Cornell Law Review

Volume 83
Issue 2 *January 1998*

Article 1

Promises of Silence: Contract Law and Freedom of Speech

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PROMISES OF SILENCE: CONTRACT LAW AND FREEDOM OF SPEECH

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"This is not a case about free speech, rather it is one about contracts and misrepresentation."[1]

INTRODUCTION

In an article written over thirty years ago about contracts that violate public policy, Professor M.P. Furmston noted that "[o]ne of the most interesting unresolved points is the extent to which one can sell one's silence."[2] Although Professor Furmston was discussing English jurisprudence when he made this observation, his words were, and remain, equally true of American law. The extent to which a party can bind himself contractually to silence is largely unexplored in American case law[3] and legal literature.[4]

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1 Cohen v. Cowles Media Co., 14 Media L. Rep. (BNA) 1460, 1464 (D. Minn. June 19, 1987). The *Cohen* case has a complicated subsequent history. *See infra* notes 80, 100 and accompanying text (discussing subsequent history).

2 M.P. Furmston, *The Analysis of Illegal Contracts*, 16 U. TORONTO L.J. 267, 293 (1966).

3 *See, e.g.*, Sandra S. Baron et al., *Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WM. & MARY BILL RTS. J. 1027, 1037 (1996) (stating that "[n]o reported cases appear in which a court specifically refused to enforce a confidentiality agreement because an employer had no legitimate interest in suppressing information of public concern").

In a few narrow areas, courts routinely decline to enforce contracts of silence on public policy grounds. For example, courts have denied enforcement to contracts of silence that obstruct the administration of justice, such as contracts to conceal a crime or contracts to suppress the testimony of a witness. *See* RESTATEMENT (FIRST) OF CONTRACTS §§ 554, 548 (1932). Contracts to conceal a crime are discussed at length in this Article. *See infra* notes 230-66 and accompanying text. Contracts to suppress evidence are briefly discussed *infra* note 35.

Courts also invalidate contracts containing overbroad employee confidentiality agreements. As this Article explains, the case law in this area focuses on the public policy of preventing restraints of trade and not on a public policy favoring freedom of speech. *See infra* notes 221-29 and accompanying text. Courts are just beginning to consider how to treat employee confidentiality agreements that implicate only speech interests. *See, e.g.*, Margaret A. Jacobs, *Will Promises of Silence Pass Tests in Court?*, WALL ST. J., Dec. 14, 1995, at B1 (noting that "[c]ourts are really struggling" with how to rule on employee confidentiality agreements that seek to suppress information about corporate wrongdoing).

4 The literature is particularly sparse on the public policy implications of contracts of silence. *See* E. ALLAN FARNSWORTH, CONTRACTS § 5.2 n.9 (1982) (noting without elaboration "an example of an interesting argument based on public policy," the argument made in *Snepp v. United States*, 444 U.S. 507 (1980), that prepublication review required by a Central Intelligence Agency employment contract was "'unenforceable as a prior restraint on protected speech'"). *But see* Baron et al., *supra* note 3, at 1031-37 (briefly discussing the enforceability of contractual "silence" provisions in the context of analyzing press liability for tortious interference with source confidentiality agreements); Julia A. Martin & Lisa K. Bjerknes, *The Legal and Ethical Implications of Gag Clauses in Physician Contracts*, 22 AM. J.L. & MED. 433 (1996) (discussing whether gag provisions in physician contracts with health maintenance organizations should be enforceable); Steven I. Katz, Comment, *Unauthorized Biographies and Other "Books of Revelations": A Celebrity's Legal Recourse to a Truthful Public Discourse*, 36 UCLA L. REV. 815, 842-47 (1989) (discussing whether nondisclosure agreements with celebrities should be unenforceable on public policy grounds, but focusing on the public policy of preventing unlawful restraints of trade). In the time surrounding the Supreme Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), which involved

This void in the case law and scholarship is not necessarily surprising. Since parties are generally free under contract law to strike whatever bargain they please—there is "freedom of contract"[5]—the central conundrum contracts of silence pose is whether their suppression of speech makes a difference. Is there something inherently troubling about a promise to suppress one's speech that warrants regulation, or should one be able to commit to keeping silent as readily as one commits to selling cotton or playing football? Are promises of silence different because they implicate the First Amendment or violate a public policy favoring freedom of speech, or are these constitutional and policy concerns irrelevant when a private party agrees to silence himself?

Recent events suggest that the answers to these questions are not solely a matter of academic concern. Contracts of silence are being used effectively to keep relevant and possibly important information out of the public domain. The most notable recent example occurred when CBS canceled a *Sixty Minutes* interview with Jeffrey Wigand, a former executive of the Brown & Williamson Tobacco Company.[6] The network feared that airing the interview would expose it to tort liability for interference with a confidentiality agreement that Wigand had entered with Brown & Williamson.[7] Wigand had in fact made a promise of silence to his former employer that was remarkable in its scope:

> [Y]ou . . . agree, acknowledge and understand that any and all information, whether privileged, confidential, trade secrets or any other information acquired by you during and as a result of your employ-

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a reporter's promise of confidentiality to a source, some commentators did consider whether enforcement of reporter-source confidentiality agreements violates the First Amendment. *See* Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609 (1991); Kurt Hirsch, Note, *Throwing the Book at Revelations: First Amendment Implications of Enforcing Reporters' Promises*, 18 N.Y.U. REV. L. & SOC. CHANGE 161 (1990-1991).

5 While the law may begin with a general presumption of freedom of contract, there are, of course, innumerable ways in which the law has come to limit that freedom. Legislation now limits freedom of contract in a myriad of fields, and the common law denies enforcement to contracts that violate public policy. *See generally* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 1-3, at 6 (3d ed. 1987) ("While the parties' power to contract as they please for lawful purposes remains a basic principle of our legal system, it is hemmed in by increasing legislative restrictions."); FARNSWORTH, *supra* note 4, § 1.7 (discussing limits on freedom of contract).

6 *See* Bill Carter, *'60 Minutes' Ordered to Pull Interview in Tobacco Report*, N.Y. TIMES, Nov. 9, 1995, at A1. CBS later decided to air the interview, but only after other news sources had published the contents of Wigand's accusations against Brown & Williamson. *See* Bill Carter, *'60 Minutes' Set to Interview Ex-Tobacco Executive Tonight*, N.Y. TIMES, Feb. 4, 1996, at A30. For an excellent account of the controversy that surrounded the network's decision to cancel the Wigand interview, see Lawrence K. Grossman, *CBS, 60 Minutes, and the Unseen Interview*, COLUM. JOURNALISM REV., Jan.-Feb. 1996, at 39.

7 *See* Grossman, *supra* note 6, at 44.

> ment with B&W . . . is confidential and proprietary information of B&W and as a former officer you have a fiduciary duty not to disclose such confidential information or to otherwise use such information against the interests of B&W. You agree to keep confidential and not disclose any such information and you agree not to make any statements or communications which could disparage the reputation and integrity of B&W or its employees or its products or otherwise reflect negatively on B&W or its products or interfere with its employees and business relationships.[8]

Only a month after CBS canceled the Wigand interview, another contract of silence made front-page news. David Himmelstein, a Harvard Medical School professor who had been previously affiliated with U.S. Healthcare, co-authored an editorial in the *New England Journal of Medicine* that decried the financial incentives U.S. Healthcare gave to doctors and condemned the "gag" provisions that the HMO was using to prevent physicians from discussing these incentives with their patients.[9] These provisions provided that a physician "shall agree not to . . . make any communication which undermines or could undermine the confidence of enrollees, potential enrollees, their employers, their unions, or the public in U.S. Healthcare or the quality of U.S. Healthcare coverage."[10]

Examples of contracts to keep silent have not been limited to the employment context. A special edition of the *New York Times Magazine* dedicated to "The Rich" noted that confidentiality provisions are becoming common in celebrity prenuptial agreements.[11] Elizabeth Tay-

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8 Memorandum in Support of Dr. Wigand's Motion to Declare Unenforceable as Violative of Public Policy Those Contracts Relied Upon by B&W at Exhibit 5 pg. 1, Brown & Williamson Tobacco Corp. v. Wigand, No. 95-CI-06560 C (Ky. Cir. Ct. filed Apr. 4, 1996) [hereinafter Wigand Brief]. The provision was part of a settlement agreement entered into between Wigand and Brown & Williamson after the company had sued Wigand for breaching a prior confidentiality agreement. *See id.* at 2-4.

9 Steffie Woolhandler & David U. Himmelstein, *Extreme Risk—The New Corporate Proposition for Physicians*, 333 NEW ENG. J. MED. 1706 (1995); *see also* Robert Pear, *Doctors Say H.M.O.'s Limit What They Can Tell Patients*, N.Y. TIMES, Dec. 21, 1995, at A1 (discussing gag provisions in HMO contracts).

10 Woolhandler & Himmselstein, *supra* note 9, at 1706. U.S. Healthcare has since dropped these provisions from its contracts. *See infra* note 269 and accompanying text. The public outcry following Dr. Himmelstein's revelation led to legislative efforts to ban "gag provisions" in HMO contracts. Many states have enacted statutes banning such provisions, and the Clinton Administration has prohibited HMOs from limiting what physicians can say to Medicare and Medicaid patients. *See* Robert Pear, *Clinton Prohibits H.M.O. Limit on Advice to Medicaid Patients*, N.Y. TIMES, Feb. 21, 1997, at A22; Robert A. Rosenblatt, *U.S. Tells HMOs: Don't Gag Doctors*, PHILA. INQUIRER, Dec. 8, 1996, at A1; *see also infra* note 187 and accompanying text (listing additional examples). These legislative efforts demonstrate how targeted legislation can regulate objectionable contracts of silence. By contrast, this Article proposes a common-law method for regulating contracts of silence that gives courts flexibility to respond to any contract of silence.

11 Jan Hoffman, *How They Keep It*, N.Y. TIMES MAG., Nov. 19, 1995, at 104 ("Now the prenups of famous folk often stipulate that the unfamous spouse be barred from writing

lor's latest "ex," Larry Fortensky, for instance, reportedly held back from the talk-show circuit because of "'legal restrictions' on [his] freedom of chat."[12] There has also been considerable debate about settlement agreements with confidentiality provisions, which critics claim are keeping crucial information, particularly about defective or dangerous products, from the public.[13] Of course, contracts of silence have also long been used in commercial circles to protect companies from the disclosure of valuable economic information such as trade secrets.[14]

In this Article, I explore whether contracts of silence should be enforceable. My thesis is that contracts of silence threaten public access to information and, therefore, warrant careful judicial regulation. While recognizing that parties may voluntarily enter into contracts of silence, and that parties may receive separate compensation for their commitments to silence, I nevertheless recommend that courts deny enforcement to these contracts when the public interest in access to the suppressed information outweighs any legitimate interest in contract enforcement.

I consider the enforceability of contracts of silence by focusing on the two primary legal theories under which such contracts could be challenged: that they are unenforceable under state contract law as against public policy, or under federal constitutional law as violative of the First Amendment. Underlying this legal analysis looms a larger policy question: to what extent should private parties be able to use the courts to enforce contracts that suppress speech? This question requires consideration of the tension between policies favoring private autonomy and ordering, embodied in the principle of freedom of contract, and policies favoring freedom of speech, embodied in the First Amendment.

Part I begins by making the case for regulating contracts of silence. After describing some common uses of contracts of silence, it

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about the marriage or appearing on television confessionals."); *see also* Bill Glauber, *Charles and Diana Settle on Terms of Their Divorce*, PHILA. INQUIRER, July 13, 1996, at A2 (suggesting that "gagging" provisions would prevent Charles and Diana from discussing the terms of their divorce settlement). For more examples of contracts to protect reputational and privacy interests, see *infra* notes 38-49 and accompanying text.

12 Jeannie Williams, *Larry on Liz Still a Story on Hold*, USA TODAY, Mar. 15, 1996, at 2D.

13 *See, e.g.*, David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (discussing attitudes toward secret settlements); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 502-05 (discussing debate over secret settlements); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991) (arguing against reforms that advocate public access to discovery material). This debate flared up again last spring when the Judicial Conference of the United States considered the issue of whether federal courts should automatically seal records in civil suits whenever both parties agree to have them sealed. *See* Julie Stoiber, *Drive for Secrecy Puts Lawyers on Two Sides of Issue*, PHILA. INQUIRER, May 6, 1996, at C1.

14 *See infra* notes 21-26 and accompanying text.

explains how these contracts can be used to suppress information of significant public interest. Part I concludes that some form of judicial regulation is necessary to insure that contracts of silence do not undermine the public interest in access to information.

The remaining three Parts consider how current law could be adapted to provide this regulation. Part II examines how courts can use content-neutral rules of contract law—rules concerning formation, defenses, and remedies—to limit the enforceability of contracts of silence. While the rules discussed in this Part apply to all contracts, they nevertheless merit consideration because courts sometimes manipulate these rules to deny enforcement to contracts of silence whose substance they find offensive.

Part III then explores a more straightforward means of regulating contracts of silence—denying enforcement on public policy grounds. Contract law clearly empowers courts to deny enforcement to contracts that violate public policy, but courts have not used this power to police contracts for their adverse impact on speech. Part III recommends that courts adopt a policy of denying enforcement to contracts of silence when there exists overriding public interest in the suppressed speech. To assist courts in developing rules for policing contracts of silence, Part III proposes a test for determining when a contract of silence violates public policy and applies the test to specific examples.

Part IV considers whether the First Amendment limits the enforcement of contracts of silence. Much of this analysis focuses on a preliminary question: whether the enforcement of contracts of silence even implicates the First Amendment. It is not clear whether enforcing a contract of silence constitutes the state action necessary to trigger the First Amendment's restraint on government power. Neither is it clear whether a party's assent to a contract of silence amounts to a waiver of First Amendment rights. If contracts of silence do implicate the First Amendment, these contracts raise serious questions about how courts can legitimately regulate them without violating core tenets of First Amendment jurisprudence.[15]

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15 The outcry surrounding CBS's decision to pull the Wigand interview prompted this Article. In the legal community, the discussion of the network's decision has thus far focused on whether CBS could have been liable for tortiously interfering with Wigand's contract. *See* Baron et al., *supra* note 3, at 1027; James C. Goodale, *'60 Minutes' v. CBS and Vice Versa*, N.Y. L.J., Dec. 1, 1995, at 1; *'60 Minutes' and the Law: Can Journalists Be Liable for Tortious Interference with Contract?*, N.Y. Comm. on Media Law (Working Draft 1996). By contrast, the legal community has paid little attention to the question of whether Wigand's contract was enforceable. *See* William Bennett Turner, *News Media Liability for "Tortious Interference" with a Source's Nondisclosure Contract*, COMM. LAW., Spring 1996, at 13, 14. *But see* Baron et al., *supra* note 3, at 1031-37 (briefly discussing the issue of contract enforceability). The latter issue, however, is equally if not more important for two fundamental reasons. First, if the contract itself is not enforceable, then any tortious interference claim

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THE SOUNDS OF SILENCE: WHAT CONTRACTS OF SILENCE SEEK TO SUPPRESS AND WHY THEY NEED TO BE REGULATED

If a contract is a legally enforceable promise,[16] then a "contract of silence" is a contract in which a party has made an enforceable promise to keep quiet about something.[17] In a legal regime that provides for freedom of contract, parties are generally free, absent public policy or First Amendment restraints, to commit to being silent about almost anything. A person might agree to not disclose another's trade secret, or not reveal another's tortious behavior. A nephew could promise his uncle not to curse.[18] A pro-choice activist could promise to stop speaking about abortion rights.

While a person may attempt to sell his silence on anything, a contract will arise only if a buyer desires to purchase the silence. Like other types of promises, a promise of silence will usually be enforceable only when it is supported by consideration.[19] The requirement of consideration means that a party must give something in exchange for the promise.[20]

This Part catalogs some common uses of contracts of silence by focusing on the interests of the parties who bargain for promises of

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becomes moot, because there can be no liability for interfering with an unenforceable contract. *See* RESTATEMENT (SECOND) OF TORTS § 774 (1979). Second, even if the media could avoid liability for tortious interference in a Wigand-like scenario, the larger concern of media access to information would continue unabated because sources, fearing their own contractual liability, would still be cowed into silence. Wigand himself refused to let CBS broadcast his interview until the network agreed to indemnify him for breach of contract. *See* Grossman, *supra* note 6, at 42.

16 *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

17 This Article uses the term "contracts of silence" instead of "confidentiality agreements" to refer to contracts in which a party has promised to suppress his speech. The former term was chosen because it was intended to cover all contracts in which a party has promised to suppress his speech, and not just contracts in which a party has promised not to disclose another's confidential information. For example, if a company paid a newspaper to stop publishing negative stories about the company, that would be a contract of silence even though the newspaper did not promise to conceal a confidence that had been shared with it. *See* Neville v. Dominion of Canada News Co., Ltd., 3 K.B. 556 (1915) (promise by newspaper covering real estate transactions to cease all reporting concerning the plaintiff's land company).

18 This is a variation on the facts of *Hamer v. Sidway*, 27 N.E. 256 (1891). Hamer involved a unilateral contract as opposed to a bilateral contract.

19 *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 71-94 (1981); *see also* FARNSWORTH, *supra* note 4, §§ 2.2-.44 (discussing requirement of consideration); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 52, at 189, § 55, at 204-05 (3d ed. 1990) (same).

20 *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (stating the "bargained for" requirement of consideration).

silence. It then explains why it is important that courts regulate contracts of silence.

A. Contracts of Silence to Protect Economic Interests

A common reason to seek a promise of silence is to protect some perceived economic interest. Typically, the party from whom one seeks the promise of silence either has acquired or will acquire information which, if disclosed, could cause economic harm to the party seeking the promise. To avoid this harm, the latter party offers the former something in exchange for a promise not to disclose.

A common example is a contract to protect a trade secret.[21] A trade secret is any confidential information, such as a process, a technique, or a compilation of information, that affords a business "an actual or potential economic advantage over others."[22] Unlike a patent or a copyright, a trade secret does not give its owner an exclusive right to the undisclosed information.[23] Anyone who legitimately acquires the information may use it.[24]

Given the limited protection of trade secrets, the owner of a trade secret must guard against its public disclosure. While the owner of a trade secret must maintain its secrecy, he may also have to share the information if he wishes to exploit it. Employees or licensees may need the information to do their work, and prospective buyers or joint venturers may need it to assess the secret's value. In these instances, owners of trade secrets often rely on contracts to protect their inter-

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21 For a general discussion of trade-secrets law, including contractual protection of trade secrets, see MELVIN F. JAGER, TRADE SECRETS LAW (1997); ROGER M. MILGRIM, 12-12A BUSINESS ORGANIZATIONS, MILGRIM ON TRADE SECRETS (1997).

22 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995); *see also* UNIFORM TRADE SECRETS ACT § 1(4) (1990) (stating definition of trade secret); RESTATEMENT OF TORTS § 757 cmt. b (1939) (same).

23 Liability for the use or disclosure of a trade secret is not based on an owner's exclusive right in the information but on the bad-faith conduct that was used to misappropriate the information. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40 (1995) (stating circumstances under which one will be liable for misappropriation of a trade secret); ARTHUR H. SEIDEL & DAVID R. CRICHTON, WHAT THE GENERAL PRACTITIONER SHOULD KNOW ABOUT TRADE SECRETS AND EMPLOYMENT AGREEMENTS § 2.02(a), at 12 (3d ed. 1995) ("A trade secret is misappropriated only when there is a wrongful taking, use, or disclosure of another's trade secret. Generally, a wrongful taking, use, or disclosure arises from a breach of a confidential or fiduciary relationship or a violation of the norms of business conduct through theft or espionage.").

24 *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. f (1995) (stating that "[i]nformation that is generally known or readily ascertainable through proper means . . . by others to whom it has potential economic value is not protectable as a trade secret"). *See generally* MICHAEL A. EPSTEIN, MODERN INTELLECTUAL PROPERTY § 1.03, at 1-28 (3d ed. 1995) (noting that "[s]ecrecy is the most important criterion for information to meet in order to be a trade secret" and discussing the requirements of secrecy).

ests.[25] Under such contracts, the party to whom the trade secret is revealed promises not to disclose the information except as the contract permits.[26]

People also seek promises of silence when they share confidential information that they intend to sell. Ideas, for instance, are not generally protected as property;[27] therefore one who blurts out a valuable idea risks having the idea stolen.[28] Someone marketing an idea may logically insist that prospective purchasers promise not to disclose the idea should they decide to reject it.[29] Likewise, a company might be willing to share nonpublic information with a potential acquirer, but only on the condition that the acquirer promises to use the information solely to evaluate the acquisition.[30] A publisher working on a controversial new book might similarly require its employees to sign a confidentiality agreement to insure that premature disclosures do not diminish the book's newsworthiness.[31] Similarly, a publisher of sensitive financial information might require its employees to commit to confidentiality to insure that they do not leak nonpublic information to outsiders who could use it for pecuniary advantage.[32]

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25 *See, e.g.*, EPSTEIN, *supra* note 24, § 2.02[A], at 2-4 ("Contractual protection for trade secrets through a non-disclosure agreement should be utilized whenever possible."); SEIDEL & CRICHTON, *supra* note 23, § 5.02, at 41-42 ("The proprietor of a trade secret should require all employees who may have access to a trade secret to sign an agreement not to divulge the secret.").

26 *See generally* EPSTEIN, *supra* note 24, apps. A & B (sample confidentiality agreements for employees and nonemployees). *But cf.* Michael J. Hutter, *Drafting Enforceable Employee Non-Competition Agreements to Protect Confidential Business Information: A Lawyer's Practical Approach to the Case Law*, 45 ALB. L. REV. 311, 315-16 (1981) (suggesting employers prefer to use covenants not to compete instead of promises of confidentiality to protect their trade secrets because the former are more easily enforced).

27 *See, e.g.*, 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 16.02, at 16-5 (1997) (stating that ideas are generally not protected as property, although acknowledging that "there are a small number of cases in which the courts have protected ideas on a property theory").

28 *See* Desny v. Wilder, 299 P.2d 257, 270 (Cal. 1956) ("The idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power."); 4 NIMMER & NIMMER, *supra* note 27, at § 16.05[B].

29 *See generally* 4 NIMMER & NIMMER, *supra* note 27, at §§ 16.01-.05 (discussing the "law of ideas" and the advantages of contractual protection for ideas).

30 *See* Alliance Gaming Corp. v. Bally Gaming Int'l, Inc., 1995 WL 523543, at *3 (Del. Ch. 1995) ("The practice of requiring a bidder to sign a confidentiality and standstill agreement as a condition to allowing 'due diligence' access to confidential information, is well recognized and accepted."); *see also* Eugene L. Grimm, The Attorney's Introductory Guide to Mergers, Acquisitions and Joint Ventures (part I), app. 9 (1995) (sample confidentiality agreement) (unpublished manuscript on file with author).

31 *Cf.* Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 543 (1985) (noting that "[e]xclusivity was an important consideration" for Harper & Row as it was preparing President Ford's memoirs for publication, and that the company "instituted procedures designed to maintain the confidentiality of the manuscript").

32 *Cf.* Carpenter v. United States, 484 U.S. 19, 23 (1987) (noting that the *Wall Street Journal* had an "official policy and practice" that, prior to publication, the contents of its "Heard on the Street" column were the "Journal's confidential information").

A different use of contracts of silence occurs in settlement agreements. In these instances, a party seeks to suppress information that could expose it to civil liability.[33] In the typical case, the manufacturer in a products liability action offers the plaintiff a generous settlement on the condition that the plaintiff agrees not to disclose evidence that could establish the manufacturer's liability to others.[34] Manufacturers have also tried to use contracts of silence with former employees to prevent them from assisting plaintiffs who bring product liability suits against the manufacturer.[35]

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33 *See, e.g.*, Luban, *supra* note 13, at 2650 ("Among the products whose defects are alleged to have been hidden by protective orders or sealed settlements are Dow Corning's silicone gel breast implants; pickup trucks made by Ford and General Motors; Upjohn's sleeping pill Halcion; Pfizer's Bjork-Shiley heart valves; and McNeil Pharmaceutical's painkiller, Zomax.").

34 *See, e.g., id.* at 2649 (describing the "basic scenario" in a products liability litigation in which a "manufacturer, concerned about the prospect of additional lawsuits by others, offers the original plaintiff a generous settlement in return for a promise of secrecy and the return of the discovery materials"); *see also* RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 75-76 (1996) (describing the typical course of events leading to a secret settlement); Anne-Thérèse Béchamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117 (1990) (exploring the rules governing the permanent sealing of court records and the enforcement of covenants of silence in civil suit settlements).

35 The most noteworthy example is the settlement agreement between Ronald Elwell and his former employer, General Motors. Elwell had worked as a safety engineer at GM for 28 years, during which time he was responsible for analyzing the defense of fire-collision cases involving GM pickup trucks. *See* Smith v. Superior Court, 49 Cal. Rptr. 2d 20, 21 (Cal. Ct. App. 1996). Elwell left GM on unfriendly terms. Each party sued the other, and eventually the parties agreed to a negotiated settlement. As part of this agreement, Elwell consented to the entry of a permanent injunction that prohibited him from

> testifying without the prior written consent of GM, either at deposition or trial, as an expert witness, or as a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed or to be filed in the future, involving GM as an owner, seller, manufacturer and/or designer of the product(s) in issue.

Id. at 22. A Michigan state court entered a permanent injunction against Elwell pursuant to the settlement agreement.

In numerous lawsuits concerning GM pickup trucks, the plaintiffs have sought relief from the Michigan court injunction in order to depose Elwell. In the vast majority of these cases, the courts have refused to give "full faith and credit" to the Michigan injunction, usually because the courts concluded that the injunction conflicted with their states' public policy favoring full disclosure during discovery. *See, e.g.*, Ake v. General Motors Corp., 942 F. Supp. 869, 880 (W.D.N.Y. 1996); Williams v. General Motors Corp., 147 F.R.D. 270 (S.D. Ga. 1993); Smith v. Superior Court, 49 Cal. Rptr. 2d 20 (Cal. Ct. App. 1996); Ruskin v. General Motors Corp., No. CV93 0073883, 1995 WL 41399, at *1-*2 (Conn. Super. Ct. 1995) (refusing to give full faith and credit to the Michigan injunction and listing twelve other decisions in which courts similarly refused to do so); Meenach v. General Motors Corp., 891 S.W.2d 398 (Ky. 1995). In one of the strongest opinions to date, the California Court of Appeals described the GM-Elwell settlement agreement as an agreement to suppress evidence. *Smith*, 49 Cal. Rptr. 2d at 26. The Court noted that such contracts have long been held to violate public policy. *Id.*; *see also* RESTATEMENT (FIRST) OF CONTRACTS § 554 (1932) ("A bargain that has for its object or consideration the suppression of evidence . . . is illegal."); 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1430, at 380

The U.S. Healthcare contract reflects yet another way in which a party can use promises of silence to protect its economic interests.[36] Although an employee's promise not to speak disparagingly about his employer may implicate neither a trade secret nor information that could subject the employer to liability, this type of speech suppression still advances the employer's economic interests by protecting its goodwill with its clientele.[37]

B. Contracts of Silence to Protect Privacy and Reputational Interests

Individuals sometimes seek promises of silence to protect privacy and reputational interests, typically when a person either learns or will learn of information about an individual that the individual prefers to keep private. While one might hope that notions of decency and loyalty would prevent these disclosures, such sentiments can be sorely tested in a society with an insatiable appetite for both gossip and consumer information.[38] A binding promise to keep information private can provide protection when traditional ethical norms are insufficient.[39]

Although parties can use contracts to protect privacy interests, they often are not so used. Contracting is particularly uulikely when one shares information with an intimate relation—a spouse, friend, doctor, or psychologist—because the relationship itself suggests that a contract is both unnecessary and inappropriate.[40] When parties deal at arms-length—contracts with lending institutions, brokers, or blood

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(1962) (same). *See generally* NADER & SMITH, *supra* note 34, at 194-201 (discussing the GM-Elwell settlement agreement).

The Court of Appeals for the Eighth Circuit recently reversed this trend, and held that a Missouri District Court improperly applied Missouri law when it refused to give full faith and credit to the Michigan injunction. Baker v. General Motors Corp., 86 F.3d 811 (8th Cir. 1996). The Supreme Court granted *certiorari* in this case and reversed the Eighth Circuit, holding that "Michigan has no authority to shield a witness from another jurisdiction's subpoena power in a case involving persons and causes outside Michigan's governance." Baker v. General Motors Corp., 118 S. Ct. 657, 667 (1998).

36 *See supra* notes 9-10 and accompanying text. Gag provisions in HMO contracts can also help reduce HMO costs by preventing patients from learning of more expensive treatment options. *See also* Martin & Bjerknes, *supra* note 4, at 443-45 (discussing gag provisions that restrict discussion of treatment options).

37 Wigand's contract with Brown & Williamson also contained a nondisparagement clause. *See supra* note 8 and accompanying text.

38 *See generally* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 332-37 (1983) (discussing "[f]unction and [p]ersistence of [g]ossip in [c]ontemporary [l]ife"); G. Michael Harvey, Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2389 (1992) (discussing the "merciless press 'feeding frenzies'" on the private lives of individuals).

39 *See generally* Katz, *supra* note 4, at 841-49 (discussing the use of nondisclosure and noncompetition agreements to protect the privacy interests of celebrities).

40 *See id.* at 844 (noting how "[p]eople are naturally reluctant to transform relationships otherwise based on mutual respect and trust into contractual relationships").

banks—a confidentiality provision is more likely, but not certain.[41] Even in arms-length transactions, such as library or video selections, individuals may not perceive the need to bargain for a promise of silence.[42]

People with heightened concerns about their privacy may use contracts of silence more aggressively. Confidentiality provisions are common, for example, in celebrity prenuptial agreements.[43] Some commentators have also suggested that celebrities require their personal secretaries, household staff, and other potential sources of unauthorized biographies to sign confidentiality agreements.[44] Bill Gates, for example, required the contractors who worked on his $40 million house to sign confidentiality agreements.[45]

Contracts of silence are occasionally also used when someone who provides information to the press prefers to remain anonymous.[46] In the famous case, *Cohen v. Cowles Media Co.*,[47] a source of

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41 The law occasionally imposes a duty of confidentiality in certain special relationships even in the absence of an express contractual commitment of confidentiality. *See infra* notes 89-95 and accompanying text.

42 Most people would not be concerned that their video selections might become public knowledge, but this issue arose during the confirmation hearings of Clarence Thomas. *See* JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 331 (1994) (noting the potential relevance of Clarence Thomas's video rental records during his confirmation hearings). Video rental records are protected even in the absence of a contract under the Video Privacy Protection Act. 18 U.S.C. § 2710 (1994).

43 *See supra* note 11 and accompanying text; *see also* GARY N. SKOLOFF ET AL., DRAFTING PRENUPTIAL AGREEMENTS, at VII-39 (1996 Supp.) (giving sample confidentiality provisions for prenuptial agreements). Postnuptial settlement agreements can also address confidentiality interests. In *Huggins v. Povich*, 24 Media. L. Rep. (BNA) 2040 (N.Y. Sup. Ct. 1996), for instance, the court considered whether Maury Povich and Paramount Pictures could be liable for tortiously interfering with a settlement agreement between Charles Huggins, a night club owner, and his former wife, Melba Moore. The agreement included the following confidentiality provision:

> The terms and provisions of this Agreement shall remain private and confidential. Neither party shall publicly criticize, demean, malign or otherwise comment disparagingly or negatively about the other party, nor shall either party publish or cause to be published any story, article, column, comment or book (fictionalized or non-fiction) describing the other party or the marriage of the parties. . . . The provisions of this paragraph shall be enforceable by injunction.

Id. at 2042; *see also* Anonymous v. Anonymous, 649 N.Y.S.2d 665 (App. Div. 1996) (confidentiality provision in stipulation settling marriage action); Trump v. Trump, 582 N.Y.S.2d 1008, 1009 (App. Div. 1992) (confidentiality provision in postnuptial agreement).

44 *See* Katz, *supra* note 4, at 840-47 (describing potential limitations on the enforceability of confidentiality agreements in the private employment context).

45 *See* Dee Ann Glamser, *No Place Like Home for Gates—a $40M Home*, USA TODAY, Sept. 30, 1996, at 6A.

46 *See* Kathryn M. Kase, *When a Promise Is Not a Promise: The Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources*, 12 HASTINGS COMM. & ENT. L.J. 565, 571 (1990); Daniel A. Levin & Ellen Blumberg Rubert, *Promises of Confidentiality to News Sources After* Cohen v. Cowles Media Company: *A Survey of Newspaper Editors*, 24 GOLDEN GATE U. L. REV. 423, 423-24 (1994).

