BREACH AGENTS: THE LEGAL LIABILITY OF THIRD PARTIES FOR THE BREACH OF REPUTATIONAL NDAS

Mark Fenster[*]

[*] Marshall M. Criser Eminent Scholar Chair in Electronic Communications and Administrative Law, Levin College of Law, University of Florida. Thanks to Eugene Volokh, Jane Bambauer, and Amy Gajda for comments and advice. Thanks also to Li Lin and Stephanie Miller for research assistance.

Introduction

Over the past decade, nondisclosure agreements intended to protect the reputation of one or both parties from embarrassing disclosures have failed, sometimes spectacularly. Among those humiliated by revelations of their past behaviors are Donald Trump,[1] Vince McMahon,[2] Neil Gaiman,[3] and Harvey Weinstein;[4] among those companies and institutions affected are the Catholic Church,[5] the Miss USA Pageant,[6] and some of the largest tech companies.[7] These agreements' failures have occurred when one party to the agreement gave an interview,[8] passed along leaked documents,[9] or filed a public lawsuit that became the basis of public reporting about

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[1] *See* Josh Dawsey & Ashley Parker, *'Everyone Signed One': Trump Is Aggressive in His Use of Nondisclosure Agreements, Even in Government*, WASH. POST (Aug. 13, 2018, 8:43 PM); Michael Kranish, *Trump Long Has Relied on Nondisclosure Deals to Prevent Criticism. That Strategy May Be Unraveling*, WASH. POST (Aug. 7, 2020, 6:00 AM).

[2] Tim Marchman, *NDAs Vince McMahon Signed Behind WWE's Back May Be Worthless, Say Experts*, VICE (Feb. 2, 2024, 12:27 PM), https://perma.cc/YS5T-TZVK.

[3] Paul Caruana Galizia & Rachel Johnson, *Exclusive: Two More Women Accuse Neil Gaiman of Sexual Assault and Abuse*, TORTOISE (Aug. 1, 2024), https://perma.cc/R3YL-SMX9.

[4] Scott Raynor, *How Harvey Weinstein's 'Secret Weapon' Led to a Nationwide Re-evaluation of the Non-disclosure Agreement*, EVERFI, https://perma.cc/4V43-P3KM.

[5] Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases*, BOSTON GLOBE (Jan. 31, 2002).

[6] Emily Leibert & Tariro Mzezewa, *After Controversy, There's a New Miss Teen USA*, CUT (Aug. 2, 2024), https://perma.cc/82Q3-MZ2Y.

[7] *See* Matt Drange, *'A Gag Order for Life': How Tech Giants Use Secretive Legal Contracts for Their Employees to Create a Culture of Silence in Silicon Valley*, BUS. INSIDER (Sept. 24, 2021), https://perma.cc/DS42-5UAL.

[8] *See, e.g.*, Diana Falzone & Lloyd Grove, *Bill O'Reilly's Accuser Finally Breaks Her Silence*, DAILY BEAST (July 13, 2021, 10:58 PM), https://perma.cc/44WE-P2J2 (interview with party to RNDA).

[9] *See, e.g.*, Jeffrey A. Trachtenberg, Deanna Paul & Rebecca Ballhaus, *Trump's Niece Mary Says She Leaked Family Documents to the New York Times*, WALL ST. J. (July 7, 2020, 5:25 PM).

the secrets that the contract concerned,[10] as well as about the contract itself.[11] Commentators and critics have offered various prescriptions to stem the enforcement of the most egregious contracts intended to prevent a party from reporting sexual assault and harassment that violates criminal or civil law.[12] In a recent article, I described the specific doctrinal, social, and informational dynamics that both render such contracts vulnerable to breach and frustrate their enforcement.[13]

This Article considers the potential liability of third parties that assist or spur the breach of such contracts. Journalists have most frequently played key roles in these disclosures by contacting a party and encouraging them to reveal their secrets.[14] Friends and family members have also initiated or encouraged breach,[15] as have attorneys and activists who hope to reveal a party's wrongdoing.[16] Such non-

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[10] *See, e.g.*, Dartunorro Clark, *Trump Campaign Staffer Jessica Denson Sues to Void Nondisclosure Agreement*, NBC NEWS (Apr. 2, 2018, 1:45 PM), https://perma.cc/C4YB-U8C5; Nick Corasaniti, *2020 Candidates Are Asked to Condemn Nondisclosure Agreements*, N.Y. TIMES (Dec. 18, 2019).

[11] *See, e.g.*, Corasaniti, *supra* note 10 (describing how the disclosure that two candidates in the 2020 Democratic presidential primary had signed NDAs, one as an employer and the other as an employee, had become an issue in the campaign).

[12] *See, e.g.*, Rachel Arnow-Richman, Gretchen Carlson, Orly Lobel, Julie Roginsky, Jodi Short & Evan Starr, *Supporting Market Accountability, Workplace Equity, and Fair Competition by Reining in Non-Disclosure Agreements*, FED'N AM. SCIENTISTS (Jan. 31, 2022), https://perma.cc/W9W6-ZLVR (arguing in favor of legislative and regulatory reforms); Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 87 (2018) (proposing several transactional reforms); David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 170 (2019) (encouraging expansion and application of judicial public policy limitations on enforcement); Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 340–43 (2018) (proposing partial transparency of agreements as check on abusive NDAs); Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 292–95 (2018) (proposing clearer and expanded employer policies relating to harassment and NDAs).

[13] *See generally* Mark Fenster, *How Reputational Nondisclosure Agreements Fail (or, In Praise of Breach)*, 107 MARQ. L. REV. 325 (2024).

[14] Reporting on the Harvey Weinstein RNDAs is the most famous example. For journalists' accounts of their roles in encouraging disclosures, see RONAN FARROW, CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS (2019); JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT (2019).

[15] *See* FARROW, *supra* note 14, at 388 (describing how one of former NBC News anchor Matt Lauer's sexual assault victims only came forward when work colleagues encouraged her to do so).

[16] *See* Clark, *supra* note 10.

parties serve as "breach agents," outsiders to the contract who advise, encourage, or help one of the parties disclose the information they had agreed to keep secret.[17] They play an integral role in breaking the dams that keep information private—whether, viewed sympathetically, to advance the public good by bringing egregious behavior to light or, viewed critically from the perspective of the nonbreaching party, to violate a legally enforceable promise and undermine contractual stability.[18]

As non-parties to the contract, breach agents are vulnerable to suit under the common law tort of interference with performance of a contract.[19] The relationships between that tort and contract law—and between the tort and the First Amendment rights of journalists and others to gather news, to speak, and to publish—last inspired widespread consideration and commentary in 1996, when the tobacco company Brown & Williamson attempted to use a non-disclosure clause in an employment contract to silence a former executive who had been interviewed by the CBS television news show *60 Minutes*.[20]

Two developments since that time have made this issue newly relevant for attorneys and legal academics. The first is the Supreme Court's decision in *Bartnicki v. Vopper* (2001), which concerned a suit against third parties who disclosed confidential information that another party had illegally obtained.[21] *Bartnicki* simultaneously established a test that in most factual scenarios will protect the press or a source which did not itself obtain the information illegally, and also refused to grant

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[17] *See* Fenster, *supra* note 13, at 379–82.

