAs blunt our freedom to externalize the content of our minds (Shiffrin)[317] and to choose to express, and therefore define, our identities (Baker).[318] An NDA potentially renders silence (which counts as a speech act) involuntary—or at least subject to the purchaser's say-so—and therefore, "the speech act does not involve the *self*-realization or *self*-fulfillment of the speaker."[319]

313. GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 14 (Sydney Shoemaker et al. eds., 1988); *see also* Brison, *supra* note 291, at 333.

314. DWORKIN, *supra* note 313, at 16.

315. Rowena Chiu, who confidentially settled a sexual-assault claim against Harvey Weinstein, was "barred from sharing her own experiences with her spouse." KANTOR & TWOHEY, *supra* note 167, at 69. Chiu's spouse "learn[ed] his wife's secrets from a stranger," a reporter, while "standing incredulously in his own driveway." *Id.*

316. Ian Gibbons, the former chief scientist at Theranos, became depressed and felt he could not confide in his wife because of an NDA he had signed. He later committed suicide. CARREYROU, *supra* note 6, at 145–49. Zelda Perkins, a former assistant to Harvey Weinstein who confidentially settled a claim against him, "did not feel safe to discuss the trauma of the events with a therapist as we were bound in the agreement with the responsibility of being considered in breach of our contract if our therapist ever disclosed any information about the incident." *Sexual Harassment in the Workplace Inquiry: Hearing Before the H. of Commons Women and Equalities Comm.*, 57th Parl (2018) (written submission from Zelda Perkins (SHW0052)) (U.K.) [hereinafter Written Submission], http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/written/80725.pdf.

317. SHIFFRIN, *supra* note 35, at 89–93.

318. BAKER, *supra* note 34, at 51–54.

319. *Id.* at 54.

III. BUSTING THE FREE SPEECH MONOPOLY

If NDAs can conflict with the arguments from truth (they are routinely and opaquely enforced at an awesome scale), from democracy (they may conceal data relevant to the evaluation of a candidate or incumbent), and from agency (they can corrupt agents' doxastic processes), then they should not enjoy a free pass from free speech scrutiny. Regrettably, however, our free speech vocabulary has been wholly colonized by constitutions, and it is highly unlikely that courts will use the First Amendment to evaluate NDAs enforceable under state common law. There is a serious concern that the judicial enforcement of a private contract cannot count as state action. The Supreme Court has stuck fast to the state-action doctrine,[320] notwithstanding a scholarly assault.[321] The landmark decisions that seem to reject the doctrine are distinguished or confined to their facts. *Shelley v. Kraemer* famously held that the enforcement by a state court of a racially restrictive covenant violated the Fourteenth Amendment.[322] But Lillian BeVier and John Harrison, who defend the state action doctrine, suggest that *Shelley* is only a "small" exception.[323] In *New York Times Co. v. Sullivan*[324]—our index case deploying the First Amendment to limit state common law—the plaintiff was a public official, and in any event, the holding has been limited to state common law torts.[325]

The typical strategy when the federal constitution has run out is to turn to state constitutions. "State constitutions, too," Justice William Brennan reminded us over forty years ago, "are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[326] In what was dubbed the "new judicial

320. As Justice O'Connor put it, the Court's state-action cases "have not been a model of consistency." Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting). Nevertheless, she maintained that a coherent principle was discernible. *Id.*

321. *E.g.*, Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145, 145–46, 147–52 (2017); Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEX. L. REV. 15, 15–16, 16 n.7, 27–45 (2017). For contextual work on the state-action doctrine, see generally Jud Mathews, *State Action Doctrine and the Logic of Constitutional Containment*, 2017 U. ILL. L. REV. 655 (2017). For some scholarly defenses of the state-action doctrine, see generally Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767 (2010), and Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281 (2013). Some scholars neither offer a full-throated defense nor suggest eradication of the doctrine. *See, e.g.*, Nathan S. Chapman, *The Establishment Clause, State Action, and* Town of Greece, 24 WM. & MARY BILL RTS. J. 405 (2015).

322. 334 U.S. 1, 20–21 (1948).

323. BeVier & Harrison, *supra* note 321, at 1801.

324. 376 U.S. 254 (1964).

325. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

326. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); *see also id.* at 495–98 (explaining further that state courts resist federal-rights abridgment by expanding rights under state law).

federalism,"[327] Brennan exhorted readers not to forget about the "independent protective force of state law."[328] Unfortunately, just like their federal counterpart, state constitutions usually come bundled with a state-action requirement.[329] The enforcement of a private right of action sounding in contract simply does not qualify as state action.[330]

The solution, this Part argues, is to tap into the common law doctrine that contracts against public policy are unenforceable. States should refuse to enforce, as against public policy, NDAs that pose significant threats to free speech. In giving more precise content to that general proposition, this Part attempts to wrest partial control over free speech discourse from the First Amendment.

A. The Free Speech Monopoly

The Constitution colonized free speech in the twentieth century. A primary driver was the incorporation of the First Amendment to reach into individual states. From the mid-twentieth century, many First Amendment cases, some effecting profound changes, limited the authority of local officials.[331]

A second important factor is that lawyers tended to be the twentieth century's most eloquent expositors of free speech. Judges like Learned Hand, Oliver Wendell Holmes, and Louis Brandeis developed their mature free speech theories in judicial opinions.[332] Holmes is occasionally singled out for special veneration. His dissent in *Abrams v. United States*[333] was described as "the foundational document of America's free speech tradition," transforming the First Amendment from something of "an unfulfilled promise" to "our preeminent constitutional value and a defining national trait."[334] "[F]ree speech in America was never the same after 1919," runs another account, and the "triumph of the free speech principle was inevitable after Holmes unleashed his *Abrams* dissent

327. Justice Brennan's article inaugurated the "new judicial federalism," encouraging state courts to extend the protection of individual rights under state law beyond the federal baseline. *See generally* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93 (2000).

328. Brennan, *supra* note 326, at 491.

329. Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1070–71 (N.J. 2007) (observing that state action is a prerequisite for asserting free speech rights in Arizona, California, Connecticut, Georgia, Michigan, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Washington, and Wisconsin).

330. For an important statement of a contrary view, see generally Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003).

331. *See e.g.*, Cohen v. California, 403 U.S. 15 (1971) (California); Brandenburg v. Ohio, 395 U.S. 444 (1969) (Ohio); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (Alabama).

332. Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); Masses Publ'g Co. v. Patten, 244 F. 535, 538–44 (S.D.N.Y. 1917) (Hand, J.), *rev'd*, 246 F. 24 (2d Cir. 1917).

333. 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

334. THOMAS HEALY, THE GREAT DISSENT 3, 7, 245 (2013).

on the minds of generations longing to break with the restrictive traditions of the past."[335] In short, "Holmes arguably invented modern freedom of speech in his *Abrams* dissent."[336]

Before the twentieth century, major free speech figures were not lawyers. John Milton was a poet. James Madison and John Stuart Mill were political philosophers and politicians; neither was a lawyer.[337] A consequence, perhaps, of the judge-as-free-speech-theorist is that free speech scholarship centered on law schools. Law professors comprised the primary scholarly audience of free speech theory, even for the influential nonlawyers (Meiklejohn and Scanlon). Maybe the singularly poetic defenders of free speech in the twentieth century just happened to be judges. Holmes, Brandeis, and Hand are known for their rhetorical capacity and unparalleled prose. Even so, the consequence of the (possibly coincidental) fact that these three judges advanced free speech is that lawyers claimed professional expertise over the trio's writing.

Third, free speech theory is legalized, typically cashed out in terms of what government regulations are legitimate or illegitimate. It is not centrally concerned with the social conditions that promote the development and communication of ideas. An example might be the pedagogical practices that maximize free speech environmentalism. Instead, theorists occupy themselves with an account of the free speech right, which is a sword wielded against authority. The "free speech on campus" debate surfaces periodically, but far less public attention is devoted to the practices that educators should employ to inculcate habits of mind that are receptive and sensitive to free speech.

Moreover, despite the new judicial federalism, the First Amendment has crowded out analogous state constitutional free speech guarantees. A selection of quotes from law reviews makes the point. In 1968, a note in the *Stanford Law Review* said:

> The pervasive influence of the Supreme Court in developing standards for the preservation of free expression is remarkable in view of the facts that the Court is only one of thousands of tribunals that sit in this country, that it normally interprets only one of 51 constitutions that guarantee freedom of speech and of the press, and that it was not until well into the 20th century that it began to devote serious attention to this area of individual rights.[338]

A justice of the Washington Supreme Court wrote in 1985 that "more judicial and scholarly effort has been devoted to divining the meaning and scope of the United States Bill of Rights than has been expended on all fifty state bills of

335. Ronald K. L. Collins, *Epilogue* to THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER 349, 377 (Ronald K. L. Collins ed., 2010).

336. Howard M. Wasserman, *Holmes and Brennan*, 67 ALA. L. REV. 797, 798 (2016).

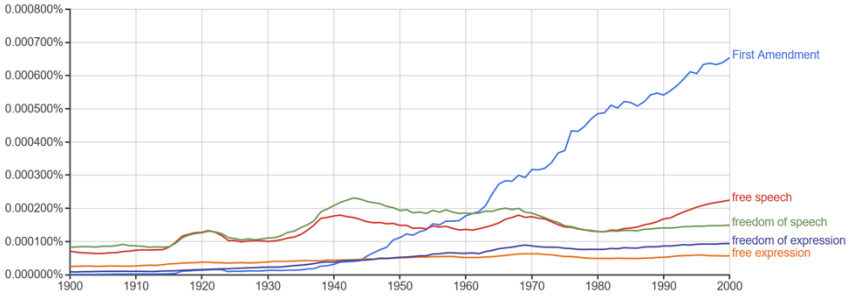
337. RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 55–56, 145 (1971). *See generally* Edward S. Corwin, *The Posthumous Career of James Madison as Lawyer*, 25 A.B.A. J. 821 (1939).