47 501 U.S. 663 (1991).

information during a gubernatorial campaigu insisted on a promise from journalists that they would not report his name.[48] In other cases, people with information about a crime have sought a commitment that law enforcement authorities would not release their names.[49]

C. Contracts of Silence to Protect Government Secrets

Government agencies occasionally use contracts of silence to prevent the public disclosure of confidential information. In *Snepp v. United States*,[50] the Supreme Court reviewed an employment contract between the Central Intelligence Agency and its former employee, Frank Snepp. In the contract, Snepp promised not to publish any writing without first clearing the work with the CIA.[51] This clause gave the Agency an opportunity to block the publication of any classified material.[52] Snepp eventually published a work without submitting it to the CIA, and the government sued.[53] The Supreme Court found that Snepp breached his employment contract and upheld the imposition of a constructive trust on Snepp's profits from the book.[54] The Court approved this remedy even though the government had conceded that Snepp's book did not contain any confidential information.[55]

D. Why Contracts of Silence Need to be Regulated

Why shouldn't a court enforce a promise of silence if it is made voluntarily and supported by consideration? Stated differently, is there any reason why a court would want to regulate contracts of silence by enforcing some promises of silence but not all? The full answer to this question will unfold throughout this Article as it makes specific arguments as to why contracts of silence might violate public policy or offend the Constitution. But before this Article addresses these specific legal theories for regulating contracts of silence, it is

48 *Id.* at 665.

49 *See* Keltner v. Washington County, 800 P.2d 752 (Or. 1990) (affirming the dismissal of a complaint against the police for disclosing the name of a child who had identified a murderer as well as the location of the murder weapon).

50 444 U.S. 507 (1980).

51 *See id.* at 507-08; *see also* Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975) (comparable contract with a CIA agent).

52 A similar contract appears to have recently prevented Pocket Books from winning the race to publish the first "quickie" biography of the Unabomher. As the *New York Times* noted in recounting Pocket's defeat: "To be fair, the co-author of Pocket's Unabomber quickie was an ex-F.B.I. agent, so the book got mired in a bureaucratic review." Hubert Herring, *Fastest Book in the West*, N.Y. TIMES, May 5, 1996, § 3, at 2.

53 *See Snepp*, 444 U.S. at 507.

54 *Id.* at 514-16.

55 *Id.* at 510, 516.

helpful to consider more abstractly why the regulation of contracts of silence is desirable.

The contracts of silence examples discussed above provide an answer to this question.[56] As those examples suggest, there are often good reasons for enforcing contracts of silence. Contracts of silence can give trade secret owners added protection when they share valuable information with others, help insure that the "idea man" is justly compensated, and help prevent the disclosure of sensitive personal, financial, or governmental information.

But at the same time, the examples also suggest that there are times when it seems inappropriate to enforce a contract of silence. Settlement agreements that suppress information about harmful products are an obvious example, as might be contracts that muzzle employee criticism. Given freedom of contract, this list could go on endlessly: contracts to conceal criminal or tortious conduct, contracts suppressing information pertaining to public safety, and contracts concealing newsworthy information about public officials or figures.

The fact that people can use contracts of silence to keep important information from reaching the public explains why lawmakers should want to regulate these contracts. Indeed, the law already recognizes the need for regulating contracts of silence in some limited instances. For example, courts have long refused to enforce contracts that conceal a crime.[57] But beyond these extreme cases, the precedent on regulating contracts of silence is sparse and largely silent, leaving the impression that parties are free to contract for one another's silence.

The apparent enforceability of contracts such as Wigand's contract with Brown & Williamson[58] or Himmelstein's contract with U.S. Healthcare[59] makes evident the inadequacy of current law regulating contracts of silence. Both of these contracts arguably sought to hide important health and safety information from the public, but in neither case did the law clearly indicate that the contracts were unenforceable.[60] Nor is the law's inadequacy limited to employment contracts. Civil procedure scholars have long recognized the dangers of secret settlement agreements, although their focus has been on the

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56 *See supra* Parts I.A-C.

57 *See* RESTATEMENT (FIRST) OF CONTRACTS § 548 (1932); *see also id.* § 554 (stating that contracts to suppress evidence are illegal and unenforceable).

58 *See supra* note 8 and accompanying text.

59 *See supra* note 10 and accompanying text.

60 *See infra* note 267 and accompanying text (noting the failure of Wigand's counsel to find direct authority for the unenforceability of Wigand's nondisclosure commitment); *see also infra* note 187 and accompanying text (noting how some states have filled in the gap in the law regarding physician gag provisions by enacting legislation specifically prohibiting such provisions).

role of courts in sealing such agreements and not on the enforceability of the agreements.[61] Even contracts to protect privacy interests can suppress information of great public interest, such as a contract seeking to suppress information about an individual's prior sex offenses,[62] a celebrity prenuptial agreement,[63] or a confidentiality agreement between a presidential candidate and a former bodyguard.[64]

Should courts be willing to enforce these contracts, or should they withhold their assistance if they believe that the contracts jeopardize the public interest in access to information? Since there can be no guarantee that private parties will consider the public interest when making a contract of silence, the only way to insure the protection of this interest is through some form of regulation. If contracts of silence are to be regulated, what should be the nature and source of this regulation? The remaining Parts of this Article address this question.

II
REGULATING CONTRACTS OF SILENCE INDIRECTLY: CONTENT-NEUTRAL CHECKS ON THE ENFORCEMENT OF CONTRACTS

Courts could regulate contracts of silence by applying content-neutral rules of contract law. The same general rules of contract formation, defenses, and remedies that apply to all contracts also apply to contracts of silence. These rules provide a court with an initial vehicle for limiting or denying enforcement to a contract of silence.

Although this Article primarily focuses on rules that would regulate contracts of silence because of their offensive content, the content-neutral rules are nevertheless worthy of discussion. These rules are important because they sometimes bar enforcement of a contract of silence before a court ever reaches the substantive question of whether it should enforce a promise of silence. But more importantly, an understanding of these rules is helpful because courts occa-

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61 *See infra* notes 359-66 and accompanying text.

62 In *Bowman v. Parma Board of Education*, 542 N.E.2d 663 (Ohio Ct. App. 1988), for instance, the court refused to enforce on public policy grounds an employment separation agreement that forbade a school district from disclosing a teacher's pedophilia to the school district that subsequently hired him. However, the court's decision may have been simplified because the contract in question attempted to conceal a crime. The court concluded that "[t]he non-disclosure clause was illegal *per se* in the respect that it purported to suppress information concerning the commission of felonies." *Id.* at 667.

63 *See, e.g.*, Hoffman, *supra* note 11, at 104 (quoting Harry M. Fain, a Beverly Hills lawyer whose clients have included O.J. Simpson's first wife, as saying that confidentiality provisions in celebrity prenuptial agreements are "a major concern these days").

64 *See, e.g.*, Stuart Taylor, Jr., *Her Case Against Clinton*, AM. LAW., Nov. 1996, at 57, 63 (discussing information that an Arkansas State Trooper allegedly has about President Clinton's former liaisons with women including Paula Jones).

sionally use them as a subterfuge for policing the substance of contracts of silence. By manipulating rules of interpretation, the requirement of definiteness, limitations on remedies, and other content-neutral rules, courts often regulate contracts of silence whose substance they find objectionable while avoiding the more intractable and less developed content-based limitations.

Because the rules considered in this Part are content-neutral, they can impede the enforcement of both legitimate and illegitimate contracts of silence. Informal contracts to protect personal privacy interests, for example, are often more vulnerable to attack under basic contract law principles than are settlement agreements or employment contracts that seem more likely to offend public policy.[65]

A. Contract Formation Problems

Parties form contracts by engaging in a bargaining process: one party makes an offer to enter into a bargain to which the other party gives an acceptance.[66] Generally, this process requires little formality (except when a contract falls within the Statute of Frauds),[67] and the parties' conduct can even imply mutual assent.[68]

The basic elements of contract formation—offer, acceptance, and consideration—are unlikely to pose any problems for contracts of silence prepared in formal settings. Formal contracts like those Wigand[69] or Himmelstein signed,[70] or written settlements or prenuptial agreements, typically indicate the consideration being exchanged, and the parties' signatures manifest their mutual assent to the agreement. Problems of contract formation are more common when contracts of silence are created informally, particularly if they are oral.

An informal contract of silence may be found to exist after one party casually shared information with another, and later claims that the other party understood that he or she gave the information in exchange for a promise not to disclose it. Such contracts may be found in the context of protection of economic interests, particularly contracts to protect ideas in the entertainment industry.[71] Such con-

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65 *See infra* notes 74-168 and accompanying text.

66 *See* RESTATEMENT (SECOND) OF CONTRACTS § 22(1) (1981). *See generally* FARNSWORTH, *supra* note 4, § 3.1-.30 (discussing offer and acceptance); MURRAY, *supra* note 19, §§ 28-51 (same).

67 *See infra* notes 110-15 and accompanying text (discussing Statute of Frauds in contract of silence context).

68 *See* RESTATEMENT (SECOND) OF CONTRACTS § 19 (discussing the manifestation of assent through conduct). *See generally* CALAMARI & PERILLO, *supra* note 5, § 1-12 (discussing implied-in-fact contracts).

69 *See supra* note 8 and accompanying text.

70 *See supra* note 10 and accompanying text.

71 *See generally* 4 NIMMER & NIMMER, *supra* note 27, § 16.05 (discussing implied-in-fact contracts in the idea submission context).

tracts may also be implied with respect to agreements to protect privacy interests, which are frequently made in noncommercial settings.[72] The potential limitations on the formation of the latter type of contracts are worth identifying because scholars concerned with protecting privacy interests have occasionally looked to contract law as a possible source of protection.[73]

1. *Lack of Consideration*

For many contracts of silence, the requirement of consideration is easily satisfied. In employment contracts, for instance, the parties are already exchanging mutual promises: the employee's promise to work and the employer's promise to pay.[74] If the original contract includes an additional commitment by an employee not to disclose trade secrets or disparage the company, a court will not require separate consideration.[75] A court would view the commitment as part of the larger bargain struck between the parties. Similarly, parties can easily include promises of silence in other types of contracts containing multiple commitments such as prenuptial and settlement agreements.

In less formal contexts, finding consideration may be more problematic, but is by no means impossible. If a wealthy business person is willing to pay a nettlesome activist to keep quiet, such payment would certainly suffice for consideration. Moreover, in any setting in which the party seeking a promise of silence is providing the other party with desired information, the disclosure of the information can constitute consideration.[76] In the reporter-source context, for example, the consideration for the newspaper's promise not to reveal the source's name can be either the source's promise to disclose the information or the act of doing so.[77]

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72 *See* Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 19-20 (1995) (discussing various social settings in which promises to protect privacy interests might be made).

73 *See, e.g., id.* at 14-39 (discussing possibility of using contracts to protect privacy interests); Katz, *supra* note 4, at 841-47 (discussing use of contracts to protect celebrity privacy interests).

74 *See* EPSTEIN, *supra* note 24, § 2.02[A][1].

75 *See id.* Epstein notes that consideration problems can arise if an employee nondisclosure agreement is signed after employment has commenced. In such a case, a court might require some new consideration to support the employee's nondisclosure commitment. He concludes that "the best procedure for employers to follow is to enter into nondisclosure agreements with employees at the start of the employment relation or, when this is not possible, to provide additional consideration (*e.g.*, increased wages or benefits) to nondisclosure agreements executed after the start of the employment relationship." *Id.*

76 *See* 4 NIMMER & NIMMER, *supra* note 27, § 16.04[A] (arguing that the act of disclosing an idea, if bargained for, should constitute consideration).

77 *See* Cohen v. Cowles Media Co., 457 N.W.2d 199, 202 (Minn. 1990) (suggesting that consideration existed in a reporter-source contract), *rev'd on other grounds*, 501 U.S. 663

Even when consideration is lacking, promises of silence may still be enforceable under a promissory estoppel theory. Under the doctrine of promissory estoppel, a promise can be enforced if the other party reasonably relied on the promise, and if injustice can be avoided only by enforcing the promise.[78] Promissory estoppel typically applies in situations where one makes a promise in the absence of a bargain, although courts occasionally apply it to enforce a promise when a bargain was made but was unenforceable.[79] The plaintiff in *Cohen v. Cowles Media Co.*, for instance, ultimately recovered under a promissory estoppel theory even though the court acknowledged that the parties had made a bargain, albeit an unenforceable one.[80]

2. *Lack of Mutual Assent*

Whether parties actually make a contract of silence depends upon the parties' desire to consummate a deal and each party's bargaining power either to insist upon or object to a commitment of silence. For example, Larry might prefer not to agree to a confidentiality provision, but Liz might have the bargaining power to

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(1991); *see also* Gilles, *supra* note 72, at 20 ("In cases where a reporter is the recipient of confidential information, the courts have generally held consideration to be present."). *But see* Sirany v. Cowles Media Co., 20 Media L. Rep. (BNA) 1759 (D. Minn. 1992) (dismissing a source's contract claim because the alleged reporter-source contract lacked consideration). The Court explained: "Basically, consideration is to an enforceable contract what the orange orb is to basketball—without it you just don't have a real game." *Id.* at 1760.

In these situations, the source must make sure not to disclose the information until after the bargain is made. Even if the source does disclose the information before extracting a nondisclosure commitment, the commitment may still be enforceable as a promise for a benefit received. *See* RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981). For example, in *Desney v. Wilder*, the court found a promise to pay for the use of an idea enforceable even though the promise was made after the idea was disclosed. 299 P.2d 257, 269 (Cal. 1956). The court relied on a California statute that stated: "a moral obligation originating in some benefit conferred upon the promisor . . . is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise." CAL. CIV. CODE § 1606 (West 1982). *See generally* FARNSWORTH, *supra* note 4, § 2.8 (discussing when a moral obligation can form the basis for enforcing a promise); MURRAY, *supra* note 19, § 67, at 291-98 (same).

78 *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."). *See generally* FARNSWORTH, *supra* note 4, § 2.19 (discussing promissory estoppel theory); MURRAY, *supra* note 19, § 66 (same).

79 *See* Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 680 (1984) (noting that "[o]ver time, the use of promissory estoppel [has] extended to a variety of commercial and noncommercial cases and served to remedy defective assent as well as absence of consideration").

80 Cohen v. Cowles Media Co., 479 N.W.2d 387 (Minn. 1992). This case was decided on remand from the U.S. Supreme Court. In the initial adjudication of this case by the Minnesota Supreme Court, the court rejected the contract claim because it found that the parties had not intended to make a legally binding contract, *see* Cohen, 457 N.W.2d at 199, and the Supreme Court did not dispute this finding, *see Cohen*, 501 U.S. at 663.

insist upon it.[81] One of the more troubling aspects of contracts of silence is that sometimes neither party to a contract has an incentive to challenge a confidentiality provision because people outside of the contract bear the costs of the commitment to silence. This is particularly true with contracts that impinge on the public interest.

In the U.S. Healthcare contract,[82] for instance, the doctor's patients, and not the doctor, may feel most heavily the costs of a doctor "gagging" herself. The doctor, whom the gag provision may not personally or economically harm, may have no incentive to challenge it, particularly if the contract is otherwise favorable to her.[83] The same is often true with secret settlement agreements. A plaintiff who accepts a generous settlement offer in a products liability action has little incentive to challenge a confidentiality provision since he is already receiving compensation for his injury. People external to the contract—those who either have been or will be harmed by the defendant's products—bear the cost of his silence.[84]

Even if both parties are inclined to form a contract, they must manifest mutual assent to do so to create a contract of silence.[85] This fundamental requirement is likely to be a problem only in informal contexts in which people frequently do not resort to contracting.[86] A person intending to tell her friend that she has tested positive for the HIV virus, for example, is unlikely to bargain for a return promise not to disclose the information. Parties in such intimate relations, whether with family members, friends, doctors, or psychologists, typically do not make contractual bargains. They rely on trust rather than contract to protect their interests.[87]

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81 *See supra* note 12 and accompanying text.

82 *See supra* notes 9-10 and accompanying text.

83 A doctor would have an incentive to challenge these provisions if the provisions were incompatible with the doctor's ethical or legal obligations to his patients, or if the doctor's compliance with a gag provision could potentially subject the doctor to malpractice liability. *See generally* Martin & Bjerknes, *supra* note 4, at 449-68 (discussing legal and ethical implications of gag provisions in physician contracts).

84 *See* Luban, *supra* note 13, at 2653 ("A secret settlement allows the plaintiff to receive money and the defendant to retain secrecy, at the cost of perpetuating avertable public hazards. The two parties settle their case by passing on costs to third parties not at the table.").

85 *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 18 (1981).

86 *Cf.* Gilles, *supra* note 72, at 21 ("The courts have also been reluctant to characterize non-commercial promises of confidentiality as offer and acceptance capable of forming a contract, citing both a lack of intention to contract and the vague and ambiguous nature of the agreement.").

87 *See* Katz, *supra* note 4, at 844 (noting that "[p]eople are naturally reluctant to transform relationships otherwise based on mutual respect and trust into contractual relationships").

Of course, parties who are keenly aware of their privacy concerns might insist on forming contracts of silence.[88] Additionally, even when parties do not explicitly contract for a promise of silence, courts will sometimes imply such a promise, especially when there is a pre-existing contractual relationship.[89] This type of implication most often occurs when a party reveals personal information to a professional, particularly if the ethical code of the profession mandates that the professional respect the client's privacy.[90] Contracts with doctors,[91] psychologists,[92] and bankers[93] are common examples of situations in which courts are willing to imply a promise of silence as a component of the contractual relationship.[94] Outside of these special relationships, it is far from clear that a court will be willing to imply a promise of confidentiality. Professor Susan Gilles has predicted that "contracts with libraries, video stores or even employers and insurers

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88 *See id.* at 841-49 (discussing the use of confidentiality agreements by celebrities); *see also supra* note 11 (same).

89 *See* Gilles, *supra* note 72, at 17 ("The American courts have . . . reacted favorably to claims that an existing contract contains an implied guarantee of confidentiality."); Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1444 (1982) (noting instances in which courts have implied promises of confidentiality into contractual relationships).

90 *See* Vickery, *supra* note 89, at 1444 (noting that courts have "looked to licensing statutes, professional codes of ethics, and other sources of public policy" to find an implied duty of confidentiality in various relationships).

91 *See, e.g.*, Hammonds v. Aetna Cas. & Sur. Co. 243 F. Supp. 793, 801 (N.D. Ohio 1965) (implying a commitment of confidentiality into a doctor/patient contract); Mull v. String, 448 So. 2d 952 (Ala. 1984) (finding that a plaintiff can bring a cause of action against a doctor for breach of implied covenant of confidentiality); Anderson v. Strong Mem'l Hosp., 531 N.Y.S.2d 735, 739 (N.Y. Sup. Ct. 1988) (noting that "the physician-patient relationship itself gives rise to an implied covenant of confidence and trust which is actionable when breached"), *aff'd in part and rev'd in part*, 542 N.Y.S.2d 96 (App. Div. 1989); Bryson v. Tillinghast, 749 P.2d 110, 113 (Okla. 1988) (finding that an implied promise of confidentiality exists in a doctor/patient contract).

92 *See, e.g.*, MacDonald v. Clinger, 446 N.Y.S.2d 801, 805 (App. Div. 1982) (explaining that the psychiatrist-patient relationship was "one of trust and confidence out of which sprang a duty not to disclose"); Doe v. Roe, 400 N.Y.S.2d 668, 674 (N.Y. Sup. Ct. 1977) (finding an implied covenant of confidentiality in a psychiatrist-patient contract).

93 *See, e.g.*, Constitutional Defense Fund v. Humphrey, No. 92-396, 1992 WL 164734, at *6 (E.D. Pa. 1992) (denying motion to dismiss a claim for breach of a bank's implied duty of confidentiality with regard to customer's bank records); Milohnich v. First Nat'l Bank, 224 So. 2d 759, 760 (Fla. Dist. Ct. App. 1969) (finding an implied duty of confidentiality regarding customer's bank records); Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 290 (Idaho 1961) (concluding that "it is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons . . . any information relating to the customer acquired through the keeping of his account"); *see also* Edward L. Raymond, Jr., Annotation, *Bank's Liability, Under State Law, For Disclosing Financial Information Concerning Depositor or Customer*, 81 A.L.R. 4th 377 (1990) (discussing banks' contractual duty of confidentiality).

94 *See generally* Gilles, *supra* note 72, at 17-19 (discussing and citing numerous examples of implied covenants of confidentiality).

will probably not be held to contain an implied term requiring them to keep personal data secret."[95]

3. *Lack of Objective Intent to Make a Legally Binding Contract*

The objective manifestations of the parties may result in the formation of a binding agreement, regardless of either party's intent.[96] Even when parties manifest assent to an agreement, however, a court can still deny enforcement if it believes that reasonable people would not have intended the agreement to be legally binding.[97]

This formation problem is only likely to occur in noncommercial contexts. Reasonable people anticipate that commercial deals will be enforceable, but that casual arrangements between friends and family will not.[98] Thus, even if a friend extracts from another a promise to keep information about an AIDS test confidential, a court still might not enforce the agreement if it concludes that reasonable people would not have intended the agreement to be binding. If the disclosing party had insisted on the preparation of a written contract, the presumption against enforcement could be overridden, but absent such a gesture, the presumption might apply.[99]

The problem of unenforceability can also arise in contracts between reporters and their sources. In *Cohen v. Cowles Media Co.*, the

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95 *Id.* at 19.

96 *See* RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981) ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract. . . .").

97 This denial of enforcement occurs most often in the context of social engagements and domestic arrangements. *See id.* § 21 cmt. c; MURRAY, *supra* note 19, § 31, at 59-62. A bizarre variation of this rule was arguably the basis of the Supreme Court's decision in *Totten v. United States*, 92 U.S. 105 (1875), which concerned a contract between William A. Lloyd and President Lincoln. Lincoln had hired Lloyd to spy on Confederate troops during the Civil War for compensation of $200 per month. Lloyd proceeded to act under the contract, but once the war ended, he only received reimbursement for his expenses. Lloyd's estate brought suit for breach of contract, but the Court of Claims dismissed the action and the Supreme Court affirmed. The Supreme Court's decision seems to suggest that if reasonable people would know that the existence of a contract is to be kept confidential, then the contract is unenforceable. As the Court explained: "Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter." *Id.* at 106. Thus, the Court concluded, "[t]he secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by [such] an action would itself be a breach of a contract of that kind, and thus defeat a recovery." *Id.* at 107. The Justice Department recently relied on the *Totten* case in arguing against the enforcement of contracts made between the United States government and Vietnamese spies during the Vietnam War. Tim Weiner, *New Files Prove Vietnam Cover-Up*, N.Y. TIMES, June 8, 1996, at A1.

98 Of course, one has to distinguish between a social engagement between friends, which is unlikely to be enforceable, and a commercial transaction between friends, such as a loan of money, which will be enforceable. A commitment of nondisclosure one friend makes to another would seem to fall somewhere between these two extremes.

99 *See* CALAMARI & PERILLO, *supra* note 5, § 2-4, at 30 (noting that the presumption that parties do not intend to be bound by commitments to social engagements can be overridden "if the parties manifest an intent to be bound").

Minnesota Supreme Court refused to enforce an agreement between a reporter and a source as a contract because the court said it was "not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract."[100] According to the court, the parties in this unique setting "understand that the reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract."[101]

4. *Lack of Definiteness*

Even if parties have made a bargain that reasonable people would intend to be enforceable, a court can still deny enforcement if the terms of the contract are so indefinite as to make the determination of the existence of a breach or the granting of a remedy impracticable.[102] Although the trend of modern contract law is to salvage indefinite agreements unless the indefiniteness suggests the parties never reached a bargain, a court can still manipulate this rule to deny enforcement to a contract of silence that it finds objectionable.[103] For example, in *Ruzicka v. Conde Nast Publications, Inc.*,[104] the court refused to enforce a reporter's promise to exclude from an article facts that would reveal the plaintiff as the source for his story. Basing its conclusion on a First Amendment theory, the court held "that where the agreement between a reporter and a source requires that the source not be made identifiable, with no further particulars or specific facts about what information would identify the source to the relevant audience, the agreement is too ambiguous to be enforced."[105]

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100 457 N.W.2d 199, 203 (Minn. 1990), *rev'd on other grounds*, 501 U.S. 663 (1991).

101 *Id.*; *see also* Ruzicka v. Conde Nast Publications, Inc., 939 F.2d 578, 582 (8th Cir. 1991) (relying on *Cohen*, the court held that "promises of confidentiality between journalists and sources are not legally enforceable under Minnesota law because such parties do not intend a binding contract"). For subsequent history of the *Ruzicka* case, see *infra* note 104.

102 *See* RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981); *see also* MURRAY, *supra* note 19, § 38, at 83 ("Even though parties intend to form a contract, if the terms of their agreement are not sufficiently definite or reasonably certain, no contract will be said to exist.").

103 *See* MURRAY, *supra* note 19, § 38, at 84 (noting that "the general observation that modern courts are much less willing than their predecessors to regard indefiniteness as fatal cannot be gainsaid"); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 33(2) ("The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.").

104 733 F. Supp. 1289 (D. Minn. 1990), *aff'd in part and remanded*, 939 F.2d 578 (8th Cir. 1991) (affirming dismissal of contract claim on other grounds and remanding for consideration of promissory estoppel claim), 794 F. Supp. 303 (D. Minn. 1992) (finding defendant's promise too indefinite to enforce on promissory estoppel grounds and granting summary judgment), *vacated*, 999 F.2d 1319 (8th Cir. 1993) (reversing and remanding for trial on the promissory estoppel claim).

105 *Id.* at 1300-01.

A similar result can occur when a contract is definite enough to enforce but contains vague or ambiguous terms requiring interpretation. A court disinclined to enforce a contract of silence can interpret the agreement so as to limit the scope of the promise of silence. This is particularly true when enforcement of the contract would suppress information of public interest. The *Restatement (Second) of Contracts* seems to authorize such a narrow construction by providing in section 207 that "in choosing among reasonable meanings of a promise or agreement . . . a meaning that serves the public interest is generally preferred."[106] In *Wildmon v. Berwick Universal Pictures*,[107] for example, the court cited to this provision to construe narrowly a provision in a contract that attempted to limit when a filmmaker could show footage of an interview with the plaintiff.[108] The court was "of the opinion that unless the contracting parties have clearly promised to limit the flow of information . . . an ambiguous contract should be read in a way that allows viewership and encourages debate."[109]

5. *Lack of Written Evidence: The Statute of Frauds*

Although contracts generally do not have to be in writing,[110] the Statute of Frauds provides that, for certain types of contracts to be enforceable, there must be written evidence.[111] Of the contracts the Statute of Frauds covers, the type of contract of silence most likely to pose a problem is one that is incapable of performance within one year of its creation.[112] A three-year employment contract including a promise not to disclose trade secrets, for instance, would likely fall within the Statute of Frauds and thus require a writing to be enforceable.[113]

Somewhat surprisingly, a contract that contained a commitment to keep quiet for an indefinite period would probably not fall within the Statute of Frauds, assuming that the other promises were all capable of performance within one year. Because the party who committed to keeping quiet could die at any moment and thus complete his

106 RESTATEMENT (SECOND) OF CONTRACTS § 207.

107 803 F. Supp. 1167 (N.D. Miss. 1992).

108 *Id.* at 1177.

109 *Id.* at 1178.

110 *See* MURRAY, *supra* note 19, § 68, at 300 ("Except for formal contracts, i.e., contracts under seal, the common law does not require contracts to be evidenced by a writing. A promise is legally binding though expressed orally or by conduct if the other essentials for contract formation exist.").

111 *See* RESTATEMENT (SECOND) OF CONTRACTS § 110.

112 *See id.* § 110(1)(e).

113 *See id.* § 130 illus. 5 (illustrating that a five-year employment contract is within the Statute of Frauds). As the Restatement notes, "[w]here any promise in a contract cannot be fully performed within a year from the time the contract is made, all promises in the contract are within the Statute of Frauds." *Id.* § 130(1).

performance, the contract would be performable within one year of its creation.[114] As the trial court in *Cohen v. Cowles Media Co.* said in denying a summary judgment motion based on the Statute of Frauds, "contracts of uncertain duration are simply excluded from the [S]tatute [of Frauds]."[115]

B. Defenses to Enforcement

All of the usual contract defenses can apply to a contract of silence. Thus, if one of the parties was a minor or was mentally incompetent, that party could void a contract of silence.[116] Similarly, a contract of silence would be voidable if a party fraudulently induced another to enter into the contract, or forced the party to do so under duress.[117] A court can also refuse to enforce all or part of a contract of silence that the court finds unconscionable.[118] While all of these defenses are potentially applicable to a contract of silence, the unconscionability and duress defenses are worthy of separate discussion.

1. *Unconscionability*

The doctrine of unconscionability is of particular interest because it is a tool that courts could use to strike objectionable promise of silence provisions in certain contractual contexts. The doctrine would be especially applicable when a party made a promise of silence in an adhesion contract—a form contract provided by a party with significantly greater bargaining power.[119] Employment contracts, particularly ones with lower level employees, tend to give rise to concerns regarding unconscionability. Contracts with professionals, such as the

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114 *See* Hollywood Motion Picture Equip. Co. v Furer, 105 P.2d 299 (Cal. 1940) (finding an oral contract that included a commitment not to use the plaintiff's secret patterns enforceable despite the indefinite duration of the contract because it was capable of being performed within one year of its making); *see also* 12 MILGRIM, *supra* note 21, § 4.04 (discussing Statute of Frauds in the context of trade secret agreements); 4 NIMMER & NIMMER, *supra* note 27, § 16.04[B][2] (discussing the one-year Statute of Frauds provision and contracts to pay for ideas). Even if a contract falls within the one-year provision of the Statute of Frauds, it will be taken out of that provision as soon as one party has fully performed her side of the contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 130 (1981). That is likely to occur in any contract in which one party's sole commitment is to disclose information to another, such as an idea for the entertainment industry, or information that a source gives to a reporter. *See* 4 NIMMER & NIMMER, *supra* note 27, § 16.04[B][2].

115 14 Media L. Rep. (BNA) 1460, 1464 (D. Minn. June 19, 1987), *aff'd in part, rev'd in part*, 445 N.W. 2d 248, 259 (Minn. Ct. App. 1989) (rejecting Statute of Frauds defense because one party had fully performed), *aff'd in part, rev'd in part*, 457 N.W. 2d 199 (Minn. 1990) (rejecting plaintiff's contract claim on other grounds).

116 *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 14, 15.

117 *See id.* §§ 164, 175.

118 *See id.* § 208.

119 *See id.* § 211(3) (stating that where one party "has reason to believe that the party manifesting [assent to a standardized agreement] would not do so if he knew that the writing contained a particular term, the term is not part of the agreement").

U.S. Healthcare contract with Dr. Himmelstein,[120] may also require some scrutiny.

Although available to courts, the doctrine of unconscionability is not well suited for policing promises of silence that threaten the public interest, such as the gag provision in the U.S. Healthcare contract. Unconscionability focuses on the parties to the contract and asks whether one party has imposed a particularly oppressive term on another.[121] A promise of silence that jeopardizes the public interest, however, will not necessarily be oppressive to the party making the promise; it is the public, and not Dr. Himmelstein, that suffers if the court honors his promise of silence.[122]

The doctrine of unconscionability is better suited to striking promises of silence that oppress the party making the promise. For example, a provision in an employment contract preventing an employee from disclosing any information—not just trade secrets—that she acquired during her employment can be oppressive because it might prevent the employee from obtaining another job in her industry.[123] When a promise of silence threatens the public interest but not the interests of the party making the commitment, courts may more appropriately strike the provision because it violates public policy.

2. *Duress*

As noted in Part I, two parties often enter a contract of silence because one party either has learned or will learn of information that another party does not want disclosed.[124] If the parties enter a contract of silence after the party committing to silence has already learned of the information, the possibility of blackmail always exists; that is, the parties entered into an agreement because one party threatened to disclose the information unless the other agreed to pay for her silence. This can be true whether the information is of economic value (i.e., a threat to disclose the formula for Coca-Cola) or of personal value (i.e., a threat to disclose that a politician has had an affair).

As a matter of criminal law, the difference between lawful contracting and blackmail depends upon whether the parties made the

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120 *See supra* notes 9-10 and accompanying text.

121 *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965) ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are *unreasonably favorable to the other party.*") (emphasis added).

122 *See supra* notes 9-10 and accompanying text.

