University of Colorado Law Review

Volume 90 | Issue 2 Article 3

Spring 2019

Limiting the Right to Buy Silence: A Hearer-Centered Approach

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LIMITING THE RIGHT TO BUY SILENCE: A HEARER-CENTERED APPROACH

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INTRODUCTION: THE POTENTIAL IMPACT OF A HEARER-CENTERED APPROACH TO THE FIRST AMENDMENT ON THE FLOW OF SPEECH AND INFORMATION—A TRADE-OFF WELL WORTH MAKING

Under current Supreme Court doctrine, the speaker is far and away the most powerful resident in Mr. Madison's First Amendment neighborhood.[1] Indeed, the speaker-centered First Amendment has never been stronger.[2] Under the umbrella of First Amendment protection, hordes of autonomous speakers roam the American earth (and the internet) flexing their dignitary muscles in prodigious (if occasionally appalling) feats of self-definition and self-expression.[3] Despite the challenges of navigating and thriving in such a kaleidoscopic, occasionally

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1. I have argued that while the speech process typically involves five participants—a speaker; a hearer; a conduit; the subject or target; and a regulator—the Supreme Court has anointed the speaker as the neighborhood's unquestioned ruler. *See* BURT NEUBORNE, MADISON'S MUSIC 97–131 (2015).

2. *See* Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 897–900 (2017).

3. The 2017 term of the Supreme Court reinforced the speaker-centered First Amendment in the context of compelled speech. A five-Justice majority of a deeply divided Court applied a speaker-centered approach to invalidate a California law mandating that privately operated, prenatal clinics serving poor women display information about the free availability elsewhere of additional medical options, including abortion. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (invalidating mandatory notices as unconstitutionally compelled speech). The same five-Justice majority focused solely on the speaker in denying public employee unions the right to collect mandatory "agency fees" to reimburse the union for the costs of providing legally compelled representational services to all covered employees. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448 (2018) (invalidating compulsory agency shop payments as unconstitutionally compelled political expression). The dissenters demonstrated far greater concern for the potential hearer of the speech in *Becerra*, and the recipient of the compelled payments in *Janus*. *Becerra*, 138 S. Ct. at 2380, 2385 (Breyer, J., dissenting); *Janus*, 138 S. Ct. at 2495–96 (Kagan, J., dissenting).

dysfunctional information bazaar, I believe that the emergence of a powerful First Amendment is cause for genuine celebration.[4]

I fear, though, that the Supreme Court's fixation on the protected interests of the autonomous speaker, to the exclusion of the other residents in Mr. Madison's First Amendment neighborhood, may have become too powerful. Supreme Court doctrine has not only cemented the power that wealthy persons and corporations have to dominate our electoral politics,[5] but has also condemned vulnerable hearers to soul-wrenching, unwanted verbal assaults,[6] empowered vituperative bigots to chip away at the dignity and self-worth of long-suffering targets,[7] protected the sale of violent, misogynistic video games to children,[8] stripped public employee unions of their power to collect reasonable fees from free riders,[9] and barred govern-

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4. I have celebrated, questioned, and defended the emergence of a powerful First Amendment in Burt Neuborne, *Blues for the Left Hand: A Critique of Cass Sunstein's "Democracy and the Problem of Free Speech,"* 62 U. CHI. L. REV. 423 (1995) (arguing that hearers should not be viewed as weak and malleable creatures in need of widespread government protection); Burt Neuborne, *Taking Hearers Seriously*, 91 TEX. L. REV. 1425 (2013) (reviewing TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2012)) [hereinafter Neuborne, *Taking Hearers Seriously*]; and Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789 (1998).

5. *E.g.*, McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014) (invalidating ceiling on aggregate campaign contributions); Ariz. Free Enter. Club v. Bennett, 564 U.S. 721 (2011) (invalidating matching fund system designed to equalize campaign spending); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (invalidating limits on corporate electoral expenditures); Buckley v. Valeo, 424 U.S. 1 (1976) (invalidating limits on campaign expenditures).

6. Elonis v. United States, 135 S. Ct. 2001 (2015) (reversing criminal conviction for disseminating threats to ex-wife on the internet because judge's charge allowed conviction if defendant knew or should have known that the words would be viewed as threats, and requiring proof of subjective intention to threaten); McCullen v. Coakley, 134 S. Ct. 2518 (2014) (invalidating restriction on unwanted face-to-face antiabortion speech directed at women approaching abortion clinic); Snyder v. Phelps, 562 U.S. 443 (2011) (reversing jury verdict for emotional harm to family members caused by antigay demonstration aimed at funeral of soldier killed in Afghanistan).

7. Virginia v. Black, 583 U.S. 343 (2003) (reversing conviction and imposing stringent rules on prosecuting cross burning); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (reversing conviction for burning cross on lawn of newly arrived black family).

8. Brown v. Entm't Merch.'s Ass'n, 564 U.S. 786 (2011) (invalidating statute forbidding sale of violent videogames to minors).

9. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448 (2018)

ments from assuring that poor women seeking prenatal care receive accurate information about alternative options.[10]

In an effort to restore a degree of balance to the First Amendment neighborhood, I have joined a number of colleagues in urging greater concern for the hearer in the free speech equation.[11] It's a controversial move that has divided me from many defenders of the First Amendment who argue, not unreasonably, that a hearer-friendlier First Amendment will lead to the enactment of paternalistic, governmentally imposed restrictions on speakers that would both diminish the quantity of speech and information and provide the government with a dangerous weapon to censor unpopular ideas.[12]

Thoughtful defenders of the First Amendment status quo like Floyd Abrams and David Cole are surely correct in noting that increased concern for hearers might well diminish the flow of certain kinds of speech—namely, massive unanswered propaganda by the rich in electoral campaigns; vituperative verbal attacks on targeted hearers based on race or religion; and unwanted face-to-face speech. Thoughtful defenders are also

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(invalidating agency fees).

10. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (striking down mandatory notices).

11. NEUBORNE, *supra* note 1, at 97–131; Neuborne, *supra* note 2; Neuborne, *Taking Hearers Seriously*, *supra* note 4. My conception of the hearer rejects the notion of weak hearers in need of government protection in favor of a vision of strong hearers endowed with the dignitary capacity to shape their own destinies on par with the dignitary interest of speakers that underlies much of the Supreme Court's speaker-centered jurisprudence. The dignitary (as opposed to utilitarian) First Amendment stems from Justice Brandeis's concurrence in *Whitney v. California*, 274 U.S. 357, 372–80 (1927). The classic utilitarian justification is found in Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 624–31 (1919). For a particularly unpersuasive effort to shoehorn worthless speech into the dignitary box, see Chief Justice Roberts' decision in *United States v. Alvarez*, 567 U.S. 709 (2012) (affording dignitary-based First Amendment protection to conscious lies about having been awarded the Congressional Medal of Honor).

12. For a thoughtful defense of the existing law, see FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT (2017). *See also* David Cole, *Why We Must Still Defend Free Speech*, N.Y. REV. BOOKS (Sept. 28, 2017) https://www.nybooks.com/articles/2017/09/28/why-we-must-still-defend-free-speech/ [https://perma.cc/H4S3-G27U] (responding to criticism of the ACLU for having defended the right of Nazi protestors to march in Charlottesville; the rally ended tragically in the death of a counter-demonstrator); David Cole, *Liberals, Don't Lose Faith in the First Amendment*, N.Y. TIMES (Aug. 1, 2018), https://www.nytimes.com/2018/08/01/opinion/first-amendment-liberals-conservatives.html [https://perma.cc/ZW9E-F2RK] (defending a strong First Amendment in the wake of the 2017 Supreme Court term).

correct in warning about the slippery slope. There is always a risk that allowing the government to regulate any aspect of the speech process will lead to greater censorship. To my mind, though, the injuries to democracy and to particularly vulnerable targets caused by an unduly speaker-centered First Amendment justify the risk of narrowly tailored, hearer-centered restrictions, even if the result were less speech. But the result of a move to a hearer-centered approach need not be less speech. Measured across the entire First Amendment horizon, the emergence of a First Amendment rooted in greater concern for hearers has the potential to dramatically enrich the flow of speech and information, not diminish it.