338. Peter P. Miller, Note, *Freedom of Expression Under State Constitutions*, 20 STAN. L. REV. 318, 318 (1968) (footnotes omitted).

rights combined."[339] And it was not until 2002 that a scholar published "the first sustained examination of Pennsylvania's constitutional guarantees of free speech and press since the dawn of the twentieth century" and "the first comprehensive study to synthesize the two and a quarter century history of Pennsylvania's protection of free expression."[340]

Finally, the dominance of the First Amendment in the twentieth century is suggested by the Google Ngram Viewer. Figure 1 shows the frequency of certain two- and three-word phrases (*First Amendment*, *free speech*, *free expression*, *freedom of speech*, *freedom of expression*) as a percentage of, respectively, all two- and three-word phrases occurring in a corpus of American English books in the twentieth century.[341] The phrase *First Amendment* rocketed skyward from the late 1930s, overtaking *free speech* in the mid-1950s.

Figure 1. *Frequency of Free Speech Phrases*



The graph is suggestive, even if not demonstrative (it does not, for example, distinguish between the several First Amendment rights).

339. Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. PUGET SOUND L. REV. 157, 157 (1985).

340. Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. PA. J. CONST. L. 12, 13 (2002) (footnotes omitted).

341. *Google Ngram Viewer*, GOOGLE, https://books.google.com/ngrams/interactive_chart?content=First+Amendment%2Cfree+speech%2Cfreedom+of+speech%2Cfree+expression%2Cfreedom+of+expression&year_start=1900&year_end=2000&corpus=17&smoothing=3&share=&direct_url=t1%3B%2CFirst%20Amendment%3B%2Cc0%3B.t1%3B%2Cfree%20speech%3B%2Cc0%3B.t1%3B%2Cfreedom%20of%20speech%3B%2Cc0%3B.t1%3B%2Cfree%20expression%3B%2Cc0%3B.t1%3B%2Cfreedom%20of%20expression%3B%2Cc0 (last visited Feb. 13, 2020).

B. Contracts Against Democratic Public Policy

Let's get the customary aphorism out of the way: the doctrine that contracts against public policy are unenforceable is "a very unruly horse, and when once you get astride it you never know where it will carry you."[342] That famous rebuke, issued by Sir James Burrough in 1824, was soon quoted approvingly in an American opinion.[343] Yet the doctrine that contracts against public policy are unenforceable had already gained a strong foothold in the United States.[344] The gist of the doctrine is that, in some cases, courts will not enforce a private contract that violates some public good.[345] The rationale is two-fold: to deter future illegal bargains (deterrence) and to refuse state assistance in enforcing them (nonassistance).[346] For example, the traditional doctrine held that public policy permits "a contract for silence so long as it is not in contemplation to conceal and prevent the punishment of a crime."[347] The short form of the doctrine refers to a blanket notion of unenforceability; in fact, it is marked by significant remedial flexibility.[348]

It is striking, and now forgotten, that the classical doctrine trafficked in democratic principles. Although common law judges differed on whether wagering contracts contravened public policy,[349] all agreed that *election* wagers violated democratic norms. In 1785, the full King's Bench held that a wager

342. Richardson v. Mellish (1824) 130 Eng. Rep. 294, 303; 2 Bing. 229, 252. *See generally* David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563 (2012).

343. Chappel v. Brockway, 21 Wend. 157, 164 (N.Y. Sup. Ct. 1839).

344. *See generally* Gulick v. Ward, 10 N.J.L. 87, 91–93 (N.J. 1828) (collecting American authorities and quoting an opinion of James Kent); Mount v. G. & R. Waite, 7 Johns. 434 (N.Y. Sup. Ct. 1811). The doctrine arose in England by the fifteenth century as contracts in restraint of trade were held void. *See* W. S. M. Knight, *Public Policy in English Law*, 38 L.Q. REV. 207, 207 (1922); William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 373–75 (1954).

345. RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 1, intro. note (AM. LAW INST. 1981).

346. *Id.* Arthur Linton Corbin favored the deterrence rationale and dismissed nonassistance as a "pious fear that the 'judicial ermine' might otherwise be soiled." 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1534, at 819 (1962) (first published 1950). A reviewer disagreed. Harold C. Havighurst, Book Review, 61 YALE L.J. 1138, 1144–45 (1952) ("In most instances, then, the protection of the good name of the judicial institution must provide the principal reason for the denial of a remedy to one who has trafficked in the forbidden. This is, moreover, a very good reason."). The nonassistance rationale is impressively pedigreed. Holman v. Johnson (1775) 98 Eng. Rep. 1120, 1121; 1 Cowp. 341, 343 (Lord Mansfield) ("No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causâ, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.").

347. Wells v. Sutton, 85 Ind. 70, 74 (1882).

348. Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 118–21 (1988).

349. WARREN SWAIN, THE LAW OF CONTRACT 1670–1870, at 239–44 (J.H. Baker ed., 2015).

between two voters over the election of a member of Parliament was void.[350] Whether the winner of the bet is entitled to recover, said Lord Mansfield,

> turns on the species and nature of the contract; and if that be in the eye of the law corrupt, and against the fundamental principles of the constitution, it cannot be supported by any Court of Justice. One of the principal foundations of this constitution depends on the proper exercise of this franchise, that the election of members of Parliament should be free, and particularly that every voter should be free from pecuniary influence in giving his vote.[351]

The wager was therefore void because it placed the two voters under a pecuniary influence.[352]

Unsurprisingly, Mansfield's reasoning found a receptive audience across the Atlantic.[353] As early as 1799, Jeremiah Chase, second cousin to Samuel Chase,[354] wrote that a bet between two residents entitled to vote for county sheriff would be "against sound policy, and ought not to be sanctioned by a court of justice."[355] "It is a fundamental principle of our constitution that elections should be free," said Chase, and he charmingly added that "the election of a sheriff is of great importance to the community, and ought to be free from corrupt and undue influence."[356] Election wagers "have a malignant and evil tendency by making the parties, their connexions and friends, partizans in the election, and creating an interest and views incompatible with the general good and sound policy." [357]

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350. Allen v. Hearn (1785) 99 Eng. Rep. 969, 971; 1 T.R. 56, 59. This was a decision on a point of law from a special case found by a jury. *Id.* at 969; *see* 3 WILLIAM BLACKSTONE, COMMENTARIES *378. All four judges agreed that the election wager was void. *Allen*, 99 Eng. Rep. at 971; 1 T.R. at 59–60.

351. *Allen*, 99 Eng. Rep. at 971; 1 T.R. at 59–60.

352. *Id.* Another ground for the decision was that an election wager, if valid, could be a pretext for a bribe. *Id.*

353. Every state court that considered the issue concluded that election wagers were contrary to public policy. *See generally* Motlow v. Johnson, 39 So. 710 (Ala. 1905); Givens v. Rogers, 11 Ala. 543 (1847); Jeffrey v. Ficklin, 3 Ark. 227 (1841); Hill v. Kidd, 43 Cal. 615 (1872); Wheeler v. Spencer, 15 Conn. 28 (1842); Porter v. Sawyer, 1 Del. (1 Harr.) 517 (Super. Ct. 1835); Gregory v. King, 58 Ill. 169 (1871); Wood v. McCann, 36 Ky. (6 Dana) 366 (1838); Hickerson v. Benson, 8 Mo. 8 (1843); Brush v. Keeler, 5 Wend. 250 (N.Y. Sup. Ct. 1830); Rust v. Gott, 9 Cow. 169 (N.Y. Sup. Ct. 1828); Denniston v. Cook, 12 Johns. 376 (N.Y. Sup. Ct. 1815); Bettis v. Reynolds, 34 N.C. (12 Ired.) 344 (1851); Cooper v. Rowley, 29 Ohio St. 547 (1876); M'Allister v. Hoffman, 16 Serg. & Rawle 147 (Pa. 1827); Smyth v. M'Masters, 2 Browne 182 (Pa. Ct. Com. Pl. 1812); Stoddard v. Martin, 1 R.I. 1 (1828); Laval v. Myers, 17 S.C.L. (1 Bail.) 486 (1830); Russell v. Pyland, 21 Tenn. (2 Hum.) 131 (1840); Tarleton v. Baker, 18 Vt. 9 (1843); Machir v. Moore, 43 Va. (2 Gratt.) 257 (1845).

354. 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 739 n.2 (Maeva Marcus et al. eds., 1985). Both Chases voted against the ratification of the Constitution. *The Maryland Convention, Saturday, 26 April 1788*, *in* 12 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 647 (John P. Kaminski et al. eds., 2015); *see also* CARROLL T. BOND, THE COURT OF APPEALS OF MARYLAND, A HISTORY 100–02 (1928).

355. Wroth v. Johnson, 4 H. & McH. 284, 286 (Md. Gen. Ct. 1799). Although it was not at the apex of Maryland's judicial hierarchy, the General Court of Maryland was "the great court of the people of Maryland while it existed." BOND, *supra* note 354, at 88.

356. *Wroth*, 4 H. & McH. at 286.

357. *Id.* at 286–87.

Similarly, in 1809, William W. Van Ness, a thirty-three-year-old justice of the New York Supreme Court, held that a gubernatorial election wager was void on Mansfield's authority.[358] If democratic reasons voided an election wager in England, said Van Ness, "how much is their force increased, when applied to an analogous case in our own country, in which the very existence of every department of the government, depends upon the free, and unbiassed exercise of the elective franchise."[359] James Kent, who agreed with Van Ness, wrote to similar effect five years later:

> [W]hen we consider the importance of popular elections to the constitution and liberties of this country, and that the value of the right depends upon the independence, moderation, discretion, and purity with which it is exercised; we cannot but be disposed to cherish a decision which declares *gambling upon such elections to be illegal*, as being founded in the clearest and most incontestable principles of public policy.[360]

Kent expressly "place[d] the decision of this case upon those great and solid principles of public policy which forbids this species of gambling, as tending to debase the character, and impair the value of the right of suffrage."[361]

At a time when they reached independent conclusions on matters of general law, the federal courts, too, nixed election wagers. William Cranch, sitting on the Circuit Court of the District of Columbia in 1831, voided on public policy grounds a wager between two residents of Washington, D.C., that Andrew Jackson would not receive Kentucky's electoral vote.[362] After reviewing the authorities, Cranch held that "one of the maxims of sound public policy in all elective governments, [is] that elections should be pure and free," and that "[a]ny contract which would tend to substitute a corrupt for a patriotic motive to influence a vote either directly or indirectly, would be contrary to that maxim."[363] For Cranch, any monetary interest, even an indirect or contingent one, created a corrupt motive. "It is the nature and tendency of the contract, not the degree of mischief which it may effect," he said, taking his cue from Mansfield, "that decides its validity."[364] In a passage that now seems quaint, Cranch worried that the betting parties, prompted by corrupt motives, might sully the election "by exciting the passions, by holding up the promise of their influence in obtaining offices for those who seek them, or by denouncing those

358. Firth Haring Fabend, *The Dutch-American Political Elite in New York State*, *in* FOUR CENTURIES OF DUTCH-AMERICAN RELATIONS 1609–2009, at 250, 250–51 (Hans Krabbendam et al. eds., 2009); *see also* Bunn v. Riker, 4 Johns. 426, 436–37 (N.Y. Sup. Ct. 1809).