[18] *Compare, e.g.*, Overbey v. Mayor of Baltimore, 930 F.3d 215, 223–26 (4th Cir. 2019) (refusing to enforce a confidentiality clause in a settlement agreement that required the defendant in a contract breach suit to remain silent about police abuses), *with id.* at 232–34 (Quattlebaum, J., dissenting) (stressing the interest in settling legal claims, which is encouraged by confidentiality clauses, and in the certainty that a settlement agreement would be enforceable).

[19] *See infra* Part III.

[20] *See* Bill Carter, *CBS Broadcasts Interview With Tobacco Executive*, N.Y. TIMES (Feb. 5, 1996). Academic commentary at that time included Sandra S. Baron, Hilary Lane & David A. Schulz, *Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WM. & MARY BILL RTS. J. 1027, 1027–28 (1996), and Mark J. Chasteen, *In Search of a Smoking Gun: Tortious Interference with Nondisclosure Agreements as an Obstacle to Newsgathering*, 50 FED. COMMC'N L.J. 483, 484–85 (1998); Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 264–65 (1998).

[21] 532 U.S. 514 (2001).

a blanket constitutional protection for reporting truthful information that would apply no matter how a source had obtained the information.[22]

Second, individuals and institutions have increasingly relied upon NDAs outside of the employment context to protect personal and corporate reputations, even after the recent wave of breached contracts and the resulting embarrassing disclosures.[23] Occasionally, the parties litigate in the aftermath of a breach; for example, one state court recently extended constitutional protection to *The New York Times*, which had used its successful persuasion of a party to an NDA to breach as the basis for a front-page story about President Donald Trump's finances.[24] Given both the supply of NDAs and the high demand for their breach among the press and the public alike, more such litigation is likely to arise.

This Article describes the robust protection that the First Amendment offers third parties from tort claims, as well as the situations that mark such protection's likely limits. Parts I and II describe, in turn, reputational NDAs and the breach agents who play key roles in encouraging disclosure of the secrets bound by such agreements. Part III explains the tortious interference with contract doctrine on which parties to the contract can rely to seek recovery against breach agents. Part IV discusses the broader First Amendment protections that breach agents can use to defend themselves from tort suits, how courts have resolved the few such lawsuits which have reached them, and the general parameters of those protections.

I. REPUTATIONAL NDAS

NDAs attempt to secure the parties' shared secrets with mutual, enforceable promises. Parties execute them to further a variety of aims, including most prominently the protection of valuable, proprietary information from exposure to current or potential competitors.[25]

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[22] *See infra* Part IV.A.

[23] *See* Reeves Weideman, *Hush-Hush Affair: How the NDA Became the Defining Legal Document of Our Time*, CUT (July 1, 2024), https://perma.cc/R876-YXKC ("Gradually, then all at once, the NDA became enmeshed in every part of our lives."). Even Donald Trump continues to try to use them, notwithstanding all the failed NDAs upon which he's relied. *See* Ben Protess & Maggie Haberman, *After Hush-Money Verdict, Trump Tried to Silence Stormy Daniels Again*, N.Y. TIMES (Oct. 18, 2024).

[24] *See* Trump v. Trump, 79 Misc. 3d 866 (N.Y. Sup. Ct. 2023).

[25] On the history of the relationship between trade secrets and contract law, see Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 315–16 (2008);

In addition, some NDAs protect information that could harm an individual's or institution's reputation if disclosed.[26] I will refer to these types of NDAs—some of which are designed to protect reputation, others of which might broadly protect against disclosure but are later enforced to protect reputation—as reputational NDAs (RNDAs).[27] They play a key role within the "reputation revolution," a movement that has been enabled in large part by networked digital communication and an increasingly globalized economy.[28] Individuals' and institutions' relative personal and commercial standing, which factors into the price they can charge for their goods or services, is increasingly tied to their public reputation.

Parties execute RNDAs under a variety of circumstances.[29] Stand-alone agreements signed before or after the events that the parties agree to keep confidential may be drafted with the main purpose of protecting one or both parties' reputations. Broader NDAs initially intended for purposes besides protecting reputation—such as employment agreements that limit workers from divulging valuable proprietary information to competitors and agreements that settle disputes either pre- or post-litigation—may later be used to that end. The protection of a party's reputation, as opposed to the disclosure of proprietary information to competitors, thus might not necessarily have been considered by one or both parties at the time of contract. In the latter scenario, a party can, for example, use a broadly drafted NDA initially intended to protect commercial information from disclosure to later protect its reputation.

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on the relationship between NDAs and confidential business information, see Rex N. Alley, Note, *Business Information and Nondisclosure Agreements: A Public Policy Framework*, 116 NW. U.L. REV. 817, 827 (2021).

[26] Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 48 (2015); Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 156–57 (1998).

[27] For a full discussion of RNDAs as a functional subcategory of NDAs, see Fenster, *supra* note 13, at 332–34.

[28] Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U.L. REV. 1667, 1670–71 (2008).

[29] *See generally* Fenster, *supra* note 13, at 332–34 (describing when and how RNDAs are drafted and executed).

RNDAs typically contain several key terms.[30] They detail the consideration that the parties agree to exchange: One party may provide financial compensation or employment and both parties agree to keep confidential identified categories of information. Many RNDAs stipulate remedies—including injunctions against disclosure and liquidated damages (often calculated on a per-breach basis)—and mandatory arbitration (rather than public legal proceedings) as the sole means to settle disputes over alleged or anticipated breaches. Some RNDAs also include a "meta-confidentiality clause" that prohibits discussion of the formal agreement's existence, on the presumption that knowledge and suspicion about the agreement can lead to investigations into what it covers.[31]

Since 2017, when the widespread use of RNDAs to protect against disclosure of sexual assault and abuse became public knowledge,[32] critics have excoriated them as a contractual tool of oppression by which the powerful and wealthy deploy seemingly consensual agreements and legal process to silence their victims.[33] Revelations about the troubling use of these contracts have led activists, elected officials, and commentators to pursue legislative, regulatory, and legal means to impede their enforceability.[34]

At the same time, RNDAs constitute reciprocal agreements for which those with knowledge of embarrassing information are compensated, sometimes handsomely, in exchange for their silence. They often benefit both parties and can be not only enforceable but morally defensible.[35] Drafted narrowly to cover secrets that

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[30] *See generally id.* at 334–36 (describing common terms in RNDAs).

[31] *Id.* at 335.

[32] *See* Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, ATLANTIC (Oct. 18, 2017), https://perma.cc/LF9L-3D34.

[33] *See, e.g.*, Emily Otte, *Toxic Secrecy: Non-Disclosure Agreements and #MeToo*, 69 KAN. L. REV. 545, 554–57 (2021); Vasundhara Prasad, Note, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2520–22 (2018); D. Andrew Rondeau, Comment, *Opening Closed Doors: How the Current Law Surrounding Nondisclosure Agreements Serves the Interests of Victims of Sexual Harassment, and the Best Avenues for Its Reform*, 2019 U. CHI. LEGAL F. 583, 606–08 (2019).

[34] *See* Arnow-Richman et al., *supra* note 12.

[35] *See* Fenster, *supra* note 13, at 336–37.

constitute private matters rather than legal wrongs, and agreed to under fair circumstances, RNDAs can serve as consensual agreements to protect both parties' privacy about consensual actions.