The Supreme Court has already recognized that a hearer's right to receive information can reinforce the speech of willing speakers who lack strong First Amendment rights of their own.[13] The Court has also recognized that respecting a hearer's First Amendment interest in receiving information can pry important information out of unwilling speakers: consumer protection warnings and Freedom of Information Act (FOIA) suits are obvious examples.[14] But that's only the tip of a hearer-centered free speech revolution that would have the potential to close two substantial loopholes in modern First Amendment doctrine:

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13. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (allowing a corporate speaker without a clear First Amendment right to borrow the First Amendment rights of hearers); Fed. Election Comm'n v. Akins, 524 U.S. 11 (1992) (recognizing hearers' standing to challenge official action resulting in suppression of information); Kleindienst v. Mandel, 408 U.S. 753 (1972) (recognizing the standing of prospective audience members to challenge the refusal to grant a visa to a foreign Marxist speaker who lacked First Amendment rights of his own); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (recognizing a First Amendment right to receive communist propaganda from a foreign government that lacks First Amendment protection).

14. Cent. Hudson Gas & Elec. Corp v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (upholding a ban on commercial advocacy of unlawful action); Va. State Bd. Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (resting the entire commercial speech doctrine on the consumer's need for information). *See generally* Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J.L. & POL'Y 53 (2016). For a useful report on the current status of the Freedom of Information Act, see David E. McCraw, *The "Freedom From Information" Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 YALE L.J.F. 232 (Nov. 21, 2016), https://www.yalelawjournal.org/forum/the-freedom-from-information-act-a-look-back [https://perma.cc/N2WT-MVB8].

1) our national security classification system that sucks enormous quantities of important information into its bureaucratic vortex and dribbles only a small fraction back;[15] and

2) the widespread existence of private censoring techniques designed to bury vast quantities of significant information about powerful people or entities.[16]

Under current legal ground rules, massive overclassification of alleged government national security secrets dwarfs the capacity of the Freedom of Information Act to assure that information embarrassing to the government but of great potential importance to the public sees the light of day.[17] The recognition and enforcement of a robust First Amendment hearer's right to know would challenge the current pathological culture of massive overclassification, selective leaking, and politicized security clearances by requiring that the government meet a high First Amendment standard before removing important information from the public arena.

The second loophole, private lawmaking by the powerful, establishes a system of judicially reinforced private censorship that may block the flow of even more speech and information

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15. For an overview of the area, see FREDERICK A.O. SCHWARZ, JR., DEMOCRACY IN THE DARK: THE SEDUCTION OF GOVERNMENT SECRECY (2015). The modern use of national security concerns to limit the flow of important information dates from *United States v. Reynolds*, 345 U.S. 1 (1953) (recognizing a national security privilege to the production of relevant evidence).

16. I know of no overarching effort to chronicle and assess the use of government-reinforced private lawmaking to limit the flow of information. Since the vast bulk of private censoring occurs in settings of secrecy, it is difficult to obtain reliable data about its scope. There is, however, a substantial literature describing and critiquing aspects of private censoring. *See, e.g.*, Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627 (1999); Laurie K. Dore, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999); Seth Katsuya Endo, *Contracting for Discovery* (forthcoming at 2018–19 Stanford Procedure Forum) (on file with author); Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261 (1998) (surveying the use of contract to suppress the flow of information); Steven Gillers, *Speak No Evil: Settlement Agreements Conditioned on Non-Cooperation Are Illegal and Unethical*, 31 HOFSTRA L.J. 1 (2002).

17. *See* SCHWARZ, *supra* note 15; McCraw, *supra* note 14. For an overview of the area, see Ann Koppuzha, *Secrets and Security: Over-Classification and Civil Liberty in Administrative National Security Decisions*, 80 ALB. L. REV. 501 (2017).

than overclassification.[18] Judicially approved private censorship techniques like record sealing,[19] confidentiality agreements,[20] and stipulated protective orders[21] are merely the visible surface of a vast ocean of imposed silence policed by the threat of judicially enforceable nondisclosure agreements (NDAs) that often include confidential arbitration clauses that effectively seal the silencing process from public view.[22]

Given the formally consensual nature of most private silencing arrangements, and the refusal of our legal system to acknowledge the reality of the unfair bargaining relationship at the core of many so-called "consensual" contracts of adhesion,[23] efforts by putative speakers to renege on a contractual obligation to remain silent will probably fail. History tells us, though, that third parties whose lives are adversely affected by private lawmaking—in this case, putative hearers with an important interest in receiving the information at issue—have a fighting chance to resist the power of the strong to purchase silence.[24]

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18. See sources cited *supra* note 16.

19. For a recent survey of record sealing in criminal contexts, see Joy Radice, *The Juvenile Records Myth*, 106 GEO. L.J. 365 (2018). The widespread sealing of civil court records is discussed in Dore, *supra* note 16.

20. Confidentiality agreements are surveyed in Bast, *supra* note 16.

21. My NYU Lawyering Program colleague Seth Endo has authored an excellent draft article analyzing the use of stipulated protective orders to limit the flow of information. *See* Endo, *supra* note 16. I benefitted from that article's insights.

22. Garfield, *supra* note 16 (describing the widespread use of NDAs); *see also* Bast, *supra* note 16. For a summary of recent newsworthy situations featuring NDAs, see Michelle Dean, *Contracts of Silence*, COLUM. JOURNALISM REV. (Winter 2018), https/www.cjr.org/special/report/nda-agreement.php [https://perma.cc/GJT8-DX9Y]. *See generally* David S. Solove, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650 (2009).

23. For a brief review of our legal system's response to imposed contracts of adhesion, see Burt Neuborne, *Ending Lochner Lite*, 50 HARV. C.R.-C.L. L. REV. 183, 187–98 (2015).

24. *See id.* at 194–97. For examples of the process of rejecting the enforceability of contracts because of the third party effect, see *Bunting v. Oregon*, 243 U.S. 426, 438 (1917) (upholding maximum hours in mills, factories, and manufacturing establishments); *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (upholding a 10-hour maximum for women employed in laundries on the basis of a longer work day's impact on children); and *Holden v. Hardy*, 169 U.S. 366, 398 (1898) (upholding an eight-hour maximum work day for miners on the basis of a longer work day's impact on the family). As *Lochner v. New York* makes clear, the third-party argument did not guarantee success. 198 U.S. 45, 64–65 (1905) (invalidating maximum hours for bakers). *See also* Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923) (invalidating minimum wage for women). *Lochner* eventually fell when the Supreme Court adopted a posture of deference to state judgments that freedom of

To my mind, it is a First Amendment bargain worth making to trade the existing power of wealthy and dominant speakers, who play a disproportionate role in the electoral process and assault the dignity of vulnerable hearers with impunity, for a hearer-centered First Amendment, which would impose a duty on the government to stop radically overclassifying potentially embarrassing information and serve as a check on the ability of the powerful to drop a judicially enforceable cone of silence over their actions.

Of course, a hearer-driven challenge to both overclassification and private censorship need not be constitutional. We could beef up the Freedom of Information Act to impose enhanced scrutiny on government efforts to shield information from public view. Similarly, judges—both state and federal—could simply stop approving stipulated silencing orders, record-sealing agreements, and settlements containing gag rules. Most importantly, judges could decline to enforce NDAs as unconscionable contracts in derogation of public policy.[25] But the success of any such nonconstitutional reform effort to deal with either or both of the First Amendment loopholes would turn on a recognition of the unacceptable impact that overclassification and private lawmaking have on the ability of nonconsenting third parties to access important information—in short, a hearer's right to know. It would, then, be a short but important step to give nonconsenting third parties a uniform First Amendment right to challenge the enforceability of both overclassification and judicial enforcement of contracts barring the disclosure of significant information. I'll confine this brief Symposium Essay to sketching out a hearer-centered First

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contract had to be curbed to protect third parties. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (upholding minimum wage for female workers).