359. *Bunn*, 4 Johns. at 436.

360. Vischer v. Yates, 11 Johns. 23, 28 (N.Y. Sup. Ct. 1814).

361. *Id.* at 32. The judgment was reversed, on unrelated grounds, on a writ of error to the New York Senate sitting as the Court for the Correction of Errors. Yates v. Foot, 12 Johns. 1, 16 (N.Y. 1814).

362. Denney v. Elkins, 7 F. Cas. 464, 464 (C.C.D.C. 1831) (No. 3,790).

363. *Id.* at 466–67.

364. *Id.* at 467.

already in office; by circulating false reports, by hiring writers and printers to extol their candidate and slander his opponent."[365]

The two basic democratic principles animating these cases found their fullest expression in an opinion of the Massachusetts Supreme Judicial Court, speaking through Chief Justice Lemuel Shaw, in 1847.[366] The first principle centers on an individual's reasons for voting. As Shaw put it, all voters must exercise "free choice"—that is, they must be "free to inquire and judge, free to will and determine, and free to act with purity and intelligence, uninfluenced and unseduced by interested, sinister, or corrupt motives."[367] Otherwise, said Shaw, "they act without regard to the fitness of the candidate, or to their own sense of duty."[368] As the Pennsylvania Court of Common Pleas said in 1812, a voter who bets on an election "puts the mind . . . completely into trammels" and "cannot act freely."[369] The second democratic principle is cumulative. Shaw noted: "If one bet can be made on an election, many can be made. If small sums can be staked, large ones can. So that, on a great and exciting popular election, a large amount of money may depend on the result."[370] The electorate, in the aggregate, "will have a common, and may have a large, pecuniary interest in the issue."[371] Often, Shaw reminded us, "a few thousand, or even a few hundred, votes may decide the election of a State; and the election of a State may decide that of the Union."[372] In short, "[a]n election so influenced could not be regarded as the expressed will of an intelligent constituency."[373]

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365. *Id.*

366. Ball v. Gilbert, 53 Mass. (12 Met.) 397, 399 (1847).

367. *Id.* at 400.

368. *Id.*

369. Smyth v. M'Masters, 2 Browne 182, 189 (Pa. Ct. Com. Pl. 1812).

370. *Ball*, 53 Mass. (12 Met.) at 400.

371. *Id.*

372. *Id.* at 401.

373. *Id.* A tendril of English reasoning nearly took firm root in the United States. Wagers that "tend[ed] to introduce indecent discussions" were deep-sixed by the common law. Atherfold v. Beard (1788) 100 Eng. Rep. 328, 331; 2 T.R. 610, 615. In *Atherfold v. Beard*, the King's Bench voided a bet that the collection of hops duties in Canterbury for 1786 would exceed that for 1785. *Id.* at 328. Enforcing this wager, said one judge, "might be attended with mischievous consequences to permit any two persons, by the means of laying an impertinent wager, to bring forward a discussion of this sort, and expose to all the world the amount of the public revenue." *Id.* at 331 (Ashurst, J.). "[T]his wager could not be proved," said another, "without searching the books relating to the revenues of the country." *Id.* (Buller, J.). Van Ness, in his 1812 opinion for the New York Supreme Court, noticed this reasoning. He referred obliquely to the disputed 1792 gubernatorial election and thought that an election wager could generate "a discussion calculated to endanger the peace and tranquility of a community, already sufficiently heated and agitated." Bunn v. Riker, 4 Johns. 426, 435 (N.Y. Sup. Ct. 1809). There was a separation of powers element too. One of the judges in *Atherfold* said, "Parliament is the proper place in which these questions are to be discussed; and it would be improper to permit it elsewhere." *Atherfold* (1788) 100 Eng. Rep. at 331; 2 T.R. at 615 (Ashurst, J.). And the Pennsylvania Court of Common Pleas insisted that the validity of an election "ought never to be brought into discussion," because "the legislative and judicial authorities might be put into a state of collision, upon a question, which it is apprehended, the legislature alone is competent to determine." *Smyth*, 2 Browne at 189. But by 1831, Cranch (in his opinion for the D.C. Circuit Court) was "not so clear" on this aspect of public policy, preferring to rest "mainly upon the tendency of such contracts to introduce corruption into our elections." Denney v. Elkins, 7 F. Cas. 464, 467 (C.C.D.C. 1831) (No. 3,790).

C. Contracts Against Free Speech Public Policy

The doctrine that contracts against public policy are void, then, is no stranger to constitutional principles. Indeed, the logic holding election wagers unenforceable shares a common structure with the informed-voter variant of the argument from democracy. Recall that, on that view, speech regulations are illegitimate when they deprive the citizen of information necessary to meaningfully vote. Likewise, courts void election wagers because they corrupt the franchise. An election subject to widespread betting, just like an election where critics are censored by the threat of libel damages, "could not be regarded as the expressed will of an intelligent constituency."[374]

Despite this affinity, no American court has squarely held that an NDA is contrary to public policy for concealing information from the voting public. The first Restatement of Contracts included the following tantalizing illustration:

> A, a candidate for political office, and as such advocating certain principles, had previously written letters to B, taking a contrary position. B is about to publish the letters, and A fearing that the publication will cost him his election, agrees to pay $1000 for the suppression of the letters. The bargain is illegal.[375]

But it is unclear whence this illustration came. The second Restatement dropped it.

The closest decided cases arose from bargains between newspapers and candidates, but the few opinions that exist are old and inconsistent.[376] In 1902, the Vermont Supreme Court voided a contract where a political candidate secretly purchased the editorial support of a newspaper.[377] "To secure a free and exact expression of the sovereign will," the court said, "there must be a proper selection of candidates, as well as an honest election."[378] Because "the editorial column is relied upon as a public teacher and adviser, there can be no more dangerous deception than that resulting from the secret purchase of its favor."[379] A New York court, however, reached the opposite conclusion in 1882.[380] The judge thought that "[t]he press is not a social organ of the people at all; the people have nothing whatever to do with it."[381] "And even if it were

374. Ball v. Gilbert, 53 Mass. (12 Met.) 397, 401 (1847).

375. RESTATEMENT (FIRST) OF CONTRACTS § 557 cmt. b, illus. 1 (AM. LAW. INST. 1932).

376. English authority also holds as contrary to public policy a bargain that a newspaper be paid to refrain from exercising its right to comment. *See, e.g.*, Neville v. Dominion of Can. News Co. [1915] 3 KB 556.

377. Livingston v. Page, 52 A. 965, 966 (Vt. 1902).

378. *Id.*

379. *Id.*; *see also* Miller v. Glockner, 1 Ohio App. 149, 152 (1913) ("[T]he secret purchase of the editorial influence of a newspaper is void . . . .").

380. Irving Browne, *Gade v. Robinson Consolidated Mining Co.*, 26 ALB. L.J. 423, 423 (1882).

381. *Id.*

a subject of public advantage or disadvantage to have a conscientious press," he insisted, "it cannot . . . be a ground of interference if the contract was in itself legal."[382]

In a thoughtful article, Alan Garfield argued that "courts should carefully monitor all contracts of silence on public policy grounds" and "deny enforcement . . . whenever there is an overriding public interest in the dissemination of the suppressed speech."[383] To refuse to enforce an NDA, a court must find that the disclosure interest "clearly outweighs" the countervailing confidentiality interest.[384] The appropriate balance in individual cases is struck by "extrapolat[ing] principles from the extreme examples."[385] The "extreme examples" are NDAs protecting trade secrets and NDAs concealing criminal conduct.[386] A contract to protect trade secrets does not offend public policy because "an array of laws suggests that public policy endorses efforts to protect trade secrets."[387] This array contains, among others, tort law (improper use or disclosure of trade secrets is independently actionable) and agency law (agents are not typically authorized to use or disclose trade secrets).[388] Because those laws "reflect a societal choice to protect trade secret information," a contract preventing disclosure of a trade secret is not contrary to public policy.[389] A contract to conceal a crime, however, is unenforceable because "relevant laws send a clear signal of public policy."[390] Most notably, the crime of compounding is committed if someone "accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense."[391]

For "contracts of silence that fall between the two extreme paradigms," Garfield said that his analysis is "more challenging and more speculative."[392] For example, although NDAs requiring a confidant not to report criminal activity to law enforcement authorities violate public policy, "it is not clear how a court would rule on a contract limiting a party's ability to tell someone other than law enforcement authorities about a crime."[393] Garfield considered another example, settlement agreements, at greater length. He suggested that an appropriate analogy appears in the jurisprudence on sealing settlement

382. *Id.* at 424.
383. Garfield, *supra* note 20, at 295.
384. *Id.* at 315.
385. *Id.* at 295.
386. *Id.*
387. *Id.* at 301.
388. *Id.* at 301–02.
389. *Id.* at 302.
390. *Id.* at 307.
391. *Id.*
392. *Id.* at 312.
393. *Id.* at 310.

agreements. Leaning heavily on a Third Circuit case, *Pansy v. Borough of Stroudsburg*,[394] Garfield noted that "courts have moved from a prior practice of blindly agreeing to seal settlements to a more critical approach in which courts balance the public interest in disclosure against the interests in confidentiality and administrative necessity."[395] The Third Circuit in *Pansy* had held that "good cause must be demonstrated to justify" a confidentiality order over a settlement agreement.[396] "Certainly," concluded Garfield, "a court attempting to apply the proposed test in deciding a contract case could use the *Pansy* decision to guide its balancing of the competing disclosure and confidentiality interests that secret settlement agreements raise."[397]

There are many virtues of Garfield's argument, not least of which is the evident desire to tie the public policy doctrine to "other areas of law in which lawmakers have already struck a balance between a party's interest in suppressing information and the public's interest in speech."[398] His proposal has weaknesses too, some of which he acknowledged.[399] But Garfield's proposal is not, as he put it, "a speech-based policy ground for evaluating contracts of silence."[400] It is, instead, a proposal for evaluating contracts on public policy grounds by reference to existing law. It defers to the balance struck between disclosure and confidentiality in other places and does not engage in the substantive evaluation of NDAs on free speech grounds. Garfield did observe that "the balance struck between confidentiality and disclosure interests in other areas of law should not necessarily determine what private parties can contract to do."[401] His argument, however, was unconcerned with exploring that issue. It was occupied with discerning whether "the balance struck in another area"—meaning another law that "communicates something about the legitimacy of a party's effort to suppress speech"—"reflects a clear public policy preference for the disclosure of information."[402]

By contrast, this Article engages free speech public policy. Rather than analogize from other areas of the law—a process that can be quite fraught—this Article draws directly on the centuries of intellectual resources reflected in the constitutional guarantee of freedom of speech.