II. BREACH AGENTS

RNDAs sometimes fail to deliver on their promise to control the flow of information that might inflict reputational harm, and in the process can increase the reputational damage that the secrets threatened to cause.[36] Non-parties have initiated, supported, and promoted RNDA breaches, in many instances serving as a but-for cause in a party's decision to disclose. Reporters who broke the stories about Harvey Weinstein's long pattern of sexual abuse and Bill O'Reilly's pattern of sexual harassment, for example, have described their efforts to persuade victims to breach, despite knowing of the existence of the victims' contractual obligations—and in some instances *because* the contracts' existence suggested that the victims held valuable secrets.[37] In the wake of recent revelations about Vince McMahon's use of NDAs to keep secret his own pattern of sexual abuse as CEO of World Wrestling Entertainment (WWE), a reporter who covered the story described what occurs in the aftermath of such revelations: "[I]nvestigative reporters and, crucially, lawyers are going to be chasing every rumor anyone has ever heard about WWE and calling every woman who's ever worked there."[38]

Not all breach agents intervene for professional or mercenary reasons, and those who stand to gain from prompting disclosure can also have public, altruistic

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[36] *See id.* at 373 (describing the independent damage that disclosure of an RNDA's existence and efforts to enforce it might cause).

[37] *See* Lisa Ryan, *The Reporters Who Uncovered Harvey Weinstein Sexual Abuse Just Won the Pulitzer Prize*, CUT (Apr. 16, 2018), https://perma.cc/3RFK-J6EF; *see generally* FARROW, *supra* note 14; KANTOR & TWOHEY, *supra* note 14.

[38] Tom Scocca, *The Hideous Spectacle of Vince McMahon*, INDIGNITY (Feb. 12, 2024), https://perma.cc/ND4Y-7M9S (interview with *Vice* reporter Tim Marchman). Attorneys who act as breach agents risk violating Model Rule of Professional Conduct 4.4, which prohibits using a method of obtaining evidence that violates the rights of third parties. *See generally* Maura Irene Strassberg, *An Ethical Rabbit Hole: Model Rule 4.4, Intentional Interference with Former Employee Non-Disclosure Agreements, and the Threat of Disqualification, Part I*, 89 NEB. L. REV. 923 (2011).

motivations for doing so. Reporters bring public scrutiny to wrongful acts and assist victims by helping tell their stories.[39] Friends, coworkers, and family members encourage victims to disclose when they appear to suffer from regret for having agreed to keep silent about events from which they still suffer.[40] Even strangers offer financial support for breach if a victim's dilemma is made public.[41] Non-parties promote breach for a complex mix of motivations, whether to offer support for a victim or shed light on abusive behavior, or to investigate and produce a compelling and valuable story, or to earn publicity and compensation for a blockbuster story, or to secure a high-profile and lucrative client.

III. TORTIOUS INTERFERENCE WITH CONTRACT

In addition to a cause of action against the party to a contract who breaches an RNDA, a contracting party whose secrets are revealed has a potential cause of action in tort against a non-party who, by intentionally and improperly interfering with the contract, served as an agent of breach. This is the case even if the defendant is a member of the press.[42] First Amendment speech and press rights only become relevant if the defendant can be liable for tortious interference. To make a prima facie case for tortious interference, a plaintiff must show that a valid contract existed between the plaintiff and another; the defendant knew of the contract; the defendant, with improper motive or by improper means, interfered with the contract;

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[39] *See* Chasteen, *supra* note 20, at 508 (arguing against finding press liability when "the purpose of inducing the third party to breach his nondisclosure agreement is to gather information about a public figure on matters of public concern and not merely to harm or compete with the plaintiff"); Baron, Lane & Schultz, *supra* note 20, at 1064 ("Imposing liability for obtaining information from a source bound by an agreement to remain silent would severely impair the press's ability to serve its constitutional function by effectively cutting off vital sources of information.").

[40] *See, e.g.*, FARROW, *supra* note 14, at 388 (describing how one of former NBC News personality Matt Lauer's sexual assault victims only came forward after friends and colleagues encouraged her).

[41] *See, e.g.*, Scott Gleeson, *Chrissy Teigen Offers to Pay $100,000 Fine for McKayla Maroney to Speak Out Against Nassar*, USA TODAY (Jan. 18, 2018, 6:52 PM).

[42] *See* Michelle Dean, *Contracts of Silence: How the Non-Disclosure Agreement Became a Tool for Powerful People to Stymie Journalists from Informing the Public*, COLUM. JOURNALISM REV. (Feb. 14, 2018), https://perma.cc/D8VT-ZYSV (discussing the possibility that journalistic organizations may also need to "be prepared to support and even indemnify a victim for any legal fees they might incur for lawsuits afterwards").

and the interference caused the breach and resulted in the plaintiff's economic loss.[43]

A. Contractual Validity

To prove that the RNDA with which a defendant interfered is enforceable, a plaintiff must show that the contract is formally, procedurally, and substantively valid. The various formal and procedural requirements include meeting the test for a writing under the statute of frauds, consideration flowing from both parties, the parties' mutual assent, and the lack of fraud and misrepresentation. Assuming both parties were represented by competent counsel with experience and knowledge sufficient to negotiate and draft contracts that avoid these issues, the RNDA is unlikely to be procedurally invalid.[44]

The most significant barrier to an RNDA's substantive validity is a court's common law authority to decide that enforcement of a contract against a breaching party would violate public policy.[45] A substantial scholarly literature on the applicability of the public policy exception to RNDAs maintains that the doctrine reaches excessively broad RNDAs that would require the parties to keep secret about abusive acts, including credible allegations of sexual harassment and assault.[46] The most persuasive of these arguments claim that enforcing confidentiality in such

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[43] Foster v. Churchill, 87 N.Y.2d 744, 749–50 (1996); RESTATEMENT (SECOND) OF TORTS § 766 (1979); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 17 (2020).

[44] Various formal and procedural infirmities in Donald Trump's NDA with the adult film star Stormy Daniels is an exceptional instance that reflects more on Michael Cohen, the attorney who orchestrated the agreement, and the client who retained him than on the tendency of wealthy individuals who initiate an RNDA with more professional counsel. *See* Adam Levitin, *Stormy Daniel's Three-Way (Contract) & Donald Trump's Performance Problem*, CREDIT SLIPS BLOG (Mar. 20, 2018, 4:52 PM), https://perma.cc/V8NV-JMD7 (describing myriad formal problems in the contract); Rebecca R. Ruiz, *Stormy Daniels Sues, Saying Michael Cohen Colluded With Her Former Lawyer*, N.Y. TIMES (June 6, 2018) (describing some of the issues with the contract's negotiation).

[45] *See* RESTATEMENT (SECOND) OF CONTRACTS § 178(1) cmts. e & f (1981); Baron, Lane & Schultz, *supra* note 20, at 1032–35; Hoffman & Lampmann, *supra* note 12, at 189.