25. *See* Neuborne, *supra* note 23, at 197–98. The high-water mark of the effort to use unconscionability to limit the enforcement of unfairly bargained contracts was Judge J. Skelly Wright's decision in *Williams v. Walker-Thomas Furniture*, 350 F.2d 445 (D.C. Cir. 1965), declining to enforce creditors' remedies in a consumer sales contract. Today, despite occasional flickers in state courts, the aggressive use of unconscionability to police unfairly bargained contracts has largely failed. Anne Flemming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L.J. 1383 (2014). In the compelled arbitration context, the Supreme Court has used the preemption doctrine to squelch state judicial efforts to use unconscionability to limit the imposition of compulsory arbitration clauses in unfairly bargained contracts of adhesion. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

Amendment challenge to the ability of the powerful to use judicially enforceable contracts to buy silence.

I. USING THE LAW TO SILENCE CRITICS: THE MOVE FROM CRIMINAL LAW, TO TORT, TO CONTRACT

A. The Rise and Decline of Criminal Law and Tort as Silencing Techniques

Until relatively recently, the powerful were free to use both criminal law and the law of tort to silence unwanted speech. Before the ink was dry on the First Amendment, President John Adams invoked the Alien and Sedition Acts to lock up his most vehement critics, including many newspaper editors who opposed his reelection.[26] Vermont's only member of Congress was imprisoned.[27] Benjamin Franklin's nephew, Benjamin Franklin Bache, editor of a ferociously partisan newspaper, was indicted and died in jail awaiting trial.[28] President Woodrow Wilson used the criminal law to silence critics of American involvement in World War I.[29] More recent examples include the imprisonment of the leadership of the American Communist Party,[30] the jailing of young men for burning their draft cards to protest the war in Vietnam,[31] and the attempt to prosecute Dr. Benjamin Spock and Rev. William Sloane Coffin, prominent critics of the Vietnam War, for signing "A Call to Resist Illegitimate Authority," which urged resistance to the draft.[32]

Similarly, for many years, the torts of libel and slander were used as weapons to frighten—and punish—speakers who

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26. *See generally* TERRI DIANE HALPERIN, THE ALIEN AND SEDITION ACTS OF 1798 (2016).

27. *Id.*

28. *Id.*

29. *See generally* DAVID M. RABBAN, FREE SPEECH IN THE FORGOTTEN YEARS (1997) (chronicling the widespread use of criminal law to crush dissent in World War I); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME—FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004) (same).

30. Dennis v. United States, 341 U.S. 494 (1951) (affirming a criminal conviction of the leadership of the American Communist Party).

31. United States v. O'Brien, 391 U.S. 367 (1968) (affirming a criminal conviction for burning a draft card to protest the Vietnam War).

32. United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

embarrassed or discomfited the powerful.[33] The tort of invasion of privacy, invented in the late 1800s, was openly driven by the desire of the rich to insulate themselves from prying eyes.[34] Tort law was routinely invoked successfully by employers to prevent collective action by employees.[35]

Over the past half century, however, the emergence of a robust First Amendment has substantially limited the ability to use both criminal law and tort law to suppress unwelcome speech. The key move was the abandonment in *Brandenburg v. Ohio*[36] of the "bad tendency" test applied by the Supreme Court in *Schenck v. United States*,[37] *Debs v. United States*,[38] and *Gitlow v. New York*[39] to uphold the convictions of dissenting speakers. In its place, the *Brandenburg* Court substituted a heightened level of First Amendment scrutiny requiring proof of imminent, extremely serious harm demonstrably caused by the speech in question before criminal law could be used to suppress speech. Even before *Brandenburg*, *New York Times v. Sullivan* had imposed stringent First Amendment limits on the torts of libel and slander requiring proof of knowing and intentional falsity.[40] The Court later imposed similar First Amendment restraints on the tort of intentional infliction of emotional distress.[41] Thus, by the mid-1970s, it had become extremely difficult,[42] but not impossible,[43] to use criminal law and torts

33. The use of libel as a suppression device is both exemplified and sketched in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). While defenders of libel occasionally argue that it is a technique to protect the weak, the economic realities of expensive civil litigation (to say nothing of the architecture of the tort itself, which turns on placing an economic value on reputation) have combined to assure that libel—and the threat of libel—has functioned historically as a tool of the powerful, custom made for suppressing embarrassing speech. *See* Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

34. *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

35. *See* Vegelahn v. Guntner, 167 Mass. 92 (1896) (enjoining picketing as tortious).

36. 395 U.S. 444 (1969) (rejecting an effort to prosecute members of the Ku Klux Klan for vaguely threatening speech).

37. 249 U.S. 47 (1919).

38. 249 U.S. 211 (1919).

39. 268 U.S. 652 (1925).

40. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964).

41. Hustler Magazine v. Falwell, 485 U.S. 46 (1988); *see also* Snyder v. Phelps, 562 U.S. 443 (2011).

42. The robust nature of the newly minted protection for speech was on display in *Cohen v. California*, 403 U.S. 15 (1971), when the Supreme Court

as reliable information-control devices. But power is like a great river—dam its flow in one direction and the river will seek to carve a new channel. That new channel was private lawmaking.

B. The Move to Private Lawmaking as a Partial Substitute for Tort and Criminal Law

Once the evolution of First Amendment doctrine had substantially diminished the ability to use tort and criminal law as censorship techniques, the powerful turned to a system of private censorship in the form of sealed settlement agreements, sealed judicial records, confidential discovery, stipulated protective orders, and widespread judicially enforceable nondisclosure agreements.[44] The move from public to private censorship should have surprised no one. At least twice before in the history of our nation's jurisprudence, when constitutional doctrine had evolved to block the coercive use of tort and criminal law to control the weak, private (so-called "consensual") lawmaking has emerged as a partial substitute.

For much of our Anglo-American legal history, important aspects of the employment relationship were governed by coer-

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struck down an effort to prosecute a young man for entering a courthouse wearing a jacket with the words "Fuck the Draft" emblazoned on the back. The protection reached its peak in *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990), which invalidated convictions for burning the American flag as a form of protest.

43. The threat of libel is still used by the powerful to intimidate critics. *See* FIONA DONSON, LEGAL INTIMIDATION (2000) (describing so-called SLAPP suits (Strategic Lawsuits Against Public Participation) designed to intimidate critics). Moreover, as the fate of Gawker, a controversial website specializing in the dissemination of embarrassing information, demonstrates, privacy-based tort continues to provide the powerful with a tool to strike back at speakers who embarrass them. *See* Gawker Media, LLC v. Bollea, 170 So. 3d 125 (Fla. Dist. Ct. App. 2015); Gawker Media, LLC v. Bollea, 129 So. 3d 1196 (Fla. Dist. Ct. App. 2014). In the Gawker litigation, Hulk Hogan, a widely known professional wrestler, obtained a $31 million privacy judgment against Gawker for broadcasting tapes of Hogan having consensual sex with his best friend's wife. It appears that the tapes were made by the husband without Hogan's knowledge or consent. The judgment forced Gawker into bankruptcy. It appears that Hogan's lawsuit was bankrolled by Peter Thiel, an immensely wealthy Silicon Valley tycoon, who never forgave Gawker for outing him as gay in 2007. *See* RYAN HOLIDAY, CONSPIRACY: PETER THIEL, HULK HOGAN, GAWKER, AND THE ANATOMY OF INTRIGUE (2018).