394. 23 F.3d 772 (3d Cir. 1994).
395. Garfield, *supra* note 20, at 334 (citing *Pansy*, 23 F.3d 772).
396. *Pansy*, 23 F.3d at 786.
397. Garfield, *supra* note 20, at 335.
398. *Id.* at 316.
399. *Id.* at 343–44.
400. *Id.* at 345.
401. *Id.* at 317.
402. *Id.* at 316–17.

D. Modern Times

Modern courts are wary of the public policy exception to NDA enforceability because public policy strongly favors freedom of contract. The U.S. Supreme Court, when it was still in the business of general law, emphasized the "general rule" that "competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."[403] Accordingly, "[t]he principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests."[404] This view is influential in state courts.[405] It is compounded when applied to NDAs, because written agreements waiving speech rights are typically viewed as voluntary and rational bargains.[406] Today, NDAs are voided on public policy grounds if they purport to conceal civil wrongs like trespass,[407] breach a contract with a third person,[408] or prohibit a party from reporting criminal misconduct to law-enforcement authorities[409] or subsequent employers.[410]

Aside from the common law public policy doctrine, there are at least two contexts in which modern courts examine the enforceability of NDAs. The first concerns the judicial application of *Pickering v. Board of Education of Township High School District 205*[411] and its progeny, which "continue to be the meter by which the First Amendment rights of public employees are measured."[412] Under

403. Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356 (1931) (first citing Printing & Numerical Registering Co. v. Sampson (1875) 19 LR Eq. 462, 465; then citing Balt. & Ohio Sw. Ry. Co. v. Voigt, 176 U.S. 498, 505 (1900)).

404. *Id.* at 356–57; *see also* W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766 (1983) ("[A] public policy . . . must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" (quoting Muschany v. United States, 324 U.S. 49, 66 (1945))).

405. Livingston v. Tapscott, 585 So. 2d 839, 841 (Ala. 1991); Bailey v. Lincoln Gen. Ins. Co., 255 P.3d 1039, 1045 (Colo. 2011); Collins v. Sears, Roebuck & Co., 321 A.2d 444, 449 (Conn. 1973); City of Largo v. AHF-Bay Fund, LLC, 215 So. 3d 10, 15–16 (Fla. 2017); Emory Univ. v. Porubiansky, 282 S.E.2d 903, 904–05 (Ga. 1981); Robinson v. Allied Prop. & Cas. Ins. Co., 816 N.W.2d 398, 408–09 (Iowa 2012); Terrien v. Zwit, 648 N.W.2d 602, 608 n.9 (Mich. 2002); Ramapo River Reserve Homeowners Ass'n v. Borough of Oakland, 896 A.2d 459, 467–68 (N.J. 2006); Siloam Springs Hotel, LLC v. Century Sur. Co., 2017 OK 14, ¶ 21, 392 P.3d 262, 268; *In re* Baby, 447 S.W.3d 807, 822 (Tenn. 2014).

406. Wilkicki v. Brady, 882 F. Supp. 1227, 1234–35 (D.R.I. 1995) ("[P]ermitting an individual to waive his rights in such a manner advances the fundamental principle of personal autonomy. [Plaintiff] made an arguably rational decision. To deny him the opportunity to exercise his options in the face of a potentially more severe alternative outcome compromises his ability to choose. This is an interest the public shares individually and collectively that should not be lightly discounted.").

407. *See, e.g.*, Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850, 854 (10th Cir. 1972).

408. *See, e.g.*, Unami v. Roshan, 659 S.E.2d 724, 727 (Ga. Ct. App. 2008).

409. *See, e.g.*, Fomby-Denson v. Dep't of the Army, 247 F.3d 1366, 1368 (Fed. Cir. 2001).

410. *See, e.g.*, Bowman v. Parma Bd. of Educ., 542 N.E.2d 663, 667 (Ohio Ct. App. 1988).

411. 391 U.S. 563 (1968).

412. Baumann v. District of Columbia, 795 F.3d 209, 215 (D.C. Cir. 2015) (quoting Tygrett v. Barry, 627 F.2d 1279, 1282 (D.C. Cir. 1980)). It is too early to discern the effect of *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), on the *Pickering* framework. In dissent,

Pickering, the validity of a restraint on public-employee speech is determined by "arriv[ing] at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees."[413] Under the *Pickering* framework, public employees cannot be dismissed for criticizing their employer[414] or for uttering political remarks to other employees in private conversation.[415] Nor can they be prohibited from accepting compensation for making speeches or writing articles.[416]

Pickering generated a developed jurisprudence that demonstrates how courts can weigh disclosure interests against confidentiality interests. For example, in *Baumann v. District of Columbia*, the D.C. Circuit recently upheld the suspension of a police officer for releasing to the news media police radio communications recorded during an exchange of gunfire.[417] On confidentiality interests,[418] the court noted the police department's "weighty interest in preserving confidential information that, if released publicly, could jeopardize the successful conclusion of a criminal investigation."[419] Confidentiality protected the integrity of investigations "by preventing the premature and unauthorized disclosure of the . . . communications."[420] The court acknowledged that the officer and the public "have a strong interest in his speaking to the public about safety issues related to the [department's] management."[421] It was crucial, however, that aside from releasing the audio itself, the officer was free to speak publicly about the incident.[422] And the prohibition on releasing the audio was not indefinite. Because these obligations were "sufficiently tailored temporally and in scope to enable law enforcement better to investigate criminal activity

Justice Kagan thought that *Janus* would simply create "an exception, applying to union fees alone, from the usual rules governing public employees' speech." *Id.* at 2491 (Kagan, J., dissenting).

413. *Pickering*, 391 U.S. at 568.

414. *Id.*

415. Rankin v. McPherson, 483 U.S. 378, 386–87, 392 (1987).

416. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 466 (1995).

417. *Baumann*, 795 F.3d at 209.

418. The court stated that in disclosing the recording, the officer was speaking as a union official, not a police officer, on a matter of public concern. *Id.* at 215–16.

419. *Id.* at 216 (first citing Dixon v. Kirkpatrick, 553 F.3d 1294, 1297 (10th Cir. 2009); then citing Swartzwelder v. McNeilly, 297 F.3d 228, 239 (3d Cir. 2002); then citing Hanneman v. Breier, 528 F.2d 750, 754 (7th Cir. 1976)).

420. *Id.* at 217. The court pointed to other legal contexts requiring confidentiality of investigatory information: grand jurors, court reporters, and prosecutors in grand-jury proceedings; judicial employees who receive confidential information in the course of their official duties; and the Freedom of Information Act's exclusion of records on law-enforcement investigations and proceedings. *Id.* at 216.

421. *Id.* at 217 (first citing Sanjour v. EPA, 56 F.3d 85, 94 (D.C. Cir. 1995); then citing Baumann v. District of Columbia, 987 F. Supp. 2d 68, 77 (D.D.C. 2013)).

422. *Id.*

and police operations implicating police safety," the confidentiality interests outweighed the disclosure interests.[423]

Another context in which courts assess NDAs is the special motion in a strategic lawsuit against public participation (SLAPP) to dismiss or to strike pleadings. Some state courts have held that the local anti-SLAPP statute does not reach lawsuits seeking to enforce NDAs. The Massachusetts Supreme Judicial Court, for example, denied an anti-SLAPP special motion to dismiss because an NDA was a "substantial basis" for the claims independent of the confidant's "petitioning activity."[424] California courts, by contrast, evaluate some NDAs rather closely. If the defendant makes a threshold showing that the challenged cause of action "arises from" its exercise of free speech rights, then the plaintiff must show a probability of prevailing on the claim.[425] If the complaint lacks *all* merit, it will be struck; however, if it states and substantiates a legally sufficient claim, it will survive.[426] In fact, the anti-SLAPP statute "poses no obstacle to suits that possess minimal merit."[427] In determining whether the defendant satisfied the threshold "arising from" condition, the court looks to "the gravamen or principal thrust" of the plaintiff's action.[428] "The anti-SLAPP statute's definitional focus," explained the Supreme Court of California, "is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech."[429] It is, then, an inquiry that privileges substance over form.

The Supreme Court of California stressed that "the anti-SLAPP statute neither constitutes—nor enables courts to effect—any kind of 'immunity' for breach . . . of contracts affecting speech."[430] But the anti-SLAPP jurisprudence does demonstrate judicial capacity to subject NDAs to free speech scrutiny. For example, in *Vivian v. Labrucherie*,[431] an ex-husband (a police officer) alleged that his ex-wife's statements to the family court and to a sheriff's department's internal-affairs investigators breached the nondisparagement clause of their settlement agreement. The California Court of Appeal granted the ex-wife's special motion to strike.[432] First, the ex-husband sought "to impose liability on [his ex-wife] for having made her statements to the internal affairs investigators and in her family court papers."[433] Second, the court observed that the

423. *Id.* at 212.