[46] *See* Catherine Fisk, *Nondisclosure Agreements and Sexual Harassment: #MeToo and the Change in American Law of Hush Contracts*, *in* GLOBALIZATION OF THE METOO MOVEMENT 475, 480 (David Oppenheimer & Ann Noel eds., 2020); Garfield, *supra* note 20, at 315; Ryan M. Philp, Comment, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL L. REV. 845, 849 (2003); Rondeau, *supra* note 33, at 587–89.

contexts threatens or even affirmatively harms non-parties to the contract, including in particular later victims whose predators were able to continue to engage in abusive acts by keeping secret prior abuses. Contracts that would enable harms to third parties fall within the traditional domain of the public policy exception to enforcement.[47] But the public policy exception to enforcement is narrow, and an excessively broad application of the exception could swallow any contract deemed morally dubious. If it were too broad, courts would have enormous discretion to invalidate contracts on grounds best left to the legislature.[48]

B. Intent to Interfere

Assuming the RNDA is enforceable, a tortious interference claimant must demonstrate the defendant's intent to interfere. Whether they are reporters, or one party's friends or family members, breach agents typically know of or quickly learn of a party's contractual duties not to disclose prior to encouraging them to breach. The journalists whose stories disclosed the intrafamily conflicts and negotiations over Fred Trump's estate, for example, relied on documents that were supplied by his granddaughter Mary in violation of the NDA to which all the parties, including Mary, had agreed in their settlement agreement.[49] In a tweet responding to the lawsuit's filing, one of the *Times* reporters wrote, "I knocked on Mary Trump's door. She opened it. I think they call that journalism."[50] Recent accounts by investigative journalists who uncovered RNDAs describe the moments they learned of the contracts' existence, whether from a party to the contract or someone to whom a party had confided.[51] Friends and strangers who have encouraged breach have also done

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[47] *See* Hoffman & Lampmann, *supra* note 12, at 189–93.

[48] *See* Fenster, *supra* note 13, at 347–50 (noting the limitations of the common law public policy exception to enforcement, including the vagueness and uncertainty in judicial balancing of the public harm against the parties' expectations and the financial hurdles defendants face in raising it).

[49] *See* Trump v. Trump, 189 N.Y.S.3d 430, 434–35 (Sup. Ct. 2023) (describing *New York Times* reporters' receipt of documents while knowing of the existence of Mary Trump's contractual obligation not to disclose them).

[50] Susanne Craig (@susannecraig), X (Sept. 22, 2021, 12:35 AM), https://perma.cc/94PC-8R4S.

[51] *See* Fenster, *supra* note 13, at 361–62 (summarizing the accounts in FARROW, *supra* note 14, and KANTOR & TWOHEY, *supra* note 14, of discovering Harvey Weinstein's RNDAs).

so knowing of the party's contractual commitment.[52] Assuming "interference" is broad enough to include an effort to encourage breach, a plaintiff should have little trouble meeting the intent to interfere element.

C. Improper or Wrongful Motive and Means

Since its beginnings in nineteenth-century English common law,[53] the modern doctrine of tortious interference with a contractual relationship has focused on the extent of a defendant's malice.[54] The second Restatement of Torts set forth a multi-factor balancing test that considers, among other things, the non-party's improper conduct and motive alongside the parties' contractual obligations and the extent to which the non-party's conduct caused breach.[55] The third Restatement replaced the term "improper" with "wrongful," and defined "wrongful conduct" to include appropriating the plaintiff's contractual benefits, purposely injuring the plaintiff, or

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[52] *See, e.g.*, FARROW, *supra* note 14, at 388 (describing friends' and colleagues' knowing encouragement of victim bound by RNDA to breach); Gleeson, *supra* note 41 (describing Chrissy Teigen's offer of financial support to USA gymnast, knowing of her contractual obligation).

[53] *See* Lumley v. Gye, 118 Eng. Rep. 749 (Q.B. 1853) (recognizing a cause of action against a defendant who induced his competitor's employee to quit her job and work for him). Lumley argued that Gye intentionally and maliciously used Lumley's contract with his employee as a "tool" to harm his economic well-being. *Id.* at 751. A claim for modern-day tortious interference was referred to at that time as the "entic[ement] of servants." *Id.* at 752–53, 755, 758–59. However, Lumley's case did not involve a master-servant relationship, but a contractual relationship with his employee. *Id.* at 752. Still, two judges on the three-judge panel acknowledged that the application of an enticement action was necessary to remedy Lumley's damages. *Id.* at 755–56, 758–59. *See also* Bowen v. Hall, 6 Q.B.D. 333 (1881) (extending *Lumley* by focusing on the defendant's malicious intent where a brick manufacturer enticed a specialized brick-maker to violate his employment contract with the defendant's competitor); Temperton v. Russell, 1 Q.B. 715 (1893) (extending *Lumley* to apply to all contracts, regardless of whether the contract was for the procurement of services or goods). On the doctrinal development and its importation into U.S. law, see RESTATEMENT (SECOND) OF TORTS § 766 cmt. c (1979); *see also* Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 664–66 (1923) (noting the doctrine's roots in Roman law).

[54] On the early history of the doctrine that only required a plaintiff to show a third party's intent to interfere, see Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 337–43 (1980); Sayre, *supra* note 53, at 675–77; Daiquiri J. Steele, *Integrating Interference Theory*, 104 B.U. L. REV. 185, 197–98 (2024). On the shift to an improper motive requirement, see Charles E. Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728, 745–62 (1928); John T. Nockleby, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510, 1537–38 (1980).

[55] RESTATEMENT (SECOND) OF TORTS § 767 (1979).

engaging in an independent and intentional legal wrong.[56] As Shyamkrishna Balganesh has explained, the doctrine does not

> simplistically treat the act of "interference" as independently wrongful. Only when the interference is shown to be wrongful as an independent matter—either owing to the interests/rights involved, the defendant's motives, or the independent impropriety of the actions as such—does liability attach.[57]

In its explanatory comments, the third Restatement states:

> The wrong in such a case may be described as "independent" to emphasize that the conduct was wrongful apart from its effect on the plaintiff's contract. An independent wrong, for purposes of this Section, can be conduct regarded as culpable by the law of tort, by criminal law, by equity, or by regulation.[58]

Wrongfulness to which liability would attach, then, requires an act beyond mere contact, such as fraudulent acts or defamatory statements.[59]

The test for improper motive and means lead a court to focus on the same issues and facts as it would, and perhaps already has, in reviewing a challenge to the contract's substantive validity. Just as a court is more likely to refuse enforcement of a contract on public policy grounds based on the relative malevolence of the agreed-to performance, which for an RNDA would turn on the character of the actions to be kept secret, so a court asked to evaluate the relative wrongfulness of a breach agent's interference with a contract will inevitably consider the interference's propriety and legality.[60] This is especially the case if the interference is by the press or ultimately leads to public exposure of behavior that, in the absence of publicity, would enable a party to escape criminal or civil liability.[61]

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[56] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 17 (2020).

[57] Shyamkrishna Balganesh, *Copyright as Market Prospect*, 166 U. PA. L. REV. 443, 458 (2018); *see also* Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 128 (1982) ("Where the defendant's act of interference is independently unlawful, tort objectives predominate; where the defendant's behavior is lawful except for the resulting interference, tort theory should reflect and remain consistent with contract policies.").

[58] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 17 cmt. e (2020).

[59] *Id.* at cmt. e, illus. 5 & 6.

[60] *See* Baron, Lane & Schultz, *supra* note 20, at 1040–51.

[61] The third Restatement's elaboration of wrongfulness—which requires the defendant either to have intended to appropriate the contract's benefits, engaged in conduct that constituted "an independent and intentional legal wrong," or had the sole purpose of harming the plaintiff—will

D. Economic Loss

In pursuing a contract claim against a party who breaches an RNDA that does not stipulate liquidated damages, a plaintiff might struggle to prove the economic loss caused by the breach.[62] A trier of fact must consider the cause of a loss in reputational status for prior bad acts when disclosure served as the trigger but the acts themselves constituted the underlying cause. If, for example, a party engaged in an egregiously harmful act that they attempted to keep secret with an RNDA, a breach that causes the act to be made public may be a but-for cause of the resulting reputational loss, but the harmful act is the larger causal factor.