44. *See supra* notes 19–22.

cive norms drawn from criminal and tort law.[45] Over time, legally coerced forced labor in the form of slavery, serfdom, bondage, indentured servitude, chattel slavery, peonage, compulsory apprenticeship, and feudal labor was gradually abolished.[46] Deprived of the formal coercive tools of forced labor, powerful employers, seeking to avoid regulation designed to protect workers, turned to private lawmaking in the form of judicially enforceable private employment contracts. These were designed to give legal force to "agreements" to work for less than a living wage or under hellish conditions, which arose from radically unequal bargaining power.[47] While the most blatant efforts to use the law of contracts to reintroduce legally forced labor were rejected by the Supreme Court in the Peonage Cases,[48] the era of *Lochner v. New York* provided constitutional protection for powerful employers to use unfairly bargained private contracts as a partial substitute for the more overtly labor-coercive techniques.[49]

Similarly, the decline of overtly racist civil and criminal norms imposing residential, workplace, and social racial segregation ushered in a wave of private lawmaking in the form of racially restrictive real estate covenants and other contractual-

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45. An enormous literature exists on the history and prevalence of forms of legally compelled forced and unfree labor. *See* BONDED LABOR: GLOBAL AND COMPARATIVE PERSPECTIVES (18TH–21ST CENTURY) (Sabine Damir-Geilsdorf et al. eds., 2016); PETER KOLCHIN, AMERICAN SLAVERY: 1619–1877 (rev. ed. 2003); ROBERT MILES, CAPITALISM AND UNFREE LABOR: ANOMALY OR NECESSITY? (1987).

46. Despite the formal abolition of legally coerced forced labor, islands of forced labor persist today in the United States in the form of convict labor, human trafficking, certain forms of immigrant labor, child labor, certain forms of agricultural labor, and persistent labor problems in the seafood industry. Worldwide, unfree and forced labor remains a massive reality. *See* SIDDHARTHA KARA, SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY (2010); ANN JORDAN, SLAVERY, FORCED LABOR, DEBT BONDAGE, AND HUMAN TRAFFICKING: FROM CONCEPTUAL CONFUSION TO TARGETED SOLUTIONS (2011); Henry Calvin Mohler, *Convict Labor Policies*, 15 J. AM. INST. CRIM. L. & CRIMINOLOGY 530 (1925).

47. The Associated Press was awarded the Pulitzer Prize in 2016 for its reporting on forced labor in the seafood industry. *AP Wins Pulitzer Prize for "Seafood from Slaves" Investigation*, ASSOCIATED PRESS (Apr. 18, 2016), https//www.ap.org/press-releases/2016/ap-wins-pulitzer-prize-for-seafood-from-slaves-investigation [https://perma.cc/8758-BARG].

48. United States v. Reynolds, 235 U.S. 133, 150 (1914) (refusing to permit imposition of criminal sanctions for the violation of an employment contract); Bailey v. Alabama, 219 U.S. 219, 243–44 (1911) (same); *see also* Aziz Huq, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351 (2001).

49. For a brief description of the era of substantive due process, see Neuborne, *supra* note 23, at 190–97.

ly imposed agreements designed to achieve the same racist ends. The unduly delayed process of dismantling legally coerced racial segregation finally began in *Buchanan v. Warley*,[50] which invalidated a municipal ordinance making it criminal for a "colored person" to occupy a house on a block with a majority of white residents. A decade later, though, in *Corrigan v. Buckley*,[51] the Supreme Court upheld the enforcement of racially restrictive real estate covenants, authorizing a private law end run around *Buchanan* that placed the authority of the state at the disposal of racists seeking to use private lawmaking to assure racial segregation.[52]

Why should we be surprised, then, that the decline of criminal law and tort as two means of silencing critics of the rich and powerful has given rise to an epidemic of private lawmaking designed to silence putative critics? In the areas of employment and race relations, as discussed in Part III, the law has evolved to blunt the effort to use private lawmaking to replicate a lost world of repression through criminal law and torts. The jury is still out on whether the law will similarly evolve to blunt massive private censorship.

II. THE WIDESPREAD USE OF PRIVATE LAWMAKING TO SUPPRESS THE FREE FLOW OF INFORMATION

Donald Trump isn't the first person to use contracts and settlement terms to suppress adverse information about himself.[53] The *New York Times* and the *New Yorker Magazine* shared the 2018 Pulitzer Prize for Public Service Reporting in connection with an October 5, 2017, exposé of Harvey Weinstein's systematic sexual abuse of numerous women with whom he had interacted as one of the leading producers in Hollywood.[54] The *New York Times* story detailed the use of NDAs to

50. 245 U.S. 60, 82 (1917).

51. 271 U.S. 323 (1926).

52. As discussed *infra* in note 126 and the accompanying text, a generation after upholding them, the Supreme Court eventually put an end to judicially enforced racially restrictive covenants in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

53. For a summary of numerous recent newsworthy situations featuring NDAs, see Dean, *supra* note 22.

54. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https//www.nytimes.com/2017/10/05/us/Harvey-weinstein-harrasment-allegations.html [https://perma.

suppress information about Weinstein's activities.[55] In the wake of the report, more than eighty women came forward to accuse Weinstein of sexual improprieties.[56] When, in March 2018, the Weinstein Company filed for bankruptcy after multiple victims had stepped forward, the company voided all NDAs.[57] On May 25, 2018, Weinstein was arrested in New York and charged with rape and other offenses.[58]

Big tobacco companies used NDAs and sealed settlements to suppress adverse information about cigarettes for a generation.[59] The truth is that every single day money changes hands in an American courthouse in the form of settlement agreements purchasing silence about activities that might expose a powerful payor to civil liability or public obloquy.[60] Judges and plaintiffs' lawyers routinely cooperate with defendants' lawyers by sealing the record[61] or entering stipulated protective orders governing information obtained during discovery.[62]

Otherwise thoughtful lawyers, with whom I worked in achieving the $1.25 billion Holocaust-related settlement with Swiss banks, sought to include a gag order in early drafts of the complex class action settlement agreement that would have forbade class beneficiaries from criticizing the settlement's terms or the Swiss banks' behavior. The gag was dropped dur-

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cc/T78X-ZV7E].

55. *Id.*

56. Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017), https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accuser/804663001 [https://perma.cc/QXQ6-BPM3].

57. Andrea Mandell, *Weinstein Co. Files for Bankruptcy, Terminates All Non-Disclosure Agreements*, USA TODAY (Mar. 20, 2018), https://www.usatoday.com/story/life/movies/2018/03/19/weinstein-co-finds-new-buyer-ends-non-disclosure-agreements/440530002/ [https://perma.cc/64TM-E6GD].

58. Benjamin Mueller & Alan Feuer, *Arrested on Rape Charges, Weinstein Posts $1 Million Bail*, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/25/nyregion/harvey-weinstein-arrested.html [https://perma.cc/G4QU-MVZG].

59. Garfield, *supra* note 16 (discussing the use of NDAs by the tobacco industry). I benefitted from Professor Garfield's careful analysis of the area.

60. For a useful analysis of confidential settlements, see Ben DePoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957 (2010).

61. *See* Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, ATLANTIC (Oct. 18, 2018), https://www.theatlantic.com/business/archive/2017/10/legal-agreements-sexual-assault-ndas/543252/ [https://perma.cc/7VGX-Q2RW].

62. *See* Endo, *supra* note 16.

ing the drafting process when I wouldn't sign it.[63]

Outside of court, celebrities, politicians, and other rich folk routinely place confidentiality clauses in their prenuptial agreements, divorce settlements, employment agreements, and private business deals. Big businesses routinely include nonnegotiable compulsory arbitration clauses in their consumer and employment contracts requiring all disputes to be settled in a confidential arbitration, and the Supreme Court lets them get away with it.[64]

Private censorship is why we never hear from President Trump's ex-wives, each of whom signed a confidentiality agreement as part of their divorce settlements.[65] Rumors fly that Ivana Trump testified under oath that pre-President Trump slept with a copy of Adolph Hitler's *Collected Speeches*[66] on his bed-stand, but you'll never hear it today from the original source.[67] Frankly, I'd much rather know what Nazi garbage a younger Trump was putting into his head all those years than who he was sleeping with, but the transcript of that divorce proceeding is sealed as tightly as Trump's tax returns. Even if she wished to talk about Trump's alleged fascination with Hitler's techniques for manipulating the German people, Ivana Trump has been contractually gagged,[68] and presumably

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63. *In re* Holocaust Victims Assets Litig., 105 F. Supp.2d 139 (E.D.N.Y. 2000) (describing and approving the settlement agreement). No formal record of the proposed gag provisions exists. The related question of the issuance of judicial gag orders is beyond the scope of this essay. Since such gag orders are nonconsensual, they raise different issues. *See* United States v. Salameh, 992 F.2d 445 (2d Cir. 1993) (reversing a district court gag order).