123 *See, e.g.*, Disher v. Fulgoni, 464 N.E.2d 639, 644 (Ill. App. Ct. 1984) (invalidating overbroad employee confidentiality agreement on public policy grounds, but also noting the "unconscionable nature" of the agreement).

124 *See supra* notes 21-49 and accompanying text.

contract voluntarily or as a result of a threat.[125] From a contracts perspective, the question is whether the contract is voidable because it was made under duress. If the threat to disclose the information is considered "improper" and coerced the other party into entering the contract, then the victimized party has the option of rescinding the contract.[126]

For the most part, blackmail transactions are of little import to this Article's analysis. Duress in the blackmail context focuses on when courts should not enforce a promise to pay for silence. By contrast, this Article focuses on when courts should not enforce a promise to be silent. The issue of blackmail would be relevant only if lawmakers, anxious to prevent extortionate contracts of silence, chose to discourage such contracts by denying enforcement to all contracts of silence. Such an approach would be overbroad because parties could make some contracts containing promises of silence without any coercion. Nevertheless, this concern may explain a somewhat cryptic provision in the first *Restatement of Contracts*. That provision, section 557, states that a "bargain that has for its consideration the nondisclosure of discreditable facts . . . is illegal."[127]

There are two possible explanations for this rule. One is that the rule is based on speech concerns—that parties should not use contracts to suppress information of public interest. Under this explanation, the rule is a rather bold pronouncement in favor of speech, at least if "discreditable facts" is broadly defined.[128] One could conceivably argue, for instance, that the U.S. Healthcare[129] and the Brown & Williamson[130] contracts are unenforceable because they try to suppress discreditable information. The same might also be true of Liz's contract of silence with Larry.[131]

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125 *See* MODEL PENAL CODE § 223.4(3) (1980); *see also* Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663, 1664 (1993) (noting, as a paradox of blackmail law, that, while it is unlawful to threaten the disclosure of embarrassing or harmful information unless one is paid, "it is not unlawful for one who knows another's secret to *accept* an offer of payment made by an unthreatened victim in return for a . . . promise not to disclose the secret").

126 *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.").

127 RESTATEMENT (FIRST) OF CONTRACTS § 557 (1932).

128 Two hypotheticals illustrating section 557 suggest that the rule could be relatively far-reaching: a contract between a married man and his mistress, in which the mistress promises not to disclose the man's love letters; and a contract in which a politician seeks to prevent the disclosure of letters he had written years earlier that contain statements in conflict with the politician's current position. *Id.* § 557 cmt. a, illus. 1-2.

129 *See supra* notes 9-10 and accompanying text.

130 *See supra* note 8 and accompanying text.

131 *See supra* note 12 and accompanying text.

The other explanation for section 557 is that the section was intended to deny enforcement only to contracts that were the product of blackmail. While this narrow reading of section 557 is not improbable, the commentary to the section does not support it. The commentary specifically notes that "[i]n many cases falling within the rule . . . the bargain would be voidable for duress," but nevertheless goes on to state that "such a bargain is illegal whether or not the threats go so far as to bring the case within the definition of duress."[132] The commentary later explicitly dismisses the need for elements of duress: "Moreover, even though the offer to pay for non-disclosure is voluntarily made and though there is no duty to make disclosure or propriety in doing so, a bargain to pay for non-disclosure is illegal."[133]

Regardless of section 557's intent, it is unclear whether section 557 accurately reflects current law. Only two cases, both in California, appear to have cited the section since its publication in 1932.[134] Nor does the second *Restatement* include a comparable provision, although that may be due to the second *Restatement*'s general preference for not listing specific instances of illegality.[135]

If section 557 reflects current law, it seems that many commentators and courts are not aware of it. The precise definition of "discreditable information" might be the subject of debate, but one would at least expect discussions about particularly questionable contracts of silence, such as settlement agreements or contracts between reporters

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132 RESTATEMENT (FIRST) OF CONTRACTS § 557 cmt. a.

133 *Id.* If duress was the concern, one would also expect the *Restatement* chapter discussing duress, and not the chapter on illegality, to include section 557. *See* RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. f (1981); RESTATEMENT (FIRST) OF CONTRACTS § 493 illus. 17 (1932) (both containing duress sections referencing contracts made under the threat that one party will disclose embarrassing information about another). Certainly the drafters could have concluded that a blackmail contract is not only made under duress but also is unenforceable as illegal, but again, the comments to section 557 do not support limiting the section's reach to blackmail transactions.

Williston, the Reporter for the first *Restatement of Contracts*, confirmed in his treatise that the policy behind section 557 was speech-based and not duress-based; however, he articulated a more narrow rule than that found in the *Restatement*. According to Williston, "[a] bargain to refrain from disclosing to a third person to whom a duty of disclosure exists information of value or interest to him is illegal." 6 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1738 (1938) (citing section 557). If this statement is intended to reflect the rule of section 557, then the scope of the rule would depend upon how often courts find a "duty of disclosure."

134 Allen v. Jordanos' Inc., 125 Cal. Rptr. 31, 33-34 (Cal. Ct. App. 1975) (holding as unenforceable a promise to withhold information from State Department of Human Resources Development so that plaintiff could get unemployment benefits); Brown v. Freese, 83 P.2d 82, 86-87 (Cal. Dist. Ct. App. 1938) (holding as unenforceable a promise not to revoke a will when the consideration was a return promise not to disclose embarrassing information about the promisor's husband).

135 RESTATEMENT (SECOND) OF CONTRACTS, *Introduction* to ch. 8, at 3 ("Because of the myriad of such policies, this Chapter does not purport to deal in detail with all of the many kinds of promises that may be unenforceable on grounds of public policy.").

and sources, to mention the section. Scholarly and case discussions, however, have virtually ignored section 557. Part III, which considers when a court should deny enforcement to a contract of silence on public policy grounds, will discuss the desirability of using section 557's "discreditable facts" standard as a means for determining whether a court should enforce a contract of silence.[136]

C. Limitations on Remedies

Even when parties have made an enforceable contract of silence, the remedies available upon breach may not be satisfactory. Contract remedies are somewhat ill-suited to remedy breaches of contracts of silence. In a typical breach of contract action, the remedies try to repair the plaintiff's lost bargain. Expectation damages, the standard contract remedy, attempt to give the plaintiff the "benefit of his bargain" by putting him in as good a position as if the parties had performed the contract.[137]

By contrast, when a party breaches a contract of silence, the damages reflect the injury the defendant's breach caused rather than the plaintiff's lost bargain. These damages seem more tort-like than contract-like. This is true whether the breach consists of disclosing a trade secret, essentially a claim regarding stolen information or information rendered valueless, or whether the breach consists of disclosing personal facts, essentially a claim regarding embarrassment and possible injury to one's reputation.

If the breach of a contract of silence results in pecuniary injury, as with disclosure of a trade secret, contract rules can provide a proper remedy, even if tort law might do so more easily. The Jager treatise on trade secret law, for instance, notes that if a court bases recovery for misuse of a trade secret on contract rather than tort, "then a different and somewhat more restricted standard applies."[138] For example, it mentions that plaintiffs can only recover those consequential damages that were reasonably foreseeable at the time of contracting.[139] Jager nevertheless concludes that the differences between contract and tort remedies "are significant in theory but not in practice."[140] Courts faced with technical arguments about contract remedies sometimes sidestep the issue by pointing out that the breach of a trade secret contract is also a tort, therefore allowing for recovery of tort damages.[141]

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136 *See infra* notes 414-21 and accompanying text.

137 *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a.

138 1 JAGER, *supra* note 21, at 7-60.

139 *Id.*

140 *Id.* at 7-63.

141 For example, in *Cherne Industries, Inc. v. Grounds & Associates*, 278 N.W.2d 81 (Minn. 1979), an employer sued an employee for breaching a confidentiality agreement by disclos-

The inadequacy of contract damages is more clearly evident with contracts to protect personal privacy interests. In these contracts, the damages primarily consist of emotional distress and loss of reputation, neither of which courts traditionally award for breach of contract.[142] While courts can grant damages for emotional distress when either "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result"[143]—a difficult but not insurmountable obstacle for a contract to protect privacy interests—the case law tends to disfavor granting such relief.[144]

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ing a trade secret. When the defendant disputed the amount of damages, claiming that it was not a proper measure under contract law, the court responded by noting that the defendant's act was also tortious and that the lower court was therefore within its discretion in granting a tort remedy. *Id.* at 95-96; *see also* Consolidated Boiler Corp. v. Bogue Elec. Co., 58 A.2d 759, 771-72 (N.J. Ch. 1948) (awarding damages for the disclosure of trade secrets).

142 Typically, courts do not award damages for emotional distress in contract actions. *See* RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a ("Damages for emotional disturbance are not ordinarily allowed."); FARNSWORTH, *supra* note 4, § 12.17. Neither do courts award damages for loss of reputation. *See* DAN B. DOBBS, LAW OF REMEDIES § 12.5(1) (2d ed. 1993) (noting that "intangible damages for loss of reputation" should not be granted in contract actions); *see also* Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 446 (1st Cir. 1966) (finding "no basis . . . for allowing plaintiff to recover damages for injury to his reputation caused by the termination"); O'Leary v. Sterling Extruder Corp., 533 F. Supp. 1205, 1209 (E.D. Wis. 1982) (holding that plaintiff cannot recover for injury to his reputation). *But see* Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 894 (1st Cir. 1988) (holding that loss of specific professional opportunities falls outside the general rule prohibiting recovery for damages to reputation); Christopher J. Moore, Comment, *Recovery in Contract for Damages to Reputation:* Redgrave v. Boston Symphony Orchestra, Inc., 63 ST. JOHN'S L. REV. 110 (1988) (discussing and criticizing *Redgrave*). Courts typically give three reasons for why these damages are disallowed: (1) the damages are not foreseeable at the time of contracting, as is typically required for consequential damages; (2) claimants cannot prove the damages with reasonable certainty; and (3) awarding damages would result in disproportionate compensation for the plaintiff. *See* FARNSWORTH, *supra* note 4, § 12.17; Gilles, *supra* note 72, at 27 n.120, 29 n.124. Nevertheless, as Professor Farnsworth has noted, courts have not applied these rules "inflexibly," and have sometimes looked to the nature of the contract and made exceptions where breach "was particularly likely to result in serious emotional disturbance." FARNSWORTH, *supra* note 4, § 12.17, at 895. The *Restatement* recognizes this exception by providing that loss due to emotional distress may be recovered if "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." RESTATEMENT (SECOND) OF CONTRACTS § 353.

143 RESTATEMENT (SECOND) OF CONTRACTS § 353. For example, courts commonly award damages for emotional distress for breach of contracts to make funeral arrangements. *See* CALAMARI & PERILLO, *supra* note 5, § 14-5, at 596.

144 *See, e.g.*, Keltner v. Washington County, 800 P.2d 752 (Or. 1990). In *Keltner*, the plaintiff, a 14 year-old girl who had identified a murder suspect, sued law enforcement authorities for breaching a contract to keep the girl's name confidential. The plaintiff sought damages for emotional distress, but the court dismissed the action, holding that such damages were not recoverable. *Id.* at 753, 758; *see also* Gilles, *supra* note 72, at 30-32 ("In short, breach of confidence plaintiffs who seek monetary damages have found courts willing to compensate job loss, but little else. Unless plaintiffs can convince the court to grant injunctive relief, past cases indicate that recovery, in terms of monetary damages, will be minimal.") (footnotes omitted). *But see* Huskey v. NBC, 632 F. Supp. 1282, 1293 (N.D. Ill. 1986) ("By their very nature, contracts not to invade privacy are contracts whose breach may reasonably be expected to cause emotional disturbance."); Humphiers v. First Inter-

Whether a contract of silence involves economic interests or privacy interests, the damages resulting from its breach are likely to consist largely of consequential damages, which are recoverable only if they were reasonably foreseeable at the time of contracting.[145] In addition, parties must prove contract damages with reasonable certainty.[146] Although courts have tended to relax these requirements in recent years,[147] these requirements still give leeway to a court that is disinclined to fully enforce an objectionable contract of silence.

In a 1920 case, *Weld-Blundell v. Stephens*,[148] the House of Lords employed a more direct method of limiting remedies for an objectionable contract of silence. In *Weld-Blundell*, an accountant breached an implied duty not to disclose a letter the plaintiff wrote that contained libelous statements about two officials who worked with the plaintiff. The accountant accidentally left the letter where others could find it, and the defamed officials learned of its contents and successfully sued the plaintiff for libel.[149] The plaintiff subsequently sued the accountant, claiming that his liability to the other parties arose only because of the accountant's breach.[150] As a lower court judge summarized the plaintiff's position: "If the plaintiff is right, the obligation not to disclose is equivalent to an obligation to indemnify the plaintiff against the liability to pay the amount recovered for damages and costs in an action brought as a consequence of the disclosure."[151]

The court held that the defendant was not liable for the damages in the libel actions.[152] Although the plaintiff would not have incurred these damages but for the defendant's breach, the damages were nonetheless more closely connected to the plaintiff's own misconduct than the defendant's. Lord Wrenbury explained:

> [T]he amount [the plaintiff] had to pay was measured by his own wrongful act. It bore no pecuniary relation to [the defendant] Stephens's wrongful act. Stephens's act was not the cause . . . of his having to pay, but was an act without which possibly he would never have been called upon to pay. It was not causa causans [the immediate cause] but at most causa sine qua non [a necessary cause].

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state Bank, 696 P.2d 527, 529 (Or. 1985) (noting that "contract law may deny damages for psychic or emotional injury not within the contemplation of the contracting parties . . . though perhaps this is no barrier when emotional security is the very object of the promised confidentiality") (citation omitted).

145 *See* RESTATEMENT (SECOND) OF CONTRACTS § 351.

146 *See id.* § 352.

147 *See* FARNSWORTH, *supra* note 4, §§ 12.14-.15.

148 1920 App. Cas. 956.

149 *See id.* at 962, 978.

150 *See id.* at 997.

151 *Id.* at 978 (quoting L.J. Warrington's lower court opinion).

152 *Id.* at 977-78, 981, 1000.

> In discharging his liability to pay damages for malicious libel [the plaintiff] suffered no damage at all. A man is not damnified by being compelled to satisfy his legal obligation.[153]

Should modern courts choose to follow the causation analysis of *Weld-Blundell*, they could create significant damage limitations for breaches of some contracts of silence.[154] What damages, for instance, could a products liability defendant receive if a plaintiff breached a settlement agreement and shared with others information about the defendant's hazardous products? Surely under the *Weld-Blundell* analysis, the plaintiff should not be liable if people who learned of the manufacturer's misconduct from the plaintiff's breach subsequently sued the manufacturer. Moreover, the fact that the plaintiff could not be liable for these damages might also suggest that a harsh liquidated damages provision in the agreement would not be enforceable because it would not be a reasonable estimate of the plaintiff's potential liability.[155]

Aside from seeking damages, a plaintiff suing for breach of a contract of silence can also seek equitable relief.[156] Indeed, when a party breaches a contract of silence, the remedy at law may very well be inadequate, so that equitable relief would be appropriate. Of course, if the trade secret or private information has already been publicly

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153 *Id.* at 998. Translations of the Latin are from BLACK'S LAW DICTIONARY 220-21 (6th ed. 1990).

154 *See, e.g.*, 6 WILLISTON, *supra* note 133, § 1738, at 4915 (Using *Weld-Blundell* as his source, Williston states the following general rule in his text: "Where a valid contract is broken, recovery may still be limited to nominal damages if the loss suffered is due to the plaintiff's own wrongful acts to a third party which the breach has disclosed."). Williston also cites to another English case, *Howard v. Odhams Press, Ltd.*, 2 All. E.R. 509, 513 (1937) (noting that the lower court properly awarded nominal damages for breach of an employer's promise not to disclose an employee's confession of wrongdoing "because the damages the plaintiff [employee] sought to recover were due to his own wrongful act").

An interesting analogy can be made between these cases and cases concerning the liability of journalists who commit torts while newsgathering. In some of these cases, the tortious conduct allows the journalists to uncover improper behavior by the plaintiffs that the journalists subsequently publish. Courts and commentators have debated whether the plaintiffs in these cases should be able to recover for consequential damages that result from the publication of the illegally obtained information. *See, e.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956 (M.D.N.C. 1997) (ruling that news program's fraudulent acquisition and broadcast of an exposé of a grocery store was not the proximate cause of the store's damages); John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111 (1996) (arguing that courts should consider the effects of illegally obtained information when determining damages in claims against journalists).

155 *See* RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981) ("Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.").

156 *See, e.g.*, EPSTEIN, *supra* note 24, § 3.02[A], at 3-24 ("It is well settled that a trade secret owner may obtain injunctive relief to prevent the unauthorized use and disclosure of the owner's trade secrets.").

disclosed, injunctive relief would be of little avail, but that is not always the case. Brown & Williamson, for example, sought an injunction to keep Wigand from disclosing information.[157]

If a court enjoins a party from breaching a contract of silence, it raises constitutional concerns because the injunction is a prior restraint.[158] Although courts often say that prior restraints are presumptively unconstitutional,[159] they nevertheless routinely uphold them in some circumstances.[160] Courts commonly issue prior restraints to protect property interests such as copyrights and trade secrets,[161] and occasionally use them to protect privacy interests.[162] Courts have issued prior restraints to enforce trade secret contracts[163] and contracts to protect government secrets,[164] raising the question of whether courts should use such restraints to enforce contracts such as the U.S. Healthcare contract with Himmelstein[165] or the Brown & Williamson

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157 *See* Wigand Brief, *supra* note 8, at 4.

158 *See* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 8.01 [1] (1994) ("[M]ost prior restraints involve either an administrative rule requiring some form of license or permit before one may engage in expression, or a judicial order directing an individual not to engage in expression, on pain of contempt.") (footnote omitted); *see also* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 101 (1979) (describing a court injunction against publishing the name of a criminal as fitting within "the classic mold of prior restraint"). *But see* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 20-21 (1981) (arguing that not all injunctions on speech should be considered a prior restraint).

159 *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); *see also* SMOLLA, *supra* note 158, § 8.01[4] ("[T]he Supreme Court has repeatedly emphasized that prior restraints are *presumptively* unconstitutional.").

160 *See* SMOLLA, *supra* note 158, §§ 8.01[4], 8.05[3] (noting some of the areas in which prior restraints are allowed).

161 *See id.* § 8.05[3][b] ("Prior restraints are also entered with some frequency to protect other intellectual property interests, such as the protection of trade names or artistic rights."); *see also* MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 95 (5th ed. 1995) (noting how prior restraints are a "not-uncommon" remedy for protecting copyright rights and are also used to protect trade secrets). *But see* Oregon *ex rel.* Sports Management News, Inc. v. Nachtigal, 921 P.2d 1304, 1309 (Or. 1996) (holding statute authorizing prior restraints to protect trade secrets unconstitutional under Oregon state constitution).

162 *See, e.g.*, Huskey v. NBC, 632 F. Supp. 1282, 1294 (N.D. Ill. 1986) (suggesting that a prior restraint may be permissible to protect a plaintiff's privacy interests); Commonwealth v. Wiseman, 249 N.E.2d 610, 616-18 (Mass. 1969) (enjoining the public showing of a film that included embarrassing shots of mentally ill patients at an asylum); *see also* SMOLLA, *supra* note 158, § 8.05[1][b] (suggesting that "there is precedent for the issuance of injunctions to prevent invasions of privacy").

163 *See, e.g.*, Cherne Indus., Inc. v. Grounds & Assocs., 278 N.W.2d 81, 94 (Minn. 1979) (granting an injunction to prevent a former employee from breaking a covenant not to compete with his previous employer by disclosing trade secrets).

164 *See, e.g.*, United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972) (granting an injunction to prevent a former CIA agent from authoring a book disclosing government secrets).

165 *See supra* note 10 and accompanying text.

contract with Wigand.[166] Should it make a difference what information the contract suppresses, or should courts issue a restraint as a matter of course because they are simply enforcing a contract right?[167] A Kentucky court, after all, did issue a temporary restraining order against Wigand that lasted for months.[168]

III
REGULATING CONTRACTS OF SILENCE DIRECTLY: WHEN THE SALE OF A PARTY'S SILENCE SHOULD VIOLATE PUBLIC POLICY

Contracts of silence can also be unenforceable because of their content. Even in the absence of formation problems or personal defenses such as fraud and duress, a court can still deny enforcement because the substance of a contract violates public policy. While freedom of contract might exist, there is no freedom to use contracts to undermine important societal values.

This Part addresses this content-based limitation on contracts of silence. The central concern here is whether the "sale" of a party's silence in a contract should ever constitute a violation of public policy, rendering unenforceable either the promise of silence provision or the entire contract. In the vocabulary of legal scholarship, the question is whether the right to sell one's silence should be market-alienable—is silence something that a party should be able to trade lawfully in a contract exchange or should its trading be prohibited?[169]

The power of courts to deny enforcement to a contract on public policy grounds is not only indisputable, but also open-ended. Under the *Restatement (Second) of Contracts*, a contract or term will be unen-

166 *See supra* note 8 and accompanying text.

167 *Cf. Huskey*, 632 F. Supp. at 1294 (suggesting that prior restraints to prevent private wrongs are much more likely to be sustainable than prior restraints issued at the instance of the government); *Cherne*, 278 N.W.2d at 94 (upholding an injunction for breach of a trade secret contract and stating "[g]iven the public interest in preserving the ability of parties freely to enter contracts and to seek judicial enforcement of such contracts and in providing judicial remedies for breaches of fiduciary duties imposed by law, any infringement by the injunction on defendants' First Amendment rights is tolerable and justified"). It is unclear precisely what type of prior restraint analysis should apply to these contracts. Indeed, as Franklin and Anderson have noted, it is not even entirely clear why prior restraints in trade secret and copyright cases are not subject to the same rigorous analysis that courts apply to other prior restraints. FRANKLIN & ANDERSON, *supra* note 161, at 95 ("The failure to subject such injunctions to the full rigor of prior restraint analysis has not been fully explained.").

168 Wigand Brief, *supra* note 8, at 6 (stating that "Dr. Wigand has now been subject to the temporary restraining order for four months without any judicial review of the dubious contract provisions allegedly providing the basis for that restraint").

169 *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850 (1987); *see also* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 443-44 (1993) (discussing transferability of rights).

forceable when public policy considerations against enforcement clearly outweigh the interests in favor of enforcement.[170] By not explicitly limiting what public policies a court can consider in this balance,[171] the *Restatement* allows courts to derive public policy by considering other laws as well as their own sense of what restrictions are needed to protect the public welfare.[172]

This Part applies the *Restatement* balancing analysis to determine when, if ever, courts should deny enforcement to contracts of silence. Initially, however, there is little doubt that some contracts of silence, like a contract to conceal a crime, are unenforceable on public policy grounds.[173] Nor is there any doubt that some contracts of silence, like a contract to protect trade secrets, do not violate public policy.[174] The uncertainty only arises when one ventures beyond such extreme examples into the middle ground occupied by contracts like the U.S. Healthcare contract,[175] settlement agreements, and prenuptial agreements.

The thesis of this Part is that courts should carefully monitor all contracts of silence on public policy grounds. This Part recommends that courts deny enforcement to contracts of silence whenever there is an overriding public interest in the dissemination of the suppressed speech. To help courts determine whether a contract of silence violates public policy, this Part proposes a test that extrapolates principles from the extreme examples.

A. Creating the Analytical Framework: The *Restatement* Balancing Test

It is not surprising that courts refuse to enforce contracts that violate public policy. When Bugsy complains that he has not been paid despite having completed his end of a hit-man contract, no one would expect a court to award damages.[176] Courts will not enforce contracts that violate public policy both because they do not want to

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170 RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

171 *Id.* § 179 cmt. a (stating that the rule for deriving public policies against the enforcement of a contract is "an open-ended one that does not purport to exhaust the categories of recognized public policies").

172 *Id.* § 179.

173 *See* RESTATEMENT (FIRST) OF CONTRACTS § 548 (1932); *infra* notes 230-66 and accompanying text.

174 For discussion of contracts that protect against disclosure of trade secrets, see *infra* notes 204-29 and accompanying text.

175 *See supra* note 10 and accompanying text.

176 *See* EDWARD J. MURPHY & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 624 (4th ed. 1991) (describing a "hit-man" contract as an example of a contract that violates public policy).

encourage the kind of activity involved in the contract,[177] and because they do not want to undermine their legitimacy by lending support to undeserving claimants.[178] A court can refuse to enforce all or part of a contract on public policy grounds,[179] and can raise the objection even if the parties have not.[180] If a court renders a contract unenforceable on public policy grounds, it can either leave the parties where it found them or avail itself of a wide range of intermediate remedies.[181]

Under section 178 of the *Restatement*, a contract term is unenforceable on public policy grounds "if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[182] In other words, section 178 provides two bases for determining whether a contract term is unenforceable on public policy grounds. The first indication that a term violates public policy is when legislation explicitly provides that such a provision is unenforceable. Indeed, there could hardly be a more certain indication of public policy. In such instances, a court need only interpret the statute to determine whether it covers the particular contractual provision in controversy.[183]

While legislation is the simplest way to determine that a contract violates public policy, such legislation is rare.[184] One example of legislative intervention affecting contracts of silence is state statutes invali-

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177 *See* RESTATEMENT (SECOND) OF CONTRACTS, *Intro.* to ch. 8, at 2 (1981) ("[A] refusal to enforce the promise may be an appropriate sanction to discourage undesirable conduct, either by the parties themselves or by others."); *see also* Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 118-19 (1988) (noting that courts withhold judicial relief to deter illegal contracts).

178 *See* RESTATEMENT (SECOND) OF CONTRACTS, *Intro.* to ch. 8, at 2 ("[E]nforcement of the promise may be an inappropriate use of the judicial process in carrying out an unsavory transaction."); Harold C. Havighurst, Book Review, 61 YALE L.J. 1138, 1145 (1952) (reviewing §§ 1228-1541 of ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS (1950)) ("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.").

179 *See* FARNSWORTH, *supra* note 4, § 5.1, at 326 (stating that a court can "refuse to enforce the agreement or some part of it" on public policy grounds).

180 *See* RESTATEMENT (SECOND) OF CONTRACTS, *Intro.* to ch. 8, topic 1, at 5 ("Even if neither party's pleading or proof reveals the contravention, the court may ordinarily inquire into it and decide the case on the basis of it if it finds it just to do so, subject to any relevant rules of pleading or proof by which it is bound.").

181 *See id.* §§ 183-84 (authorizing courts to sever offensive parts of a contract or partially enforce contracts for benefit of innocent party); §§ 197-99 (allowing restitution in certain instances).

182 *Id.* § 178(1).

183 *See* FARNSWORTH, *supra* note 4, § 5.1; MURPHY & SPEIDEL, *supra* note 176, at 625.

184 *See* FARNSWORTH, *supra* note 4, § 5.1 (noting that "[i]n most cases" there is no legislation that speaks directly to the enforceability of a contract).

dating certain post-employment restraints.[185] Such statutes could potentially limit the enforceability of contract provisions restricting post-employment disclosures of information.[186] Similarly, the recent public outcry over gag provisions in HMO contracts led several states to enact laws banning such provisions.[187] For most contracts of silence, however, no clear legislative resolution may exist.[188]

When legislation does not address a contract's enforceability, the *Restatement* provides a default public policy basis upon which a court can declare a contract term unenforceable. Under the *Restatement*, a court should deny enforcement to a contract term if, under the circumstances, public policy against enforcement clearly outweighs the interests in favor of enforcing the term.[189] The *Restatement* does not list the public policies that courts can consider in this balance. Rather, a court can consider relevant legislation, case law, and its own perception of the public welfare.[190] An oft-quoted passage from a nineteenth-century English decision best captures the open-ended na-

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185 *See, e.g.*, CAL. BUS. & PROF. CODE §§ 16600-02.5 (West 1997); MONT. CODE ANN. § 28-2-703 (1997); N.D. CENT. CODE § 9-08-06 (1987); OKLA. STAT. ANN. tit. 15, §§ 217-19 (West 1993); *see also* Thornton Robison, *The Confidence Game: An Approach to the Law About Trade Secrets*, 25 ARIZ. L. REV. 347, 370 (1983) (discussing states that have banned post-employment restrictive covenants on public policy grounds).

186 *See* Robison, *supra* note 185, at 370 (noting that statutes banning post-employment covenants might also preclude the enforcement of post-employment confidentiality provisions). *But see* 12A MILGRIM, *supra* note 21, § 6.01[3][e] (suggesting that such statutes raise constitutional due process concerns to the extent that they invalidate covenants designed to protect trade secret property rights).

187 *See* Milt Freudenheim, *H.M.O.'s Cope with a Blacklash on Cost Cutting*, N.Y. TIMES, May 19, 1996, at A1 (noting that at least six states had passed laws banning gag provisions in HMO contracts with practitioners and several more had bills pending to ban such provisions); Robert Pear, *Laws Won't Let H.M.O.'s Tell Doctors What to Say*, N.Y. TIMES, Sept. 17, 1996, at A12 (noting that sixteen states have adopted laws prohibiting "gag clauses" in HMO contracts with physician-providers); Calvin Woodward, *Clinton Speaks out for Bill to Lift HMO 'Gag Order' on Network Doctors*, PHILA. INQUIRER, Sept. 7, 1996, at A3 (same); *see also* Jennifer L. D'Isidori, Note, *Stop Gagging Physicians!*, 7 HEALTH MATRIX 187, 223-31 (1997) (reviewing current and pending state legislation concerning HMO gag provisions).

188 For example, courts could construe whistleblower statutes, which prevent employers from retaliating against employees who report regulatory violations, to preclude enforcement of contracts of silence in which employees promised not to make such a report. *Cf.* Connecticut Light & Power Co. v. Secretary of Labor, 85 F.3d 89 (2d Cir. 1996) (holding that a public utility's settlement offer to a former employee that included a clause prohibiting the employee from disclosing information about potential safety violations to authorities violated a whistleblower provision in the Energy Reorganization Act). *See infra* note 243 and accompanying text.

189 RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

190 *Id.* § 179 ("A public policy against the enforcement of promises or other terms may be derived . . . from (a) legislation relevant to such a policy, or (b) the need to protect some aspect of the public welfare. . . ."); *see also* CALAMARI & PERILLO, *supra* note 5, § 22-1 (stating that public policy has been used to strike down contracts on various grounds); 6A CORBIN, *supra* note 35, § 1374 (stating that contracts can be unenforceable as illegal because legislation declares them so, but also "because they are so declared by the Common Law, are against Public Policy, or are so treated in the prevailing mores of the community (contra bonos mores)"); Walter Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679

ture of this public policy analysis, characterizing public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you."[191] In fact, the public policy analysis is not only open-ended, but it can also lead to different conclusions over time.[192] What at one time might have offended public policy (i.e., a "palimony" contract) might later be perfectly acceptable.[193] It is at least clear that contract law does not require that a contract be illegal under criminal law to be unenforceable on public policy grounds.[194]

If there is a check on courts' power to police contracts on public policy grounds, it comes from the public policies that underlie contract law. Contract law exists in recognition of the benefits of private contracting.[195] By insuring that the justified expectations of a nonbreaching party will be protected when another breaches, the law promotes contracting among private individuals.[196] When a court denies enforcement to a contract on public policy grounds, it frustrates these expectations.[197] Moreover, if a court declares a contract unenforce-

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(1935) (arguing that courts should consider public policy interests when assessing the validity of contracts).

191 Richardson v. Mellish, 130 Eng. Rep. 294, 303 (C.P. 1824); *see also* Pittsburgh, C., C. & St. L. Ry. v. Kinney, 115 N.E. 505, 507 (Ohio 1916):

> Public policy is a community common sense and common conscience . . . applied . . . to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the [particular] circumstances.

192 *See* FARNSWORTH, *supra* note 4, § 5.2 ("As the interests of society change, courts are called upon to recognize new policies, while established policies become obsolete or are comprehensively dealt with by legislation.").

193 At one time, for instance, now-legal arbitration agreements were considered a violation of public policy. *See id.* § 5.2 n.11; 14 WILLISTON, *supra* note 133, § 1721. Similarly, contracts made or to be performed on a Sunday were unenforceable. *See* RESTATEMENT (FIRST) OF CONTRACTS § 538 (1932). For a history of the law concerning co-habitation agreements, see MURRAY, *supra* note 19, § 98(J), at 525-28.

194 *See* RESTATEMENT (SECOND) OF CONTRACTS, *Intro.* to ch. 8, topic 1, at 5 ("This Restatement is concerned with whether a promise is unenforceable and not with whether some other sanction has been attached to the act of making or performing it in such a way as to make that act 'illegal.'"); *see also* FARNSWORTH, *supra* note 4, § 5.1 (explaining that conduct rendering an agreement unenforceable need not be a crime); Gellhorn, *supra* note 190, at 686 (discussing a court's decision to invalidate a contract "not expressly banned by the legislature.").