In a wrongful interference with contract suit against a third party who allegedly interfered with a contract, tort damages offer a plaintiff "more liberal rules" than those available for contract breach.[63] In addition to pecuniary and consequential

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make a contract interference claim against the press more difficult to pursue. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 17(2) (2020). Indeed, as a comment to the Restatement states, a court "should be mindful of restrictions on the underlying tort or other wrong that provides the basis of the plaintiff's claim," including constitutional defenses like free speech. *Id.* § 17(2) cmt. e. The second Restatement's multi-factor balancing test sets a lower bar for "improper." *See* RESTATEMENT (SECOND) OF TORTS § 767 (1979) (setting seven factors for a court to consider).

[62] I develop this point in Fenster, *supra* note 13, at 392–94 (noting problems with causation, the "reasonable certainty" requirement for contract damages, and the limitation against seeking damages for mere embarrassment, as well as the difficulty of enforcing a liquidated damages clause because of the tendency for contract drafters to impose excessive and therefore penalizing and unenforceable damages in the contract intended to create an *in terrorem* effect on a party who might later contemplate breach).

[63] *See* Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 406 N.E.2d 445, 452 n.6 (N.Y. 1980). As the second Restatement notes,

> The action for interference with contract is one in tort and damages are not based on the contract rules, and it is not required that the loss incurred be one within the contemplation of the parties to the contract itself at the time it was made. The plaintiff can also recover for consequential harms, provided they were legally caused by the defendant's interference.

RESTATEMENT (SECOND) OF TORTS § 774A cmt. d (1979).

losses, a plaintiff claiming tortious interference can also seek damages for emotional distress as well as for actual harm to reputation, so long as those damages can reasonably be expected to result from the interference.[64]

IV. The Extent of a First Amendment Defense Against Tortious Interference

Assuming a plaintiff can state a claim for tortious interference with an RNDA, a defendant may argue that the plaintiff seeks to censor or to punish the defendant's efforts to publicize the information obtained from one of the contracting parties. This is most clearly the case when the third party is a reporter or publication, but it is equally true if they are a friend or family member who shares the information with others.[65] In either scenario, the cause of action seeks to punish the defendant for their speech.

The Supreme Court has held that the First Amendment provides a defense against various state common law claims that seek to impose liability for a defendant's speech.[66] These claims include defamation,[67] intentional infliction of emotional distress,[68] invasion of privacy,[69] and malicious interference with business relations.[70] Although the Court has yet to consider whether and how the First Amendment would apply to tortious interference claims, it has established several general

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[64] *See* Restatement (Second) of Torts § 774A(1); Rich v. Fox News Network, LLC, 939 F.3d 112, 128 (2d Cir. 2019) (severe emotional distress damages available against news organization that interfered with confidentiality agreement between plaintiffs and a private investigator).

[65] *See infra* Part IV.C.1 (discussing equivalent constitutional rights of journalists and non-journalists).

[66] *See* Snyder v. Phelps, 562 U.S. 443, 451 (2011) (declaring that the First Amendment can serve as a defense in state tort suits (citing Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 50–51 (1988))). Notably, the Supreme Court has stated that a defendant facing a claim of promissory estoppel, which is "a law of general applicability," cannot benefit from an application of the First Amendment's strict scrutiny. Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991). Because breach agents have made no formal or informal agreement with the party whose secrets they disclose, *Cohen* is less relevant than torts based on reputational, privacy, or business harms. For further discussion of *Cohen*, see *infra* note 141.

[67] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[68] *See, e.g.*, *Snyder*, 562 U.S. at 451; *Hustler Mag.*, 485 U.S. at 50–51.

[69] *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 494–95 (1975).

[70] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982).

principles in analogous scenarios. These include instances when the press has published private, confidential information that it obtained without the permission of the party the information concerns, or that it received the information from a source which obtained it illegally or without authorization. I describe this general precedent in the first section, from which I draw the conclusion that in most but not all such cases, the First Amendment protects third-party disclosures of confidential information. The second section describes the few state and lower federal court decisions that have considered constitutional defenses to claims of tortious interference with RNDAs. Most but not all courts have ruled in defendants' favor.

The final section identifies the contested issues at play in this litigation and draws from the scant case law a rough sense of how courts will and, I argue, should apply the First Amendment to the actions of RNDA breach agents. The constitutional analysis overlaps with the tort analysis in two ways. First, the wrongful motive and means element of a tortious interference claim resembles the character of the interference consideration in the First Amendment defense. Second, a court's analysis of whether the content of the disclosure concerns a matter of public concern for constitutional purposes inevitably resembles its review of whether the contract should be enforceable under the public policy exception. But by focusing on disclosure more as speech than as conduct, the First Amendment emphasizes distinct interests and gives more weight to the spread of information than the protection of contractual obligations.

A. Third Party Disclosures and the First Amendment

The First Amendment does not protect the disclosure of all secrets by third parties, but it comes close. The publication of even the most valuable state secrets provided to newspapers by whistleblowers who had illegally passed them along—secrets whose disclosure, the government argued in the *Pentagon Papers* case, would threaten national security—can withstand government efforts to stop their publication.[71] The Supreme Court stopped well short in the *Pentagon Papers* case of holding that the First Amendment offers blanket immunity from post-disclosure punishment, however. Several of the Justices explicitly distinguished the constitutional

[71] New York Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 714 (1971) (per curiam) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."), and Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (noting the "heavy burden" the government must meet to justify prior restraint)).

rights of the press to be free of government censorship prior to publication from the authority of the government to criminally prosecute the newspapers, and especially the sources who leaked the documents, after publication.[72]

1. Private secrets, obtained legally

The disclosure of *private* secrets that RNDAs attempt to protect is of much less consequence, except to the parties, than the classified secrets at stake in *Pentagon Papers*.[73] In several cases since *Pentagon Papers*, the Court has held that First Amendment protections extend to the press when it publishes unauthorized leaks of private information received from others, even when statutes would otherwise punish such disclosures.

The earliest of these cases involve information obtained legally by the press. *Smith v. Daily Mail Publishing* (1979)[74] concerned a local newspaper that had published the name of a juvenile arrested for shooting and killing another youth. Its reporters had obtained his name from witnesses and government officials at the scene, but its publication of the juvenile's identity led to its prosecution for violating

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[72] *See, e.g.*, *id.* at 730 (Stewart, J., concurring); *id.* at 732–37, 740 (White, J., concurring); *id.* at 742 (Marshall, J., concurring). For an example of post-publication discipline, consider the Court's decision in *Snepp v. United States*, 444 U.S. 507 (1980), in which a former CIA employee divulged classified information in his memoir after skipping the CIA's pre-publication review process that he had agreed in his employment agreement with the agency to use. Deeming Snepp in breach of the agency's use of its employment contract as a "reasonable means" of restricting an employee's ability to disclose its secrets, the Court established a constructive trust as an equitable remedy that forced him to disgorge the profits from his writings. *Id.* at 509 n.3, 515.