424. Duracraft Corp. v. Holmes Prods. Corp., 691 N.E.2d 935, 943–44 (Mass. 1998).

425. Equilon Enters., LLC v. Consumer Cause, Inc., 52 P.3d 685, 694 (Cal. 2002).

426. Navellier v. Sletten, 52 P.3d 703, 708 (Cal. 2002).

427. *Id.* at 712.

428. Episcopal Church Cases, 198 P.3d 66, 73 (Cal. 2009) (quoting Martinez v. Metabolife Int'l, Inc., 113 Cal. App. 4th 181, 193 (2003)).

429. *Navellier*, 52 P.3d at 711.

430. *Id.* at 712.

431. 214 Cal. App. 4th 267 (2013).

432. *Id.* at 277–78.

433. *Id.* at 274.

nondisparagement clause was relatively narrow because it exempted statements made by the ex-wife to the family court and did not obviously prohibit the ex-wife from making statements to the internal affairs investigators.[434] Moreover, the ex-wife's statements to investigators were privileged. The litigation privilege "promotes full and candid responses to a public agency," and "the dispute in this case involves a significant public concern—a governmental investigation into inappropriate conduct by a police officer."[435]

E. Now We're Talking: Two Examples

When do the free speech implications of an NDA become so acute that it is against public policy to enforce it? Baked into this question is the assumption that a confidentiality agreement is presumptively enforceable. Yet it is not simply a matter of stamping an NDA with the "waiver" label and concluding that free speech is not implicated. Nor is it a matter of voiding all NDAs that conceal information of public concern. The two examples have been chosen because the NDAs at issue are publicly available.

1. Daniels v. Trump

On October 28, 2016, an agreement between Essential Consultants, LLC, and Peggy Peterson took effect.[436] Michael Cohen, once a personal lawyer and fixer for Trump, signed the agreement on behalf of Essential Consultants, which paid $130,000 to Peterson in exchange for her silence on information designated as confidential.[437] The agreement was between "'EC, LLC' and/or DAVID DENNISON, (DD), on the one part, and PEGGY PETERSON, (PP), on the other part."[438] The agreement noted that the names "are pseudonyms whose true identity will be acknowledged in a Side Letter Agreement."[439] The Side Letter Agreement identified Peterson as Stormy Daniels (whose legal name is Stephanie Clifford), who claimed to have had sex with Trump once in July 2006 and remained in contact with him for about a year.[440] The identity of Dennison is redacted in the court filing,[441] but no one credibly disputes that Dennison is Trump, who denied having sex with Daniels and has not otherwise

434. *Id.* at 276–77.
435. *Id.* at 277.
436. Settlement Agreement, *supra* note 143.
437. *Id.* at 7.
438. *Id.* at 5.
439. *Id.*
440. Declaration of Stephanie Clifford in Support of Plaintiff's Opposition to Defendant Essential Consultants, LLC's Motion to Compel Arbitration, Exhibit 2: Side Letter Agreement at 22, Clifford v. Trump, No. 2:18-CV-02217-SJO-FFM (C.D. Cal. Apr. 9, 2018) [hereinafter Side Letter Agreement].
441. *Id.*

commented on their relationship. The nominal Dennison did not sign the agreement.[442]

Daniels sued Trump and Essential Consultants in the Superior Court of California, seeking a declaration that the NDA was "invalid, unenforceable, and/or void" on several grounds, including for violating public policy.[443] Essential Consultants removed the action to federal court, where it was dismissed as moot on March 7, 2019, because both Trump and Essential Consultants covenanted not to sue Daniels on the agreement.[444]

The litigation raised a question of general importance, even if the dismissal foreclosed its ventilation. Did the NDA infringe free speech to such a degree that its presumptive enforceability was overridden? The complaint urged that the NDA was "void *ab initio* because it violates public policy by suppressing speech on a matter of public concern about a candidate for President of the United States, mere weeks before the election."[445] The complaint contained the sole public policy argument on the record but only reproduced the first Restatement's illustration quoted above.[446] This Article has argued that whether the NDA was unenforceable for violating free speech public policy depends on a contest between values implicated by the contract. This requires articulating those values, which, in turn, demands situating the agreement in the parties' background relationship and assessing the information it sought to suppress.

The NDA was between a corporate alter ego of Trump's agent and a person who claimed to have had a brief sexual relationship with Trump in 2006. The district court did not decide whether Trump was a party to the agreement, and Trump never asserted that he was. Yet public facts fairly support the inference that Cohen, who controlled Essential Consultants, signed the NDA as Trump's authorized agent. First, Cohen was Trump's personal attorney when, in the three days from October 26 to 28, he incorporated Essential Consultants, signed the NDA, and transferred the hush money.[447] Second, Cohen was in direct contact with Trump and the Trump campaign's press secretary in October 2016. Cohen spoke to Trump by phone three times in the three days from

442. Settlement Agreement, *supra* note 143 *passim*; Side Letter Agreement, *supra* note 440 *passim*. On each page, there is space for "PP" and "DD" to initial, and the letters "EC" are always in the space reserved for "DD." Side Letter Agreement, *supra* note 440 *passim*.

443. First Amended Complaint at 9–10, Clifford v. Trump, No. 2:18-CV-18-02217-SJO-FFM, 2018 WL 8300107 (C.D. Cal. Mar. 26, 2018) [hereinafter First Amended Complaint].

444. Clifford v. Trump, No. CV-18-02217-SJO-FFMX, 2019 WL 3249597, at * 1 (C.D. Cal. Mar. 7, 2019).

445. First Amended Complaint at 12.

446. *Id.*; *see supra* note 375 and accompanying text.

447. On October 26, 2016, Cohen opened the Essential Consultants checking account and transferred $131,000 from his personal home-equity line of credit. Agent Affidavit in Support of Application for Search & Seizure Warrant at 24, 48–49, *In re* Search of Four Premises & Two Electronic Devices, No. 18-MAG-2969 (S.D.N.Y. 2018) [hereinafter Agent Affidavit]. The next day, he transferred $130,000 from Essential Consultants to Daniels's lawyer. *Id.* at 49–50. The NDA was signed on October 28, after a false start. *Id.* at 43–47, 51–52.

October 26 to 28, which was unusually frequent.[448] Along with other calls, texts, and emails, the FBI affiant on a search-warrant application against Cohen believed that "at least some of these communications concerned the need to prevent [Daniels] from going public."[449] Third, according to federal prosecutors, Trump Organization executives "agreed to reimburse Cohen" for the payment.[450] Contrary to the claims of Trump, his personal attorney, and the Deputy White House Counsel for Compliance and Ethics, the reimbursement was not made under a retainer for legal services.[451] Rather, federal prosecutors stated that "no such retainer agreement existed and these payments were not 'legal expenses' . . . but were reimbursement payments."[452] In August 2018, Cohen pleaded guilty to making an excessive campaign contribution by paying Daniels "in coordination with, and at the direction of," Trump.[453]

448. On the morning of October 26, Cohen spoke to Trump twice by phone. *Id.* at 47. On October 28, Cohen spoke to Trump by phone. *Id.* at 51. The FBI affiant notes that typically, Cohen spoke to Trump once a month by phone. *Id.* at 41–42.

449. *Id.* at 41.

450. The Government's Sentencing Memorandum at 14, United States v. Cohen, No. 1:18-CR-00602-WHP (S.D.N.Y. 2018) [hereinafter Cohen Sentencing Memorandum]. The scheme worked as follows: Trump Organization executives had "agreed to reimburse Cohen by adding $130,000 and $50,000, 'grossing up' that amount to $360,000 for tax purposes, and adding a $60,000 bonus, such that Cohen would be paid $420,000 in total." *Id.* The sentencing memo refers to a Manhattan-based real-estate company, which is the Trump Organization. This was to be paid in twelve monthly installments of $35,000. *Id.* Throughout 2017, Cohen issued false monthly invoices for $35,000 to the Trump Organization under a purported retainer for legal services. *Id.* Eleven checks in Cohen's favor were drawn on Trump's personal or trust accounts from February through December 2017 (the February check was for $70,000 and covered the January and February installments). *Hearing with Michael Cohen, Former Attorney to President Donald Trump: Hearing Before the H. Comm. on Oversight and Reform*, 116th Cong. 14 (2019) (testimony of Michael Cohen). In early 2019, Cohen released images of eight checks in his favor, dated from February through December 2017, drawn on Trump's personal or trust accounts. (On February 27, 2019, Cohen produced to the House of Representatives Committee on Oversight and Reform images of two checks in his favor, one dated January 2017 signed by Trump and the other dated March 2017 signed by Trump's son and the CFO of the Trump Organization. Cohen provided images of six other checks, dated from February to December 2017, to the *New York Times* the following week.) *Id.*; Peter Baker & Maggie Haberman, *Sway Senators, Pay Fixer: Check Dates Hint at Parallel Lives of a Sitting President*, N.Y. TIMES, Mar. 6, 2019, at A1.

451. Cohen initially made the same claim himself. On February 13, 2018—one month after the NDA came to light, Rothfeld & Palazzolo, *supra* note 7—Cohen maintained that he used his personal funds to pay Daniels and was not reimbursed by Trump. Maggie Haberman, *Trump's Longtime Lawyer Says He Paid Actress Out of His Own Pocket*, N.Y. TIMES, Feb. 14, 2018, at A12. But that position soon unraveled. By early April, the FBI believed that Cohen had, during the NDA negotiations, communicated with Trump and the campaign's press secretary about silencing Daniels. Agent Affidavit, *supra* note 447, at 41. On May 3, Trump tweeted that Cohen was reimbursed for the "private" NDA. Donald J. Trump (@realDonaldTrump), TWITTER (May 3, 2018, 10:46:09 AM UTC), https://twitter.com/realdonaldtrump/status/991992302267785216. This admission by tweet was likely prompted by Sean Hannity's interview of Rudy Giuliani the day before. In that interview, Giuliani said that "the president repaid" the hush money by "[f]unnel[ing] it through a law firm." *Rudy Giuliani on Potential Trump Interview for Mueller*, FOX NEWS (May 2, 2018), https://www.foxnews.com/transcript/rudy-giuliani-on-potential-trump-interview-for-mueller. On August 21, Cohen pleaded guilty to a charge of making an excessive campaign contribution by paying Daniels "in coordination with, and at the direction of," Trump. Transcript of Plea Hearing at 23, United States v. Cohen, No. 1:18-CR-00602-WHP (S.D.N.Y. 2018) [hereinafter Transcript of Plea Hearing].