195 In particular, some scholars point to the critical role that contracts play in any sophisticated market economy. *See, e.g.*, FARNSWORTH, *supra* note 4, § 1.3 (discussing the growing need for contracts as society increasingly relies on credit); MURRAY, *supra* note 19, § 5, at 13 (noting that a "complex industrial society" cannot function without a "comprehensive system of future exchange," and that the "institution of contract brings persons and resources together as a necessary condition to the operation of the market system because the institution . . . facilitates future exchanges").

196 *See* FARNSWORTH, *supra* note 4, § 12.1 (noting that courts encourage parties to rely on contracts by protecting the expectations of an injured party after breach).

197 *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. e ("A court will be reluctant to frustrate a party's legitimate expectations unless there is a corresponding benefit to be gained in deterring misconduct or avoiding an inappropriate use of the judicial process.").

able after one party has partially or fully performed, it can result in unjust enrichment of the other party, frustrating the policies the law of restitution reflects.[198] These traditional bases for enforcing contracts suggest that courts should be reluctant to deny enforcement on public policy grounds. By denying enforcement to a contract only when the public policies against enforcement "clearly outweigh" the interests in favor of enforcement, the *Restatement* provision reflects this sentiment.[199]

B. The *Restatement* Balancing Test in Practice: Considering the Extreme Cases

Because the purpose of contract law is to protect the reasonable expectation that parties will perform a contract, the decision to declare all or part of a contract unenforceable on public policy grounds is no small matter. Professor Corbin harshly described those who take such decisions lightly: "The loudest and most confident assertions as to what makes for the general welfare and happiness of mankind are made by the demagogue and the ignoramus."[200]

While courts should be reluctant to deny enforcement on public policy grounds, they must nevertheless be prepared to do so when appropriate. If private contracting is frustrating a public policy of sufficiently important magnitude, courts should refuse to support the contract and withhold a legal remedy. "The wise man knows that he does not know and therefore speaks softly and less often," Corbin continued, "[b]ut even the wise man has opinions and of necessity must state them, vote for them, and occasionally fight for them."[201]

This section applies the *Restatement* balancing test to contracts of silence. Although the *Restatement* test is admittedly vague and open-ended, it can still guide courts to logical, principled conclusions. Its usefulness is particularly evident when the test is applied to contracts of silence at opposite ends of the spectrum: those least and most likely to be vulnerable to a public policy challenge. Applying the *Restatement* analysis to these extreme cases illustrates how courts can apply the test in a principled fashion. This analysis also shows why an absolute, all-or-nothing rule regarding the enforceability of contracts of silence is

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198 *See id.* According to the *Restatement*,

> [t]he interest in favor of enforcement becomes much stronger after the promisee has relied substantially on those expectations as by preparation or performance. The court will then take into account any enrichment of the promisor and any forfeiture by the promisee if he should lose his right to the agreed exchange after he has relied substantially on those expectations.

Id.

199 *Id.* § 178.

200 CORBIN, *supra* note 35, § 1375.

201 *Id.*

inappropriate. The next section addresses the difficulty of drawing a principled line between contracts that do and do not offend public policy. This section introduces the analysis by revealing how courts can apply the *Restatement* test in the extreme cases.

1. *The* Restatement *Balancing Test When There Are Powerful Arguments for Enforcement: Contracts to Prevent the Disclosure of Trade Secrets*

Perhaps the best example of a contract of silence that is unlikely to offend public policy is a contract in which a party promises not to disclose a trade secret. Public policy acknowledges that trade secret owners have a legitimate interest in keeping their information confidential. Contracts to prevent the disclosure of trade secret information further this public policy.

Part II explained that trade secret owners rely on contracts to protect their interests because any commercial advantage they enjoy from their trade secrets arises solely from their competitors' lack of access to the information.[202] To insure that their information remains confidential, trade secret owners often require employees, licensees, and others with whom they share their information to sign confidentiality agreements.[203]

How should a court rule if a party challenges one of these nondisclosure provisions as violative of public policy? Under the *Restatement* approach, a court would uphold the nondisclosure provision unless there was a significant public policy interest weighing against the term's enforcement. The first step in the court's analysis, therefore, is to ascertain the public policy considerations regarding contractual efforts to suppress the disclosure of trade secrets.

a. *Public Policy Analysis of Contracts to Prevent the Disclosure of Trade Secrets*

Of course, legislation that specifically governed the enforceability of contracts to protect trade secrets would greatly simplify the court's analysis. In that instance, legislators would have already expressed the public policy regarding such contracts, and the court could simply follow their lead. If no such legislation existed, however, the court would have to "derive" relevant public policy from other laws and its own sense of public welfare. While this process is undeniably open-ended, it nevertheless seems likely that a court would conclude that public policy acknowledges both the legitimacy of trade secrets as well as the legitimacy of an owner's interest in protecting his trade se-

202 *See supra* notes 23-24 and accompanying text.
203 *See supra* notes 25-26 and accompanying text.

cret.[204] Directly or indirectly, an array of laws suggests that public policy endorses efforts to protect trade secrets.

Perhaps the strongest indication that public policy favors the protection of trade secrets is in tort law, which makes the improper use or disclosure of a trade secret actionable even in the absence of a contract.[205] Of course, if trade secret information is publicly available, others are free to use it.[206] A party who learns of the information through a confidential relationship, however, is liable in tort if he uses or discloses the information without the owner's consent.[207] Such confidential relationships usually occur in many of the same contexts in which parties use contractual nondisclosure provisions, including relationships with employees, licensees, and prospective purchasers.[208] Tort law's acknowledgement that the unconsented use or disclosure of trade secrets is improper strongly indicates that public policy favors the protection of the secret information. As Professor Prosser's treatise notes, tort obligations are "based on policy considerations" and, unlike contractual obligations, are "imposed apart from and independent of promises made."[209]

A further indication that public policy supports the protection of trade secrets is found in agency law, which similarly prohibits agents' unauthorized use or disclosure of trade secrets.[210] Under the *Restate-*

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204 While public policy may clearly favor the protection of trade secrets, it is not self-evident that it should. Protection of trade secrets not only rewards parties who hoard valuable information, but it also arguably conflicts with federal patent law. *See infra* notes 216-18 and accompanying text.

205 *See* RESTATEMENT OF TORTS § 757 (1939). Initially, the *Restatement (Second) of Torts* planned to address unfair competition, including the law of trade secrets. The American Law Institute determined, however, that the law of unfair competition had become so substantial that it warranted its own restatement. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION, *Foreword*, XI-XII (1995). Thus, the most recent restatement of trade secret law is found in the *Restatement (Third) of Unfair Competition*. *Id.* §§ 39-45.

206 *See supra* note 24 and accompanying text.

207 *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 40, 41. A person who learns of a trade secret has a duty of confidence if, at the time the information was disclosed to him: "(1) the person knew or had reason to know that the disclosure was intended to be in confidence, and (2) the other party to the disclosure was reasonable in inferring that the person consented to an obligation of confidentiality." *Id.* § 41(b)(1)-(2). A person is liable for appropriation of a trade secret if he uses or discloses a trade secret without the owner's consent in violation of a duty of confidence. *See id.* § 40(b)(1).

208 *See* EPSTEIN, *supra* note 24, § 2.02(B)(2) (noting that a duty not to disclose a trade secret is implied in a variety of relationships, including "employer/employee, licensor/licensee, seller/buyer, manufacturer/contractor, supplier/purchaser, corporation/director, debtor/creditor, partners or joint venturers, client/consultant, and principal/agent").

209 W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 92, at 656 (5th ed. 1984).

210 The *Restatement (Second) of Agency* provides:

> Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such infor-

ment (Second) of Agency, an employee who uses or discloses his employer's trade secret without the employer's consent is liable for breaching his duty of loyalty.[211]

Moreover, many other areas of law involving the disclosure of information indirectly recognize the legitimacy of trade secrets by carving out exceptions that insure trade secret protection is not inadvertently lost through compelled disclosure. The Federal Rules of Civil Procedure recognize that there is a legitimate interest in protecting trade secrets by authorizing courts to issue orders to protect trade secret information.[212] The rules of evidence in many jurisdictions recognize this interest by creating a privilege against testifying about trade secret information.[213] Similarly, various disclosure statutes include exceptions to insure that parties do not lose trade secret protection through mandated disclosure.[214] The Freedom of Information Act, for instance, specifically exempts trade secrets from the types of information that it requires the government to make available to the public.[215]

All of these laws, whether statutory or judge-made, reflect a societal choice to protect trade secret information and not simply a private choice that parties to a contract make. Public policy acknowledges that trade secrets are entitled to protection, at least when the information falls within the definition of a trade secret and the owner has reasonably gnarded the information's secrecy.

Yet public policy's recognition of the need for protection of trade secrets is by no means self-evident. Protecting trade secrets rewards those who hoard valuable information and penalizes parties who, if

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mation does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.

RESTATEMENT (SECOND) OF AGENCY § 395 (1958). Comment b specifically states that this rule applies to trade secrets. *Id.* cmt. b, at 222. Similarly, section 396 provides that agents have a duty not to use or disclose trade secrets after termination of their employment. *Id.* § 396.

211 *Id.* § 395 cmt. g (discussing remedies available to principals after their agents improperly use or disclose the principal's confidential information).

212 FED. R. CIV. P. 26(c)(7) (authorizing courts to issue protective orders to insure "that a trade secret or other confidential research, development or commercial information not be revealed or be revealed only in a designated way"); *see also* Miller, *supra* note 13, at 432-36 (analyzing the application of rule 26(c)(7)).

213 *See* 26 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5641 (1992) (listing those states with an evidentiary privilege for trade secrets); *see also* UNIF. R. EVID. 2d § 507 (trade secret privilege).

214 *See* Thomas O. McGarity & Sidney A. Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies*, 93 HARV. L. REV. 837, 858 (1980) (discussing the development of statutory protection of trade secrets); *see also* 26 WRIGHT & GRAHAM, *supra* note 213, §§ 5642, 5644 (noting the existence of more than 80 federal statutes that explicitly restrict disclosure of trade secrets).

215 5 U.S.C. § 552(b)(4) (1994).

given access to the information, might put it to competitive use.[216] Also, trade secret protection arguably conflicts with federal patent law, which gives an inventor an exclusive monopoly to his invention, but only at the price of disclosing the invention so that others may use it when the patent term expires.[217] Trade secret law can subvert this public dedication aspect of patent law by allowing the owner of an invention to protect his invention indefinitely, at least if the work can be commercially exploited without revealing its secret.[218]

Whatever the merits of these concerns, the law has rejected them. Other policy considerations—that trade secret protection encourages inventiveness, punishes the unethical theft of information, and facilitates the minimal sharing of information that is necessary for owners to commercially exploit their trade secrets—have prevailed.[219] The Supreme Court has even explicitly rejected the argument that federal patent law preempts state trade secret law.[220]

b. *Applying the Public Policy Analysis to the* Restatement *Balancing Test*

Applying public policy analysis to the *Restatement* balancing test leads inexorably to the conclusion that promises not to disclose trade secrets should be enforceable. Public policy acknowledges that trade secret owners have a legitimate interest in keeping their information

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216 *See* 26 WRIGHT & GRAHAM, *supra* note 213, § 5642, at 295-96 ("Why, then do courts assume that the businessman who desires to take advantage of the ignorance of his competitors is the virtuous party and that those who seek knowledge in order to improve their product are the wrongdoers?").

217 *See* 35 U.S.C. §§ 112 (requiring disclosure in a patent application), 154 (providing term of patent); 2 JAGER, *supra* note 21, § 10.01[1] ("The preemption of state trade secret law by the patent laws was seen by many commentators as a logical extension of . . . [recent] Supreme Court decisions. . . . By 1970, several federal circuit courts had split decisions on the . . . issue of preemption of the trade secret laws by the patent laws."); Richard H. Stern, *A Reexamination of Preemption of State Trade Secret Law After* Kewanee, 42 GEO. WASH. L. REV. 927 (1974) (criticizing a Supreme Court decision that found no preemption of state trade secret law by federal patent law); Steven M. Gloe, Note, *Patent Law—No Federal Preemption of State Trade Secret Law*, 1974 WIS. L. REV. 1195 (same).

218 *See, e.g.*, Robison, *supra* note 185, at 353 (noting in a discussion of the conflict between trade secret law and patent law that "particularly when process information is involved, trade secrets can be kept for more than seventeen years with the help of protective law, denying the rest of the world the benefit of a patent disclosure"); 26 WRIGHT & GRAHAM, *supra* note 213, § 5642, at 319 (noting that a "dramatic" example of the costs to society of keeping an invention secret is Antonio Stradavari's decision to take his secret of violin making "to his grave").

219 *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 39 cmt. a (1995) (discussing policies underlying trade secret protection); *see also* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481 (1974) (citing the policy justifications of "commercial ethics and the encouragement of invention"); 1 JAGER, *supra* note 21, §§ 1.01-1.05 (discussing the rationales underlying trade secret law, including the "maintenance of commercial morality," and the "encouragement of research and innovation").

220 *See Kewanee Oil Co.*, 416 U.S. at 474.

private. The enforcement of contractual nondisclosure provisions complements this policy by providing trade secret owners with an additional and perhaps more effective means of protecting their interests.[221]

Not surprisingly, contracts jurisprudence has generally concurred in this conclusion. Confidentiality agreements are not only considered lawful but are also specifically acknowledged by commentators,[222] the *Restatement (Third) of Unfair Competition*,[223] and the Uniform Trade Secrets Act[224] as an important means of protecting trade secrets.[225]

While public policy might confirm the legitimacy of contracts to protect trade secrets, this holds true only so long as a contract's nondisclosure provision is limited to trade secrets. Contracts that suppress other information no longer further the public policy of protecting trade secrets. Courts must evaluate such contracts, particularly employment contracts that contain broad confidentiality provisions, on the basis of separate policies. Courts often find these agreements, such as promises not to disclose any information learned on the job, unenforceable on public policy grounds, not because the agreements suppress speech, but because they constitute an unlawful restraint of trade.[226] A contract that keeps an employee from using or

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221 Michael Epstein discusses the benefits of using a confidentiality agreement even where there is a concomitant tort duty on the part of the person learning a trade secret not to disclose the information. By using a contract, he notes, it "eliminates the necessity of proving that the implied duty of nondisclosure and non-use exists." EPSTEIN, *supra* note 24, § 2.02[A]; *see also* Hutter, *supra* note 26, at 314-17 (stating that the tort of trade secret misappropriation provides employers with inadequate protection of their trade secret information, pointing, in particular, to the difficult evidentiary burden placed on an employer and the lack of adequate remedies, and suggesting that employers require employees to sign a covenant not to compete.).

222 *See* EPSTEIN, *supra* note 24, § 2.02[A] (discussing the use of contracts to protect trade secrets); 1 JAGER, *supra* note 21, § 4.01[1] (same); 12 MILGRIM, *supra* note 21, § 4.01 (same).

223 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 cmt. d (discussing contractual protection of trade secrets).

224 UNIF. TRADE SECRETS ACT § 7, 14 U.L.A. 437, 463 (1990) (noting that the Act does not displace "contractual remedies, whether or not based upon misappropriation of a trade secret").

225 Professor Thornton Robison has argued that when parties are forced to specify in their contracts the precise scope of the protected information, confidentiality contracts are more effective than tort liability for protecting trade secrets. Robison, *supra* note 185, at 383-84.

226 *See, e.g.*, Service Ctrs. v. Minogue, 535 N.E.2d 1132, 1137 (Ill. App. Ct. 1989). The court explained:

> By defining confidential information as essentially all of the information provided by Deliverex to Minogne 'concerning or in any way relating' to the services offered by Deliverex, the confidentiality agreement amounts in effect to a post-employment covenant not to compete which is completely unrestricted in duration or geographical scope. This type of covenant is unreasonable and will not be enforced.

Id. (citation omitted).

disclosing general know-how of his trade, after all, can effectively preclude the employee from working in his industry.[227]

To determine whether a confidentiality agreement constitutes an unlawful restraint of trade, courts often refer to the tort definition of a trade secret. If a contract protects the same type of information that tort law protects, it is likely that a court will uphold it; the contract is merely complementing the public policy tort law embodies. But if a contract goes beyond protecting trade secrets, courts will often find it unenforceable as a restraint on trade.[228] As the *Restatement (Third) of*

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227 *See* Disher v. Fulgoni, 464 N.E.2d 639 (Ill. App. Ct. 1984). The court, noting that employee confidentiality agreements can limit an employee's ability to compete, stated that the agreements should be policed with the same rigor as covenants not to compete. The court stated:

> These [employee confidentiality] agreements, like covenants not to compete, affect state interests, *i.e.*, the flow of information necessary for competition among businesses. Hence, the validity of such agreements are to be determined in accordance with the public policy of the State of Illinois. This is to ensure that the restraint imposed will not cause undue hardship to the employee, and that it will not be greater than is necessary to protect the proprietary interests of the employer.

Id. at 643 (citations omitted). Confidentiality agreements particularly offend public policy when they preclude use of information already publicly available. *See, e.g.*, Cherne Indus., Inc. v. Grounds & Assocs., 278 N.W.2d 81, 90 (Minn. 1979) (stating that "matters of general knowledge within the industry may not be classified as trade secrets or confidential information entitled to protection") (quoting Whitmyer Bros. v. Doyle, 274 A.2d 577, 581 (N.J. 1971)); *see also,* 12A MILGRIM, *supra* note 21, § 5.02[3], at 5-19 (stating that "[t]o the extent that such use does not entail use or threaten disclosure of trade secrets of a former employer[,] . . . one's former employee cannot be restricted from using his knowledge, skill and experience in subsequent employment"); *cf.* RESTATEMENT (SECOND) OF AGENCY § 396(b) (1958) (suggesting that an agent has no duty to a former employer to refrain from using general information concerning his trade).

228 The *Restatement (Third) of Unfair Competition* summarizes this rule:

> The reasonableness of an agreement that merely prohibits the use or disclosure of particular information depends primarily upon whether the information protected by the agreement qualifies as a trade secret. If the information qualifies for protection under the rule stated in § 39 [the Restatement's definition of "trade secret"], a contract prohibiting its use or disclosure is generally enforceable according to its terms. Although in some cases courts have enforced nondisclosure agreements directed at information found ineligible for protection as a trade secret, many of these decisions merely reflect a more narrow definition of trade secret than that adopted in § 39. However, a nondisclosure agreement that encompasses information that is generally known or in which the promisee has no protectable interest, such as a former employee's promise not to use information that is part of the employee's general skill and training . . ., may be unenforceable as an unreasonable restraint of trade.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 cmt. d, at 472 (citation omitted); *see also* Rototron Corp. v. Lake Shore Burial Vault Co., 553 F. Supp. 691, 697 (E.D. Wis. 1982) ("The Court concludes, therefore, that under New York law, the plaintiff's claim, although founded on the secrecy agreement, must be analyzed under the law regarding misappropriation of confidential information."); Wheelabrator Corp. v. Fogle, 317 F. Supp. 633, 637 (W.D. La. 1970) ("While trade secrets will be protected where a confidential relationship exists even . . . absen[t] a contractual agreement . . . , a contractual agreement without more does not afford such protection. It must be shown that the processes or machinery

Unfair Competition notes, "the public policies that operate to restrict the scope of trade secret protection are also relevant to the enforcement of confidentiality agreements."[229]

2. *The* Restatement *Balancing Test When There Are Powerful Arguments Against Enforcement: Contracts to Conceal a Crime*

Contracts to conceal criminal behavior are at the opposite end of the spectrum from trade secret contracts. Public policy might recognize a legitimate interest in keeping trade secret information confidential, but no comparable interest exists for information about crimes. To the contrary, public policy encourages reporting crimes.[230] Contractual provisions that suppress information about criminal conduct undermine this policy.[231]

Although uncommon, contracts to conceal a crime do exist. These contracts occasionally arise when the victim of a crime receives compensation from either the crime's perpetrator or the perpetrator's relative in exchange for a promise not to report the crime.[232] The parent of a teenage embezzler, for instance, might agree to com-

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here are . . . trade secrets and that access to them was gained in confidence."); Nasco Inc. v. Gimbert, 238 S.E.2d 368, 369-70 (Ga. 1977) ("This nondisclosure covenant is overly broad and unreasonable in that it would prohibit disclosure of information not needed for the protection of the employer's legitimate business interests."); Puritan-Bennett Corp. v. Richter, 679 P.2d 206, 211 (Kan. 1984) (finding portions of a confidentiality agreement unenforceable because the provisions went far beyond trade secrets); *cf.* Phillip J. Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 548 (1984) (arguing that covenants not to compete should be unenforceable because the common law already protects an employer's trade secret interests through agency law).

229 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 reporters' note on cmt. d, at 477 (1995) (citing AMP Inc. v. Fleischhacker, 823 F.2d 1199 (7th Cir. 1987); Victor Chem. Works v. Iliff, 132 N.E. 806 (Ill. 1921)). Some cases suggest that parties can use confidentiality agreements to protect information that tort law fails to protect, and commentators have relied on this authority to argue that contractual liability for revelation of employer information can be more extensive than tort. *See* 12 MILGRIM, *supra* note 21, § 4.02[1][d][ii], at 4-29. The *Restatement (Third) of Unfair Competition* suggests that, in many of these instances, the courts simply used a narrow definition of trade secret and protected information that the *Restatement*'s definition would protect. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 cmt. d, at 472. Nevertheless, the *Restatement* acknowledges that in some instances protection of information by contract may be proper even though the information does not amount to a trade secret. *Id.* § 41 reporters' note on cmt. d, at 477.

230 *See infra* notes 236-45 and accompanying text (discussing, inter alia, whistleblower statutes and wrongful discharge jurisprudence).

231 *See* Branzburg v. Hayes, 408 U.S. 665, 696 (1972) ("[I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy.").

232 *See* 6A CORBIN, *supra* note 35, § 1421, at 357 ("Bargains to stifle a prosecution are most commonly made by those who have suffered a tortious injury at the hands of the criminal offender.").

pensate a victimized employer if the employer refrains from contacting the authorities.[233]

Contracts to conceal a crime also arise when the parties hide the commitment in sweeping confidentiality obligations. In his contract with Brown & Williamson, for instance, Wigand promised not to disclose any information he learned about the company or anything that might disparage the company.[234] Under either of these provisions, the disclosure of criminal behavior could constitute a breach. Wigand, in fact, challenged these provisions by arguing that they violated public policy by impeding a criminal investigation of Brown & Williamson.[235]

a. *Public Policy Analysis of Contracts to Conceal a Crime*

A court can easily discover how public policy regards contracts to conceal a crime. As with contracts to protect trade secrets, relevant laws send a clear signal of public policy. Here, however, public policy encourages denying enforcement to the contracts.

The clearest indication that public policy frowns upon contracts to conceal a crime is that the making of such contracts is itself criminal. Most states and the *Model Penal Code* recognize the crime of "compounding," or accepting consideration in return for a promise to refrain from reporting a crime.[236] The *Model Penal Code* provision, which has influenced compounding legislation in the majority of states,[237] provides a helpful definition of the crime: "A person commits a misdemeanor if he 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."[238]

The comments to the *Model Penal Code* clearly indicate that the crux of this crime is the contracting away of one's right to speak about another's criminal activity. The simple failure to report a crime is not

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233 *See* RESTATEMENT (FIRST) OF CONTRACTS § 548 cmt. a, illus. 1 (1932) (giving the example of a father giving an employer a promissory note in consideration for the employer's promise not to prosecute the employee-child).

234 *See supra* note 8 and accompanying text.

235 Wigand Brief, *supra* note 8, at 11 ("The Settlement Agreement clearly goes far beyond the protection of legitimate trade secrets and is now being used by B&W to impede criminal and civil investigations of B&W.").

236 MODEL PENAL CODE § 242.5 nn.18-24 (1980) [hereinafter MPC] (listing compounding statutes in various states).

237 *Id.* § 242.5 cmt. 1.

238 *Id.* § 242.5. Contracts to conceal a crime can also violate other laws. In *McGrane v. Reader's Digest Ass'n*, 822 F. Supp. 1044 (S.D.N.Y. 1993), for example, the court noted that when violations of federal law are implicated, "arrangements to 'cover up' may violate 18 U.S.C. § 3 (accessory after the fact), § 4 (misprision of felony), § 371 (conspiracy to defraud the United States), §§ 1341-1346 (mail and other fraud), §§ 1501-1517 (obstruction of justice) or other specific statutes including the Internal Revenue Code." *Id.* at 1046.

itself a crime.[239] Even promising not to report a crime is not illegal as long as it is not supported by consideration.[240] It is only when a person accepts a "pecuniary benefit" in exchange for his promise to be silent that he has committed an offense.[241] As the comments indicate, "compounding require[s] payment for silence."[242]

A state compounding law might suffice to determine how public policy views contracts to conceal a crime. Nevertheless, other laws reinforce the notion that public policy disfavors efforts to suppress the disclosure of crimes. In the employment context, for instance, a patchwork of laws suggests that public policy favors the right of employees to report the illegal activities of their employers. Whistleblower statutes protect employees from retaliation for reporting illegal activities to government authorities.[243] Courts have provided similar protection in common law, holding that the discharge of an at-will employee is wrongful if done in retaliation for reporting a crime.[244] Even agency law, which specifically provides that an employee has a duty not to disclose confidential information to the injury

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239 MPC § 242.5 cmt. 3 (noting that "[i]n general, our society does not use penal sanctions to compel reporting of crime").

240 *See id.* § 242.5 cmt. 1 (stating that "[a]bsent consideration, a mere promise to refrain from reporting a crime [does] not fall within the compounding offense, no matter how serious the crime").

241 *Id.* § 242.5.

242 *Id.* § 242.5 cmt. 1. The commitment to silence takes the form of a promise not to provide law enforcement authorities with information concerning the commission of a crime. *See id.* § 242.5. The crime of compounding can also be committed, even after a crime has been reported, by a witness's failure to cooperate with law enforcement authorities. *See* Merek Evan Lipson, Note, *Compounding Crimes: Time for Enforcement?*, 27 HASTINGS L.J. 175, 176 n.10 (1975).

243 *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 9.18 (1994) (discussing whistleblower statutes).

244 *See id.* § 9.12, at 276 (noting that the "second major category of public policy exceptions to the employment at will rule involves employees who are fired because they have reported illegal or harmful activity"); *see also* WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES 178-79 (2d ed. 1993) (discussing whistleblowers). As Holloway and Leech note, the "most emphatic" case addressing the right of employees to blow the whistle on their employers is *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981). HOLLOWAY & LEECH, *supra*, at 179. In *Palmateer*, the court stated:

> No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters. "Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy. Persons acting in good faith who have probable cause to believe crimes have been committed should not be deterred from reporting them . . . ."

Palmateer, 421 N.E.2d at 880.

of his employer, makes an exception for information regarding an employer's criminal conduct.[245]

Some laws suggest that public policy will occasionally tolerate obligations to keep quiet about criminal behavior. The law does not permit a criminal defense attorney to disclose his client's past criminal conduct.[246] The psychotherapist-patient privilege, which the Supreme Court recently endorsed,[247] likewise provides that a therapist is not free to testify about a patient's past criminal conduct if the therapist learned of the conduct during a therapy session.[248] In these instances, a countervailing public policy in favor of fostering effective attorney-client and psychotherapist-patient relations has overridden the public policy favoring disclosure of criminal behavior. This delicate balance may shift if the public interest in the information becomes sufficiently compelling. Attorneys, for instance, may reveal that their client is about to commit a crime that could result in "imminent death or substantial bodily harm."[249]

b. *Applying the Public Policy Analysis to the* Restatement *Balancing Test*

The above analysis suggests that public policy disfavors efforts to suppress the reporting of crimes. Given the apparent strength of this policy, and that contracts to conceal criminal activity flout the policy, one would expect such contracts to be unenforceable.

Once again, contracts jurisprudence is in accord. Professor Williston notes myriad cases that hold contracts concealing or compounding a crime to be unenforceable.[250] He explains that such cases

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245 *See* RESTATEMENT (SECOND) OF AGENCY § 395 & cmt. f (1958) (stating that "if the confidential information is to the effect that the principal is committing or is about to commit a crime, the agent is under no duty not to reveal it").

246 *See id.* § 395 cmt. f (noting that "an attorney employed to represent a client in a criminal proceeding has no duty to reveal that the client has confessed his guilt").

247 Jaffee v. Redmond, 116 S. Ct. 1923, 1931 (1996).

248 *See* 25 WRIGHT & GRAHAM, *supra* note 213, § 5547, at 370 (stating that there is not an exception to the psychotherapist-patient privilege for the "mere revelation of a past crime in the course of an otherwise proper therapeutic relationship").

249 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1997); *cf. Jaffee*, 116 S. Ct. at 1932 n.19 ("[W]e do not doubt that there are situations in which the [psychotherapist-patient] privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.").

250 6 WILLISTON, *supra* note 133, § 1718, at 1487 n.1; *see, e.g.*, Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850, 853 (10th Cir. 1972) ("It is public policy . . . to encourage the disclosure of criminal activity, and a ruling here [upholding an agreement to conceal a crime] would serve to frustrate this policy."); Van Housen v. Monico, 378 A.2d 609, 610 (Conn. Super. Ct. 1976) ("An agreement made in whole or in part 'to suppress an enquiry to the commission of an offense, or to prevent, in any measure, the administration of criminal justice' is void."); Bryson v. Tillinghast, 749 P.2d 110, 113 (Okla. 1988) ("Imposing a contractual liability on this doctor whose assistance enabled the police to apprehend an accused rapist is against the strong public policy of this state and we refuse to recognize

are expressive of the public policy favoring an effective administration of justice.[251] The *Restatement (First) of Contracts* encapsulates this rule in section 548: "A bargain in which either a promised performance or the consideration for a promise is concealing or compounding a crime or alleged crime is illegal."[252] The second *Restatement* lacks a comparable provision, but instead refers the reader to the *Model Penal Code* provisions concerning obstruction of justice, which include the compounding provision discussed above.[253]

While contracts jurisprudence condemns contracts to conceal a crime, some questions as to the scope of this ban still exist. The *Model Penal Code*, for instance, applies only to promises not to report a crime to law enforcement authorities.[254] While one may expect the *Code*'s condemnation of such commitments to carry over to contract law, 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. For example, should the use of a contract to prevent the disclosure of criminal conduct to the media or to a mother-in-law violate public policy?[255]

Another question is whether the rule barring enforcement of a contract to conceal a crime should apply equally to minor and major violations of law. On this point, there is no lack of certainty—the *Restatement* and the *Model Penal Code* both condemn contracts to conceal

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such a cause of action."); Singer Sewing Mach. Co. v. Escoe, 64 P.2d 855 (Okla. 1937) (holding that a promissory note given in return for a promise to conceal a crime is void). Many of these cases appear to deal with agreements in which one party has promised not to prosecute another. *See* Baron et al., *supra* note 3, at 1032. The decision of whether to prosecute, however, is not made by private parties, but rather is made by the prosecuting authority. Therefore, promises not to prosecute are better characterized as promises of silence—in effect, either not to inform the authorities of the crime, or if the authority is already aware of the crime, not to cooperate with the authorities. *Cf.* Lipson, *supra* note 242, at 176 n.10 (describing ways in which the compounding offense can be committed).

251 6 WILLISTON, *supra* note 133, § 1718, at 4859.

252 RESTATEMENT (FIRST) OF CONTRACTS § 548(1) (1932).

253 RESTATEMENT (SECOND) OF CONTRACTS, *Intro.* to ch. 8, at 4 (1981).

254 *See supra* note 238 and accompanying text.