[73] Prior restraint is only an issue in RNDA breach cases when a party seeks an injunction in anticipation of a threatened or suspected breach rather than, or in addition to, demanding money damages, which is the typical remedy for a breach of contract. Some NDAs allow injunctions as a liquidated remedy. *See* Fenster, *supra* note 13, at 335, 395. In one such instance, the television news host Bill O'Reilly successfully persuaded a state trial court to issue a temporary restraining order to prevent a woman from appearing on a popular daytime talk show to discuss sexual assault allegations she had agreed by contract to keep confidential. *See* Diana Falzone, *O'Reilly Silences Accuser Again, Blocks 'View' Appearance*, DAILY BEAST (July 21, 2021, 4:55 PM), https://perma.cc/E7TJ-Y9UM. The information that O'Reilly's victim would have shared on *The View* had, by that time, already been widely shared through her earlier breaches of the contract. *See* Fenster, *supra* note 13, at 328–30.

[74] 443 U.S. 97 (1979).

a state statute.[75] Daily Mail responded by raising a First Amendment defense.[76] Reviewing recent precedent, the Court's seven-Justice majority explained that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[77] But the Court characterized its holding as narrow; the case, it maintained, did not include "unlawful press access to confidential judicial proceedings," nor did it raise issues of "privacy or prejudicial pretrial publicity."[78]

A decade later, the court again considered a state's prohibition against a newspaper's publication of protected private information without having illegally obtained it. In *The Florida Star v. B.J.F.* (1989),[79] a newspaper, in contravention of a state statute, published the name of a sexual assault victim after the Sheriff Department had mistakenly disclosed it. Reiterating its decision in *Daily Mail* to apply strict scrutiny to the publication of lawfully obtained, publicly significant information, the Court offered three rationales for deciding in the press's favor: the government could have safeguarded the information it held, but failed to do so; punishing the press for the government's own mistaken disclosure would be a "highly anomalous" use of state authority; and the press would likely censor itself if it faced state sanction for publication of information it had lawfully obtained.[80] Each rationale turned on the government's failure to keep private secrets and the publication's having obtained the information without wrongdoing.

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[75] *Id.* at 98–99.

[76] *Id*. at 100.

[77] *Id.* at 102–03 (citing Okla. Publ'g Co. v. Dist. Ct., 430 U.S. 308 (1977) (striking down state court injunction prohibiting publication of juvenile's identity after court had permitted public to attend court hearing which had disclosed the information); Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829 (1978) (declaring unconstitutional a state statute criminalizing confidential information revealed to judicial review commission); and Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (barring award of damages based on state statute punishing media for revealing the name of a rape victim obtained from official court records)).

[78] *Id.* at 105.

[79] 491 U.S. 524 (1989).

[80] *Id.* at 534–36.

Both cases thus presented the issue of whether the First Amendment protects the press when it violates a statute by publishing truthful information obtained legally from a third party—in both instances, from the government. In both cases, the Court held that a newspaper could rely on the First Amendment to protect itself from prior restraint, as in the *Pentagon Papers* case, and to serve as a shield from post-publication punishment. But this protection would not be universal; *Florida Star* refused to hold that publishing truthful information would *always* enjoy such protection. It explained that a future case could generate a different result if, for example, the press did not obtain the information directly as a result of the government's failure to protect it.[81] And it declined to hold that privacy could never serve as an adequate justification for punishing publication.[82] Regarding the balance between speech and privacy, the Court made plain its resistance to providing a clear rule that could anticipate future fact patterns as well as its affirmative desire to rely on "limited principles that sweep no more broadly than the appropriate context of the instant case."[83]

2. Private secrets, obtained illegally

The constitutional issue raised by imposing post-publication criminal liability on third parties who, without having violated the law themselves, publish *illegally* obtained private information was central to *Bartnicki v. Vopper* (2001).[84] *Bartnicki* involved the interception of a phone call between Kane and Bartnicki, two union workers negotiating for a collective bargaining agreement for higher pay for teachers.[85] Their phone conversation was wiretapped and recorded by an unknown individual without the participants' consent.[86] Yocum, the head of the local taxpayers'

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[81] *Id.* at 538–39.

[82] *See id.* at 541 ("We do 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, or even that a State may never punish publication of the name of a victim of a sexual offense.").

[83] *Id.* at 533.

[84] 532 U.S. 514 (2001). In so doing, as Jane Bambauer has noted, the Court is implicitly distinguishing between illegal, unprotected conduct (of, for example, illegal wiretapping) and legally protected speech (publishing the fruits of the illegal conduct). *See* Jane R. Bambauer, *Glass Half Empty*, 64 UCLA L. REV. DISCOURSE 434, 440 (2016).

[85] *Id.* at 518.

[86] *Id.* at 518–19.

organization that opposed the union's demands for higher pay, claimed to have received the tape recording in his mailbox unexpectedly and then forwarded it to Vopper, the radio show host.[87] Kane and Bartnicki alleged that Yocum and Vopper knew or had reason to know that the recording was obtained illegally and were therefore civilly and criminally liable under federal and state law for illegal wiretapping.[88] They therefore sought damages made available under federal and state wiretapping laws.[89] But Yocum and Vopper had played no role in intercepting the phone call; the illegal act of intercepting and recording it was performed by another, from whom they lawfully obtained it.[90] Meanwhile, the Court characterized the recording's subject matter, which concerned negotiations over a teacher's union contract, as "newsworthy" and "a matter of public concern."[91]

Reasoning that "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party," the Court concluded that the First Amendment protected Yocum and Vopper, as opposed to the illegal wiretapper, from civil liability.[92] The decision followed the Court's conclusion in *Daily Mail* that a newspaper enjoys First Amendment protection when it lawfully obtains truthful information about a matter of public significance, absent a "need [to further a state interest] of the highest order."[93] The Court noted two key factual findings that supported its conclusion: first, that the defendants had played no role in the illegal interception of the private conversation and only learned about its existence after the recording; and, second, that the information disclosed by the recording was a matter of "public concern" and therefore "newsworthy."[94]

Nevertheless, the Court did not ignore the privacy interests of victims whose private communication had been intercepted, or of the government's interest in

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[87] *Id.* at 519.

[88] *Id.*

[89] *Id.* at 520.

[90] *Id.* at 525.

[91] *Id.*

[92] *Id.* at 529–30.

[93] *Id.* at 528 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

[94] *Id.* at 525.

protecting them.[95] It affirmatively conceded that the "constitutional calculus" to be applied in the "balance" between privacy and speech requires consideration of the relative offensiveness of a particular intrusion on privacy.[96] But whatever interests Kane and Bartnicki possessed in the confidentiality of their conversations, those "privacy concerns give way when balanced against the interest in publishing matters of public importance."[97] Justice Stevens, writing for a four-Justice plurality, noted that "[o]ne of the costs associated with participation in public affairs is an attendant loss of privacy."[98] Privacy interests, in other words, did not outweigh the broader public interest in the disclosure's substance. That the initial interception of a private phone conversation was illegal did "not suffice to remove the First Amendment shield from speech about a matter of public concern."[99]

Joined by Justice O'Connor, Justice Breyer's concurrence, necessary to form a majority, offered a narrower understanding of the extent of constitutional protection by giving the privacy interest protected by the federal wiretapping statute more weight than Justice Stevens's plurality opinion did.[100] The concurrence emphasized that the wiretapping statute did not criminalize the defendants' receipt of the recording, the defendants played no role in the illegal act,[101] and the plaintiffs, who were limited public figures, had "little or no *legitimate* interest"[102] in keeping secret the content of conversations that included threats of violence and were "a matter of unusual public concern."[103] Given facts suggesting that the plaintiffs enjoyed only limited privacy rights in their conversations, Justice Breyer would still have resolved the case in favor of the defendants' free speech rights, as the Court did in plurality, but more narrowly.[104]

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[95] *Id.* at 532 ("Privacy of communication is an important interest.") (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985)).