64. Neuborne, *supra* note 23, at 200–04 (briefly discussing the Supreme Court compulsory arbitration cases).

65. We know that Trump's divorce from his first wife, Ivana, contained a nondisclosure clause because he successfully enforced it against her when she sought to publish a novel based upon her life with him. Trump v. Trump, 582 N.Y.S.2d 1008 (N.Y. App. Div. 1992); *see also* David A. Graham, *Donald Trump's Long History of Paying for Silence*, ATLANTIC (Jan. 17, 2018), www.theatlantic.com/politics/archive/2018/01/Donald-trumps-long-history-with-hush-money/550745/ [https://perma.cc/W947-WZCX] (describing Trump's use of the NDA with his second wife, Marla Maples, to block a novel critical of him).

66. ADOLPH HITLER, MY NEW ORDER: A COLLECTION OF SPEECHES (Raoul de Roussy de Sales ed. 1941).

67. Michael Kennedy, Ivana's lawyer, has corroborated the story of her assertions about Trump's fascination with Hitler. *See* Marie Brenner, *After the Gold Rush*, VANITY FAIR: HIVE (Sept. 1990), https://www.vanityfair.com/magazine/2015/07/donald-ivana-trump-divorce-prenup-marie-brenner [https://perma.cc/H37P-K8PF].

68. Graham, *supra* note 65.

well paid for the privilege.

As Alan Garfield points out in his useful article,[69] it is important to note that not all confidentiality agreements are troublesome efforts at a cover-up. Contracts to protect trade secrets or abstract ideas from being unfairly appropriated provide important legal protections not available under trademark or copyright law.[70] Similarly, relationships of trust and confidence often legitimately call for contractual reinforcement of confidentiality.

President Trump seems, however, to have raised contractually enforced silence to an art form. Although he is far from the first powerful person to use the technique, our forty-fifth President has allegedly built much of his career—business, social, and political—on the repeated use of NDAs to suppress public knowledge of embarrassing and, occasionally, potentially unlawful behavior.[71]

Acting through designated fixers like Michael Cohen,[72] President Trump is alleged to have used his money to purchase silence from women with whom he carried on consensual sexual liaisons, business associates whom he has allegedly wronged, litigants in judicial proceedings with whom he has settled, and several ex-wives whom he has divorced.[73] The guarantees of silence are codified in elaborate, written NDAs under which Trump, or his designated fixer, purchases silence for considerable sums of money and threatens serious financial consequences if the purchased silence is not forthcoming.[74] And

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69. Garfield, *supra* note 16.

70. *Id.* at 269–70.

71. The media is rife with stories of Trump's use of NDAs. The *Atlantic* article by Graham, *supra* note 65, is a representative example of the genre. Two examples of his potentially unlawful use of NDAs are discussed *infra* in notes 81 and 84 and the accompanying text.

72. Michel Cohen, a lawyer who served as President Trump's longtime designated fixer, and who negotiated the Stormy Daniels NDA, is currently under investigation in the Southern District of New York. A grand jury has seized his files and telephone records. *See* Natasha Bertrand, *The Michael Cohen Case: A Definitive Guide to the Key Players*, ATLANTIC (Apr. 17, 2018), https://www.theatlantic.com/politics/archive/2018/04/michael-cohens-day-in-court/558221/ [https://perma.cc/2MGB-Q3WC].

73. Graham, *supra* note 65; *see also* Scott Horsley, *Sworn to Secrecy: Trump's History of Using Nondisclosure Agreements*, NPR (Mar. 19, 2018), https://www.npr.org/2018/03/19/595025070/sworn-to-secrecy-trumps-history-of-using-nondisclosure-agreements [https://perma.cc/5HQR-AM57].

74. Horsley, *supra* note 73.

it isn't just a bluff. In 2013, Trump successfully sued a participant in the Miss Universe Pageant for $5 million because she violated an NDA by charging that the pageant was rigged.[75] Similarly, in 1992, when Trump's first wife, Ivana, sought to write a novel entitled *For Love Alone*, a thinly fictionalized story of their marriage, Trump sued her for allegedly breaching her divorce agreement NDA.[76] The NDA was upheld in state court, and the case was eventually settled under seal.[77]

The most notorious Trump nondisclosure disputes involved alleged directions to his lawyer/fixer Michael Cohen in October 2016 to orchestrate hush money payoffs to two women—an adult movie actress and a Playboy model, respectively—with whom Trump had allegedly maintained consensual sexual liaisons during his third marriage.[78] Trump is alleged to have feared that if the allegations of extramarital sexual relationships were made public immediately after videotapes had aired in October 2016 depicting him as a misogynistic boor, his presidential campaign would suffer.[79]

One NDA with Stormy Daniels, an adult entertainer and pornographic movie performer, is a garden-variety hush money contract designed to buy her silence for a payment of $130,000, with the hush money initially paid to her, allegedly at the President's direction, by Michael Cohen (who took out a fraudulent home equity loan to raise the cash).[80] After the election, Cohen was reimbursed by The Trump Corporation in the guise of inflated invoices for phony legal fees.[81]

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75. *Id.*

76. Trump v. Trump, 582 N.Y.S.2d 1008 (N.Y. App. Div. 1992).

77. *Id.* at 1011.

78. Graham, *supra* note 65.

79. Cohen has pled guilty to eight crimes, two of which involve orchestrating NDAs for the President. The charging statement and plea arrangement are set forth at Emily Stewart, *Read Michael Cohen's Plea Deal*, VOX (Aug. 21, 2018, 5:42 PM), https/www.vox.com/2018/8/2117765496/michael-cohen-plea-deal [https://perma.cc/A42Q-9SKN].

80. The story of the Stormy Daniels payoff was broken by the Wall Street Journal. Michael Rothfeld & Joe Palazzolo, *Trump Lawyer Arranged $130,000 Payment for Adult Film Star's Silence*, WALL ST. J. (last updated Jan. 12, 2018, 3:13 PM), https://www.wsj.com/articles/trump-lawyer-arranges-130,000-payment-for-adult-film-stars-silence-1515787678 [https://perma.cc/FYK9-6857].

81. Prosecutors alleged that the Stormy Daniels payment is either an unlawfully undisclosed campaign contribution by Cohen to the Trump campaign, or an undisclosed campaign expenditure by The Trump Corporation in support of the Trump campaign. If it is deemed a campaign contribution by Cohen, the $130,000

The second recent and notorious silencing payment is more complex. It involved a three-cornered agreement with David Pecker, chair of the American Media Corporation, the publisher of the *National Enquirer*, to purchase from Playboy model Karen McDougal the rights to the story of her sexual liaison with the president for $150,000, and then to kill the story.[82] It's unclear how—indeed, whether—the American Media Corporation was reimbursed by Trump.[83] Pecker is said to have described the arrangements to a grand jury under a grant of immunity. [84]

Michael Cohen has pled guilty to arranging both payments at then-candidate Trump's direction.[85] The President stoutly denies wrongdoing, insisting that the sexual liaisons never took place and that Cohen is lying to obtain a lighter sentence.[86]

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far exceeds the permissible contribution limit of $2,700. If, because the payments were reimbursed, it is deemed payment from The Trump Corporation, it is an unlawful corporate contribution to the Trump campaign. The payment cannot be deemed an independent corporate expenditure under *Citizens United* because Trump was orchestrating the arrangement. As a contribution, it violates the ban on corporate contributions and far exceeds a permissible amount. Cohen has pled guilty to violating the campaign finance laws by orchestrating the deal. *See* Stewart, *supra* note 79.