255 In *McKenzie v. Lynch*, 133 N.W. 490 (Micb. 1911), a husband settled a civil claim with a man who had engaged in "criminal conversation" with his wife. As part of the settlement, the husband promised not to "do anything whereby this matter will acquire any publicity whatever." *Id.* The court found this provision unenforceable because it could prevent the husband from "becom[ing] a complaining witness, in a criminal proceeding" against the other party to the contract. *Id.* at 491. Some read this case as suggesting that a promise not to disclose a crime is enforceable if the commitment will not impede a criminal prosecution. *See* 17A AM. JUR. 2D *Contracts* § 274 (1991) (suggesting that an agreement not to disclose a crime is enforceable "unless the agreement would have the effect of preventing a prosecution for the offense."). *But see* Bowman v. Parma Bd. of Educ., 542 N.E.2d 663, 667 (Ohio Ct. App. 1988) (rejecting plaintiff's argument that a contract to conceal a crime was enforceable because the defendant had revealed the crime to a school board and not to law enforcement authorities). *Cf.* Donovan v. R.D. Andersen Constr. Co., 552 F. Supp. 249, 252-53 (D. Kan. 1982) (applying the Occupational Safety and Health Act whistleblower statute to employee who reported safety violations to the media).

crimes regardless of the nature of the crime. Comments to the first *Restatement* provide that "[t]he rule stated . . . is applicable whether the crime in question is a felony or a misdemeanor, and whether the accused is innocent or guilty of the crime."[256] The *Model Penal Code* similarly indicates that its compounding provision applies to "any" offense.[257] The breadth of this rule combined with the breadth of regulation in the United States suggests that in many instances parties cannot legitimately contract for the suppression of speech to inhibit the reporting of a crime to law enforcement authorities.[258]

Finally, there is an open question as to whether a contract between a victim of a crime and its perpetrator should be unenforceable. The *Restatement (First) of Contracts* is unequivocal on this matter. While expressly acknowledging that a victim may contractually settle any civil claim he has against a criminal,[259] the first *Restatement* nevertheless indicates that such a contract is unenforceable if part of the consideration consists of a victim's promise to conceal or compound the offense.[260] The criminal may hope that a civil settlement would lead the victim to drop criminal charges, but the parties may not expressly include this as part of the consideration.[261]

The *Restatement (Second) of Contracts* is more ambiguous on this point because of its reference to the *Model Penal Code* provision on compounding.[262] The *Model Penal Code* provision specifically exempts from criminal liability victims who promise not to report a crime in exchange for reasonable compensation for the harm the criminal caused.[263] As the comments to the *Code* note, the penal laws do not ordinarily compel the reporting of a crime, and the "victim of [a] crime who refrains from reporting the offense because his loss has been made good is no more derelict in his societal duty than one who,

256 RESTATEMENT (FIRST) OF CONTRACTS § 548(1) cmt. a; *see also* 6A CORBIN, *supra* note 35, § 1421, at 355 (stating that stifling "prosecution is in all cases contrary to public policy and illegal"); 6 WILLISTON, *supra* note 133, § 1718, at 4857 (noting any bargain to conceal a crime is unlawful even if "no crime in fact has been committed").

257 MPC § 242.5 & cmt. 2 (1980).

258 *See, e.g.*, EEOC v. Astra USA, Inc., 94 F.3d 738, 744-45 (1st Cir. 1996) (holding unenforceable settlement agreements that prevent the employees from communicating with the EEOC); EEOC v. Cosmair, Inc., 821 F.2d 1085, 1090 (5th Cir. 1987) (voiding waiver of right to file charge against employer with EEOC); Chambers v. Capital Cities/ABC, 159 F.R.D. 441, 446 (S.D.N.Y. 1995) (holding that a confidentiality provision in an age discrimination settlement agreement cannot prevent the employee from being deposed in a separate age discrimination action).

259 RESTATEMENT (FIRST) OF CONTRACTS § 548(2).

260 *Id.* § 548 cmt. a, at illus. 1.

261 *See id.*; 6A CORBIN, *supra* note 35, § 1421, at 358.

262 RESTATEMENT (SECOND) OF CONTRACTS, *Intro.* to ch. 8, at 4.

263 MPC § 242.5 (1980) ("It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.").

out of indifference or affection for the offender, fails to report known criminal conduct."[264]

Does the second *Restatement*'s reference to the *Model Penal Code* mean that this criminal law exception also applies to the civil enforcement of contracts? The *Restatement (Second) of Contracts* is silent on this point, but the *Model Penal Code* is not. Comments in the *Code* indicate that the drafters believed that contracts with victims should be enforceable, as long as they only provide for reasonable compensation.[265] After noting that most cases concerning compounding are not criminal prosecutions, but civil actions by victims, the comments explain why these victims should be able to recover under a contract:

> The issue in such cases is whether the promise of payment is void because it grew out of illegal compounding. If this defense is sustained, the alleged offender who undertook to suppress his crime is relieved of his obligation to compensate the victim. This result is hardly well calculated to discourage obstruction of justice. Indeed, it would encourage an offender to believe that, once having evaded prosecution by a promise of restitution, he can also avoid his promise to pay.[266]

C. The *Restatement* Balancing Test in the Uncertain Middle Ground: Developing a Test to Distinguish Between Legitimate and Illegitimate Contracts of Silence

This Section considers how the *Restatement* analysis should apply to contracts of silence that fall between the two extreme paradigms. These contracts do not obviously offend public policy like a contract to conceal a crime, but they also do not have a powerful claim to legitimacy like a contract to protect trade secrets. For these contracts, should the public policy favoring the enforcement of contracts make these contracts enforceable, or can a public interest in access to the suppressed speech override the interests in enforcement?

The answer to this question is not clear, and courts need guidance to answer it. Courts lack adequate guidance in part because usually no analogous law definitively indicates whether a contract of silence should be enforceable; a precise correlation between a related law and a contract of silence, like the relation of a contract to conceal a crime and a criminal compounding statute, is a rare occurrence. In the absence of such a close correlation, the public policy analysis is more challenging and more speculative.

Adequate precedent concerning the enforceability of contracts of silence in the middle range is also lacking, particularly for contracts

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264 *Id.* cmt. 3.

265 *Id.*

266 *Id.* (footnote omitted).

that implicate the public interest.[267] Parties may not have widely used such nondisclosure provisions in the past, or if they did, the parties committing to silence may have only rarely breached them.[268] Even if a party breached nondisclosure provisions, the other party may have had no incentive to sue. It would have been poor public relations, for example, for U.S. Healthcare to sue a doctor for violating its gag provisions. Indeed, the company dropped the provisions as soon as information about them became public.[269]

This lack of adequate precedent was evident in the *Snepp* case, in which the dissent argued that the defendant's contract with the CIA was unenforceable on public policy grounds. Rather than citing cases that condemned contractual suppressions of speech, the dissent could rely only on cases that invalidated overbroad employment contracts as a restraint of trade.[270] Wigand has relied on similar case law in his current litigation with Brown & Williamson.[271]

These restraint of trade cases have language that courts can stretch to protect speech interests, for example, the requirement that the nondisclosure provisions must serve a "legitimate" interest of the employer and must not violate the "public interest."[272] These cases are, nonetheless, based on a public policy favoring the protection of competition, not on one favoring the protection of speech. Consequently, these cases are arguably inapposite when an employee breaches for the purpose of sharing information with the public and

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267 The absence of adequate precedent is evident in the memorandum of authorities prepared in support of Dr. Wigand's motion to have his contract with Brown & Williamson declared unenforceable. Wigand Brief, *supra* note 8. Dr. Wigand argues that the contract seeks to suppress evidence of criminal conduct, and he provides case law to support that proposition. *Id.* at 10-16 (making a variety of arguments that the contract seeks to obstruct justice). But for his argument that the contract seeks to suppress information of wrongdoing and information relevant to the public's health and safety, he cites no contracts cases, relying instead on wrongful discharge cases and a Kentucky whistleblower statute. *See id.* at 16-19; *see also* Baron et al., *supra* note 3, at 1037 ("No reported cases appear in which a court specifically refused to enforce a confidentiality agreement because an employer had no legitimate interest in suppressing information of public concern."); Stefan Rützel, *Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing*, TEMP. ENVTL. L. & TECH. J., Spring 1995, at 1, 26 (finding no cases in which an employer had sued an employee for breaching a contract to conceal information about an employer's environmentally-harmful activities).

268 People may have been unwilling to risk contractual liability for the sake of sharing information with the public.

269 *See* Marian Uhlman, *U.S. Healthcare Alters 'Gag Rule' on Its Member Physicians*, PHILA. INQUIRER, Feb. 3, 1996, at D1 (discussing changes in U.S. Healthcare contracts).

270 Snepp v. United States, 444 U.S. 507, 520 (1980) (Stevens, J., dissenting).

271 Wigand Brief, *supra* note 8, at 20-24.

272 MURRAY, *supra* note 19, § 98, at 514 ("[C]ourts generally agree that restrictive covenants must be (a) necessary to protect the legitimate interest of the buyer of the business or interests of the employer, (b) reasonable with respect to territory and time, (c) not unduly harsh or oppressive on the seller or employee, and (d) not injurious to the public.").

not for the purpose of competing. For example, the majority opinion in *Snepp* concluded that: "A body of private law intended to preserve competition . . . simply has no bearing on a contract made by the Director of the CIA in conformity with his statutory obligation to 'protec[t] intelligence sources and methods from unauthorized disclosure.'"[273]

This Section attempts to provide courts with the guidance that is currently lacking. Because this Section cannot analyze how public policy would view every potential contract of silence, it will instead suggest a test that courts can use when confronting a public policy challenge to a contract of silence. Using the two extreme paradigms as starting points, this Section will extrapolate a rule for invalidating contracts of silence as violative of public policy.

1. *A Test for Evaluating Contracts of Silence*

The simplicity of the *Restatement*'s balancing test masks the difficulties that courts encounter in trying to apply it. Indeed, the *Restatement* test gives courts virtually no guidance, other than indicating that a court should begin with the presumption of enforcing contracts.[274] Rather than list the public policies a court should consider in its analysis,[275] the *Restatement* directs a court to "derive" public policy from other laws and its own sense of what the public welfare requires.[276] Given such limited guidance, how should a court determine whether a contract of silence should be enforceable? How should a court know when another law is relevant to its analysis, in the absence of a law that is virtually on point?

The answers to these questions can be derived from the two extreme cases. On one extreme, a contract to conceal a crime not only demonstrates that some contracts of silence will be unenforceable on public policy grounds, but also demonstrates *when* a contract of silence will be unenforceable. Thus, several more specific public policies might explain why contracts to conceal a crime are not enforceable—the policy of ferreting out crime and the policy of preventing the obstruction of justice. Ultimately, however, these policies all lead to a more general conclusion: that a court will not enforce a contract of silence when the public interest in the suppressed

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273 *Snepp*, 444 U.S. at 513-14 n.9.

274 *See supra* notes 182-99 and accompanying text.

275 Although the *Restatement* mentions certain well-established public policies that place limits on freedom of contract (e.g., restraint of trade, impairment of family relations), a comment in the *Restatement* makes it clear that this list "does not purport to exhaust the categories of recognized public policies." RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. a (1981).

276 *Id.* at § 179(b) (authorizing a court to derive a public policy against the enforcement of a contract from "the need to protect some aspect of the public welfare").

speech outweighs the interests in enforcing the contract. In the case of contracts to conceal a crime, the public interest in information regarding criminal conduct simply outweighs the traditional interests in contract enforcement.

This general rule also applies in the analysis of contracts to protect trade secrets, with the balance of interests tilting toward enforcement. Here, too, a variety of public policies can explain why contracts to protect trade secrets should be enforceable, for example, promotion of inventiveness and discouragement of the theft of valuable information.[277] But combined, these policies form a more general rule: that a court will enforce a contract of silence when the interests in enforcing the contract outweigh any competing public interest in access to the suppressed speech.

These two examples suggest a guideline for when a court should enforce a contract of silence. A court must compare the strength of the public and private interests in enforcing a contract that suppresses speech, the "confidentiality interest," with the competing public interest in not having the threat of contractual liability inhibit speech, the "disclosure interest." If the disclosure interest clearly outweighs the interest in confidentiality, then the court should not enforce the contract.[278] The overriding public interest in the speech in this situation renders the right to sell one's silence "inalienable." Conversely, if the disclosure interests do not sufficiently outweigh the confidentiality interests, then the court should enforce the contract. Here, the right to sell one's silence is "alienable."

Given this test for enforcement of a contract of silence, the next question is how courts should apply the test. Courts could conclude that the public interest in free speech overrides the interests in enforcing a contract of silence only when a contract involves the concealment of a crime. Beyond this extreme case, courts could hold that all contracts of silence should be enforced. Conversely, courts could define the public interest in uninhibited speech more broadly. Courts could easily find an overriding public interest in speech regarding tortious conduct or nontortious conduct that implicates public health and safety. But courts could even go beyond this finding. An examination of the law of defamation or the tort of public disclosure of private facts, for example, may suggest that the public also has an in-

277 *See supra* note 219 and accompanying text.

278 *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (stating that a contract term should be unenforceable on public policy grounds only if the interest in its enforcement is "clearly outweighed" in the circumstances by a public policy against enforcement).

terest in the lives of public officials and celebrities, perhaps even in the latest travails of Larry and Liz.[279]

Given this wide range of choices, how should a court decide when the public interest in speech overrides the interests in contract enforcement? Again, the two extreme cases suggest an answer. In both cases, the conclusion whether to enforce a contract is not based on a wholly arbitrary exercise of discretion. Rather, the conclusions are carefully drawn by looking 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. For example, criminal compounding laws, wrongful discharge jurisprudence, and whistleblower statutes all suggest that the public interest in information about criminal conduct outweighs a person's privacy interest in suppressing such information.[280] Agency and trade secret law, by contrast, suggest that a person's interest in protecting trade secrets is sufficient to override the public interest in access to such information.[281]

This discussion answers the question of how a court should know when another law is relevant to its public policy analysis of a contract of silence. The answer is that another law is relevant if it communicates something about the legitimacy of a party's effort to suppress speech. A related law will not always be available to resolve a contract of silence dispute, but courts should look to the multitude of laws in which lawmakers have wrestled with the dilemma of balancing confidentiality and disclosure interests. The dilemma arises, for example, when lawmakers determine what private information public agencies should disclose,[282] and when courts decide the scope of an agent's duty of confidentiality.[283] The dilemma also underlies the question of when a party should be liable in tort for publicly disclosing private facts about another,[284] and exists when a court determines the scope of an evidentiary privilege.[285]

The problem of distinguishing between legitimate and illegitimate claims to confidentiality not only occurs in other areas of law, but also often occurs in contexts in which parties use contracts of silence. Thus, while parties often use contracts to protect trade secrets,

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279 *See generally* KEETON ET AL., *supra* note 209, at 805-15, 839-42, 859-63 (discussing limitations on liability for defamation and public disclosure of private facts); *see also infra* notes 398-404 and accompanying text (discussing tort law's ineffectiveness in protecting privacy interests).

280 *See supra* notes 236-45 and accompanying text.

281 *See supra* notes 205-11 and accompanying text.

282 *See infra* notes 408-10 and accompanying text.

283 *See infra* notes 335-39 and accompanying text.

284 *See infra* notes 397-407 and accompanying text.

285 *See, e.g.*, Spectrum Sys. Int'l Corp. v. Chemical Bank, 558 N.Y.S.2d 486, 487 (App. Div. 1990) (discussing the "strong public policy favoring full disclosure" in determining the scope of a party's attorney-client privilege), *aff'd on other grounds*, 575 N.Y.S.2d 809 (1991).

the misappropriation of a trade secret is actionable in tort even in the absence of a contract.[286] Similarly, the public disclosure of another's personal facts can be tortious even if the parties have not contracted to keep the information confidential.[287]

Noncontract areas of law provide guidance in contracts of silence disputes precisely because they do not merely reflect the decision of private parties as to what information should be confidential. Rather, in each of these areas, lawmakers, whether legislators or judges, have made deliberate public policy choices between confidentiality and disclosure.[288] By creating laws that prevent the disclosure of information, lawmakers express a public policy preference for protecting the confidentiality of information. Conversely, by allowing information to be freely disclosed, lawmakers can equally express opposition to the suppression of information. Thus, the trade secret tort suggests both that trade secret information is legitimately kept confidential, and that information that is not a trade secret is available for public use.[289] Likewise, the private-facts tort suggests both that a person has a legitimate interest in keeping certain personal information private, and that the public interest in newsworthy information can outweigh this privacy interest.[290]

Of course, the balance struck between confidentiality and disclosure interests in other areas of law should not necessarily determine what private parties can contract to do. But when the balance struck in another area reflects a clear public policy preference for the disclosure of information, it raises a question as to whether parties should be able to subvert this preference through contract. Contracts to conceal a crime illustrate this point. A variety of laws related to contracts to conceal a crime—criminal compounding provisions, whistleblower statutes, and wrongful discharge jurisprudence—do not specifically address the civil enforcement of a contract of silence.[291] Nevertheless, these laws clearly demonstrate the public interest in the disclosure of

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286 *See supra* notes 205-09 and accompanying text.

287 *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977).

288 *Cf.* Harvey, *supra* note 38, at 2427-28 n.206 (arguing that it makes more sense to protect personal privacy interests by tort than by contract because "the diverse privacy and First Amendment interests at stake in this area are probably best accommodated within a tort framework, where the multi-faceted elements upon which they should be balanced can be clearly defined"); Vickery, *supra* note 89, at 1451 (arguing that courts should recognize a tort for breach of confidence "because it would address squarely the individual and societal interests at stake in a confidential relationship").

289 *See supra* note 228 and accompanying text.

290 Under the *Restatement (Second) of Torts*, there is only liability for the public disclosure of private facts if the information is "not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS § 652D(b). This is sometimes referred to as the "newsworthiness" defense. *See* Zimmerman, *supra* note 38, at 350-62 (discussing the newsworthiness defense).

291 *See supra* notes 236-45 and accompanying text.

information about criminal conduct. A court certainly could conclude that the public policy these laws embody also limits the ability of private parties to use contracts to suppress information about criminal conduct.

A court must bear in mind a final lesson from the extreme cases before it can apply the proposed test: the balance of confidentiality and disclosure interests in any given case will depend greatly on the facts. As the facts change, so may the public policies affecting the balance of interests. Thus, an employment contract to protect trade secrets might generally be enforceable, but not one that prohibits the disclosure of general professional know-how.[292] The analysis may also change if the context in which a contract is made changes. Thus, a contract not to report a crime might be unenforceable if a witness makes it, but it might be enforceable if a victim makes it, because the latter contract implicates a separate public policy favoring the settlement of civil claims.[293] Relevant contextual considerations include not only who made the promise of silence, but also the relationship of the parties to the contract, and how the party promising silence acquired the suppressed information.

That enforcement of a contract of silence will turn on a fact-intensive inquiry should neither cause alarm, nor raise concerns that such a process will cause "[c]haos [to] envelope the commercial world."[294] Such fact-intensive inquiries are common when courts police contracts for public policy violations. In many instances, courts rely on a fact-intensive "rule of reason" analysis to determine whether a contract violates public policy.[295] Similarly, under this analysis, courts must balance the public interests in enforcement against disclosure to determine whether a contract of silence is "reasonable."

a. *Preliminary Thoughts on Sources of Public Policy*

Many laws communicate something about the legitimacy of suppressing speech, but not all will be relevant to a contract of silence dispute. First Amendment jurisprudence, for instance, speaks volumes about efforts to suppress speech, but should such jurisprudence be relevant to a contractual dispute that does not involve government action? Similarly, limitations on tort liability suggest policies favoring speech, but what relevance should tort limitations have for

292 *See supra* note 227 and accompanying text.

293 *See supra* notes 262-66 and accompanying text.

294 C.I.T. Corp. v. Jonnet, 214 A.2d 620, 622 (Pa. 1965) (expressing concern of Justice Musmanno that a proposed rule of contract law would cause "[c]haos . . . [to] envelope the commercial world").

295 *See* FARNSWORTH, *supra* note 4, § 5.2 (noting that "[i]n many instances, the rule that condemns an agreement on grounds of public policy is formulated as a rule of reason instead of an absolute one").

contract? After all, people routinely create contractual obligations where none exist in tort.[296]

i. *Should First Amendment Jurisprudence Be a Source of Public Policy?*

Judicial enforcement of a contract of silence may constitute state action and thus implicate the First Amendment.[297] If so, the policy implications of the First Amendment will be directly imposed on contracts of silence, just as they are in defamation actions. If contracts of silence do not implicate the First Amendment, should courts still look to First Amendment jurisprudence as a source of public policy? For example, a number of First Amendment cases hold that the government cannot terminate employees for speech about a matter of "public concern."[298] Should this jurisprudence be a source of public policy for a court determining whether a private-sector nondisclosure provision unlawfully suppresses speech?

While there is no obvious answer to this question, it is worth noting that courts have previously considered using the First Amendment as a source of "public policy" in other areas of the common law. Two areas of tort law, wrongful discharge and the public disclosure of private facts, are noteworthy examples. Under wrongful discharge law, an employer may be liable if she terminates an at-will employee in violation of a recognized "public policy."[299] In this context, courts have wrestled with whether firing an employee for exercising his free speech rights violates public policy.[300] Does it violate public policy, for instance, if an employer terminates an employee for wearing a Newt Gingrich tee-shirt, or for refusing to say the pledge of allegiance during a company assembly?[301]

The Third Circuit, in venturing a guess as to how Pennsylvania courts would rule on this question, held in *Novosel v. Nationwide Insurance Co.*[302] that the First Amendment could be a source of public policy for the common law of wrongful discharge even in the absence of

296 *See infra* note 310 and accompanying text.

297 *See infra* Part IV.

298 See, for example, *Connick v. Myers*, 461 U.S. 138, 142-46 (1983), *Pickering v. Board of Education*, 391 U.S. 563, 573-75 (1968), and their progeny. The Supreme Court's most recent decision on this topic extended this right to independent contractors who work for the government. *See* Bd. of County Comm'rs v. Umbehr, 116 S. Ct. 2342 (1996).

299 ROTHSTEIN ET AL., *supra* note 243, § 9.9.

300 *See* Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341, 348-55 (1994) (discussing the "handful of cases" that have considered whether it constitutes a wrongful discharge to fire an employee for exercising her freedom of speech).

301 *See id.* at 341 (noting that a "private-sector employer in the United States may fire an employee for the employee's political views").

302 721 F.2d 894, 898-900 (3d Cir. 1983).

any government action. Subsequent courts, however, including Pennsylvania courts, have rejected *Novosel*'s reasoning.[303] The rationale of these courts is often that the First Amendment restrains only government power and, therefore, should not be a source of public policy in situations that do not involve state suppression of speech. As the Supreme Court of Illinois concluded in *Barr v. Kelso-Burnett*, the public policy the First Amendment mandates is that "the power of government, not private individuals, be restricted."[304]

Jurisprudence concerning the private-facts tort has arguably, although less openly, reached a different conclusion. Under this tort, a person may be liable for publicizing personal facts about another.[305] This tort is admittedly different from the wrongful discharge tort because enforcement of the private-facts tort constitutes state action and thus implicates the First Amendment.[306] But even before the First Amendment was invoked in private-facts cases, the common law recognized a First Amendment-like defense to the tort: no liability arises if the information disclosed is "of legitimate concern to the public."[307] As a comment in the *Restatement of Torts* notes, "[t]he common law has long recognized that the public has a proper interest in learning

303 *See* Barr v. Kelso-Burnett Co., 478 N.E.2d 1354, 1356-57 (Ill. 1985); Shovelin v. Central N.M. Elec. Coop., Inc., 850 P.2d 996, 1010 (N.M. 1993); Paul v. Lankenau Hosp., 569 A.2d 346, 348 (Pa. 1990) (arguing no cause of action in at-will relationship for wrongful discharge); *see also* Bingham, *supra* note 300, at 351 (noting that the Third Circuit, in following the lead from the Pennsylvania Supreme Court, "has declined to extend the rule of *Novosel* to cases in which there is no state action").

304 *Barr*, 478 N.E.2d at 1357; *see also Shovelin*, 850 P.2d at 1010 ("[W]e have not found a single case adopting or endorsing the public policy recognized in *Novosel* to support a claim for retaliatory discharge.").

305 *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977).

306 *Compare* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491-97 (1975) (applying the First Amendment to a public disclosure of private-facts claim) *with* Rendell-Baker v. Kohn, 457 U.S. 830, 837-43 (1982) (finding no state action when a private employer terminates an employee for exercising First Amendment rights). *But see* Bingham, *supra* note 300, at 362 (arguing that "state action" occurs "when a state court rejects an employee's claim that a private employer fired him or her in violation of the public policy embodied in the First Amendment").

307 RESTATEMENT (SECOND) OF TORTS § 652D(b); *see also* KEETON ET AL., *supra* note 209, at 859 (explaining that at common law, "the privilege of giving further publicity to existing public figures [and] giving publicity to news, and other matters of public interest" were recoguized as founded on freedom of the press). *See, e.g.*, Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir. 1940), *vacated*, 387 U.S. 239 (1967) (protecting newspaper article about a once famous child prodigy who was still a "public figure" despite his departure from the public arena); Spahn v. Julian Messner, Inc., 221 N.E.2d 543, 544-45 (N.Y. 1966) (stating that the New York courts have liberally construed the state's privacy statute in consonance with the statute's intended remedial purpose, "[b]ut at the same time, ever mindful that the written word or picture is involved, courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest").

about many matters."[308] This common law defense may be based on a public policy emanating from the First Amendment.[309]

Which of these two torts provides the better analogy for a contract of silence dispute? On the one hand, the wrongful discharge tort seems more analogous because, in both discharge and contract actions, private parties determine the content of the suppressed speech. On the other hand, both the private-facts tort and a contract of silence action involve the use of court power to punish speech—one through the imposition of tort liability and the other through the imposition of contract liability. While there may be no definitive answer to this question, the private-facts tort seems to be the more comparable of the two. The decision whether a contract violates public policy does not turn on if private parties selected the terms of the contract; rather, it turns on whether enforcement of a contract is an appropriate use of judicial power. Private-facts jurisprudence addresses the use of judicial power more clearly.

ii. *Should Limitations on Tort Liability Be a Source of Public Policy?*

Another potential source of public policy in a contract of silence dispute is liability limitations on related torts. Of course, it is usually possible to create contract liability where none exists in tort. For example, there is no tort obligation to deliver 100 pounds of cotton, but one can certainly create this obligation by contract. Creation of additional contract obligations is also possible when tort and contract obligations closely overlap. Thus, if one delivers a horse for boarding at a stable, tort law might require the stable owner to take reasonable care of the horse, but one could still, by contract, obligate the owner to provide the horse with the best stable and food.[310]

Nonetheless, situations may arise where limitations on tort liability are based on a public policy that may also be relevant for determining limitations on contract liability.[311] Indeed, we have seen how this

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308 RESTATEMENT (SECOND) OF TORTS § 652D cmt. d.

309 *See* KEETON ET AL., *supra* note 209, at 859 (noting that the privilege of reporting on public figures and on newsworthy events was "founded upon the basic idea of freedom of the press").

310 *See id.* at 663 (noting that "[a] bailee may be liable in tort for failure to take ordinary precautions against the destruction of the goods by fire, but the breach of an agreement to keep a horse in a separate stall or to store butter at a definite temperature is a matter of contract only").

311 Tort law is already an important basis for public policy limitations on freedom of contract. For instance, contracts that attempt to exonerate a party for intentional or reckless tortious conduct are unenforceable, and those that attempt to exonerate a party for negligent conduct are unenforceable on grounds of public policy under certain circumstances. *See* RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981); *see also id.* § 192 (contracts to commit a tort are unenforceable). In these instances, parties are attempting to

occurs with employment contracts containing nondisclosure provisions.[312] When courts determine whether a contractual nondisclosure provision violates public policy as an unlawful restraint of trade, they often ask whether the contract is protecting information beyond that which the trade secret tort protects.[313] Tort law, in effect, tells courts what information an employer may legitimately seek to monopolize. When a contract protects information other than trade secrets, it violates this public policy choice by attempting to monopolize information that tort law, through its withholding of liability, suggests should be available for competitive use.[314]

If limitations on tort liability suggest public policy limitations for contracts that restrain trade, they may similarly suggest limitations for contracts that restrain speech. Indeed, tort law is rich with examples of liability limitations based on a public policy of protecting free speech. The tort of defamation, for example, requires that a defamatory statement be false to be actionable,[315] reflecting a public policy that favors the protection of truthful speech.[316] This policy-based limitation on tort liability may also suggest a policy basis for limiting liability on contracts concerning comparable subject matter, such as a contract in which a party promises not to disparage someone even if the statements are true. Similarly, the private-facts tort immunizes

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use contracts to opt out of liability that would otherwise exist at tort, and the question is whether the public policies that underlie the tort liability should prohibit these contractual attempts at exoneration. By contrast, this Article considers whether limitations on tort liability should ever suggest public policy limitations on the ability of private parties to create liability by contract.

312 *See supra* notes 226-29 and accompanying text.

313 *See supra* note 228 and accompanying text.

314 *See supra* notes 226-29 and accompanying text.

315 *See* KEETON ET AL., *supra* note 209, at 839 (noting that truth was a defense at common law but that the burden of proving truth was on the defendant); *see also* Zimmerman, *supra* note 38, at 307 (examining English and early American defamation cases and finding that both "seemed affirmatively to protect truthful but discreditable speech, at least from civil liability"). In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the Supreme Court held that the Constitution required that the burden of proving truth or falsity be on the plaintiff, at least when there is a media defendant and the defamatory remarks concerned an issue of public concern. *See also* SMOLLA, *supra* note 158, § 11.01[4][b] (discussing the *Hepps* decision).

316 *See* KEETON ET AL., *supra* note 209, at 840. Keeton states that the rule that truth was not a defense

> was taken over by the early American decisions along with the rest of the common law of defamation; but it was so obviously incompatible with all public policy in favor of free dissemination of the truth that it has been altered by statute in nearly every state, usually to make truth a complete defense, provided that it is published with good motives and for justifiable ends.

Id.; *see also* Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 851-52 (1984) (discussing the shift of the burden to show falsity); Roy Robert Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43 (1931) (discussing the history and policies behind the truth defense).

from liability disclosures of private facts about an individual if the information is a matter of "legitimate public concern."[317] This tort law limitation may likewise suggest a public policy limitation on contracts that seek to suppress private but newsworthy information.

Although the precise extent to which public policy choices made in tort law should inform policy determinations in contract is not clear, courts should consult tort law when considering the enforceability of a contract of silence because these contracts often protect confidentiality interests under the same circumstances as a corresponding tort. Thus, tort law will often protect trade secret information that contract law often protects.[318] Likewise, both contract and tort law often protect personal privacy interests.[319] In each of these instances, a contract will merely embody the decision of private parties regarding what information should be confidential. The public interest in access to information plays no role in the parties' bargaining process.[320]

By contrast, the relevant tort law will reflect a policy-based decision regarding what information is legitimately kept private, reflected by the imposition of liability for disclosure, and what information is free for disclosure, reflected by the withholding of liability. Surely, this policy-based choice between confidentiality and disclosure interests can be of some assistance in determining whether a comparable privately-made choice violates public policy.

The fact that damages in contracts of silence actions are more tort-like than contract-like further supports consultation of tort law in contracts of silence cases. Parties suing for breach of a contract of silence do not typically seek damages for their lost bargain; rather, they seek damages for the injuries resulting from the breaching party's wrongful disclosure,[321] especially when the contract of silence sought to protect reputational or privacy interests.[322] The similarity of damages in the respective tort and contract actions reinforces the notions that the two protect comparable interests and that comparable public policy considerations should govern them.

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317 RESTATEMENT (SECOND) OF TORTS § 652D(b) (1977). *See generally* Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147 (1996-97) (discussing a test for information of legitimate public concern).

318 *See supra* notes 21-26, 205-09 and accompanying text.

319 *See supra* notes 39-49, 287 and accompanying text.

320 *See supra* notes 82-84 and accompanying text.

321 *See supra* notes 137-41 and accompanying text.

322 *See supra* notes 142-44 and accompanying text.

iii. *The Interrelation of These Arguments with the Test for Evaluating Contracts of Silence*

How do these discussions interrelate with the test for determining when contracts of silence violate public policy? The answer is that the way in which a court will apply the test may depend on how willing the court is to use the more tangentially related areas of law as sources of public policy. The more willing a court is to allow either First Amendment jurisprudence or policies limiting tort liability to influence it's decision, the more likely the court is to find instances in which a contract of silence is unenforceable because the public interest in speech outweighs a party's privacy interest. If a court finds these sources of public policy irrelevant to its analysis, it is more likely to narrowly define the public interest in speech and to uphold contracts of silence.

As courts determine how generously to extrapolate public policy limitations from other areas of law, they should pause to consider how courts have aggressively used public policy to protect economic markets from harmful contractual restraints.[323] Courts should consider whether they should use the same rigor that they have employed to protect economic markets to protect the marketplace of ideas from harmful restraints.[324] For example, the dissent in *Snepp* may have been correct in arguing that an employer should not be able to contractually suppress an employee's speech unless it serves a "legitimate" employer interest,[325] but the restraint of trade cases the dissent cited were not the proper source of authority for this proposition. Courts could still create this authority, however, just as they have created the restraint of trade jurisprudence, if they are willing to liberally define public policy limitations on the enforcement of contracts of silence.