[96] *Id.* at 533.

[97] *Id.* at 534.

[98] *Id.*

[99] *Id.* at 535.

[100] *Id.* at 536–38 (Breyer, J., concurring).

[101] *Id.* at 538.

[102] *Id.* at 539 (emphasis in original).

[103] *Id.* at 535–36.

[104] *Id.* at 538–40.

Read broadly and alongside *Daily Mail* and *Florida Star*, *Bartnicki* appears to hold that a third party enjoys broad First Amendment protection from punishment when it publishes private information on a matter of public concern received from someone else and when it played no role in obtaining the information. On similar facts, the First Circuit extended *Bartnicki* to a blogger who sought to enjoin police authorities from prosecuting her for posting video that someone else had recorded, allegedly illegally, without the police's consent.[105]

But these are fact-intensive decisions, and the Court in *Florida Star* rejected the press' request to establish a rule that would have fully immunized truthful publication of private information from legal liability, no matter the nature of the information or how the publication obtained it. Rather, the Court held, "the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel [that courts] rely[] on limited principles that sweep no more broadly than the appropriate context of the [particular] case."[106] The *Bartnicki* decision and Justice Breyer's concurrence share this resistance to a rule-based approach that would offer third parties constitutional protection in every case.

Indeed, as two federal circuit court decisions decided soon after *Bartnicki* demonstrate, the constitutional protection provided by these precedents is limited, at least to an extent. In *Trans Union Corp. v. FTC* (2001), the D.C. Circuit deemed consumer credit reports, which the FTC found had been improperly sold to target marketers by a credit reporting agency, to be matters of purely private concern; because, unlike in *Bartnicki*, strict scrutiny did not apply, the court upheld the FTC's enforcement of the Fair Credit Reporting Act because it advanced the substantial government need to protect consumers' privacy.[107] Similarly, in *Quigley v. Rosenthal*, the Tenth Circuit refused to apply *Bartnicki* to an organization's publication of illegally obtained information in part because the plaintiffs were private figures whose antisemitic statements had been illegally recorded by neighbors as part of a purely local dispute.[108]

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[105] *See* Jean v. Mass. State Police, 492 F.3d 24, 25–29 (1st Cir. 2007) (applying *Bartnicki* because the blogger "played no part in the recording of the video, . . . had 'obtained the tape lawfully,' and . . . the videotape related to a 'matter of public concern'").

[106] Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989).

[107] *See* Trans Union Corp. v. FTC, 267 F.3d 1138, 1141 (D.C. Cir. 2001).

[108] Quigley v. Rosenthal, 327 F.3d 1044, 1067 (10th Cir. 2003).

The improper character of the information's disclosure and publication creates additional uncertainty for *Bartnicki*'s application to third-party disclosure. *Quigley* turned not only on the private character of the disclosed information but also on the fact that the defendant publisher—the Anti-Defamation League—knew that the information had been illegally obtained and was involved in the dispute when some of the conversations were illicitly recorded.[109]

The D.C. Circuit too has suggested that *Bartnicki*'s application turns in part on how the information was obtained, whether the publisher knew of its illegality, and the kind of law or rule the publisher violated. In *Boehner v. McDermott* (2007), a closely split D.C. Circuit, sitting en banc, decided that strict scrutiny would apply to most efforts to punish a congressman's publication of an illegally intercepted cell phone, even though the accused congressman knew of the illegality of the recording.[110] But the recording was of a conversation among a group of rival congressmen, and a solo concurrence joined a plurality to decide the case on the grounds that a House Ethics Committee decision enforcing one of its own rules against a committee member, who had agreed to a duty of confidentiality by joining the committee, overrode the First Amendment.[111] Though likely facing a unique set of facts, the split court reveals the uncertainty of just how wrongful a violation of the law must be to warrant a refusal to apply *Bartnicki*'s strict scrutiny.

Viewed as a piece, these decisions indicate that the First Amendment can protect disclosures of private information by third parties. The nature and character of the disclosures, however, may limit its application. Like the substantive consideration of tortious interference with contract, the extent of the First Amendment's application varies based on the role a third party has played in obtaining the information and the nature of the information itself.

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[109] *Id.* at 1067.

[110] Boehner v. McDermott, 484 F.3d 573, 582–86 (D.C. Cir. 2007) (en banc) (Sentelle, J., dissenting); *id.* at 581 (Griffith, J., concurring) (agreeing with the dissent's argument that *Bartnicki* applied to the House Ethics Committee's punishment of the leaking congressman).

[111] *Id.* at 581 (Griffith, J., concurring). For a fuller discussion of *Boehner*, see William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1502–11 (2008); *see also* Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 519 (2014).

B. Breach Agents in Lower Courts

Although the Supreme Court has not confronted the issue, in most cases lower courts have held that a defendant's free speech right trumps a tortious interference with contract claim against RDNA breach agents.

A recent high-profile tortious interference case concerning a settlement agreement in 2001 signed by Donald Trump and members of his family to resolve disputes surrounding his parents' estate illustrates lower courts' application of the First Amendment. The agreement included a confidentiality clause covering all relevant financial information relating to the litigation and settlement.[112]

In 2017, as part of its ongoing efforts to find the federal and state tax returns Trump was refusing to release, reporters for *The New York Times* approached Mary Trump, the then-President's niece and one of the parties to the agreement. Following several rounds of communications via encrypted channels, Mary Trump ultimately agreed to cooperate with the reporters and gave them copies of Trump's returns, which her attorney had retained from the negotiations.[113] Those disclosures provided the basis for a lengthy article published the following year that alleged President Trump's participation in potentially illegal tax avoidance schemes.[114] Trump included *The New York Times* and three of its journalists in a suit against his niece for breach, claiming the newspaper and its reporters had tortiously interfered with the family's contract.[115] He argued that the reporters had initiated the series of events that led to Mary Trump's breach and that they knew, either before they approached her or after, that she was contractually bound to maintain confidentiality.

After a separate ruling denied Mary Trump's challenge to the NDA's enforceability,[116] a New York state trial court ruled in favor of the *Times* and its journalists,

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[112] Trump v. Trump, 79 Misc. 3d 866, 868 (N.Y. Sup. Ct. 2023).

[113] *Id.* at 871.

[114] *Id.* at 868.

[115] Although his surviving siblings were co-plaintiffs, Trump initiated the lawsuit. *See* Katerina Ang, *Trump Sues New York Times and Niece Mary Trump over Tax Records Story*, WASH. POST (Sept. 22, 2021).

[116] *See* Trump v. Trump, No. 2020-05027, 2020 WL 3602286 (N.Y. App. Div. July 1, 2020) (upholding enforceability of contract against Mary Trump, who "contract[ed] away her First Amendment rights"). The New York intermediate appellate court reaffirmed this conclusion. *See* Trump v. Trump, 212 N.Y.S.3d 323, 325 (App. Div. 2024) (upholding the NDA's enforceability against Mary

finding that their efforts to obtain information in contravention of a contract to which other parties agreed was constitutionally protected.[117] First, applying the New York constitution's free speech provision,[118] which it described as "especially vigilant 'in safeguarding the free press against undue interference'"[119] and as offering "'the broadest possible protection'" to newsgathering,[120] the court concluded that New York does not apply "tort liability [to] the press [when] a reporter induced a source to breach a nondisclosure agreement."[121] The court also concluded, based on *Bartnicki* and related Supreme Court precedent, that the First Amendment protected the *Times* and its journalists, even if the federal constitutional press right is not as robust as that provided by New York's constitution.[122]

Trump v. Trump is not alone in reaching that conclusion. In *Jenni Rivera Enterprises v. Latin World Entertainment Holdings* (2019), a California intermediate appellate court held that the First Amendment protected against the liability of a

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Trump despite the applicability of New York's anti-SLAPP law but remanding to trial court to consider whether the contract's lack of a fixed duration made its enforcement unreasonable).