82. Jim Rutenberg, Rebecca R. Ruiz & Ben Protess, *David Pecker, Chief of National Enquirer's Publisher, Is Said to Get Immunity in Trump Inquiry*, N.Y. TIMES (Aug. 23, 2018), https://www.nytimes.com/2018/08/23/us/politics/david-pecker-immunity-trump.html [https://perma.cc/79RY-SF7H]; *see also* U.S. Dep't of Justice, Nonprosecution Agreement between the Department of Justice & American Media, Inc. (Sept. 20, 2018), https://www.justice.gov/usao-sdny/press-release/file/1119501/download [https://perma.cc/7Z39-N4A8] [hereinafter Dep't of Justice, Sept. 20, 2018 Nonprosecution Agreement].

83. Dep't of Justice, Sept. 20, 2018 Nonprosecution Agreement.

84. *Id.* The Karen McDougal payment is described in Jim Rutenberg et al., *supra* note 82. The $150,000 Karen McDougal payment appears to be an unlawful corporate campaign contribution by American Media Corporation. If any reimbursement took place, it would be an allegedly unlawful campaign contribution from whoever did the reimbursing. If the alleged reimbursement came from The Trump Corporation, the payment would be a doubly unlawful undisclosed corporate contribution. If it came from Trump personally, it would be a protected personal campaign expenditure. The only campaign finance violation would then be Trump's failure to have disclosed it. Jonathan Edwards, the Democratic candidate for Vice President in 2004, was acquitted in 2012 on one count of failing to disclose a similar campaign expenditure after he paid $130,000 to hush up an adulterous affair. Alan Martin, *Edwards Not Guilty on One Count, Hung Jury on Other Five*, ATLANTIC (May 31, 2012), https://www.theatlantic.com/national/archive/2012/05/john-edwards-jury-has-finally-reached-a-verdict/327435/ [https://perma.cc/8837-S7QL].

85. *See* Stewart, *supra* note 79.

86. Trump's denials have been widely reported. For a representative story,

My purpose in wallowing in President Trump's salacious world is to highlight the importance of developing legal tools that will blunt the power of NDAs to block the flow of potentially important information. I take no position on who is telling the truth. In fact, I'm not sure you can use the word truth in the same sentence with any of Stormy Daniels, Karen McDougal, Michael Cohen, David Pecker, or Donald Trump. Moreover, I'm not sure that who Donald Trump consensually sleeps with is the kind of important information that should lead a court to question a consensual, self-imposed contractual gag.

Whether or not Trump's NDAs with Stormy Daniels or Karen McDougal are subject to successful challenge is, however, less important than developing a blueprint for challenging NDAs generally.

III. WHEN, IF EVER, SHOULD NDAS BE JUDICIALLY ENFORCEABLE?

That question brings us squarely to the subject of this Symposium[87]—the importance of viewing the First Amendment through the lens of the hearer.[88] To the extent that judicial enforcement—or the threat of judicial enforcement—of an NDA inhibits the free flow of information that is significant to the general public about a public figure,[89] does such judicial enforcement violate the First Amendment? I think the answer may differ depending on whether we use a speaker-centered

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see Jordan Fabian, *Trump Denies Having Prior Knowledge of Cohen's Hush Money Payments*, HILL (Aug. 22, 2018, 2:08 PM), https://thehill.com/homenews/administration/403059/trump-denies-prior-knowledge-of-Cohen-hush-money-payments [https://perma.cc/X95Q-6W48].

87. My thanks to the conference organizers for inviting me to Boulder once again. I never turn down a chance to spend time in Colorado. Several years ago, an Attorney General of Colorado who shall remain nameless jokingly threatened to tax me as a Colorado resident if I was found in the state for yet another conference.

88. As noted above, I have written on the importance of bringing hearers into the First Amendment equation. *See* NEUBORNE, *supra* note 1; Neuborne, *supra* note 2; *see also* Neuborne, *Taking Hearers Seriously*, *supra* note 4.

89. I put to one side whether information relevant to public issues should be treated the same as information about public figures. I'm borrowing the distinction between public figures and public issues from the law of libel. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). I also put to one side whether salacious accounts of consensual sex qualify as significant information about a public figure.

analysis or shift to a hearer-centered view of the First Amendment.

A. A Speaker-Centered Approach to NDAs

Viewed solely from the perspective of the prospective speaker, the judicial enforcement of a contractual agreement to remain silent, freely entered into in return for significant consideration, doesn't appear to be a First Amendment violation. It may not even constitute state action. As demonstrated by the Supreme Court's troublesome decisions in the Federal Arbitration Act cases, which culminated in *Epic Systems Corp. v. Lewis*,[90] when the state merely enforces a volitional contract between two consenting parties, a majority of the Justices view the enforcement process as enhancing the autonomy of both parties by assisting them in effectuating their original volitional bargain.[91]

My quarrel with cases like *Epic* is less with the notion that consensual promises should be enforced than with the Court's overly formalistic approach to what constitutes a consensual agreement. For example, I would not view the imposition of harsh, nonnegotiable terms in an employment agreement signed by a gas station attendant who desperately needs the job as a consensual agreement. But that's a different article.

Assuming that an agreement is genuinely consensual, I believe that the Justices' view of the enforcement of fairly bargained contracts as crucial to the health of free choice institutions, such as the economic market, is correct. If contractual promises freely made in return for valuable consideration could not be enforced when one of the parties suffers from buyer's or seller's remorse, it would be hard to see how a complex free market economy could function. Thus, if you view contract enforcement as nothing more than effectuating the autonomous wishes of the parties, it's easy to see why the judicial enforcement of a genuinely volitional contract might not be state action at all.

That's the crucial analytical difference between and among tort, contract, and promissory estoppel. The Supreme Court

90. 138 S. Ct. 1612 (2018).
91. *Id.* at 1621–23.

correctly views judicially enforceable tort law as a series of legally imposed rules limiting individual autonomy, but views judicially enforceable contract law as a series of legally imposed rules reinforcing and enhancing the autonomy of both parties to the contract. Thus, at least since *New York Times v. Sullivan*,[92] judicially enforcing a speech-related tort like libel has been treated as state action in violation of the First Amendment, while garden-variety enforcement of contracts is almost never viewed as raising substantive constitutional questions.

Similarly, judicial enforcement of a duty imposed by the state under a theory of promissory estoppel,[93] as opposed to a bilateral agreement, is also seen by the Justices as government restriction of individual autonomy.[94] The mere enforcement of a voluntary bilateral promise is, on the other hand, plausibly seen as nothing more than state assistance in carrying out the autonomous wishes of the parties.

Even if you get over the state action hurdle, the signer of an NDA may well have waived her free speech rights in return for a mess of pottage.[95] You can't sell yourself into slavery, but promising to remain silent in return for a substantial sum of money may plausibly be seen as a valid waiver of a First Amendment right.[96] The Supreme Court has made it clear that constitutional rights—even First Amendment rights—may be waived as long as the waiver is genuinely volitional.[97] Voluntarily accepting a great deal of money to keep silent may well constitute just such a waiver. But accepting a badly needed job should not, I believe, carry the same level of voluntariness.

Finally, even if state action is present and the First Amendment has not been waived, holding the speaker to her

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92. 376 U.S 254 (1964).

93. Promissory estoppel is described and critiqued in Susan Lorde Martin, *Kill the Monster: Promissory Estoppel as an Independent Cause of Action*, 7 WM. & MARY BUS. L. REV. 1 (2016).

94. *See* Cohen v. Cowles Media, 501 U.S. 663 (1991) (recognizing the enforcement of a duty imposed by promissory estoppel as state action).

95. *See generally*, *Genesis* 25:29–34 (King James).

96. *See* Snepp v. United States, 444 U.S. 507 (1980) (appearing to view a contractual promise as a waiver of a First Amendment right).

97. *See* Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281 (2006).

promise may be seen as viewpoint-neutral governmental regulation that survives First Amendment scrutiny, like rules governing nondiscriminatory access to parks and sidewalks.[98] That's why it would—and perhaps should—be so difficult for prospective speakers like Stormy Daniels and Karen McDougal to extricate themselves from a promise to remain silent for which they have been compensated handsomely.