2. *Applying the Test: Selected Examples*

This Section will illustrate how to apply the proposed test to a variety of contracts of silence. The contracts selected for examination are those that will likely raise public policy concerns.

a. *Contracts to Conceal Tortious Conduct*

Contracts to conceal tortious conduct may likely violate public policy. The public interest in disclosure of information about tortious conduct is fairly compelling, particularly if disclosure is made to an injured party. The primary question is whether a sufficiently powerful

323 *See, e.g.*, FARNSWORTH, *supra* note 4, § 5.3 ("One of the oldest and best established of the policies developed by courts is that against restraint of trade."); MURRAY, *supra* note 19, § 98 (discussing public policy limitations on contracts in restraint of trade).

324 *See generally* SMOLLA, *supra* note 158, § 2.02 (discussing the "marketplace of ideas" as a theory underlying the First Amendment).

325 Snepp v. United States, 444 U.S. 507, 519 (1980) (Stevens, J., dissenting).

confidentiality interest can ever override public interest concerns. A simple hypothetical demonstrates how the public interest in disclosure can outweigh any competing confidentiality interest. Imagine that one neighbor has negligently broken another neighbor's window in full view of a third party. If the negligent neighbor pays the witness for promising not to tell the injured neighbor, should a court enforce the contract?

On the one hand, the public interest in not inhibiting the witness's speech is fairly compelling. Tort law itself evidences this public interest—tort law exists so that individuals who have suffered wrongs can receive compensation for their injuries.[326] Contracts suppressing information about tortious conduct frustrate this public policy by creating barriers for tort victims attempting to identify wrongdoers and thereby vindicate their rights.

Tort law is already an important source of public policy limitations on private contracting. Contracts to commit a tort are unenforceable,[327] including contracts to conceal information to commit a fraud.[328] Courts also carefully police contracts that exonerate a party from tort liability out of concern that such contracts may encourage tortious behavior.[329] A court could conclude that these same public policy concerns should apply to contracts concealing information about tortious conduct. Indeed, contracts concealing torts can encourage tortious behavior by giving tortfeasors confidence that no one will discover their actions.

By contrast, it is difficult to find in the hypothetical a legitimate confidentiality interest in suppressing speech regarding tortious conduct. Although the negligent neighbor has the ordinary interests in enforcing his contract—a failure to enforce the contract will frustrate

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326 *See* KEETON ET AL., *supra* note 209, at 5-6 (describing tort law as being "directed toward the compensation of individuals . . . for losses which they have suffered within the scope of their legally recognized interests").

327 *See* RESTATEMENT (SECOND) OF CONTRACTS § 192 (1981) (providing that "[a] promise to commit a tort or to induce the commission of a tort is unenforceable on grounds of public policy"); *see also* FARNSWORTH, *supra* note 4, § 5.2 (stating that contracts to commit a tort are not enforceable).

328 *See* 6A CORBIN, *supra* note 35, § 1455. Corbin states that "[a] bargain is illegal if it is made for the purpose of defrauding one or more third persons, or if its terms are such that it will have such an effect," and subsequently notes that "[t]here may be no public or private duty to disclose damaging facts about a person or a corporation; but a bargain not to make such a disclosure is illegal if for the purpose of bringing off a profitable sale of shares or other property." *Id.*; *see also* RESTATEMENT (FIRST) OF CONTRACTS § 577 illus. 4 (1932):

> A desires to buy land from B at a low price. C is aware of facts which, if told to B, will induce him to refuse to sell for such a price. A promises C $500 if C will not tell B the facts in question. C does not tell B. The agreement is illegal.

329 *See* RESTATEMENT (SECOND) OF CONTRACTS § 195.

his expectations, and his money will unjustly enrich the witness[330]—he still lacks a legitimate privacy interest for wanting to suppress the information. His sole motivation is to conceal his wrongdoing, an interest a court is unlikely to recognize.

Given the absence of a legitimate interest in suppressing the speech and a compelling public interest in disclosure, a court should not enforce the hypothetical contract. A court could either leave the parties where it found them, or give restitutional relief to the negligent neighbor by requiring the witness to return his money.[331] While the resolution of this hypothetical is simple, the hypothetical contract may differ from either a settlement agreement, in which a plaintiff promises not to publicize information about a manufacturer's defective product, or an employment contract, like Wigand's contract with Brown & Williamson.[332]

i. *Employment Contracts*

Should the analysis of the hypothetical apply equally to an employment contract in which an employee promises not to disclose information about his employer's tortious conduct? The public interest in disclosure seems to be the same as in the hypothetical. The sole question is whether a competing confidentiality interest now counterbalances this public interest. In other words, does an employer have a legitimate interest in suppressing information that a negligent neighbor lacks?

An employer hoping to enforce such a contract may argue that employers do have a legitimate interest in controlling employee disclosures. If companies are to operate effectively, employers must be able to share sensitive information with their employees without fear that the employees will divulge the information.

Both agency and trade secret law support this confidentiality interest. Agency law recognizes this interest by including an obligation not to disclose confidential information "to the injury of the principal" as part of an agent's duty of loyalty.[333] Similarly, trade secret law recognizes this interest by providing that an employee is sometimes liable for disclosing confidential information.[334]

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330 *See supra* notes 196-98 and accompanying text.

331 *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 197-98. Restitutional relief seems unlikely in this case because denial of this relief is not likely to cause a disproportionate forfeiture, and the negligent neighbor was not excusably ignorant of his wrongful behavior. *See id.*

332 *See supra* note 8 and accompanying text.

333 RESTATEMENT (SECOND) OF AGENCY § 395 (1958); *see also supra* note 210 and accompanying text.

334 *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 (1995); *see also supra* notes 205-08 and accompanying text.

Given both the employer's legitimate interest in confidentiality and the public's interest in disclosure, how should a court decide whether to enforce such a contract of silence? In this situation, a court should consult other areas of law for guidance, especially because other areas of law have already considered an employee's obligation of confidentiality to his employer. Trade secret and agency law may indicate both an employer's legitimate confidentiality interest and the limits of this interest.

Imagine an employment contract that forbids an employee from disclosing that his employer harmed a third party. A court that is unsure whether the employer's confidentiality interest should override the public interest in disclosure of this information could look to agency and trade secret law for guidance. If a court followed this approach, it would likely conclude that employers have no legitimate interest in suppressing information about their tortious conduct. While agency and trade secret law may not explicitly address this point, neither seems to impose liability on an employee for such disclosure.

Agency law, for example, provides that an agent should not disclose information "to the injury of the principal," but that he may disclose confidential information "in the protection of a superior interest . . . of a third person."[335] The only illustration of this exception in the *Restatement (Second) of Agency* concerns the disclosure of criminal conduct,[336] but one of the few cases to address the issue, *Willig v. Gold*,[337] also held that an agent does not have a fiduciary duty to hide information about his principal's tortious behavior. In *Willig*, a broker whom the plaintiff hired disclosed to the plaintiff's insurer that the plaintiff had been making misrepresentations to the insurer.[338] The plaintiff subsequently sued the broker for breaching his fiduciary obligations. In upholding judgment for the broker, a California appellate court spoke clearly: "we are sure that [no case] can be found, that [holds] an agent is under a legal duty not to disclose his principal's dishonest acts to the party prejudicially affected by them."[339]

Similarly, a court is unlikely to protect information about an employer's tortious conduct as a trade secret. The *Restatement of Unfair*

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335 RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f.

336 *Id.*; *see also* Phillip I. Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry*, 24 OKLA. L. REV. 279, 288-89 (1971) (arguing that, "except in the single area of 'crime,' the *Restatement* [of Agency] provides no support for the view that [an] employee may disclose non-public information about his employer . . . in order to promote the superior interest of society," but nevertheless noting that the *Restatement* was primarily drafted to protect economic interests and may therefore not be useful in determining the legitimacy of an agent's public interest disclosures).

337 171 P.2d 754 (Cal. Dist. Ct. App. 1946).

338 *Id.* at 755.

339 *Id.* at 757.

Competition defines a trade secret as "any information that can be used in the operation of a business" and that affords to its owner "an actual or potential economic advantage over others."[340] Information concerning an employer's tortious conduct does not obviously satisfy either of these elements: it is unlikely to be "used" in the operation of the business,[341] and, although economic harm may result if the employee reveals the information, this harm does not emanate from the loss of a competitive advantage. The Supreme Court seemed to acknowledge this distinction in *Ruckelshaus v. Monsanto Co.*:

> We emphasize that the value of a trade secret lies in the competitive advantage it gives its owner over competitors. . . . If . . . a public disclosure of data reveals, for example, the harmful side effects of the submitter's product and causes the submitter to suffer a decline in the potential profits from sales of the product, that decline in profits stems from a decrease in the value of the pesticide to consumers, rather than from the destruction of an edge the submitter had over its competitors, and cannot constitute the taking of a trade secret.[342]

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340 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995).

341 Research regarding the potentially harmful effects of an employer's products may be an exception. For example, federal laws require manufacturers of drugs, pesticides, and other substances to conduct costly studies on the health and safety effects of their products. Manufacturers must submit these studies to the appropriate federal agency before the agency can clear the products for public sale. Such information is most likely protected as a trade secret because of the competitive advantage it gives to the company who produced the studies. As McGarity and Shapiro have noted, strictly applying the common definition of trade secret "would classify virtually all undisclosed health and safety testing data as trade secrets since such data invariably give the owner a competitive advantage where competitors cannot market the same product without reproducing the data." McGarity & Shapiro, *supra* note 214, at 862 (arguing that despite the fact that this information gives companies a competitive advantage, these companies should nevertheless disclose the information for the public's benefit, and legislatures should take other measures to protect a company's competitive advantage such as preventing their competitors from using the data in their own submissions to government agencies).

342 467 U.S. 986, 1011 n.15 (1984). Wright and Graham quote this passage and conclude that the "competitive advantage" that trade secret information must afford "means a legitimate one, not simply any advantage." 26 WRIGHT & GRAHAM, *supra* note 213, § 5644, at 352. *Stork-Werkspoor Diesel V.V. v. Koek*, 534 So. 2d 983 (La. Ct. App. 1988), demonstrates that this protection will only be afforded to deserving claimants. In *Koek*, a ship engine manufacturer, SWD, sued a former employee, Koek, for consulting with cargo owners who had sued the manufacturer claiming that a ship containing their cargo sank because of a defective engine. *Id.* at 985. The court, in holding that the employee could not be liable under Louisiana's Trade Secret Act because the information the employee disclosed did not constitute a trade secret, stated: "Although the information sought will certainly be of economic advantage if [the cargo owners] prevail in their federal suit, that advantage does not derive from use of the information in an unfairly competitive manner." *Id.* at 986; *see also* McGrane v. Reader's Digest Ass'n, Inc., 822 F. Supp. 1044, 1052 (S.D.N.Y. 1993) ("Disclosures of wrongdoing do not constitute revelations of trade secrets which can be prohibited by agreements binding on former employees."); *cf.* Cipollone v. Liggett Group Inc. 106 F.R.D. 573, 577 (D.N.J. 1985) (lifting part of a protective order that forbid the plaintiffs from disclosing information about the defendant tobacco company's knowledge of the effects of smoking and its efforts to conceal this knowledge, and stating that "[t]hese mat-

Employers dissatisfied with this balance of confidentiality and disclosure interests might redirect a court to jurisprudence concerning the lawful termination of an at-will employee. Both whistleblower statutes and wrongful discharge jurisprudence protect employees terminated for reporting illegal activities of their companies.[343] This jurisprudence arguably reflects a balance between an employer's legitimate expectation in controlling information and the public's disclosure interest. While this jurisprudence protects employees who reveal criminal conduct to government authorities, it does not clearly protect employees who reveal tortious conduct.[344] An employer thus might argue that this jurisprudence provides a model of where to strike the balance between an employer's confidentiality interest and the public's disclosure interest.

Discharge jurisprudence, however, is not the appropriate model for resolving contract of silence cases because discharge cases do not give an employer the right to prevent employee speech. These cases stand for the sole proposition that an employer can terminate an employee whose speech it dislikes. This right differs from a right to enjoin an employee from speaking or a right to receive damages if the employee speaks. However, these are the remedies that an employer would seek in a contract action.[345]

By contrast, agency and trade secret law more closely approximate a contract action because both would impose penalties on an employee for speaking. Indeed, in *Lachman v. Sperry-Sun Well Survey-*

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ters may be private and their disclosure may prove embarrassing and incriminating, but that alone would not be sufficient to bar them from the public and the press"). *But see* Southwestern Energy Co. v. Eickenhorst, 955 F. Supp. 1078 (W.D. Ark. 1997) (holding that an attorney's use of a former client's information in bringing a class action lawsuit against the client violates the Arkansas Trade Secret Act).

343 *See supra* notes 243-44 and accompanying text.

344 Whistleblower statutes applicable to private sector employees are often applicable only to disclosures of illegal conduct or regulatory violations made to government agencies. *See* ROTHSTEIN ET AL., *supra* note 243, § 9.12, at 298. Similarly, authority in the wrongful discharge jurisprudence supports protection of employees who disclose an employer's wrongdoing to a client or customer, but it is limited. *See id.* at 282. Whistleblowers who report to the press are generally not protected. *See id.*; *see also* Brown v. Hammond, 810 F. Supp. 644 (E.D. Pa. 1993) (terminating a paralegal for revealing to clients an employer's improper billing practices did not violate public policy); PAUL H. TOBIAS, LITIGATING WRONGFUL DISCHARGE CLAIMS § 5.14 (1996) ("The decisions concerning whistleblowers who report non-criminal misconduct are mixed.").

345 Two cases illustrate how courts can more narrowly construe public policy in a wrongful discharge context than in a contracts context. In *Shovelin v. Central New Mexico Electric Cooperative, Inc.*, 850 P.2d 996 (N.M. 1993), the court concluded that an employee failed to state a claim of wrongful discharge when he was terminated after his election to become mayor of a small town. The court rejected the plaintiff's argument that his termination violated a public policy favoring his right to run for office. *Id.* at 1009-11. By contrast, in *Davies v. Grossmont Union High School District*, 930 F.2d 1390 (9th Cir. 1991), the court relied on a similar public policy in refusing to enforce a settlement agreement provision in which a former teacher promised not to run for public office in a school district.

ing Co.,[346] one of the few contract cases to consider whether an employer can contractually suppress information about its tortious conduct, the *Willig* agency decision featured prominently.[347] In *Lachman*, the owner of an oil and gas company hired the defendant to perform a directional survey of its well.[348] The contract included a provision that "forbade the defendant to communicate information concerning the survey or well to any third party."[349] The defendant subsequently learned from the survey that the oil company was taking oil from adjoining property, and the defendant's employees later notified the property owners.[350] The oil company then sued the defendant for breaching the contract's confidentiality provision.

The *Lachman* court cited an Oklahoma decision, *Singer Sewing Machine Co. v. Escoe*,[351] for the proposition that contracts to conceal a crime are not enforceable.[352] Although the court acknowledged that the oil company's actions may not have been criminal, it concluded that the *Singer* rule should apply even if the company's actions were only tortious:

> [T]he same misappropriation, minus the element of guilty knowledge, can render the wrongdoer free of criminal responsibility, but the injury worked on the third parties may be the same. It is this injury that the law has an interest in correcting. . . . *We do not see any indication . . . that the "criminal" as opposed to the "tortious" nature of the injury is essential to the rule in Singer, and we apply it here.*[353]

The *Lachman* court's conclusion that a contract to conceal tortious conduct is unenforceable perhaps strikes the best balance be-

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346 457 F.2d 850 (10th Cir. 1972).

347 *Id.* at 852.

348 *Id.* at 851.

349 *Id.*

350 *See id.*

351 64 P.2d 855 (Okla. 1937).

352 *Lachman*, 457 F.2d at 853.

353 *Id.* (emphasis added). Contracts that prevent employees from discussing an employer's tortious conduct in the context of formal litigation are particularly vulnerable to a public policy challenge. *See* Hamad v. Graphic Arts Ctr., Inc., 72 Fair Empl. Prac. Cas. (BNA) 1759 (D. Or. Jan. 3, 1997) (refusing to enforce a confidentiality provision that prevented a former employee from testifying in a civil rights action); Smith v. Superior Court, 49 Cal. Rptr. 2d 20, 26 (Cal. Ct. App. 1996) ("agreements to suppress evidence have long been held void as against public policy, both in California and in most common law jurisdictions") (citations omitted); RESTATEMENT (FIRST) OF CONTRACTS § 554 (1932) (stating that bargains to suppress evidence are unenforceable); Solomon Moore, *Firms' Suit Against Worker Dismissed*, L.A. TIMES, May 16, 1997, at B1 (dismissing a lawsuit against a former State Farm employee who disclosed in sworn testimony that State Farm had forged customer signatures, and stating: "Any contract which acts to require an employee to remain silent as to her employer's fraud is not just and reasonable."). *Cf.* State Farm Fire and Cas. Co. v. Superior Court, 62 Cal. Rptr. 2d 834 (Cal. Ct. App. 1997) (finding that employee's testimony was not protected by the attorney-client privilege because it fell under the crime/fraud exception).

tween an employer's interest in his employees' loyalty and the public interest in uninhibited speech concerning tortious conduct. The law of wrongful discharge vindicates the public interest in ensuring effective employer-employee relations. If an employer distrusts his at-will employee, he can fire him. Conversely, the limitation on an employer's right to punish an employee for speech protects the public interest in uninhibited speech. An employer may be able to fire an employee who discloses information regarding the employer's tortious conduct, but he cannot sue the employee for such statements.[354]

Of course, the rule's appropriateness will depend on case-specific facts. Contractually providing that an employee may not inform a victim of his employer's theft[355] is quite different from providing that an employee cannot disclose a company's research results—even if this research suggests that the company's products are dangerous—or providing that an employee cannot disclose information about tortious conduct found in a company's self-evaluation study.

In these latter instances, an employer has a more compelling argument for suppressing the information. A court forced to decide a contract of silence case would have to determine whether this heightened confidentiality interest now sufficiently outweighs any countervailing public interest in disclosure. The result of this balance will depend on the facts of each case and ultimately on the court's sense of what the public welfare mandates. Additionally, related areas of law can supply guidance for this decision. For example, the fact that courts sometimes consider health and safety studies a trade secret that may help a court to determine whether to enforce an employment contact suppressing such information.[356]

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354 This does not suggest that employees should be denied protection against discharge for disclosing an employer's tortious conduct. Indeed, in many instances either a whistleblower statute or more liberal wrongful discharge decisions may protect an employee. *See* Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 116-19 (1995) (discussing the scope of protected speech in private sector employment); *see also* D'Isidori, *supra* note 187, at 234-36 (recommending that legislatures ban at-will employment for physicians as a means of insuring that physicians will be able to speak freely with their patients).

355 This seems to be the rule of *Lachman*.

356 *See supra* note 341 and accompanying text. A court considering the strength of an employer's confidentiality interest in a self-evaluation report could look to the literature and case law concerning the evidentiary privilege for self-evaluations. *See generally* Ann C. Hurley & Jonathan S. Green, *Environmental Audit Privilege: Recent State Legislation and the Common Law Self-Evaluative Privilege*, *in* THE 24TH ANNUAL CONFERENCE ON ENVIRONMENTAL LAW (1995); David P. Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 HARV. J. ON LEGIS. 113 (1988) (proposing a legislative model for privilege in self-evaluation material); Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083 (1983) (discussing ways in which courts have applied the privilege).

ii. *Settlement Agreements*

Litigation settlement agreements are also contracts of silence that can suppress evidence of tortious conduct. The typical case arises when an injured plaintiff brings a products liability suit against a manufacturer. Discovery ensues during which the plaintiff learns of information indicating the dangerousness of the defendant's products. Hoping to prevent further dissemination of this information, the defendant makes the plaintiff a generous settlement offer, but only on the condition that the plaintiff returns all discovery materials and promises not to discuss the case with the public or the media.[357]

Should a court enforce such a promise? If a court followed the proposed test, the answer would depend on whether the public interest in the suppressed information clearly outweighs the interest in enforcing the contract. Because a compelling public interest in disclosure exists, the key question is whether a sufficiently powerful confidentiality interest counterbalances this public interest.

Here, too, a court may look to other areas of law for guidance. Indeed, although contract law precedent on the enforceability of such confidentiality provisions is sparse,[358] there is considerable authority in civil procedure on the legitimacy of secret settlements.[359] The reason is that parties to secret settlements often ask courts to "seal" their agreements by incorporating the agreements into a protective order.[360] Sealing settlements is advantageous because parties can then rely on a court's contempt power to enforce the agreement instead of bringing a separate breach of contract action.[361]

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357 *See* Luban, *supra* note 13, at 2649.

358 *See, e.g.*, EEOC v. Astra USA, Inc., 94 F.3d 738, 744-45 (1st Cir. 1996) (holding unenforceable settlement agreements that prevent employees from communicating with the EEOC); EEOC v. Cosmair, Inc., 821 F.2d 1085, 1090 (5th Cir. 1987) (voiding a settlement agreement provision that prevented an employee from filing a charge with the EEOC); Chambers v. Capital Cities/ABC, 159 F.R.D. 441, 446 (S.D.N.Y. 1995) (holding that a confidentiality provision in an age discrimination settlement agreement cannot prevent the employee from being deposed in a separate age discrimination action); Bowman v. Parma Bd. of Educ., 542 N.E.2d 663, 666-67 (Ohio Ct. App. 1988) (refusing to enforce a settlement agreement that forbid a school district from disclosing a teacher's pedophilia to the school district that subsequently hired him); Hamad v. Graphic Arts Ctr., Inc., 72 Fair Empl. Prac. Cas. (BNA) 1759 (D. Or. Jan. 3, 1997) (holding that confidentiality provisions in settlement agreement could not prevent former employee from being deposed in a separate action).

359 Most of this litigation occurs when third parties seek access to a judicially sealed settlement. *See* Alan B. Morrison, *Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure; Where Does the Balance Lie?*, 24 U. RICH. L. REV. 109, 117 (1989); Béchamps, *supra* note 34, at 119-20; Patrick S. Kim, Note, *Third-Party Modification of Protective Orders Under Rule 26(c)*, 94 MICH. L. REV. 854, 854-57 (1995).

360 *See* Béchamps, *supra* note 34, at 118-19.

361 *See id.* at 119 (noting that "[a]lthough the parties may not be required by statute to file . . . [their settlement] agreement[ ] with the court, the parties will frequently opt to do

Not surprisingly, commentators have hotly debated the legitimacy of sealing settlement agreements. Those who condemn the sealing of agreements claim that it prevents the disclosure of important health and safety information, as well as other information in the public interest.[362] Those who support sealing agreements make a variety of arguments based on administrative concerns. Professor Arthur Miller has argued that many settlements would not occur without an agreement to keep them confidential, and that the court system could not bear to have all of these actions proceed to trial.[363] Advocates have also expressed concern that courts will deny parties broad discovery rights if they are unsure of their ability to prevent subsequent disclosure of sensitive information.[364] Advocates of sealing have also expressed concern for the parties' privacy rights. Some worry that courts, in allowing disclosure of health and safety information, will inadvertently allow the disclosure of material that deserves to be kept confidential, including trade secret information or personal health information.[365] Proponents also suggest that denying plaintiffs the right to sell their silence may deprive plaintiffs of their best bargaining chip for achieving a favorable settlement.[366]

These arguments translate easily into the proposed balancing test for deciding whether to enforce a contract of silence. The arguments that opponents of sealing make support the public's disclosure interest in denying enforcement to a confidentiality provision, and the administrative and privacy interests that proponents of sealing cite support the confidentiality interests in enforcing such a provision.[367]

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so in order to obtain a consent decree that will enable them to enforce the agreement by use of the court's contempt power without filing an entirely new lawsuit").

362 *See* Luban, *supra* note 13; Béchamps, *supra* note 34.

363 Miller, *supra* note 13, at 486 ("Our civil justice system could not bear the increased burden that would accompany reducing the frequency of settlement or delaying the stage in the litigation at which settlement is achieved. Thus, absent special circumstances, a court should honor confidentialities that are bargained-for elements of settlement agreements.").

364 *See id.* at 483-84.

365 One example is disclosure of the fact that an individual has AIDS. *See* Marcus, *supra* note 13, at 482.

366 Luban argues:

> The biggest worry about sunshine regimes is that secret settlements may be the only way that a weak plaintiff who has suffered serious harm can obtain compensation. If judges make secrecy agreements unenforceable, a weak plaintiff may not receive a serious settlement offer and the case goes to trial. Since plaintiffs can demand a generous settlement in return for secrecy, and trials are expensive, banning secret settlements may cost plaintiffs money.

Luban, *supra* note 13, at 2657.

367 In contracts cases, the public interest in settling claims can sometimes override the public interest in disclosure. Recall that the *Model Penal Code* suggests that courts should enforce contracts between criminals and their victims to settle the victims' civil claims even if the contracts conceal a crime. *See supra* notes 263-66 and accompanying text.

Identifying these interests, however, does not tell a court which interest outweighs the other. That answer would obviously depend on the facts of the given case, but a court faced with a contract dispute can still receive guidance from examining how courts have balanced these interests in the civil procedure context.

If a court sought such guidance, it would find 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.[368] Part of this movement has occurred in response to legislation. Texas and Florida, for instance, have enacted laws that limit the ability of their courts to seal settlements, particularly when sealing an agreement would suppress information impacting public health and safety.[369] Important judicial decisions, such as *Pansy v. Borough of Stroudsburg*,[370] have also heralded this trend. In *Pansy*, the Third Circuit harshly criticized the common practice of automatically sealing settlements whenever parties requested it:

> [S]imply because courts have the power to grant orders of confidentiality does not mean that such orders may be granted arbitrarily. Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders. Because defendants request orders of confidentiality as a condition of settlement, courts are willing to grant these requests in an effort to facilitate settlement without sufficiently inquiring into the potential public interest in obtaining information concerning the settlement agreement.[371]

To ensure that a court adequately considers the public interest when deciding whether to seal a settlement, the *Pansy* court concluded that courts should not grant confidentiality orders applying to settlements unless "good cause" exists.[372] To make this determination, the *Pansy* court suggested that courts engage in a "balancing process" that weighs the interests in granting the confidentiality order against the interests in denying such an order.[373] Among the factors a

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368 Perhaps most notable is a trilogy of Third Circuit decisions. *See* United States v. A.D. PG Publ'g Co., 28 F.3d 1353 (3d Cir. 1994); Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994); Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157 (3d Cir. 1993); *see also* Cerisse Anderson, *Judge Refuses to Seal Documents Filed in Discovery in New York*, N.Y.L.J., Mar. 28, 1997, at 1 (discussing *Matter of Anderson Kill & Olick*, a New York Supreme Court case).

369 *See* FLA. STAT. ANN. § 69.081 (West Supp. 1998); TEX. R. CIV. P. ANN. 76a (West 1996).

370 23 F.3d 772 (3d Cir. 1994).

371 *Id.* at 785-86.

372 *Id.* at 786.

373 *Id.* at 787.

court should consider in granting a confidentiality order are a party's privacy interest and the need for confidentiality to settle a case.[374] While acknowledging these interests, the court also qualified their significance. The court stated that a party that is a "public person" has diminished privacy interests, and that orders to protect a party from "*non*-monetizeable" harm such as embarrassment are not appropriate for business enterprises "whose primary measure of well-being is presumably monetizeable."[375] Likewise, the court warned that "[d]istrict courts should not rely on the general interest in encouraging settlement, and should require a particularized showing of the need for confidentiality in reaching a settlement."[376] In describing the interests in denying a confidentiality order, the *Pansy* court said: "If a settlement agreement involves issues or parties of a public nature, and involves matters of legitimate public concern, that should be a factor weighing against entering or maintaining an order of confidentiality."[377]

Certainly, 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. The *Pansy* decision lucidly articulates both the factors a court can consider in such an analysis and some important qualifications to these factors.

One could argue, however, that a court's decision to seal a settlement is different from a decision to enforce a private settlement agreement under contract law. The *Pansy* decision itself suggests that if parties cannot establish the good cause a confidentiality order requires, they can still "have the option of agreeing privately to keep information concerning settlement confidential, and may enforce such an agreement in a separate contract action."[378] Yet, it is unclear why a court would be willing to use its power to enforce a contract of silence if it were unwilling to do the same to enforce a sealed settlement. Professor Luban, for instance, has argued that whether there are "sealed settlements with the blessing of a court" or "secret settlements without the blessing of a court," the "underlying issues are very similar."[379] Indeed, the Texas sunshine law creating a "presumption of openness" for court records applies to both officially filed settlement agreements as well as to "settlement agreements not filed of rec-

374 *See id.* at 787-88.

375 *Id.* at 787 (quoting Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986)).

376 *Id.* at 788.

377 *Id.*

378 *Id.*

379 Luban, *supra* note 13, at 2650.

ord."[380] Even the *Pansy* decision noted that "[i]n some circumstances, a private agreement to keep terms of a settlement confidential may be unenforceable because it violates public policy."[381]

b. *Contracts to Suppress Disparaging or Embarrassing Information*

Contract and speech interests can collide when parties make contracts to suppress disparaging or embarrassing information. Such contracts occur in both commercial settings, such as an employment contract that forbids an employee from making disparaging remarks about her company or the company's products, and in noncommercial contexts, such as a prenuptial agreement that forbids a spouse from publicly discussing the marriage if the couple later separates.

i. *Employment Contracts*

While employment contracts with antidisparagement provisions may be rare, they do exist. For example, in his contract with Brown & Williamson, Wigand agreed not to make "any statements or communications which could disparage the reputation and integrity of B&W or its employees or its products."[382] Similarly, Dr. Himmelstein promised not to "make any communication which undermines or could undermine the confidence of enrollees, potential enrollees, their employers, their unions, or the public in U.S. Healthcare or the quality of U.S. Healthcare coverage."[383]

How do such provisions fare under the proposed test? To begin with, the public interest in uninhibited speech will vary widely depending upon the nature of the suppressed information. A promise not to make disparaging remarks can cover anything from information about corporate crime to idle gossip about a senior manager.[384]

Even if the public interest in speech is weak, however, there still remains the question whether any legitimate confidentiality interest

380 TEX. R. CIV. P. ANN. 76a(2)(a)(3) (West 1996); *see also* FLA. STAT. § 69.081(4) (Supp. 1996) (stating that "[a]ny portion of an agreement or contract which has the purpose or effect of concealing a public hazard . . . is void, contrary to public policy, and may not be enforced").

381 *Pansy*, 23 F.3d at 788 n.21; *see also* Luban, *supra* note 13, at 2657 (noting that judges can refuse to enforce secret settlement contracts that are contrary to public policy).

382 Wigand Brief, *supra* note 8, at 11. This provision was actually part of a settlement agreement with Wigand and not an employment contract.

383 Woolhandler & Himmelstein, *supra* note 9, at 1706.

384 One can make a powerful argument for disclosure in instances in which a nondisparagement clause seeks to suppress information affecting public health and safety. Indeed, both whistleblower laws and wrongful discharge jurisprudence can provide support for the argument that public policy favors employee disclosure of such information. *See* Nina G. Stillman, *Wrongful Discharge: Contract, Public Policy, and Tort Claims*, *in* 24th ANNUAL INSTITUTE ON EMPLOYMENT LAW, at 313, 347-50 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5219, 1995) (discussing cases in which public health and safety laws have formed the basis of wrongful discharge claims).

outweighs this interest. The strongest argument for suppressing employee speech is the "loyalty" argument: that, in order to function effectively, employers must be able to control employee disclosures of the company's information. Certainly, this argument is convincing if the speech concerns the type of sensitive economic information that other areas of law already acknowledge (i.e., trade secrets and sensitive financial information).[385] However, if embarrassing or disparaging information does not fit into one of these categories, should an employer nevertheless be able to contractually suppress it? Can a television station buy an employee's promise not to comment on the vapidity of the station's programming? Can a car manufacturer buy an employee's promise not to speak about the poor quality of cars built on Fridays?

A variety of laws suggest how a court should balance the competing confidentiality and disclosure interests in these examples. A comparison of discharge law and the tort of defamation illustrates probably the starkest choice between speech and confidentiality interests.

A "discharge" model for balancing disclosure and confidentiality interests suggests that employers have a legitimate interest in curbing their employees' disparaging remarks. The further an employee's remarks move from information about crimes or public health and safety, the clearer it becomes that employers need not tolerate public criticism by employees, even if the revealed information is of public interest. The Supreme Court recognized this notion in *NLRB v. Local Union 1229*,[386] holding that a television station's discharge of employees who publicly complained about the quality of the station's programming did not constitute an unfair labor practice under the National Labor Relations Act.[387] As the Court explained: "There is no more elemental cause for discharge of an employee than disloyalty to his employer."[388]

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385 *See supra* notes 205-20 and accompanying text.