452. Cohen Sentencing Memorandum, *supra* note 450, at 14.

453. Transcript of Plea Hearing, *supra* note 451, at 23. This could also supply an independent basis for voiding the NDA on public policy grounds, because the NDA violated federal campaign-finance law.

The NDA was dated October 28, 2016, less than two weeks before the presidential election. Another aspect of the timing is telling. October 7, 2016, saw the release of the *Access Hollywood* tape, a decade-old recording of Trump blustering about his sexual predation.[454] At the time, the tape's release was momentous: it threw Trump's campaign into "damage control,"[455] it was "[e]lection-defining,"[456] it had "taken over the election,"[457] and it led "mainstream pundits" to "conclu[de] that the election was over."[458] The following night, in less than an hour, Cohen had phone conversations with Trump himself, the campaign's press secretary, the president of American Media, Inc., and the editor of the *National Enquirer*.[459] The FBI affiant believed that some of these conversations were about silencing Daniels, "particularly in the wake of the *Access Hollywood* story."[460] This is consistent with Cohen's testimony to the House Committee on Oversight and Reform.

Although the NDA was styled a "Confidential Settlement Agreement and Mutual Release," the contract was not responsive to any threatened or actual legal proceeding. There was no dispute to settle when the agreement was signed. Rather, the NDA was executed so that Daniels would refrain from publicly detailing her alleged sexual encounter with Trump and would profit from her silence. Cohen testified to the House Committee on Oversight and Reform that Daniels's attorney at the time, Keith Davidson, contacted him with a demand for $130,000, which "was not a number that was actually negotiated" as "[i]t was told to me by Keith Davidson that this is a number that [Daniels] wanted."[461] But according to Daniels, Davidson told her that it was Cohen who had approached him with the $130,000 figure. "I had no idea," Daniels wrote, "how they had arrived at that price for my silence."[462]

The NDA's express terms covered all information that Daniels had obtained about Trump, but it specified information about sexual conduct. It

454. The *Washington Post*, which first released the recording, characterized Trump's comments as "extremely lewd" and "vulgar." David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eeed4_story.html. Other commentators observed that Trump's comments described sexual assault. *See, e.g.*, Jia Tolentino, *Trump and the Truth: The Sexual-Assault Allegations*, NEW YORKER (Oct. 20, 2016), https://www.newyorker.com/news/news-desk/trump-and-the-truth-the-sexual-assault-allegations.

455. Michael C. Bender & Janet Hook, *Lewd Trump Comments Spark Uproar*, WALL ST. J., Oct. 8, 2016, at A1.

456. John Herrman, *An Election Ill Timed for Media in Transition*, N.Y. TIMES, Nov. 9, 2016, at B1.

457. Olivia Nuzzi, who covered politics for *The Daily Beast*, described the *Access Hollywood* tape as having "blown up and taken over the election" upon its public release. Farhad Manjoo, *Breaking Up with Twitter*, N.Y. TIMES, Nov. 13, 2016, at ST1.

458. James Poniewozik, *A Test from the Political Comedy Gods*, N.Y. TIMES, Nov. 7, 2016, at C1.

459. Agent Affidavit, *supra* note 447, at 41–42.

460. *Id.* at 41.

461. *Hearing with Michael Cohen, Former Attorney to President Donald Trump: Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 34 (2019) (testimony of Michael Cohen).

462. STORMY DANIELS WITH KEVIN CARR O'LEARY, FULL DISCLOSURE 213 (2018).

permanently prohibited Daniels from disclosing any confidential information, defined as:

> (a) All *intangible* information pertaining to DD and/or his family, (including but not limited to his children or any alleged children or any of his alleged sexual partners, alleged sexual actions or alleged sexual conduct or related matters), and/or friends learned, obtained, or acquired by PP, including without limitation information contained in letters, e-mails, text messages, agreements, documents, audio or Images recordings, electronic data, and photographs;
>
> (b) All *intangible* information pertaining to the existence and content of the Property [defined in clause (d)];
>
> (c) All *intangible* private information (*i.e.*, information not generally available to and/or known by the general public) relating and/or pertaining to DD, including without limitation DD's business information, familial information, any of his alleged sexual partners, alleged sexual actions or alleged sexual conduct, related matters or paternity information, legal matters, contractual information, personal information, private social life, lifestyle, private conduct . . . ;
>
> (d) All *tangible* materials of any kind containing information pertaining to DD learned, obtained, participated or acquired by PP, including without limitation letters, agreements, documents, audio or Images recordings, electronic data, and photographs, canvas art, paper art, or art in any other form on any media. [These] are collectively referred to as, the "Property" . . . .[463]

The agreement required the transfer of all the "Property" to Trump.[464] The existence of the NDA itself was deemed confidential.[465] Liquidated damages were set at $1 million per breach, and confidential arbitration was required.[466] If Daniels breached or threatened to breach, Trump was entitled to obtain, ex parte and without notice, a restraining order or preliminary injunction.[467] Trump had power to elect the law of California, Nevada, or Arizona to govern the contract.[468]

It follows that the salient relational context is not that between Essential Consultants and Daniels, the nominal parties to the NDA. Essential Consultants stood in for Trump, the real party in interest. The relevant background relationship, then, was a social acquaintance commencing about a decade before the NDA was signed, where one consort alleges and the other denies that their acquaintance included a sexual encounter. The NDA's definition of confidential information confirms its main objective was to conceal rumors or facts about Trump's sexual activity. Notably, the NDA includes nothing about Daniels in its definition of confidential information; only Trump was protected by its

463. Settlement Agreement, *supra* note 143, at 4–5.
464. *Id.* at 2.
465. *See id.* at 4, 8–12.
466. *Id.* at 9.
467. *Id.* at 10.
468. *Id.* at 12.

nondisclosure provisions. Daniels was also subject to an obligation not to publicly disparage Trump.[469]

Privacy and profit were the positive values underwriting the NDA. Trump's agent signed the NDA, it must be assumed, at least partly to protect Trump's privacy. The NDA's coverage centered on Trump's sexual activity, and his desire to suppress what he considered to be false rumors must have arisen partly to protect his and his family's quietude and tranquility. The NDA was economically valuable to Trump, too—and not only because it expressly covered any information that Daniels possessed about his businesses and contracts. Similarly, for Daniels, the value of the NDA sounded in economy and privacy. After Daniels's representatives took their cut, she received $80,000 for her silence. Yet according to Daniels, this "paltry amount" was not the primary value of the NDA.[470] Rather, it was privacy. She wrote: "This was about putting all this behind me confidentially and never having to worry about Trump coming after me or my family."[471] Daniels feared that unless Trump acquired a contractual right to hold her to a promise to waive her speech right—unless, that is, Daniels signed the NDA—she and her family might be targeted.

But the bargain strikes at the heart of the free speech argument from democracy. Four aspects of the contract combine to leave little doubt that Trump's design was to influence the ballot by concealing information relevant to the exercise of the voters' sovereign prerogative. First, when the contract was signed, Trump was the Republican presidential nominee. It would be possible here to emphasize the significance of Trump's special status as one of the horses in a two-horse race for U.S. president, the most consequential elected office in the country. But the point is more general. Trump was a candidate for public office when the NDA was signed and thus a potential repository of government power. Like all candidates, his objective was to win the election and become a public official. A candidate necessarily claims that she will, if elected, represent her constituency and wield official power. Her character, discretion, judgment, and morality are implicated as matters of public concern. Voters, therefore, are entitled to vote for those candidates who they believe will best represent them and will wield that power most effectively.

Second, the NDA was drafted and signed mere weeks before the 2016 presidential election. Even considered on its own, the fact of an imminent election suggests that the NDA was designed to influence the ballot; the impression is strengthened by the timing of the *Access Hollywood* tape and the following day's flurry of phone calls between Cohen, Trump, and the press secretary for the Trump campaign. After the tape's release, according to Cohen's congressional testimony and the public statements of Daniels and her lawyer, the campaign

469. *Id.* at 8.

470. DANIELS WITH O'LEARY, *supra* note 462, at 214.

471. *Id.* at 213.

viewed the NDA to silence Daniels as an urgent priority, and efforts to execute it intensified.

Third, the information concealed by the NDA was relevant to the evaluation of Trump as a candidate for president. Whether a candidate adheres to traditional norms of sexual morality matters to a large portion of voters. Voters are also entitled to know what steps a candidate is prepared to take during the campaign to keep such information private. The NDA robbed voters of these grounds for the evaluation of candidate Trump. Some voters might have approved of Trump's behavior or believed he was being treated unfairly; for others, the scandal would have counted against his candidacy. It is partly for this reason that the truth or falsity of the information concealed by the NDA is immaterial to its enforceability. Falsity is instrumentally valuable to truth. And if free speech public policy rendered unenforceable only those NDAs that protected true information, then criticism of government would be deterred. A confidant challenging an NDA concealing true information would be discouraged from speaking out because of the difficulty or expense of proving truth in court.[472] That would "dampen[] the vigor and limit[] the variety of public debate."[473]

Fourth, the NDA wore a punitive aspect. The most obvious manifestation was the liquidated damages clause, requiring Daniels to pay $1 million for each unauthorized disclosure of confidential information. But the NDA also permitted Trump "to immediately obtain . . . an *ex parte* issuance of a restraining order and preliminary injunction or other similar relief . . . without advance notice to" Daniels.[474] Essential Consultants took advantage of that one-sided clause on February 27, 2018, when it obtained, with neither notice nor hearing, an emergency temporary restraining order against Daniels.[475] The order is stamped: "Confidential Proceeding." A close friend said that Daniels was "shocked" by the order, only learning of it when she landed after a flight from Los Angeles to Texas.[476] It should be noted, however, that despite the punitive posture of the NDA, Daniels was not actually deterred from speaking after February 2018, when she took the position that Cohen had repudiated the NDA.[477]

The general presumption of contract enforceability is rebutted by the combination of these four aspects of this NDA. The fundamental point is that courts cannot be enlisted to delegitimize a presidential election. Enforcing this

472. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

473. *Id.*

474. Settlement Agreement, *supra* note 143, at 16.

475. EC, LLC v. Peterson, ADRS Case No. 18-1118-JAC (ADR Servs., Inc., L.A.) 1–2 (Feb. 27, 2018) (Connor, Arb.), https://www.nytimes.com/files/stormy-Daniels-restraining-order.pdf.