What little Supreme Court precedent we have on this issue suggests that speaker-centered challenges to the enforcement of voluntary NDAs would face tough sledding in this Supreme Court. In *Snepp v. United States*,[99] for example, an ex-CIA agent published a book critical of the agency's operations in South Vietnam entitled *Decent Intervals* without submitting it for contractually required prepublication review by the CIA.[100] When it learned of the book's publication, the CIA sought judicial enforcement of the preclearance agreement by demanding that all royalties be held in a constructive trust for the CIA as liquidated damages for the breach.[101] The Fourth Circuit recognized that the CIA preclearance agreement was a valid contractual obligation, but ruled that a constructive trust was unwarranted because no classified information had in fact been revealed.[102] If a contractual remedy existed in the absence of actual damages, the Fourth Circuit confined it to punitive damages for willful breach.[103]

By the time the *Snepp* case reached the Supreme Court, it had become clear that no breaches of the classification rules had occurred.[104] Nevertheless, without requiring oral argument, the Court, acting *per curiam*, reinstated the constructive trust as the only effective means of enforcing the author's contractual promise.[105] Justice Stevens, joined by Justices Brennan and Marshall, dissented on First Amendment

98. *See Cohen*, 501 U.S. at 668–71; Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984).

99. 444 U.S. at 508–09.

100. *Id.* at 507–09.

101. *Id.*

102. United States v. Snepp, 595 F.2d 926, 935–36 (4th Cir. 1979).

103. *Id.* at 936–37.

104. 444 U.S. at 514–16.

105. *Id.*; *see also* United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972) (granting preliminary injunction to enjoin publication).

grounds.[106]

In *Cohen v. Cowles Media*,[107] a confidential source leaked damaging information about a candidate for public office to a newspaper after the newspaper promised to preserve his anonymity.[108] When the newspaper subsequently published the source's name, he lost his job and sued for breach of contract.[109] The Minnesota trial court rejected a pure bilateral contract claim, but recognized a claim sounding in promissory estoppel.[110] The Minnesota Supreme Court reversed, ruling that judicial enforcement of the promissory estoppel claim would violate the First Amendment.[111] The United States Supreme Court then reversed the Minnesota Supreme Court. The Court acknowledged that judicial enforcement of a legal duty imposed under promissory estoppel constituted state action, but ruled that viewpoint-neutral judicial enforcement of promissory estoppel duties against everyone, including the press, would not violate the First Amendment.[112] Justice Stevens, who had authored the First Amendment dissent in *Snepp*, cast the swing vote in *Cowles Media*.[113] Justices Souter, O'Connor, Blackmun, and Marshall dissented on First Amendment grounds.[114]

As demonstrated above, the majority opinions in both *Snepp* and *Cowles Media* rest heavily on the consensual nature of the promises entered into by each speaker. Moreover, in both cases the promises were instrumental in the speakers' obtaining the information they subsequently wished to disseminate. Frank Snepp would never have been in South Vietnam as a CIA agent if he hadn't signed the preclearance agreement. The Minnesota newspaper would never have known the identity of the source if it had not initially promised confidentiality. Under those circumstances, a powerful equitable basis existed for

106. *Snepp*, 444 U.S. at 516–17.
107. 501 U.S. 663 (1991).
108. *Id.* at 665.
109. *Id.* at 666.
110. *See* Cohen v. Cowles Media Co., 445 N.W.2d 248, 254 (Minn. Ct. App. 1989) (upholding damage claim, but reversing trial court's fraud finding).
111. Cohen v. Cowles Media Co., 457 N.W.2d 199, 205 (Minn. 1990).
112. *Cohen*, 501 U.S. at 669–70.
113. *Id.* at 664.
114. *Id.* at 676.

enforcing the promise as a form of reliance.[115] Perhaps that's a basis for distinguishing *Snepp* and *Cowles Media* from situations like Stormy Daniels's NDA, where her possession of the information she wishes to disseminate has nothing to do with her promise not to speak.

Given the power of the speaker-centered First Amendment, it is possible that the current Court would adopt the reasoning of the four dissenters in *Cowles Media*, at least as applied to information obtained without the aid of the promise at issue—but I doubt it. It is difficult for me to imagine a rule that would enforce a silencing agreement about sex if it was entered into before the sex in order to induce the partner to cooperate, but not if it was entered into after the sex act to cover up its occurrence.

Once a competent speaker enters into a genuinely consensual promise to remain silent, either before or after the event, I'm afraid the speaker-centered First Amendment will not get her out of the agreement, even when her promise was not instrumental in obtaining the information in the first place. A deal is a deal.

B. A Hearer-Centered Approach to NDAs

1. Substantive Due Process and Third Party Effect

The equities—and quite possibly the law—change dramatically if we look at NDAs through the lens of a third party: a prospective hearer who never consented to the original secrecy deal. It's standard contract law to distinguish between people who actually agree to a contract and folks who are adversely affected by it without their consent.[116] Not only are nonconsenting third parties not bound by such a contract, they are also free to challenge its very existence.

For example, under nineteenth century contract law, the state enjoyed regulatory power to refuse to recognize the enforceability of certain kinds of contracts that caused unac-

115. RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW. INST. 1981).

116. *See* Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57 (2012) (critiquing the use of consent in contract theory). *See generally* DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY (1989).

ceptable, widespread harm to nonconsenting third parties.[117] That's the primary basis for the nineteenth century notion of allowing the "police power" to limit contracting parties' rights to enter into contracts that imposed adverse health and safety consequences on non-signatories.[118] In the *Lochner* era, the dividing line between someone who made a promise and a nonconsenting third party who was adversely affected by the promise was often the difference between winning and losing in the Supreme Court.[119]

Opponents of *Lochner* had an intellectual choice. They could have attacked the fundamental fairness of unequally bargained and unreasonably harsh employment contracts head-on, by asking why the state is permitted under the Due Process clause to exercise its enforcement powers at the behest of the dominant bargaining partner.[120] As the fate of the twentieth century effort to expand the reach of the "unconscionable contracts" doctrine makes clear, though, judicial fiddling post hoc with the enforceability of contracts on the basis of subjective fairness sends a frisson through the free enterprise system.[121] So, opponents of *Lochner* did not frontally attack the idea of a judicially enforceable, unfairly bargained contract. Rather, they stressed the horrendous impact of such unfairly bargained contracts on nonconsenting third parties, like wives, children, and society at large.[122]

Although they lost in *Lochner*, the opponents of *Lochner* won a fair share of the time in other cases,[123] and eventually fully triumphed in 1937.[124] *Lochner* was never formally over-

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117. *See* Aditi Bagchi, *Other People's Contracts*, 32 YALE J. ON REG. 211, 225 (2015).

118. Commonwealth v. Alger, 61 Mass. (1 Cush.) 53, 85 (1851) (discussing nineteenth century police power); *see also* Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905) (upholding compulsory vaccination laws).

119. Neuborne, *supra* note 23, at 190 n.40 (summarizing the seven leading contract cases of the *Lochner* era). Reformers won three and lost four—in each case defenders of the effort to regulate the scope of permissible employment contracts relied heavily on the third-party effect of unregulated, harsh employment terms.

120. Dean Roscoe Pound urged such a course. Roscoe Pound, *The Causes of Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 742 (1906).

121. *See* Neuborne, *supra* note 23, at 197.

122. *Id.* at 192. Occasionally, harms to the contracting party herself were stressed, but only because the Justices did not believe that women were capable of defending themselves in the rough and tumble of bargaining.

123. *Id.* at 192 n.53.

124. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (upholding a min-

ruled, but it was effectively police powered to death by the Supreme Court on the grounds that the state has the power to protect third parties from the effects of unfair private contracts.[125]

2. Racial Justice and Third-Party Effect

The distinction between a contract's signatories and adversely affected, nonconsenting third parties was also the basis for the Supreme Court's refusal in *Shelley v. Kraemer* to permit the enforcement of a consensual contract.[126]

For much of our national life, racially segregated residential neighborhoods were mandated by law. When, in 1917, the Supreme Court finally invalidated state and local ordinances forbidding the sale of real property to blacks,[127] racists moved quickly to seal the legal gap with legally enforceable, quasi-consensual agreements paralleling the invalidated ordinances.[128] The idea of real covenants running with the land was dusted off and used to impose a series of semi-volitional agreements that attached themselves to real property and "ran with the land," obliging new owners, who had notice of the restrictive covenants because they were usually recorded on the deed, to live up to the original contractual promise to refuse to sell to blacks.[129] In 1926, the Supreme Court upheld the ugly process.[130] In 1940, in *Hansberry v. Lee*,[131] the Court required a showing that the original decision to impose the covenants was truly voluntary, and refused to recognize phony, allegedly preclusive judicial determinations of voluntariness.[132] But *Hansberry* merely put a speed bump in the racist road.