386 346 U.S. 464 (1953).

387 *Id.* at 471-78.

388 *Id.* at 472. The *Local Union 1229* case, better known as the *"Jefferson Standard"* case, did not specifically address the question of whether a discharge was in violation of public policy. Rather, it concerned whether the discharge of the employees violated section 7 of the National Labor Relations Act, which affords to employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157 (1994). As Professor Cynthia Estlund has observed, courts have tended to construe section 7 as protecting employee speech related only to working conditions and not more generally to matters affecting the public interest. Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 921-22 (1992). Although the Court engaged in statutory interpretation, the decision is nevertheless suggestive of how public policy might regard an employee's right to make disparaging or disloyal remarks about her employer. Wrongful discharge jurisprudence similarly tends to deny protection to employees who disparage their employ-

By contrast, a "defamation" model suggests that an employer lacks a legitimate interest in contractually curbing truthful employee speech, even if it disparages the company or its products. By creating liability for defamatory remarks, the tort of defamation protects an employer's interest in preventing false remarks that damage its reputation.[389] At the same time, by precluding liability for truthful remarks, the tort similarly suggests that the public interest in truthful speech overrides an employer's interest in protecting its reputation or that of its products.[390]

The defamation model is probably the better model for deciding a contract of silence case. As previously discussed, wrongful discharge actions are not comparable to breach of contract actions because discharge law addresses only employee termination, and not employee liability for speech.[391] By contrast, defamation law imposes liability on speech per se and, thereby, more closely approximates an action for breach of a contract of silence.

If a court used defamation jurisprudence as a guide for ruling on the enforceability of a nondisparagement clause, it would probably conclude that the clause was unenforceable. Defamation law's immunization of truthful remarks from liability suggests that the public interest in the free flow of information outweighs an employer's interest in controlling damaging remarks about its company. Of course, an employer may still be able to terminate an at-will employee who "badmouths" his company, but he may not be capable of buying an employee's silence with the expectation of enforcing that agreement if the employee breaches.

In contrast, the private-facts tort indicates that individuals have a legitimate interest in controlling the disclosure of information about themselves, even if the information is truthful.[392] Thus, an employ-

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ers, outside of disclosures about illegal activities or activities impacting on the public's health and safety. *See, e.g.*, Clark v. Modern Group Ltd., 9 F.3d 321, 327 (3d Cir. 1993) (finding no wrongful discharge when an employer terminated an employee for protesting the employer's attempt at tax evasion when no actual violation occurred); Brown v. Hammond, 810 F. Supp. 644, 647 (E.D. Pa. 1993) (finding no wrongful discharge when a paralegal was terminated for revealing her employer's improper billing practices to the employer's clients); Wagner v. General Elec. Co., 760 F. Supp. 1146, 1156 (E.D. Pa. 1991) (finding no wrongful discharge of a terminated employee who had disparaged his employer's products and manufacturing methods and stating: "If plaintiff was not fulfilling his duties and was acting contrary to the interests of his employer by undermining the confidence in the defendant's products, it cannot be a violation of public policy to discharge plaintiff").

389 *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 561 (1977) (discussing defamation of a corporation).

390 *See id.* § 558 (stating that liability for defamation requires a statement that is both "false" and "defamatory").

391 *See supra* note 345.

392 *See* RESTATEMENT (SECOND) OF TORTS § 652D.

ment contract that suppresses purely personal, truthful information, such as a contract between a personal secretary and a celebrity, may be enforceable. However, the law of privacy is unlikely to support the enforcement of contracts with business entities, because such entities are not considered to have a right of privacy.[393] The *Pansy* court acknowledged this when it stated that a court should not grant confidentiality orders designed to protect business entities from the disclosure of embarrassing information.[394]

ii. *Contracts to Protect Personal Privacy*

Individuals can use contracts of silence to protect personal privacy interests. For example, parties can use contracts to prevent the disclosure of sensitive health or financial information when this information is shared with a bank, insurance company, or health provider.[395] Parties can also use contracts to suppress disclosures of intimate information by former spouses, reporters, household employees, or video stores.[396]

The list of potential contracts protecting privacy interests is endless, but all such contracts raise the same question of how to balance an individual's privacy interest against the public's interest in information. While the application of the proposed test depends upon the facts of the given case, looking at how lawmakers have balanced these interests in other areas of law provides insight into how a court could balance privacy and disclosure interests.

Here, as in the area of employment contracts, a court would find more than one potentially relevant model. Somewhat ironically, the private-facts tort model is arguably the most speech-protective option.[397] Given the origin and nature of this tort, which imposes liability on a party who publicly discloses highly offensive facts about another, one may expect its jurisprudence to soundly endorse the individual's right to privacy. The reality, however, has been the oppo-

393 *See* Med. Lab. Management Consultants v. American Broad. Cos., 931 F. Supp. 1487, 1493 (D. Ariz. 1996) (concluding that a corporation has no privacy rights); RESTATEMENT (SECOND) OF TORTS § 652I cmt. c (stating that "[a] corporation, partnership or unincorporated association has no personal right of privacy").

394 *See supra* note 375 and accompanying text; *see also* Wauchop v. Domino's Pizza, Inc., 138 F.R.D. 539, 546 (N.D. Ind. 1991) (holding that a protective order should not be granted to a corporation unless it can show that the "embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position."); Miller, *supra* note 13, at 435 (noting that "[c]ourts have limited the types of potential harm to the divulging party that they will consider" in determining whether to grant a protective order and that "damage to a corporation's goodwill or reputation generally is not sufficient to establish a need for confidentiality") (citing Brown & Williamson Tobacco Co. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983)).

395 *See supra* notes 91-93 and accompanying text.

396 *See supra* notes 38-49 and accompanying text.

397 *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977).

site. Courts rarely impose liability for private-facts torts, often because they conclude that the public interest in information outweighs the individual privacy interest.[398] Defendants often successfully raise a "newsworthiness" defense to the tort, which provides that a defendant will not be liable for making disclosures that are of "legitimate concern to the public."[399] Courts have interpreted this defense so broadly that a finding of liability under the tort is a rare occurrence.[400] Many commentators have lamented the ineffectiveness of the tort in protecting privacy interests and have advocated the tort's interment.[401]

While the private-facts jurisprudence may encourage courts to deny enforcement to contracts of silence protecting privacy interests, this jurisprudence is arguably a poor model for deciding contract cases because the idiosyncratic nature of the private-facts tort imposes liability only if private information is "publicized."[402] One consequence of this requirement is that most private-facts actions are brought against the media.[403] Not surprisingly, courts have been re-

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398 *See* Gilles, *supra* note 72, at 7 (noting that the "private-facts tort has not been universally adopted, and even where adopted the number of successful actions has been insignificant") (footnote omitted); Zimmerman, *supra* note 38, at 293 n.5 (stating that, in a survey of state case law up to 1983, the author "found fewer than 18 cases in which a plaintiff was either awarded damages or found to have stated a cause of action sufficient to withstand a motion for summary judgment or a motion to dismiss").

399 RESTATEMENT (SECOND) OF TORTS § 652D(b); *see also* Zimmerman, *supra* note 38, at 350-62 (discussing the evolution of the newsworthiness defense).

400 *See* Harvey, *supra* note 38, at 2409 (stating that the broad interpretation of newsworthiness has "severely limit[ed] the liability of the press"). To the extent that the common law has not eviscerated the private-facts tort, the First Amendment has. Decisions such as *Florida Star v. B.J.F.*, 491 U.S. 524 (1989)—which held that the First Amendment barred civil liability of a newspaper that published a rape victim's name in violation of a state statute—have strongly suggested that the First Amendment may leave little room for liability under the private-facts tort. *See* Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1222-23 (1990) (suggesting that *Florida Star* makes it highly unlikely that a plaintiff could recover in a private-facts tort action); Harvey, *supra* note 38, at 2414 (noting that the Supreme Court's decisions "have adopted increasingly inflexible positions that ultimately render[ ] a plaintiff victory over the press implausible, if not impossible"). Of course, the extent to which the First Amendment has limited the private-facts tort may or may not be relevant to a court attempting to derive the applicable public policy for purposes of deciding a contract of silence case. *See supra* notes 297-309 and accompanying text.

401 *See, e.g.*, Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News and Social Change, 1890-1990*, 80 CAL. L. REV. 1133, 1174 (1992) ("I suggest that the privacy tort be formally interred, and that we look to the concept of breach of confidence to provide legally enforceable protection from dissemination of identified types of personal information."); Zimmerman, *supra* note 38, at 362-65 (advocating the elaboration of privacy law rather than relying on existing tort causes of action).

402 RESTATEMENT (SECOND) OF TORTS § 652D (stating that "one who gives publicity" regarding another's private life is subject to liability).

403 *See* Harvey, *supra* note 38, at 2405-06 (stating that while the publicity requirement might be "pragmatic," it still "assures that the great majority of private-facts cases are necessarily brought against media defendants"). The Supreme Court recognized this fact in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489 (1975), where the Court stated:

luctant to impose liability on media defendants, particularly for a tort that is so vaguely defined that it fails to give media defendants adequate warning regarding actions that will result in liability.[404]

Contract of silence actions, by contrast, are much less likely to chill media speech. One can bring a breach of contract action only against the breaching party, which in most cases is not the media, but rather an individual who promised his silence. A contract action also does not pose the same notice problem that the private-facts tort raises. Liability for breach of contract simply arises when a party fails to do what he promised.

Contract of silence actions are more similar to lawsuits brought under the breach of confidence tort, which a few jurisdictions have recognized, and which a number of scholars have suggested courts should adopt as a replacement for the ill-fated private-facts tort.[405] The breach of confidence tort, which is the primary means for protecting confidentiality interests in England, has developed slowly in the United States.[406] Courts impose liability under the tort when a person discloses information that he received in confidence. Such a confidential relationship can arise in professional relationships, as with doctors or lawyers, but can also occur in an informal setting if the party receiving the information either explicitly or implicitly agrees to keep the information confidential.[407]

In both breach of confidence and contract of silence actions, the duty of nondisclosure arises only because a party has either explicitly or implicitly assumed such a duty. Moreover, in both instances, courts impose liability on the party who breaches a confidence, rather than on the party who subsequently publicizes the disclosed information. Thus, compared with the private-facts tort, the breach of confidence

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> Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent . . . .

Id.

404 *See* Harvey, *supra* note 38, at 2409-13.

405 *See, e.g.*, Gilles, *supra* note 72, at 52-53 (noting that California and New York recognize a "separate but limited" breach of confidence tort, and that other jurisdictions have "toyed" with recognizing the tort); *see also* Bezanson, *supra* note 401, at 1174-75 (advocating a breach of confidence action); Harvey, *supra* note 38, at 2392-95 (same); Vickery, *supra* note 89, at 1468 (same).

406 *See* Gilles, *supra* note 72, at 52-58; Vickery, *supra* note 89.

407 *See* Balboa Ins. Co. v. Trans Global Equities, 267 Cal. Rptr. 787, 797 (Cal. Ct. App. 1990) (stating that a duty of confidence arises when information is "offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others" (quoting Farris v. Enberg, 158 Cal. Rptr. 704, 711 (Cal. Ct. App. 1979))); Tele-Count Eng'rs, Inc. v. Pacific Tel. & Tel. Co., 214 Cal. Rptr. 276 (Cal. Ct. App. 1985) (same).

tort is a better guide for courts in balancing confidentiality and disclosure interests in contract actions.

The breach of confidence tort is also not alone in suggesting that personal privacy interests can override the public interest in access to information. To the contrary, numerous statutory schemes confirm the importance of protecting personal information by establishing rules to prevent the disclosure of such information.[408] For example, an exception to the Freedom of Information Act prevents the disclosure of sensitive personal information.[409] Likewise, the Federal Rules of Civil Procedure authorize courts to enter protective orders to prevent the disclosure of embarrassing personal information.[410]

Even if these laws suggest that courts should enforce most contracts protecting personal information,[411] the public interest in disclosure will still outweigh the interests in enforcement in some instances. Here, too, other areas of law provide guidance. For example, the breach of confidence tort allows the defense of an overriding public interest in the disclosed information.[412] Unlike the exceptions to the private-facts tort, however, this exception has not swallowed the rule. Rather, the exceptions are limited to situations in which a clearly compelling public interest in disclosure exists (i.e., information about criminal or tortious conduct).[413]

In considering the benefits of the proposed test for policing contracts that suppress personal information, it is worth recalling that the *Restatement (First) of Contracts* had its own provision for ruling on the enforceability of such contracts.[414] Section 557 provides: "A bargain that has for its consideration the nondisclosure of discreditable facts . . . is illegal."[415] The drafters may have intended solely that this section deny enforcement to contracts made under duress, but neither

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408 *See* Privacy Act, 5 U.S.C.A. § 552a (West 1996 & Supp. 1997); *see also* Videotape Privacy Protection Act, 18 U.S.C.A. § 2710 (West Supp. 1996) (protecting confidentiality of videotape rentals); 42 U.S.C. § 290dd-2 (1994) (providing for confidentiality of patient records in alcohol and drug abuse treatment programs). *See generally* PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW (1996) (discussing various federal and state laws that protect personal privacy interests).

409 5 U.S.C.A. § 552(b)(6) (West 1996) (listing among the categories of information that the government need not disclose, "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

410 FED. R. CIV. P. 26(c) (authorizing protective orders "to protect a party or person from annoyance, embarrassment [or] oppression").

411 *See, e.g.*, Trump v. Trump, 582 N.Y.S.2d 1008 (App. Div. 1992) (holding that a confidentiality provision in a postnuptial agreement did not violate public policy).

412 *See, e.g.*, Humphers v. First Interstate Bank, 696 P.2d 527, 535 (Or. 1985) (noting when disclosures may be justified in the physician-patient context).

413 *See* Harvey, *supra* note 38, at 2444-49 (discussing public interest exceptions to liability for the breach of confidence tort); Vickery, *supra* note 89, at 1462-68 (same).

414 RESTATEMENT (FIRST) OF CONTRACTS § 557 (1932); *see supra* notes 127-36 and accompanying text.

415 RESTATEMENT (FIRST) OF CONTRACTS § 557.

the plain language of the provision nor its accompanying comments support such a narrow reading.[416] The second *Restatement* did not include a comparable section, but that may simply reflect the second *Restatement*'s preference for not listing specific examples of illegal contracts.[417] Thus, section 557 may remain an accurate statement of the law, and a comparison of section 557 with the proposed test is worthwhile.

Any difference between the proposed test and section 557 turns on the definition of "discreditable facts." If "discreditable facts" are facts that the public has an overriding interest in hearing, then section 557 parallels the proposed test. The dictionary definition of "discreditable" and the illustrations in the *Restatement*, however, suggest that the term is directed at information that casts doubt on a person's reputation. *Webster's*, for instance, defines "discreditable" as "injurious to reputation."[418] Similarly, one of the *Restatement*'s illustrations, a contract between a married man and his mistress in which the mistress promised not to disclose the man's love letters,[419] surely suppresses information that injures the man's reputation, but it may not suppress information in which the public has an overriding interest.[420]

Regardless of how one defines "discreditable facts," the proposed test still seems to be a better device for adjudicating contract of silence cases. The proposed test sidesteps the obvious definitional problem that the term "discreditable facts" raises. More importantly, the proposed test more clearly focuses a court on the interests truly at stake in a contract of silence case: the confidentiality interest in enforcing a contract and the public interest in avoiding the inhibition of the speech by the threat of contract liability. By instructing courts to carefully balance these competing interests, the proposed test maintains the flexible balancing approach that the second *Restatement* advocates.[421]

3. *Why Courts Should Adopt the Proposed Test*

This recommendation of a new policy basis for regulating contracts is necessarily made with some hesitation. No one wants to be Corbin's "demagogue" or "ignoramus" who loudly declares "what makes for the general welfare and happiness of mankind."[422] Even if the recommendation is made with some hesitancy, it is nonetheless

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416 *See supra* notes 132-33 and accompanying text.

417 *See supra* note 135 and accompanying text.

418 WEBSTER'S NEW COLLEGIATE DICTIONARY 323 (1979).

419 RESTATEMENT (FIRST) OF CONTRACTS § 557 illus. 2 (1932).

420 One could argue that this contract conceals a crime (i.e., adultery) and that, therefore, there is an overriding public interest in the suppressed information.

421 *See supra* notes 189-94 and accompanying text.

422 *See supra* note 200 and accompanying text.

made with the conviction that contracts of silence raise important public policy concerns justifying some form of judicial intervention.

Wigand's contract with Brown & Williamson[423] and Himmelstein's contract with U.S. Healthcare[424] illustrate the dangers that unregulated contracts of silence pose. Both of these contracts arguably attempted to prevent important health and safety information from reaching the public, and in both instances, neither party to the contract had a clear incentive to object to this suppression. Wigand and Himmelstein chose to breach the contracts and publicly disclose the suppressed information, but they are exceptional situations, and Wigand paid for his action by having to defend a breach of contract lawsuit.[425]

Such contractual suppressions of speech can threaten the marketplace of ideas in the same way that governmental suppression of speech can. But whereas the First Amendment limits governmental suppression of speech, contractual suppression of speech may not implicate the First Amendment.[426] The question then remains whether restraints should be imposed as a matter of "public policy" even if the Constitution does not require them. Should society tolerate the private suppression of speech because a corporate bureaucrat rather than a government bureaucrat decided what speech to suppress, or because a party "agreed" to suppress his speech by siguing a form contract provided by a corporation?

Regardless of the answer to this question, regulation of contracts of silence will not prevent private parties from curbing their own speech or from using their influence to encourage others to curb their speech. Regulation of contracts of silence will, however, deprive parties of a court's assistance in suppressing speech. An employer may still pressure an employee into silence,[427] but the government need not assist him by providing a common law mechanism for muzzling employees.

Judicial policing of contracts of silence on public policy grounds is probably the best way to monitor contracts of silence. Legislators, of course, could regulate offensive contracts of silence by piecemeal stat-

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423 *See supra* note 8 and accompanying text.

424 *See supra* note 10 and accompanying text.

425 Brown & Williamson agreed to drop its lawsuit against Wigand as part of the settlement agreement between state attorneys general and the tobacco industry. *See* Henry Weinstein, *At White House, Red Carpet for Tobacco Whistle Blowers*, L.A. TIMES, July 19, 1997, at D1. According to Louisville's *Courier-Journal*, the company did in fact dismiss the lawsuit on July 31, 1997. Kim Wessel, *B&W Dismisses Lawsuit Against Wigand: Ex-Executive Still Has Confidentiality Deal*, THE COURIER-JOURNAL, Aug. 1, 1997, at 3B.

426 *See infra* Part IV.

427 This is not to say that the law should allow an employer to bully an employee into silence by threatening to fire the employee. *See, e.g.*, Bingham, *supra* note 300 (discussing such situations and suggesting a legal remedy).

utes, as some have recently done for gag provisions in HMO contracts.[428] But because freedom of contract allows parties to create an endless variety of contracts of silence, it is preferable to allow courts to police such contracts on a case-by-case basis using an open-ended public policy analysis.

If courts adopted a speech-based policy ground for evaluating contracts of silence, it would neither undermine the stability of contracts nor cause commerce to cease. Indeed, the regulation of contracts of silence is unlikely to pose any risk to contracts used for the traditional purpose of protecting sensitive proprietary information such as trade secrets. If a court applied the proposed test to such contracts, the court would inevitably conclude that these contracts are enforceable.

The only contracts likely to be vulnerable under the proposed test are those that seek to suppress nonproprietary information, such as disparaging or embarrassing information or evidence of wrongdoing. Regulating these types of contracts will not disrupt the flow of commerce because legitimate commerce does not depend on the enforceability of such contracts. Indeed, these contracts protect tort-like interests rather than the type of commercial interests that are typically the subject matter of contracts. Regulating contracts of silence will help to insure that courts can consider the public policy that tort law incorporates when parties use contracts to bypass tort.

Courts reluctant to adopt a speech-based policy for regulating contracts can gain confidence from a British Law Commission's recommendation of a similar regulatory regime for English contracts that suppress speech. The Law Commission, initially appointed in the 1970s "to consider the law of England and Wales relating to the disclosure or use of information in breach of confidence,"[429] submitted its final report to Parliament in 1981.[430] Most of the Law Commission's report concerns the proposed codification of England's breach of confidence tort.[431] This tort is the cousin of the breach of confidence tort currently emerging in some American jurisdictions. England uses the breach of confidence tort to protect a wide range of information, from commercial information, such as trade secrets, to personal information.

While the Law Commission recommended that Parliament adopt a statutory tort, it also recommended that the statute include a de-

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428 *See supra* note 187 and accompanying text.

429 THE LAW COMM'N, LAW COM. NO. 110, BREACH OF CONFIDENCE (1981) [hereinafter LAW COMM'N REPORT].

430 *Id.* at i.

431 The proposed statutory tort has yet to be adopted by Parliament, but English courts do enforce a common law tort for breach of confidence. *See* Harvey, *supra* note 38, at 2397.

fense for disclosures in which there is an overriding public interest.[432] The report concluded that "the courts should have a broad power to decide in an action for breach of confidence whether in the particular case the public interest in protecting the confidentiality of the information outweighs the public interest in its disclosure or use."[433]

The Commission's report is relevant here because it also discussed the enforceability of contracts that suppress speech. The Commission concluded that the proposed statutory tort should not preclude parties from using contracts to prevent the disclosure of confidential information, and that parties should be able to use contracts even to prevent the disclosure of information that the breach of confidence tort did not protect.[434] Having concluded that contractual obligations could "co-exist" with the statutory tort, the Commission nevertheless recommended "one significant change" in contract law: that "the new broader approach to a balancing of the public interests involved in disclosure should apply not only to the statutory tort but also to contractual obligations of confidence."[435] Thus, the Commission thought that, as in the tort context, courts should deny contract liability for the disclosure of information if the public interest in disclosure outweighed the interest in allowing the information to remain confidential. Indeed, the Commission strongly favored similar public interest rules for both contract and tort law.[436]

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432 LAW COMM'N REPORT, *supra* note 429, at 138-41.

433 *Id.* at 138.

434 *Id.* at 165-66.

435 *Id.* at 167.

436 *Id.* (stating that it would be a "particularly unfortunate distinction" if the rules regarding a public interest defense differed for tort and contractual obligations). Parliament did not adopt the Commission's proposed statutory scheme. *See supra* note 431. Nevertheless, English case law recognizes a public interest defense to the common law breach of confidence tort, and courts have also applied this defense to breaches of contractually-based confidences. *See, e.g.*, Attorney General v. Guardian Newspapers Ltd. (No. 2), [1988] 3 W.L.R. 776, 793 (H.L. (E.)) (Lord Griffiths, dissenting) (stating that, "[a]lthough the terms of a contract may impose a duty of confidence the remedy is not dependent on contract and exists as an equitable remedy"). The dissent noted that a public interest defense "has been developed in the modern authorities to include cases in which it is in the public interest that the confidential information should be disclosed," and described the process of making this determination as one of "balancing the public interest in upholding the right to confidence, which is based on the moral principles of loyalty and fair dealing, against some other public interest that will be served by the publication of the confidential material." *Id.* at 794 (Lord Griffiths, dissenting); *see also* Initial Servs. Ltd. v. Putterill, [1968] 1 Q.B. 396 (holding that when a master breaches a statutory duty, a servant may disclose that information as it is no longer confidential); FRANCIS GURRY, BREACH OF CONFIDENCE 328 (1984) ("The defence of just cause or excuse applies to breaches of both equitable and contractual obligations of confidence.") (footnotes omitted); GEOFFREY ROBERTSON & ANDREW G.L. NICOL, MEDIA LAW 177-78 (2d ed. 1992) (suggesting that the public's interest in disclosure "would serve as a defence to a breach of contract action based on a confidentiality covenant, just as it would if the action had been directly for breach of confidence").

The Commission's public interest defense is analogous to this Article's proposed test for determining whether a contract of silence violates public policy. In recommending this public interest defense, the Commission was not concerned that it would unduly disrupt English contract law. Instead, it analogized this policing of contracts of silence to the policing that courts have long done for contracts in restraint of trade.[437] Likewise, adoption of this Article's proposal for regulating contracts of silence will not unduly disrupt the American law of contracts. The proposal does, however, insure that the public interest is taken into account before a court enforces a contract of silence.

IV
REGULATING CONTRACTS OF SILENCE ON CONSTITUTIONAL GROUNDS: WHEN ENFORCING A CONTRACT OF SILENCE SHOULD VIOLATE THE FIRST AMENDMENT

While state courts could adequately protect the public interest in access to information through careful monitoring of contracts of silence on public policy grounds, they could just as easily fail to do so. State contract law, after all, does not currently recognize the need to police all contracts of silence on public policy grounds. Even if state courts adopted the proposed test for regulating contracts of silence, they may apply the test in a biased manner. State courts located in tobacco growing regions, for instance, may be blind to the public interest in allowing employees to publicly criticize cigarette company employers.

Given the limitations of state regulation, regulation of contracts of silence by federal constitutional law deserves consideration. Because enforcing a contract of silence penalizes a party for the act of speaking, the logical question to ask is whether this enforcement amounts to governmental suppression of speech, thereby implicating the First Amendment. If enforcement implicates the First Amendment, then constitutional law could create an initial layer of regulation governing when states could enforce contracts of silence.

Whether state enforcement of contracts of silence implicates the First Amendment, however, is not entirely clear. Although the

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437 LAW COMM'N REPORT, *supra* note 429, at 168. The Commission's report states:

> We do not believe that this is likely to cause difficulty in the law of contract. Indeed, an analogy may be drawn between our proposals for striking a balance of public interests and the present law in relation to contracts in restraint of trade, where the court has to be satisfied that the restraint is justified not only in the interests of the parties, but also in the public interest.

Id.

Supreme Court has long recognized that state enforcement of tort law can trigger the First Amendment,[438] it has yet to decide whether the same is true for state enforcement of contracts. In *Cohen v. Cowles Media Co.*,[439] the Court did conclude that state enforcement of a promissory estoppel claim triggers the First Amendment,[440] but the Court did not decide whether a pure contract claim would implicate the First Amendment.[441]

Because parties commonly use contracts of silence to protect tort-like interests,[442] the question arises whether any justifiable distinction can be drawn between tort and contract law for First Amendment purposes. Does something distinguish contract liability from tort liability that makes a difference for First Amendment analysis? The clearest difference between the two is that contractual liability is consensual in nature. Although a state creates the background rules regarding when private agreements will be enforceable, contractual obligations arise only when a party makes a promise and another party offers consideration in exchange for that promise.[443] By contrast, courts impose tort obligations, as a matter of law, for policy reasons. The state, rather than private parties, defines the conduct that will be subject to sanction.[444]

The consensual nature of contract law potentially affects its constitutional significance in a number of ways. One can argue that the enforcement of a contract of silence involves no state action, because a contract is the creation of private parties acting independently of the state.[445] Likewise, even if state action is present, one can argne that any party who agrees to a contract of silence has implicitly waived his First Amendment rights. Lastly, even if there is state action and no waiver of First Amendment rights, one can argue that state enforcement of a contract of silence is legitimate content-neutral regulation

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438 *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988) (holding that the tort of intentional infliction of emotional distress implicates the First Amendment); Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967) (holding that the invasion of privacy tort implicates the First Amendment); New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (ruling that state enforcement of common law defamation implicates the First Amendment).

439 501 U.S. 663 (1991).

440 *Id.* at 668.

441 *See infra* note 456 and accompanying text.

442 *See supra* notes 205-09, 395-407 and accompanying text.

443 *See* KEETON ET AL., *supra* note 209, at 656 (noting that contract obligations are "based on the manifested intention of the parties to a bargaining transaction").

444 *See id.* (noting that tort obligations are "imposed by law on policy considerations" and are "imposed apart from and independent of promises made and therefore apart from any manifested intention of parties to a contract or other bargaining transaction").

445 *See, e.g.*, Cohen v. Cowles Media Co., 445 N.W.2d 248, 254-56 (Minn. Ct. App. 1989), *aff'd in part and rev'd in part*, 457 N.W.2d 199 (Minn. 1990), *rev'd*, 501 U.S. 663 (1991) (finding no state action in the enforcement of a reporter-source confidentiality agreement).

of speech because the state did not select the speech being regulated. This Part will explore the cogency of each of these arguments.

Underlying this discussion are the basic notions that constitutional law primarily concerns abuses of state power, and that contracts are arguably abuses of private power.[446] However, this argument must be qualified by the recognition that private suppression of speech through contract would be meaningless in the absence of state enforcement, and that the difference between contract and tort is elusive. As Professor Gilmore once counseled in the teacher's manual for his Contracts casebook: "The beginning of wisdom in the study of law comes no doubt with the student's perception of the fact that the apparently separate subjects of Contracts and Torts . . . are in truth two different ways of talking about the same thing."[447]

A. State Action

The Supreme Court has easily found that a tort action that penalizes speech may implicate the First Amendment. In *New York Times Co. v. Sullivan*,[448] the case in which the Court first considered the issue, the Court summarily rejected the notion that enforcement of a tort did not constitute state action because the claim was a common law claim brought by a private party.[449] The Court held that if a court applied a state rule of law in a manner that inhibited speech, it implicated the First Amendment regardless of the nature of the state action. As the Court explained: "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[450]

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446 *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12.1, at 470 (5th ed. 1995) (noting that, with the exception of the Thirteenth Amendment, the "safeguards against deprivations of individual rights which are contained in the text of the Constitution specifically apply only to the activities of either the state or federal governments").

447 Grant Gilmore, Introduction and Teaching Notes from Teacher's Manual (1972) to FRIEDRICH KESSLER & GRANT GILMORE, CONTRACTS (2d ed. 1970), *reprinted in* PETER LINZER, A CONTRACTS ANTHOLOGY 39, 42 (2d ed. 1995). Of course, Professor Gilmore's prediction of the death of contracts was greatly exaggerated. GRANT GILMORE, THE DEATH OF CONTRACT (Ronald K.L. Collins ed., 2d ed. 1995); *see* Robert A. Hillman, *The Triumph of Gilmore's* The Death of Contract, 90 NW. U. L. REV. 32, 38 (1995) (noting how "Gilmore's depiction of the death of contracts was . . . exaggerated"). Indeed, Professor Gilmore's coauthor, Professor Kessler, wrote a footnote in the teacher's manual that qualified the comment quoted in the text: "The emancipation of contract from tort was of great importance. It shifted the emphasis to the phenomenon of private autonomy. The objective theory of contracts should not be allowed to obscure this fact. Today tort law is needed to serve as a corrective of rigid contract law." LINZER, *supra*, at 42.

448 376 U.S. 254 (1964).

449 *Id.* at 265.

450 *Id.*

Following this rationale, the Supreme Court has held that the torts of defamation,[451] privacy,[452] and intentional infliction of emotional distress[453] all implicate the First Amendment. In *Cohen v. Cowles Media Co.* the Court extended this logic to a promissory estoppel claim.[454] The Court has yet to decide, however, whether a breach of contract action would implicate the First Amendment. One might expect that if the Court found state action in a promissory estoppel action, it would also do so in a contract action, but language in *Cohen* arguably suggests otherwise. In explaining why enforcement of a promissory estoppel claim constitutes state action, the Court stated:

> In this case, the Minnesota Supreme Court held that if Cohen could recover at all it would be on the theory of promissory estoppel, a state-law doctrine which, *in the absence of a contract, creates obligations never explicitly assumed by the parties.* These legal obligations would be enforced through the official power of the Minnesota courts. Under our cases, that is enough to constitute "state action" for purposes of the Fourteenth Amendment.[455]

This passage raises the question of whether the Court's description of promissory estoppel as a doctrine which, "in the absence of a contract, creates obligations never explicitly assumed by the parties," has significance. The passage may have been merely a definition of promissory estoppel, but it may instead have expressed the Court's belief that the fact that promissory estoppel "creates obligations never explicitly assumed by the parties" was critical to its finding of state action. If the latter is true, as one commentator has argued,[456] then the Court may have implied that it would not have found state action in *Cohen* had there been an enforceable contract.

The Court has not yet relied on such a distinction to find state action lacking in a breach of contract case. Were the Court to do so, it would be relying on a distinction that is dubious at best and probably false. The Court's description of promissory estoppel as an action creating "obligations never explicitly assumed by the parties" could not possibly mean that a defendant in a promissory estoppel action does not initially create his obligation by making a promise to do something. On the contrary, the essence of a promissory estoppel claim is that the defendant makes a promise upon which the plaintiff

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451 *Id.*

452 *See* Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967).