476. Jim Rutenberg & Peter Baker, *Porn Actress's Trump Claims Shift, Noisily, to Legal System*, N.Y. TIMES, Mar. 8, 2018, at A1.

477. Clifford v. Trump, No. CV 18-02217 SJO (FFM), 2018 WL 3436832, at *3 (C.D. Cal. June 19, 2018); Clifford v. Trump, No. CV 18-02217 SJO (FFM), 2018 WL 3435419, at *5 (C.D. Cal. Apr. 27, 2018); DANIELS WITH O'LEARY, *supra* note 462, at 229–31.

NDA would conscript the courts to deny voters information necessary for them to intelligently exercise their suffrage. American courts have voided election wagers on many types of elections—even a primary election of a major party candidate for county coroner[478]—because such wagers tend to distort the franchise. It is tempting to dismiss the classical doctrine on election wagers as "deliciously quaint,"[479] but there is a strong analogy to the free speech argument from democracy. This NDA, executed mere weeks before the election, purported to conceal information relevant to the evaluation of a presidential candidate by threatening to penalize the confidant in possession of that information. It stifled voters from meaningfully exercising their democratic power.

2. Perkins v. Weinstein

On October 23, 1998, after a week of grueling negotiations, two former assistants to Harvey Weinstein, Zelda Perkins and Rowena Chiu, each signed a confidential settlement with Miramax Film Corporation.[480] At the time, Weinstein and his brother, Bob, controlled Miramax. Perkins alleged that Weinstein had sexually harassed her for several years, and Chiu alleged that Weinstein had sexually assaulted her at the Venice Film Festival in September 1998.[481] When Chiu told Perkins about the sexual assault, Perkins confronted Weinstein and reported his behavior to her immediate superior at Miramax.[482] Miramax agreed to pay Perkins and Chiu £125,000 each to terminate their employment and settle their claims confidentially.[483]

The nondisclosure provisions of Perkins's settlement agreement defined confidential information in three parts: first, private commercial information about Miramax that would be valuable to third parties; second, "confidential, private and/or non-public information about . . . Harvey Weinstein and Bob Weinstein and their immediate family members, close personal friends and/or close business associates";[484] and third, the terms and existence of the settlement agreement and "the related allegations made by you with respect to you

478. *See* Porter v. Sawyer, 1 Del. (1 Harr.) 517 (Super. Ct. 1835).

479. Stephen L. Carter, Opinion, *The Gamble That Could Save Democracy*, BLOOMBERG (May 13, 2015, 3:06 PM), https://www.bloomberg.com/opinion/articles/2015-05-13/let-voters-bet-on-elections.

480. *Sexual Harassment in the Workplace Inquiry: Hearing Before the H. of Commons Women & Equalities Comm.*, 57th Parl 7 (2018) (supplementary written evidence from Zelda Perkins (SHW0058)) (letter from Mark Mansell to Zelda Perkins (Oct. 23, 1998)) (UK) [hereinafter Mark Mansell Letter], https://www.parliament.uk/documents/commons-committees/women-and-equalities/Correspondence/Zelda-Perkins-SHW0058.pdf; Written Submission, *supra* note 316, at 3–4; KANTOR & TWOHEY, *supra* note 167, at 62–66.

481. Written Submission, *supra* note 316, at 2–4; KANTOR & TWOHEY, *supra* note 167, at 63–64; Rowena Chiu, Opinion, *I Can Finally Tell My Weinstein Story*, N.Y. TIMES, Oct. 6, 2019, at SR7.

482. Written Submission, *supra* note 316, at 2.

483. *Id.* at 3.

484. Perkins and Miramax Agreement, *supra* note 37.

or any other person."[485] The agreement generally prohibited disclosure or use of any confidential information without the prior written consent of the Weinstein brothers and absolutely prohibited publicity or cooperation with any media about Miramax, the confidential information, or Perkins's employment and termination.

The settlement agreement contained some unusual nondisclosure terms. Perkins was required to confirm that she would "not personally retain a copy" of the agreement.[486] If Perkins sought medical treatment related to Weinstein's conduct, then she was required, before treatment, to "obtain the medical practitioner's written confirmation in the form of a confidentiality agreement satisfactory to [Miramax] . . . that any information provided to him/her by you is subject to an absolute duty of confidentiality."[487] If Perkins was required to disclose confidential information by legal, including criminal, process, then she was to "use all reasonable endeavours to limit the scope of the disclosure as far as possible."[488] She was directed "not [to] enter into correspondence or discussions with" tax authorities about the payout.[489] During a particularly stressful part of negotiations, Perkins identified persons to whom she had already disclosed her allegations, and the settlement agreement required her to "make all reasonable endeavours to deliver confidentiality agreements within three business days . . . in a form satisfactory to [Miramax] . . . [to] the individuals identified."[490]

Only the nondisclosure provisions of Perkins's settlement agreement are currently publicly available. This is important for two reasons. First, the language of the rest of the settlement agreement cannot be directly interpreted. According to Perkins, the settlement agreement included significant concessions from Miramax. "I was adamant," said Perkins, "that we wanted remedies that would address Mr. Weinstein's behaviours."[491] These included requirements that Weinstein see a Perkins-approved therapist for three years; that within six months Miramax appoint three complaint handlers to investigate future harassment allegations; and that if there were a settlement involving Weinstein in the following two years valued at £35,000 or six months' salary, then Miramax was required to either inform its parent Disney or dismiss Weinstein.[492] Second, it is unclear if there were choice of law or severability clauses

485. *Id.*

486. *Id.* at 2.

487. *Id.* at 4–5.

488. *Id.* at 3.

489. Mark Mansell Letter, *supra* note 480, at 7.

490. Perkins and Miramax Agreement, *supra* note 37, at 5–6; Written Submission, *supra* note 316, at 4 (describing "the most traumatic negotiations when Mr. Weinstein's legal team attempted to insist that I named every individual I had told any part of the events").

491. Written Submission, *supra* note 316, at 3.

492. *Id.* at 4; Matthew Garrahan, *'I Was Made to Feel Ashamed for Disclosing His Behaviour,'* FIN. TIMES, Oct. 24, 2017, at 9.

in the settlement agreement. For the sake of argument, assume that the law of New York (Weinstein's domicile) governed. And to raise the stakes of the free speech public policy argument, assume that the nondisclosure terms were not severable.

In addition to freedom of contract, the weighty values supporting the confidential settlement are economy, administration of justice, and privacy. Miramax and Weinstein avoided the economic hit that might have resulted from publicity, and Perkins received a significant payout. The settlement agreement's public economic value was embodied by more robust corporate governance at Miramax, ordaining, in Perkins's words, "a framework to protect employees in the future."[493] (It is unclear, however, whether Miramax entrenched that framework.) And the confidential settlement agreement supported the administration of justice by easing the burden on the court system.

The privacy value of the settlement contract is more contingent. Supposedly, both Weinstein and Perkins derived value from the privacy of the settlement, but that value inured disproportionately to Weinstein's benefit. For Perkins, a putative upside of privacy was that Weinstein could credibly fulfill his contractual obligation that, within one year of Perkins leaving Miramax, if she "wish[ed] to pursue a career in a particular part of the movie business Harvey Weinstein will use all reasonable endeavours to assist [her] in securing an appropriate position."[494] Once Perkins left Miramax, however, her "career basically came to a halt" because "the film industry is a very incestuous, small industry, and Harvey at the time was the kingpin of it all."[495] Ultimately, she said, "I felt that I was left with no option other than to leave the UK and attempt to reconstruct life somewhere where I would not be in danger of breaching the contract."[496]

There are substantive reasons, grounded in free speech public policy, that caution against the judicial enforcement of the settlement contract's nondisclosure terms. The conventional free speech grammar structures the argument. Free speech, if understood as truth-promoting, is impaired when an NDA conceals sexual harassment allegations leveled by a former employee against a powerful superior. It is, of course, difficult to assess the damage sustained to public discourse during the twenty years that Perkins's allegations were stifled. But we can hazard that the absence of these allegations from the public domain was problematic for at least three reasons. First, the public was denied the opportunity to assess the allegations for itself and to subject that assessment to

493. Written Submission, *supra* note 316, at 3.

494. Mark Mansell Letter, *supra* note 480, at 6.

495. *Sexual Harassment in the Workplace Inquiry: Hearing Before the H. of Commons Women & Equalities Comm.*, 57th Parl 7 (2018) (testimony of Zelda Perkins) [hereinafter Testimony of Zelda Perkins], http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/oral/80945.pdf.

496. Written Submission, *supra* note 316, at 5.

ongoing disputation. Second, the public was robbed of data that would have helped expose the empirical prevalence of sexual harassment at work. Third, the confidentiality provisions helped delay holding Weinstein accountable for his misconduct.

If understood as agency-enhancing for listeners, free speech was frustrated by the nondisclosure terms because they hid data relevant to autonomous agents for the formation of beliefs and the performance of actions. If Perkins's allegations had not been so thoroughly concealed, then it is likely that women who were later harassed or assaulted by Weinstein would have reached different conclusions about him and altered their behavior accordingly. The luster of a job with Weinstein would have dulled for many applicants had they known what Perkins alleged. Had Perkins's allegations been public, perhaps some of the dozens of actresses who now accuse Weinstein would not have been lured to his apartment or hotel room under the false pretense of a business meeting. The private censorship of Perkins's allegations meant that victims lacked important data when they weighed competing reasons for approaching Weinstein to further their careers.