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imum wage law).

125. Cases like *West Coast Hotel Co.* ignore *Lochner*, never formally reversing it. In *Planned Parenthood v. Casey*, 505 U.S. 833, 861 (1992), three members of the Court, in dictum, announced *Lochner's* demise, but even I know that three is not a majority of nine.

126. 334 U.S. 1, 20 (1948).

127. Buchanan v. Warley, 245 U.S. 60, 82 (1917).

128. Corrigan v. Buckley, 271 U.S. 323, 327 (1926).

129. For a modern analysis of the concept, see Lawrence Berger, *Integration of the Law of Easements, Real Covenants, and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337 (1986).

130. *Corrigan*, 271 U.S. at 332.

131. 311 U.S. 42 (1940).

132. *Id.* at 45.

As a practical matter, many owners of real property burdened with racially restrictive covenants had not personally agreed to the covenant but had bought land that already had a covenant attached to it by a previous owner. Enforcing the covenants also meant that huge swaths of the real estate market were closed to people of color who, of course, had never consented to the appalling system of private racial zoning made possible by the state's willingness to enforce the underlying racially restrictive contracts. That's what gave a plurality of the 1948 Supreme Court the opening in *Shelley* v. *Kraemer* to attack the judicial enforceability of the covenants.[133]

In *Shelley*, thirty St. Louis landowners had agreed to a racially restrictive covenant governing the neighborhood, but nine had not.[134] One of the nine dissenters sold land to black purchasers who were unaware of the covenants.[135] Accurately invoking the law of real covenants, the 75 percent of white purchasers who had signed the racially restrictive covenant argued that it covered all the land in the subdivision, even the land of non-signers. The Missouri Supreme Court agreed, and held that, under existing real property law, the covenant had come into full force and effect when signed by 75 percent of the landowners.[136]

The United States Supreme Court balked. Noting that the parties to each case were black purchasers who had not agreed to the covenants, the Court ruled that enforcement of the covenants against non-signatories would violate the Fourteenth Amendment.[137] Five years later, in *Barrows v. Jackson*,[138] the Court was confronted with an effort to sue an actual signatory for damages for violating the restrictive covenant by selling his property to non-Caucasians.[139] Reluctant to allow a consenting signatory to wriggle out of a promise—even a hateful one—the Court invoked the principle of third-party standing and permit-

133. 334 U.S. 1, 19–20 (1948).
134. *Id.* at 4.
135. *Id.* at 5.
136. Kraemer v. Shelley, 198 S.W.2d 679, 681–82 (Mo. 1946) (enforcing a restrictive covenant). A similar case from Michigan was consolidated with *Shelley*. Sipes v. McGhee, 25 N.W.2d 638, 645 (Mich. 1947) (enforcing a restrictive covenant).
137. *Shelley*, 334 U.S. at 5, 23.
138. 346 U.S. 249 (1953).
139. *Id.* at 252.

ted the breaching seller to raise the rights of black purchasers who had not agreed to the covenant.[140] The *Barrows* Court ruled that imposing damages on consenting sellers would, as a practical matter, make it impossible for nonconsenting purchasers to avoid being bound by a covenant they had never agreed to.[141]

In 1954, however, when confronted with the question of whether a consenting party could challenge a racially restrictive covenant on her own, the Supreme Court split four–four.[142] In those years, racists worried about not only living next to people of color, but also being buried near them. In *Rice*, a white woman living in Iowa, who was married to a Native American man later killed in the Korean War, bought a racially restricted burial tract.[143] When she sought to inter her husband in her burial plot, the cemetery refused.[144] The Iowa state courts enforced the wife's promise against her.[145] The post-*Barrows* Supreme Court affirmed by an equally divided Court.[146]

The idea of holding someone to her promise was so powerful that four of the Justices, who had just dismantled racially restrictive covenants on behalf of nonconsenting purchasers in *Barrows* and were in the process of dismantling American apartheid in *Brown v. Board of Education*, could not bring themselves to dismantle a racially restrictive covenant on behalf of a person who had voluntarily agreed to it. Unlike the nonconsenting black purchasers in *Barrows*, the dead Native American hero in *Rice* was not given posthumous third-party standing to assert his presumed interest in resting next to his wife for eternity.

There's an important lesson here in structuring any First Amendment challenge to nondisclosure agreements—Trump's or otherwise. Viewed as an exercise in buyer's or seller's remorse, the Court will be in the grip of a powerful intuitive duty to enforce volitional promises against anyone who actually

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140. *Id.* at 257.
141. *Id.* at 254.
142. Rice v. Sioux City Mem'l Park Cemetery, Inc., 60 N.W.2d 110 (Iowa 1953), *aff'd by equally divided Court*, 348 U.S. 880 (1954).
143. *Rice*, 60 N.W.2d at 112.
144. *Id.* at 113.
145. *Id.* at 117.
146. Rice v. Sioux City Mem'l Park Cemetery, Inc., 348 U.S. 880, 880 (1954).

makes them. Once the Court enters that psychological silo, I predict that it will reach one of the following conclusions: (1) that state action is lacking, (2) that the First Amendment rights have been waived, or (3) that enforcing contracts is a content-neutral act that withstands First Amendment scrutiny.

But if the lens can be shifted to nonconsenting individuals who will suffer significant harm if the promise is enforced, the Court might be persuaded to view the First Amendment calculus differently.[147] In short, asserting a hearer's "right to know" as the counterweight to promises she hasn't consented to may be the only plausible route to attacking NDAs—either under state law as unconscionable contracts, or under federal law as violations of the First Amendment.

3. Limitations on a Hearer-Centered Attack on NDA's

Not every hearer-centered attack on an NDA will—or should—be enough to topple the agreement. As I've suggested, I'm not persuaded that a hearer-centered argument aimed at releasing more salacious details about Donald Trump's consensual sex life should succeed in vitiating a consensual nondisclosure deal. While a prospective hearer in such a setting would not be burdened by having made any promise, rendering such a promise unenforceable on the basis of an asserted interest by third parties in gaining access to relatively trivial information would drain the original promise of meaning. It's the flip side of *Barrows v. Jackson*, where the overwhelming importance of the third party's interest vitiated the original promise. To my mind, in order to void an NDA, the information at issue should be important enough to nonconsenting third parties to warrant trashing the contract. I'll leave it to the reader to decide whether information on who Donald Trump sleeps with consensually is important enough to vitiate the promise. Maybe, as President, everything he does is grist for the public mill. And it is long past time to prevent powerful men from abusing women

147. Fed. Election Comm'n v. Akins, 524 U.S. 11, 25–26 (1992). The Court went part of the way to accepting such an argument by finding that interested hearers had standing to challenge the Federal Election Commission's decision to permit the American Israel Public Affairs Committee to decline to reveal the sources of its funding. *Id.*

and then hiding it under cover of an NDA.

In any event, a nonparty hearer who can demonstrate significant public interest in access to the information protected by the NDA of a public figure has the raw material for an effective First Amendment challenge. That's just one more reason to continue the disaggregation of the First Amendment from a solidly speaker-centered doctrine to a more complex doctrine reflecting the interests of speakers, hearers, conduits, targets, and regulators.

CONCLUSION

As the Trump chronicles make clear, NDAs pose a major obstacle to the free flow of much important information. If they are to be successfully challenged, though, it should be by putative hearers brandishing a hearer-friendly First Amendment. Only then can we unlock the vast trove of information hidden from public scrutiny by our penchant for overclassification of government secrets and the ability of the powerful to buy judicially enforced silence.