453 *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988).

454 501 U.S. 663 (1991).

455 *Id.* at 668 (emphasis added).

456 *See* Gilles, *supra* note 72, at 64 (noting that the "Court's careful wording in *Cohen* suggests that . . . the Court may utilize this distinction, [between promissory estoppel and contract,] to find that court enforcement of a contract does not constitute state action").

relies.[457] The difference between a contract claim and a promissory estoppel claim is merely that in one instance a court enforces a promise because it was part of a bargain, and in the other a court enforces a promise because it induced unbargained-for reliance.[458]

By suggesting that promissory estoppel creates obligations that the parties never explicitly assumed, the Court must have meant that promissory estoppel, like the torts of defamation and intentional infliction of emotional distress, imposes legal liability for a defendant's speech even when the defendant neither consented nor intended to create any legal obligation. The Court may have been suggesting that when a party makes a promise as part of a binding contract, the party has consented to being legally bound and the law is simply enforcing an obligation that the party has already "explicitly assumed."

While this latter distinction has certain appeal, it too rests on a questionable assumption. There is no requirement in contract law that a party must subjectively intend for his contract to be legally binding.[459] If a party's actions suggest to a reasonable person that the party intended to make a binding contract, then a binding contract will be formed even if the party never thought about the legal consequences of his actions.[460] Perhaps this requirement of "objective" assent suffices to distinguish promissory estoppel from contract, but once the law imposes obligations on a party because of what a "reasonable person" would have expected, the distinction between tort and contract blurs significantly. In both areas, the law imposes an obligation on a party that the party "never explicitly assumed."

Rather than focusing on whether a contract obligation is more "explicitly assumed" than a promissory estoppel obligation, the Court should focus on the larger issue that the *Sullivan* case identified: Is state power being applied in a manner that suppresses speech?[461] If the Court focused on this issue, it would almost certainly find that state action is present in a contract of silence action. Indeed, such a conclusion flows naturally from the realization that, at the time a

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457 *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.").

458 *See* FARNSWORTH, *supra* note 4, §§ 2.2, 2.19 (discussing the bargain and reliance bases for enforcing promises).

459 *See* RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981) ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract. . . .")

460 *See, e.g.*, Lucy v. Zehmer, 84 S.E.2d 516, 518 (Va. 1954) (upholding a contract even though the defendant claimed that the "whole matter was a joke"); *see also* MURPHY & SPEIDEL, *supra* note 176, at 273 (stating that "[t]he objective theory, by considering the impression on the hearer rather than the intent of the speaker, obviously makes it possible for one to be held to a contract without any real intention to assume a legal obligation").

461 New York Times Co. v. Sullivan, 376 U.S. 254, 268 (1964).

plaintiff brings a lawsuit, the defendant either desires to speak or has spoken, and the State is being asked to either enjoin or punish the speech.

Equal Protection jurisprudence supports the proposition that enforcement of a contractual obligation constitutes state action. *Shelley v. Kraemer*[462] and *Barrows v. Jackson*[463] are the most notable examples. While subsequent decisions have narrowly construed both of these cases,[464] they are still good law, and the similarity between these cases and a contract of silence case is striking. In each situation the defendant makes a contractual commitment to do something that it subsequently either breaches or threatens to breach, and in each instance, the state must either compel the defendant to abide by the contractual obligation or punish it for having breached the contract.

Comparing the *Barrows* case with the Wigand litigation illustrates this point. In *Barrows*, the defendant had agreed to a restrictive covenant that forbade her from selling her property to "persons not wholly of the white or Caucasian race."[465] The defendant subsequently breached this covenant and the plaintiff sued for damages. Initially, the Court conceded that there was no state action, either in the mere formation of the restrictive covenant agreement or in the parties' voluntary compliance with it.[466] But once the defendant chose to breach the agreement and the plaintiff brought suit to enforce it, state action was indisputably involved. The State's action in compelling one of the parties to abide by the commitment implicated the Constitution:

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462 334 U.S. 1 (1948).

463 346 U.S. 249 (1953).

464 In other contexts, for instance, the Supreme Court has repeatedly held that the neutral application of state law does not constitute state action. *See, e.g.*, Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988) (stating that private use of state sanctioned remedies does not constitute state action); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 165-66 (1978) (holding that private action taken pursuant to state law is not state action); Evans v. Abney, 396 U.S. 435, 446 (1970) (concluding that the operation of neutral state trust laws does not constitute state action). In addition, although the Supreme Court has managed to avoid the issue of whether state enforcement of neutral trespass laws would constitute state action, commentators have assumed that the Court would conclude that it did not. *See, e.g.*, NOWAK & ROTUNDA, *supra* note 446, at 487 ("A court can uphold trespass convictions which are based on a private party's decision to refuse to open his home or other private property to members of a racial minority."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-3, at 1702 (2d ed. 1988) (noting that if the racist actor is a private individual, and if the only government choice "takes the form of a racially neutral decision to enforce the trespass laws at the request of any private property owner, a litigant may be unable to point to any decision which is *both* government-made *and* susceptible to successful constitutional challenge"); Hirsch, *supra* note 4, at 188 n.208 (stating that the "failure of the Court to rely on *Shelley* in overturning the convictions [in the sit-in cases] suggested that more state involvement was needed than mere even-handed enforcement of private biases").

465 346 U.S. at 251.

466 *Id.* at 253 (stating that "no one's constitutional rights were violated by the covenantor's voluntary adherence thereto").

> If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, *it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages.* The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in *Shelley* . . . .[467]

The Wigand case is closely analogous to *Barrows.* Just like the defendant in *Barrows,* Wigand made a prior voluntary commitment to do something; in Wigand's case, he committed to keep silent about matters concerning Brown & Williamson. Just as in *Barrows,* Wigand ultimately chose to breach his commitment, and the other party to the contract went to court seeking State assistance to compel Wigand to do something that he would no longer voluntarily do.[468] If state action existed in *Barrows,* it should also exist in Wigand's case.[469]

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467 *Id.* at 254 (emphasis added).

468 *Shelley* and *Barrows* are troublesome decisions because, if read broadly, they suggest that state enforcement of all private rights constitutes state action. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 6.4, at 404 (1997). A Supreme Court unwilling to go that far must therefore find a limiting principle that can preserve the holdings of the decisions without unduly expanding their reach. Professor Chemerinsky notes that the Court has yet to articulate "any clear limiting principles" and in fact "only rarely has applied *Shelley* as a basis for finding state action." *Id.*

A common theory for limiting *Shelley* is to restrict its logic to cases in which state power coerces a private party to do something he does not want to do. *See, e.g.,* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 635 (1991) (O'Connor, J., dissenting) (describing *Shelley* as a case in which "[t]he coercive power of the State was necessary in order to enforce the private choice of those who had created the covenants," and that "[t]he state courts in *Shelley* used coercive force to impose conformance on parties who did not wish to discriminate"); Bell v. Maryland, 378 U.S. 226, 330 (1964) (Black, J., dissenting) (noting that the state in *Shelley* "had acted 'to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which *petitioners are willing and financially able to acquire and which the grantors are willing to sell.*'") (emphasis added); Louis H. Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. PA. L. REV. 1, 13 (1959) ("The line sought to be drawn is that beyond which the state assists a private person in seeing to it that others behave in a fashion which the state could not itself have ordained. . . . *[A]ccess to state aid to induce others to conform is barred.*") (emphasis added).

469 *See* Ruzicka v. Conde Nast Publications, Inc., 733 F. Supp. 1289, 1295-96 (D. Minn. 1990), *aff'd in part and remanded,* 939 F.2d 578 (8th Cir. 1991) (finding state action in the enforcement of a reporter-source confidentiality agreement); Hirsch, *supra* note 4, at 185-89 (arguing that enforcement of a reporter-source confidentiality agreement would constitute state action under *Shelley v. Kraemer*). *But see* Cohen v. Cowles Media Co., 445 N.W.2d 248, 255 (Minn. Ct. App. 1989), *aff'd in part and rev'd in part,* 457 N.W.2d 199 (Minn. 1990), *rev'd,* 501 U.S. 663 (1991) (finding that *Evans v. Abney,* 396 U.S. 435 (1970), rather than *Shelley,* controlled, and therefore no state action existed). While subsequent Supreme Court decisions limit the reach of the *Shelley* decision, it nevertheless seems that the Minnesota Court's rejection of *Shelley* and reliance on *Evans* was misplaced. In *Evans,* the application of state trust law did not result in discrimination; it simply terminated the existence of a public park for both white and nonwhite citizens alike. By contrast, in the *Cohen* case, enforcement of the contract affirmatively suppressed a party's speech.

B. Waiver

State action is only the first hurdle that a defendant must cross to challenge the enforcement of a contract of silence on constitutional grounds. The second hurdle is waiver. Even if a court concludes that state action existed upon enforcement of a contract of silence, it may nevertheless conclude that the state action was proper because the defendant waived his First Amendment rights when he entered the contract of silence.[470]

There is no doubt that some constitutional rights can be waived.[471] Criminal defendants routinely waive procedural protections such as the right to a trial or the right to counsel,[472] and civil litigants commonly waive a variety of due process rights.[473] Rather than question whether a party can waive the constitutional right, courts concern themselves solely with whether the waiver was valid.[474]

Whether First Amendment rights may be waived is unclear, but the case law arguably supports this proposition. For example, in *Snepp v. United States*,[475] a case concerning a CIA agent's contractual commitment to submit any writing for review before publishing it, the Supreme Court noted that the defendant had "voluntarily sigued the agreement."[476] This passage suggests that the Court thought the defendant had waived his First Amendment rights. The rest of the decision greatly undermines this suggestion, however, by explaining at length why this governmental abridgement of speech was justified; a

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470 *See Cohen*, 445 N.W.2d at 258 (finding that the defendant newspapers had waived their First Amendment rights.).

471 *See* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 346 ("Constitutional rights are waived every day. People incriminate themselves, surrender their rights to counsel, waive a bundle of rights as part of plea bargains, and sign contracts surrendering a right to trial through arbitration or confession of judgment clauses.") (footnotes omitted).

472 *See* North Carolina v. Butler, 441 U.S. 369, 375-76 (1979); Corbitt v. New Jersey, 439 U.S. 212, 222 (1978); Bordenkircher v. Hayes, 434 U.S. 357, 361-62 (1978). *See generally* Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981) (stating that "[d]uring the course of a criminal adjudication, the defendant can be found to have waived virtually any of the procedural protections provided for his benefit").

473 *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) ("Where . . . forum-selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust' . . . their enforcement does not offend due process."); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972) (holding that a cognovit clause authorizing confession of judgment by creditor was not per se violative of due process). *See generally* Rubin, *supra* note 472, at 512-28 (discussing waivers in civil law context).

474 *See infra* notes 481-84 and accompanying text.

475 444 U.S. 507 (1980).

476 *Id.* at 509 n.3.

discussion that would be superfluous if the Court merely required a voluntary waiver of speech rights.[477]

The *Cohen v. Cowles Media Co.*[478] case, involving a journalist's promise not to reveal a source, also suggests that a party can waive his First Amendment rights. Although the majority decision never mentions the word "waiver," the decision's general theme implies that no constitutional violation occurs when the "law simply requires those making promises to keep them."[479] This passage arguably suggests that a First Amendment violation does not occur when a defendant has waived his right to speak by making a binding commitment to be silent.[480]

Because case law may encourage a court to find that a defendant waived his speech rights when he entered into a contract of silence, it is worthwhile to explore how a defendant could rebut such a waiver argument. The first argument for challenging a waiver of First Amendment rights is on the facts—that in any given case the defendant's waiver did not comply with the procedural requirements for a valid waiver of a constitutional right. These requirements are not entirely clear. In criminal cases, for instance, courts generally insist that a waiver be made "voluntarily, knowingly and intelligently."[481] But in other cases, particularly concerning the waiver of due process rights by civil litigants, less stringent standards apply.[482] *Snepp*'s references to the fact that the defendant there had "expressly" and "volunta-

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477 *See, e.g.*, Harvey, *supra* note 38, at 2452 (suggesting that "*Snepp* may stand not for the constitutional sanction of waiving First Amendment rights, but for the less remarkable proposition that freedom of speech is overwhelmed when national security is at stake").

478 501 U.S. 663 (1991).

479 *Id.* at 671.

480 *See* Harvey, *supra* note 38, at 2455-60 (suggesting that in *Cohen* the Supreme Court endorsed the notion that a party can waive his First Amendment rights); *see also* Leonard v. Clark, 12 F.3d 885, 889-90 (9th Cir. 1993) (fiding valid waiver of First Amendment rights in labor agreement); Erie Telecomms., Inc. v. City of Erie, 853 F.2d 1084, 1094-97 (3d Cir. 1988) (finding valid contractual waiver of First Amendment rights); ITT Telecom Prods. Corp. v. Dooley, 262 Cal. Rptr. 773, 780 (Cal. Ct. App. 1989) (explaining that "it is possible to waive even First Amendment free speech rights by contract"); *In re* Steinberg, 195 Cal. Rptr. 613, 616-18 (Cal. Ct. App. 1983) (finding waiver of First Amendment rights by filmmaker); Cohen v. Cowles Media Co., 445 N.W. 2d 258, 258 (Minn. Ct. App. 1989) (finding that the defendant newspapers had waived their First Amendment rights), *aff'd in part, rev'd in part*, 457 N.W.2d 199 (Minn. 1990).

481 *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 421 (1986) (quoting Miranda v. Arizona, 384 U.S. 436, 475 (1966)).

482 In *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), the Court was only willing to "assume" for purposes of the case that the requirements for a waiver of a "corporate-property-right" wonld be the same as in a criminal case. *Id.* at 185. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Court said that "a waiver of constitutional rights in any context must, at the very *least*, be clear." *Id.* at 95; *see also* Rubin, *supra* note 472, at 514 (suggesting that less stringent procedural requirements apply to waivers in the civil litigation context than in the criminal).

rily"[483] agreed to prepublication review suggests that the rigorous criminal law standard also applies in First Amendment cases, but the applicable standard remains unsettled.[484]

Nevertheless, strong arguments support the idea that courts should apply a more stringent standard to the waiver of First Amendment rights. Because free speech rights are at the core of our democratic system, and because a waiver of speech rights implicates both the public's interest as well as the individual's interest, such rights should be waived only when clear evidence of a knowing and intelligent waiver exists. *Curtis Publishing Co. v. Butts*,[485] in which the Supreme Court considered whether a defendant had waived his right to make a First Amendment defense to a libel claim, supports this higher waiver standard. In refusing to find a waiver, the Court emphasized that the constitutional protection purportedly waived was one that "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom.'"[486] Given the sanctity of First Amendment rights, the Court concluded that "[w]here the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling."[487]

In addition to challenging the procedural context in which a waiver of First Amendment rights is made, it is also possible to challenge the substantive right of an individual to waive his speech rights. Thus, an individual may desire to waive his free speech rights, but

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483 Snepp v. United States, 444 U.S. 507, 509 n.3 (1980).

484 *See* Harvey, *supra* note 38, at 2459 (suggesting that a waiver of First Amendment rights could be binding if it is "explicit and voluntary"); Hirsch, *supra* note 4, at 189 (assuming that a waiver of First Amendment rights would have to be made voluntarily, knowingly, and intelligently). If the criminal law standard applied in the contract of silence context, it would still be difficult to challenge a waiver of First Amendment rights in a case like *Cohen* where the only promise made by the journalists was to keep quiet about the source's identity. The standard, however, could provide a compelling argument for not finding a waiver when a promise of silence was buried in the fine print of a form contract.

485 388 U.S. 130 (1967).

486 *Id.* at 145 (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937)).

487 *Id.*; *see also* Leonard v. Clark, 12 F.3d 885, 889 (9th Cir. 1993) (relying on D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185, 187 (1972) to conclude that the "Supreme Court has held that First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent"); Erie Telecomms., Inc. v. City of Erie, 853 F.2d 1084, 1096 (3d Cir. 1988) (concluding that constitutional rights, including the First Amendment rights at issue in that case, "may be contractually waived where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver"); Ruzicka v. Conde Nast Publications, Inc., 733 F. Supp. 1289, 1296-98 (D. Minn. 1990), *aff'd in part and remanded*, 939 F.2d 578 (8th Cir. 1991) (using the *Erie Telecommunications* test in discussing whether a media defendant had waived its First Amendment rights).

those rights may not be his to waive.[488] Justice Souter suggested such an argument in his dissent in the *Cohen* decision:

> Nor can I accept the majority's position that we may dispense with balancing because the burden on publication is in a sense "self-imposed" by the newspaper's voluntary promise of confidentiality. This suggests both the possibility of waiver, the requirements for which have not been met here, *as well as a conception of First Amendment rights as those of the speaker alone, with a value that may be measured without reference to the importance of the information to public discourse.* But freedom of the press is ultimately founded on the value of enhancing such discourse for the sake of a citizenry better informed and thus more prudently self-governed. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *In this context, "'[i]t is the right of the [public], not the right of the [media], which is paramount.'"*[489]

Admittedly, the public's interest in information is not sufficient to compel a speaker to speak, and to that extent, First Amendment rights are better characterized as belonging to the speaker rather than to the public. But while the public may not have a right to compel someone to speak, it may have a right to object to the selling of one's speech rights, at least when the sale conflicts with the public's interest.[490] This suggests the need for courts to draw a line, as Professor Dworkin has suggested, "to distinguish permissible from impermissible waivers of the constitutional right to speak."[491] Dworkin's suggestion raises the question of when a waiver of First Amendment rights—or conversely, when the enforcement of a promise of silence—should

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488 *See* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984). The author writes:

> The case for recognition of waivers rests on the conviction that constitutional rights protect individual choice. But many constitutional rights protect other values or protect individual choice only as a means to the realization of other ends. For such rights, there is no paradox in asserting that the choice of the individual should not decide the applicability of the right in question.

Id. at 1387. *But see* Easterbrook, *supra* note 471, at 349-52 (rejecting the argument that the public interest in the suppressed information should have made the enforcement of the contract in *Snepp* unconstitutional.).

489 Cohen v. Cowles Media Co., 501 U.S. 663, 677-78 (1991) (Souter, J., dissenting) (emphasis added) (citations omitted) (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978); CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981)).

490 *See* Shell, *supra* note 169, at 516 (stating that "rights to free speech and a free press are arguably so fundamental to the functioning of a democratic society that they ought not to be subjected to unregulated market ordering backed by the state power of contract enforcement.").

491 RONALD DWORKIN, A MATTER OF PRINCIPLE 397 (1985).

ever violate the Constitution. The next Section addresses this question.

C. The Constitutionality of Enforcing Contracts of Silence

Whether phrased in terms of the permissibility of waiving First Amendment rights or in terms of the constitutionality of enforcing such a waiver, the issue is whether the enforcement of a contract of silence should be unconstitutional. Arguments can be made for both positions.

On the one hand, state enforcement of a contract of silence is arguably legitimate content-neutral regulation of speech. Private parties, not the state, select the speech being suppressed, so one could call the regulation content-neutral and thus avoid the strict scrutiny applicable to content-based regulation of speech. In addition, this content-neutral regulation serves the indisputably legitimate governmental interest of maintaining the stability of contractual relations.[492]

Cohen v. Cowles Media Co. appears to endorse this logic. The dissent in that case argued that enforcing a newspaper's promise of silence on a promissory estoppel theory was equivalent to punishing a newspaper for disclosing private facts in violation of a state statute—something that the Court had found unconstitutional in two prior cases.[493] The majority responded, however, by finding that these privacy cases were inapplicable because in those cases the State had defined the content of the suppressed speech, whereas in *Cohen*, private parties made this selection:

> In [the privacy] cases, the State itself defined the content of publications that would trigger liability. Here, by contrast, Minnesota law simply requires those making promises to keep them. *The parties themselves, as in this case, determine the scope of their legal obligations*, and any restrictions that may be placed on the publication of truthful information are self-imposed.[494]

This logic could easily extend to the enforcement of contracts of silence. There, too, private parties determine the speech to be sup-

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492 Even if enforcement of contracts of silence is content-neutral regulation that serves a significant governmental interest, it may still be unconstitutional if it fails to leave open ample alternative channels for communication of the information. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); *see also* SMOLLA, *supra* note 158, § 3.02[3][b][iii] (discussing the ample alternative channels requirement). Enforcement of contracts of silence may be vulnerable under this requirement because often the purpose of contracts of silence is to cut off the only likely channel for the communication of information.

493 *Cohen*, 501 U.S. at 672-73 (Blackmun, J., dissenting) (relying on just one of these cases, *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979), although the majority also referred to a second case, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989)).

494 *Id.* at 670-71 (emphasis added).

pressed, and the state merely "requires those making promises to keep them."

The argument against the constitutionality of enforcing contracts of silence is more complex, but arguably more persuasive. It hinges on recognizing that the issues of "state action" and "content-neutrality" are inextricably intertwined, and that the constitutionality of enforcing a contract ultimately depends on whether private parties can enlist the assistance of a state in carrying out actions that would be clearly unconstitutional if the state acted alone. The primary question is whether a private party's initial choice of action should ultimately immunize the subsequent state action from constitutional scrutiny.[495]

Precedent suggests that, once state action is found, the fact that the state action effectuates a private party's decision is inconsequential. If the action would be improper for the state, then the action will be unconstitutional regardless of the fact that the state is merely implementing a private party's directive. *Shelley v. Kraemer*[496] and *Barrows v. Jackson*,[497] which earlier illustrated how enforcement of a contract may constitute state action, also illustrate this point. In both cases, private parties made the initial decision to discriminate against nonwhite buyers, and, in both cases, private parties attempted to make this discrimination enforceable by entering into restrictive covenant agreements. Nevertheless, once the Supreme Court concluded that state action was involved in enforcing these covenants, it no longer mattered who initially decided to discriminate.[498] The Court instead analyzed the cases as if the state had decided to discriminate. Because such state action would be clearly unconstitutional, the state action enforcing the private parties' restrictive covenants was also unconstitutional.[499]

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495 *See, e.g.*, TRIBE, *supra* note 464, at 1689. The author describes the central issue in state action jurisprudence as follows:

> In deciding whether the litigants would indeed obtain that judicial assistance, the Supreme Court had to determine whether government inaction, acquiescence, or tolerance could fairly be judged to be tacit ratification of a challenged private choice or, perhaps, delegation of a public responsibility to a private party; if so, whether all such governmental silence or acceptance was itself a form of "state action"; and if not, whether any criteria exist for distinguishing varieties of inaction.

Id.

496 334 U.S. 1 (1948).

497 346 U.S. 249 (1953).

498 *Shelley*, 334 U.S. at 20 ("Nor is the [Fourteenth] Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement.").

499 *Barrows*, 346 U.S. at 258 ("This Court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity; or that this Court would deny California the right to incorporate in a statute.") (citations omitted).

Similar logic supported the Supreme Court's First Amendment decision in *Marsh v. Alabama*,[500] in which the state prosecuted the defendant, a Jehovah's Witness, under Alabama trespass law for distributing literature in a privately-owned "company town." Here, too, once the Court concluded that the company's actions implicated the First Amendment, the fact that a private party had decided what speech to suppress was immaterial.[501] Instead, the Court treated the case as if the government had decided what speech to suppress, and because the government could not suppress the speech at issue,[502] neither could a private company enlist the government's help to suppress it.[503]

If one extends this rationale to the contracts of silence context, then once a court finds state action in the enforcement of a contract of silence, it should arguably analyze the state action as if the state itself had selected the speech to be suppressed. State enforcement of a contract of silence would therefore be content-based regulation of speech, and the majority's observation in *Cohen* that "[t]he parties themselves . . . determine[d] the scope of their obligations"[504] would be wholly irrelevant.

If a court treats state enforcement of a contract of silence as content-based regulation, then the state's action must pass strict scrutiny.[505] Strict scrutiny would not mean, however, that such enforcement would always be unconstitutional. In most instances, there may well be a compelling state interest in protecting the stability of contracts that could justify the content-based regulation of speech. The question is whether the state interest in enforcing contracts is enough to support the constitutionality of enforcing all contracts of silence. Again, courts may need to draw a line between when enforcement of a contract of silence is permissible and when it is not.

It is suggested that courts should draw such a line, which they could derive from the same balancing of confidentiality and disclosure interests previously discussed in Part III.[506] When there is a great public interest in allowing the enforcement of a contract of silence, as with a contract to protect a trade secret or a valuable idea, then a

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500 326 U.S. 501 (1946).

501 *Id.* at 507-10. Unlike in *Shelley* and *Barrows*, the private party's actions in *Marsh* constituted state action even without any government assistance because the party was engaged in a "public function." *See generally* CHEMERINSKY, *supra* note 468, § 6.4.4, at 395-403.

502 *Marsh*, 326 U.S. at 504 (citing Lovell v. Griffin, 303 U.S. 444 (1938)).

503 *Id.* at 509 ("Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand.").

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

505 *See* SMOLLA, *supra* note 158, § 3.01[2][b][ii] (discussing how "[l]aws based on the content of speech almost always trigger some version of 'heightened scrntiny.'").

506 *See supra* Part III.C.1.

compelling state interest exists for enforcing the contract, and its enforcement should not offend the Constitution. But conversely, when a countervailing public interest in the suppressed speech outweighs the public interest in allowing the enforcement of a contract of silence, as with a contract to suppress information about criminal or tortious conduct, then no compelling state interest to justify enforcing the contract may exist, and its enforcement may be unconstitutional.

Of course, in balancing the competing disclosure and privacy interests, a court would inevitably have to decide the weight of the public interest in the suppressed information. Such an endeavor arguably conflicts with a common theme in both First Amendment jurisprudence and scholarship that suggests that entrusting judges with the task of deciding what is or is not a matter of public interest is a dangerous undertaking.[507]

The general proposition that judges should not be involved in weighing the public interest in speech, however, may be overstated. It is a perfectly logical proposition when applied to contexts in which no legitimate basis for any content-based government regulation exists, such as content-regulation of a soap-box speaker on a street corner. In that context, First Amendment jurisprudence should not tolerate courts determining whether the content-based regulation is constitutional based upon each court's sense of whether the speaker's remarks were worthy of public interest. Refusing to permit content-based regulation in such a context is preferable to allowing a judge to determine what is in the public interest.

But the proposition seems less compelling in instances where a legitimate governmental interest in regulating the content of speech exists, such as laws regulating speech defaming another's reputa-

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507 In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), for instance, the Supreme Court refused to adopt the plurality's recommendation in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), that courts use the *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), actual malice standard in any defamation action involving a matter of public interest. The Court expressed its discomfort with having judges decide which speech is or is not in the "public interest":

> [The *Rosenbloom* test] would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Mr. Justice Marshall, "what information is relevant to self-government." We doubt the wisdom of committing this task to the conscience of judges.

Id. at 346 (citation omitted) (quoting *Rosenbloom*, 403 U.S. at 79); *see also* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 3 (1990) ("The public concern test will generate . . . a judicially approved catalogue of legitimate subjects of public discussion. . . . [This] should condemn the entire undertaking, for the Constitution empowers the people, not any branch of the government, to define the public agenda.").

tion[508] or invading another's privacy.[509] A legitimate governmental interest also exists when the government regulates the speech of its own employees.[510] In these instances where some regulation of speech is justified, courts must inevitably draw a line between legitimate and illegitimate regulation. Often the most logical place for drawing this line depends upon the public interest in the regulated speech. Indeed, courts already weigh the public interest in the speech of government employees,[511] and while the Supreme Court tried to steer away from such an analysis in defamation cases,[512] the case law inevitably led back to it.[513]

In summary, if state action exists when a court enforces a contract of silence, then the state action should be treated as content-based regulation of speech. Courts should uphold the state action when the public interest in enforcing the contract outweighs any countervailing interest in disclosure of the suppressed information, but courts should find the action unconstitutional when the contrary balance is present.

CONCLUSION

When treatise writers discuss why the law enforces contracts, they often refer to the economic benefit that contracts provide in a market economy.[514] A sophisticated market economy cannot function without its participants being able to rely on executory commitments.

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508 *See Gertz*, 418 U.S. at 341.

509 *See* Florida Star v. B.J.F., 491 U.S. 511, 524 (1989) (striking down the legislation at issue in this case; however, the Court's holding was narrow and it did "not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press"); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) ("[C]onstitutional guarantees can tolerate sanctions against *calculated* falsehood.").

510 *See* Connick v. Myers, 461 U.S. 138, 142 (1983); *see also* Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2347-48 (1996) (finding state interest applicable to independent contractors); Rankin v. McPherson, 483 U.S. 378, 384 (1987) (citing *Connick* and *Pickering* in support of the state's interest); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (recognizing that the state, as an employer, has an interest in promoting the efficiency of the public services it performs through its employees).

511 *See, e.g.*, *Umbehr*, 116 S. Ct. at 2347 ("The First Amendment's guarantee of freedom of speech protects government employees from termination *because of* their speech on matters of public concern."); *Connick*, 461 U.S. at 145 (stating that protected employee expression relates to any matter of political, social, or other community concern).

512 *See Gertz*, 418 U.S. at 346 (rejecting a "public interest" test for determining when the *New York Times* actual malice standard should apply in defamation actions).

513 *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (allowing defamation plaintiffs to recover presumed and punitive damages even in the absence of a finding of actual malice if the speech does not involve "matters of public concern.").

514 *See, e.g.*, FARNSWORTH, *supra* note 4, §§ 1.2-1.3 (explaining how contracts facilitate exchange and the rise of credit); MURRAY, *supra* note 19, § 5 (discussing the purpose of contracts from an economic perspective).

Contract law makes such reliance possible by protecting the parties' performance expectations.

Contracts of silence undeniably play a role in the facilitation of commerce just like contracts for the sale of goods or services. Contracts of silence that protect valuable ideas help insure that ideas are both created and then transferred to parties who can most efficiently use them. Contracts protecting trade secrets facilitate commercial exploitation of the confidential information by insuring trade secret owners that their information will remain confidential. Contracts of silence that protect sensitive financial or personal information can promote commerce when the parties delay the disclosure of such information as they prepare to publish it for profit.

But not all contracts of silence facilitate commerce. Some contracts of silence, particularly ones in which a party promises to keep quiet about wrongful or embarrassing activities, are not intended to facilitate commerce, but rather to suppress speech. The parties do not intend to disclose the information by eventually publishing it for profit. Similarly, the public will not benefit from private commercial exploitation of the suppressed information, as is true with the exploitation of a trade secret. Rather than facilitating commerce, the purpose of these contracts is to keep the public uninformed.

Even if these contracts do not facilitate commerce, they may serve other desirable societal ends such as protecting personal privacy interests. But if these contracts are left wholly unregulated, parties can use them to deny the public access to information of vital public interest, such as information on criminal or tortious conduct or information affecting public safety.

Contractual suppression of information in these instances is troubling in the abstract, but it is particularly troubling when comparable tort laws concerning the disclosure and confidentiality of information suggest that no legitimate confidentiality interest exists in the suppressed information. The suppression appears even more troubling when First Amendment jurisprudence has evolved specifically to insure that states do not use their tort laws to penalize the disclosure of such information.

In these latter instances, it is not sufficient for courts to blithely enforce contracts of silence based on a notion of freedom of contract while ignoring the consequences of such action on freedom of speech. These contracts pose a clear conflict between society's interest in enforcing contracts and its competing interest in freedom of

speech. Courts must address this conflict directly by weighing the competing interests and determining which one should prevail.[515]

This Article both identified this conflict between freedom of speech and freedom of contract, and suggested how the common law of contract and First Amendment jurisprudence can develop to address this conflict. Hopefully, a court will never again confront a contract of silence case and claim, as the trial court did in *Cohen v. Cowles Media Co.*, that "[t]his is not a case about free speech, rather it is one about contracts."[516] Instead, hopefully a court will declare that the case is about both freedom of contract and freedom of speech and address how the law reconciles these two competing concerns.

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515 Professor Diane Zimmerman has documented a similar conflict between speech and property rights. Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665 (1992). She suggests that courts have been relatively oblivious to the tension between the two:

> The truth is that, despite large areas of peaceful coexistence between the values protected by the Speech and Press Clauses and those defended by property doctrines, conflict between the two is serious. What seems to have happened in the course of this conflict is that an ever-expanding array of new or reconstructed property theories is cannibalizing speech values at the margin. In large part, this has occurred not because speech claims are inherently weaker than property claims, but because courts fail to think critically about the justifications for, functions of, and limitations on property rules in the sensitive arena of speech.

Id. at 667 (footnotes omitted).

516 14 Media L. Rep. (BNA) 1460, 1464 (D. Minn. June 19, 1987).