Moreover, the confidentiality provisions undermined the argument from agency that focuses on speaker interests. Perkins was silenced by her settlement, throttling her capacity to externalize her mental contents and define her own identity. The havoc wreaked by the nondisclosure terms was deep and lasting. Perkins "did not feel safe to discuss the trauma of the events with a therapist" and "could not speak to any member of [her] family or friends."[497] The legal advice she received was to "not ever say anything about anything to anybody" and that "[t]he safest thing was to erase the entire last four years of my life from my memory."[498] Nearly two decades after signing the settlement agreement, Perkins said, "I also strongly feel that I am still suffering abuse from this agreement by having control exerted over my life."[499] Perkins explained her motivation for finally breaking the nondisclosure provisions to the *Financial Times*: "I want other women who have been sidelined and who aren't being allowed to own their own history or their trauma to be able to discuss what they have suffered."[500] The confidential settlement's censorship of Perkins hindered her self-development and self-realization.[501]

497. *Id.*

498. Testimony of Zelda Perkins, *supra* note 495, at 7.

499. Written Submission, *supra* note 316, at 5.

500. Garrahan, *supra* note 492.

501. Weinstein paid $100,000 to settle Rose McGowan's claim that he sexually assaulted her at the 1997 Sundance Film Festival. KANTOR & TWOHEY, *supra* note 167, at 11–12. Like Perkins, McGowan was not given a copy of the contract. *Id.* When Weinstein was first convicted on February 24, 2020, McGowan explained the lasting effect of the ordeal on her capacity to direct her own self-development and self-realization: "I've had to have this hardness that's not native to me . . . . But what I feel connected with today by this verdict and what's happened—I feel like the soft girl I was before I walked into that room. . . . [T]oday I have this tiny feeling of, like, this little chrysalis opening in my heart and my chest right now that's, like, I think it

The free speech concerns are so acute to justify the nonenforcement of the confidentiality terms of Perkins's settlement. They are amplified by the recent revelation of the scale of the NDA problem. For Julia Apostle, Twitter's former lead counsel, the sheer number of confidential settlements is salient.[502] "Eight is a lot," she wrote in October 2017 with reference to Weinstein, "no matter the timeframe."[503] More generally, the morass of NDAs shielding sexual harassment works serious free speech harms. A network of NDAs, reinforced by confidential arbitration, that conceals widespread workplace wrongdoing presents, in the aggregate, a fundamental threat to the argument from truth. Similarly, if a vast NDA web hides data of public concern, then members of the public are deciding what to believe and what to do on incomplete knowledge and therefore their autonomy is diminished.

The #MeToo movement unleashed an unprecedented communal reckoning with the profound damage inflicted by NDAs. These contracts were the primary engine of Weinstein's impunity. Each NDA that purports to conceal sexual harassment or abuse has the tendency to harm free speech. Mansfield, and the numerous American judges who followed him, voided election wagers because of their tendency to violate fundamental constitutional principles. One election wager might be insignificant, but allowing one allows all. A similar prophylactic rule may be called for here. Perhaps courts should recognize that enforcing one sexual misconduct NDA makes the judicial process complicit in a profound harm.[504]

F. Three Policy Objections

Three policy objections to this Article's proposal assert harms to three different actors: victims of misconduct seeking settlement, public officers, and potential candidates for public office. The first objection contends that a promise of confidentiality is often all the bargaining leverage that victims have during settlement negotiations. As Jeannie Suk Gersen wrote: "Absent a legally enforceable promise to keep the matter wholly out of the public eye, many powerful people would prefer to take their chances at defending themselves in court

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feels like that girl that walked in that room to be raped by Weinstein, you know, at ten in the morning." Ronan Farrow, *"I Haven't Exhaled in So Long": Surviving Harvey Weinstein*, NEW YORKER (Feb. 25, 2020), https://www.newyorker.com/news/q-and-a/i-havent-exhaled-in-so-long-surviving-harvey-weinstein.

502. Julia Apostle, Opinion, *Weinstein's Case Shows How Power Corrupts in Legal Bargains*, FIN. TIMES, Oct. 14/15, 2017, at 12.

503. *Id.*

504. Some state legislatures have struck the balance in favor of nonenforcement even for confidential settlements, voiding such agreements in cases of sexual harassment or abuse. *E.g.*, CAL. CIV. PROC. CODE § 1002 (West 2018). One commentator has argued for a significant tripartite reform to capture repeat offenders. *See* Ayres, *supra* note 19. These laws and proposals rightly focus on the harm to victims and third parties. For an argument that public policy is all about third-party harms, see generally Hoffman & Lampmann, *supra* note 22.

or in the press."[505] An NDA "may be the only way that a weak plaintiff who has suffered serious harm can obtain compensation."[506]

This is a powerful objection. One response, from Scott Altman, divides victims into two classes: those who would disclose without an NDA and those who would not.[507] For those in the first class, they are prevented by an NDA from disclosure and thereby "breach their duty to alert future victims to the harassers' behavior."[508] For those in the second class, "NDA payments represent a windfall."[509] Either way, each victim is "not wrongfully deprived of money by NDA bans."[510] One problem with this response, as Altman identified, is that there is no clean distinction between a payment for a victim's silence and a payment compensating a victim for the underlying wrong.[511] But there may be other issues too. Assume, with Altman, that a victim who would disclose absent an NDA has a duty to alert future victims. A ban on NDAs would permit the victim to discharge this duty to alert without fear of contract damages. But it is not clear why that alone changes an all-things-considered analysis. An NDA ban, all things considered, might indeed still wrongfully deprive the victim of money. That evaluation would depend on weighing the strength of any duty to alert against the duties, rights, and powers conferred by an NDA. For example, suppose the victim performs her duty to alert by efficiently breaching the NDA. An NDA ban might wrongfully deprive the victim of the additional payment extracted from the wrongdoer less any contract damages. Similarly, even if it is correct to describe a payment for silence as a "windfall" for a victim who would never speak anyway, Altman seems to assume that the withdrawal of a gratuitous payment is never wrongful. But this might ignore that the victim has bargained for the payment.

In dealing with this first objection, it is better to concede, arguendo, that a promise of confidentiality is a victim's only bargaining chip and that removing that chip would harm the victim. The question then becomes one about the balance of harms. By destabilizing some NDAs, this Article's proposal would result in greater uncertainty for contracting parties and deprive some victims of any settlement moneys, forcing them to litigate or to walk away with nothing. The status quo, which entrenches NDAs, is harmful because it conceals misconduct, degrades the agency of future victims by denying them data when

505. Jeannie Suk Gersen, *Trump's Affairs and the Future of the Nondisclosure Agreement*, NEW YORKER (Mar. 30, 2018), https://www.newyorker.com/news/news-desk/trumps-affairs-and-the-future-of-the-non disclosure-agreement.

506. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2657 (1995).

507. Scott Altman, *Sexual Harassment NDAs: Privacy, Complicity, and the Paradox of Blackmail* 23 (USC Law School, Legal Stud. Working Paper Series, Paper No. 305, 2019), https://law.bepress.com/usclwps-lss/305/.

508. *Id.* at 30.

509. *Id.*

510. *Id.* at 23.

511. *Id.* at 16.

weighing competing reasons for action, robs the public of information to subject to ongoing disputation, and hinders victims' agency by silencing them. In its shocking and awesome scale, the #MeToo movement demonstrates that NDAs enable cultures of impunity to fester unchecked. The balance of harms, in my view, favors this Article's proposal, particularly because gutting NDAs can prevent future wrongs to others who are similarly situated.

The second objection asserts that this Article's proposal creates a retroactivity problem for public officials, who will find all of their historic, perhaps decades-old, NDAs suddenly wiped out by the retroactive operation of the public policy doctrine. I hope this Article's treatment of the NDA signed by Michael Cohen and Stormy Daniels allays this objection. This Article does not argue that all NDAs ever signed by public officers are void. It argues that courts should undertake a highly contextual and fact-intensive inquiry to determine whether a particular NDA should not be judicially enforced because it is so contrary to the free speech argument from democracy.

A third objection is that this Article's proposal could discourage potential public officials from running for office. To begin with, it seems likely that any deterrent effect would be negligible. But in any case, similar arguments in the past have lacked purchase. When the American Law Institute (ALI) met in 1937 to consider the thirteenth tentative draft of the first Restatement of Torts, members debated whether there should be a conditional privilege to make defamatory statements about public officials and candidates for public office.[512] One worry ventilated was that such a privilege would deter people from running for office.[513] Although the ALI ultimately rejected the privilege, a state judge persuasively answered the worry: in Kansas, where the privilege had obtained for sixty years, there was no evidence that it deterred good people from running.[514] Moreover, the U.S. Supreme Court adopted a variation of the conditional privilege in *New York Times Co. v. Sullivan*,[515] and there is no data supporting the hypothesis that the federal rule acts as a deterrent. Even if there were, the value of "uninhibited, robust, and wide-open" public debate surely outweighs any deterrent effect.[516]

CONCLUSION

NDAs do not exercise free speech rights; they waive those rights. And while some NDAs serve important values, others are foot soldiers for a powerful elite. In the wake of the NDA crisis, courts should actually weigh

512. *Discussion of Torts Proposed Final Draft No. 3*, 14 AM. L. INST. PROC. 73, 134–57 (1937).

513. *Id.* at 145–46 (Hon. Rousseau A. Burch).

514. *Id.* at 146–47. For more on the Kansas judge, see Michael Kent Curtis, *Burch, Rousseau Angelus*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 82, 82–83 (Roger K. Newman ed., 2009).

515. 376 U.S. 254, 279–80, 282 n.21, 283 (1964).

516. *Id.* at 270.

competing interests rather than merely recite that freedom of contract trumps freedom of speech. This Article suggests that courts could deploy the doctrine that voids contracts against public policy. Courts tread warily around that doctrine and view it with a suspicion normally reserved for revolutionaries. But really, as Rose McGowan said when responding to the news of Harvey Weinstein's first criminal conviction, "I think what's revolutionary is just saying things."[517]

517. Farrow, *supra* note 501.