[117] *Trump v. Trump*, 79 Misc. 3d at 868–69.

[118] NY CONST. art. I, § 8 ("Every citizen may freely speak, write and publish his or her sentiments on all subjects.").

[119] *Trump v. Trump*, 79 Misc. 3d at 879 (quoting Immuno AG v. Moor-Jankowski, 567 N.E.2d 1270, 1277 (N.Y. 1991)).

[120] *Id.* (quoting *Immuno AG*, 567 N.E.2d at 1277).

[121] *Id.* at 882 (citing Highland Cap. Mgmt., L.P. v. Dow Jones & Co., Inc., 116 N.Y.S.3d 18 (App. Div. 2019)). *Highland Capital Management* was predominantly filed as a defamation suit against *The Wall Street Journal* for publishing the details of an arbitration decision; it only briefly considered a tertiary claim for tortious interference with contractual relations (that failed to cite any confidentiality agreement which had been violated) but noted the existing constitutional protections for newsgathering under the First Amendment. *See id.* at 20 (citing Bartnicki v. Vopper, 532 U.S. 514, 534 (2001)). *See also* Huggins v. Nat'l Broad. Co., No. 119272/95, 1996 WL 763337 (N.Y. Sup. Ct. Feb. 7, 1996) (finding constitutional protection for reporter who had solicited information from plaintiff's ex-wife subject to confidentiality agreement). The court distinguished earlier decisions refusing to extend free speech protection to reporters who trespassed onto property to gather news from a source, noting that Mary Trump willingly gave the reporter documents she had received from her attorney. *See Trump v. Trump*, 79 Misc. 3d at 880–81 (discussing United States v. Sanusi, 813 F. Supp. 149, 155 (E.D.N.Y. 1992), and Le Mistral, Inc. v. Columbia Broad. Sys., 402 N.Y.S.2d 815 (App. Div. 1978)).

[122] *See Trump v. Trump*, 79 Misc. 3d at 879–80 (citing *Bartnicki*, 532 U.S. at 525–28; Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989); and Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

television network engaged in newsgathering.[123] The owner of the intellectual property and publicity rights of Jenni Rivera, a Mexican-American singer and actor who had recently died in a plane crash, claimed that a video production company which had made a television series about her life, as well as the television network that had aired the series, had tortiously interfered with an NDA to which the celebrity's former manager had agreed.[124]

The appellate panel affirmed the trial court's decision finding the former manager in breach for providing the production company with his unpublished manuscript about Rivera.[125] But it held that the network's role in airing the series constituted a form of newsgathering and therefore enjoyed First Amendment protection.[126] The court refused to extend such protection to all newsgathering, distinguishing "routine reporting techniques"[127] from wrongful or unlawful "torts or crimes committed in an effort to gather news."[128] But the court found no evidence that the television network's contribution to the manager's breach of the NDA had been wrongful or unlawful.[129]

A Florida intermediate appellate court ruled similarly. In *Seminole Tribe of Florida v. Times Publishing Company*,[130] the Tribe alleged that the *St. Petersburg Times* and two of its reporters had wrongfully interfered with its non-disclosure agreements by soliciting its agents and employees for confidential information and

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[123] 36 Cal. App. 5th 766 (2019).

[124] *Id.* at 773.

[125] *Id.* at 774.

[126] *Id.* at 796–800. The production company, which did not raise a First Amendment defense, was found liable for interference with the contract. *See id.* at 795 ("Unlike the Producers, Univision argued in the trial court the First Amendment barred JRE's causes of action . . . .").

[127] *Id.* at 795 (citing Nicholson v. McClatchy Newspapers, 177 Cal. App. 3d 509 (1986) (holding that the First Amendment shielded reporters from invasion of privacy tort for publishing confidential information about judicial nominee)).

[128] *Id.* at 796 (citing Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 493 (Cal. 1998) (holding that the First Amendment shielded reporters from the tort of publication of private facts for publishing photographs taken without plaintiffs' consent)).

[129] *Id.* at 800. *See also Nicholson*, 177 Cal. App. 3d at 517 (holding, before the decisions in *Florida Star* and *Bartnicki* discussed in Part IV.A *supra*, that the First Amendment's protections applied to press that had legally obtained confidential information "of substantial public interest").

[130] Seminole Tribe of Fla. v. Times Publ'g Co., 780 So. 2d 310 (Fla. Dist. Ct. App. 2001).

documents that harmed the Tribe's reputation.[131] Merging its consideration of whether the newspaper had tortiously interfered and its application of the First Amendment to the newspaper's defense, the court dismissed the Tribe's complaint. The "public interest in the free flow of information, the routine news gathering techniques used in this case, the subject matter of the information obtained as being of public concern, and the limited intrusion into the relationship between the [employer] and its employees and agents," the Court concluded, all weighed against the plaintiff's contention of improper motives.[132] Viewed together, these decisions suggest that breach agents can contact a party subject to an NDA and then receive and publish confidential information from that party without being held liable for wrongful interference.

But there are limits to this protection, as a federal appellate court demonstrated in *Rich v. Fox News Network, LLC* (2019) by ruling against the defendant media company's motion to dismiss.[133] The complaint contended that reporters from Fox News had induced the plaintiffs—the parents of Seth Rich, a Democratic National Committee staffer who had committed suicide and then became the subject of conspiracy theories—to hire an investigator to find the truth about their son's death.[134] The investigator had executed a confidentiality agreement with the plaintiffs while working simultaneously to provide Fox News reporters with information that, under the contract, he had agreed not to disclose.[135] Reversing the trial court's decision, a panel of Second Circuit judges held that, beginning with the agreement's negotiation and in an effort to procure information the Riches had assumed would be kept confidential, the reporters and news network had conspired to wrongfully induce both the contract and breach.[136]

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[131] *Id.* at 312–14.

[132] *Id.* at 318.

[133] 939 F.3d 112 (2d Cir. 2019).

[134] *Id.* at 117.

[135] *Id.* at 118.

[136] *Id.* at 127.

Fox News raised a constitutional defense to the Riches' sufficient pleading of intentional interference with contract, as well as to their equally well-pled intentional infliction of emotional distress claim.[137] With respect to the contract between the investigator and the Riches, Fox News claimed that its efforts constituted newsgathering, and as such enjoyed protection under the state and federal constitutions.[138] Assuming for the sake of the motion to dismiss that such rights offered a "justification" for defendants' conduct, the court concluded that "the Riches unquestionably allege malice sufficient to overcome any such possible justification."[139] Without citing *Bartnicki* or the other third-party disclosure cases, and employing the terms that the Supreme Court has used in applying the First Amendment as a defense to defamation and intentional infliction of emotional distress claims,[140] the court found that, as stated in the complaint, the defendants' manipulative and deceitful efforts did not warrant constitutional protection.[141]

While *Trump*, *Jenni Rivera Enterprises*, and *Seminole Tribe* illustrate the strength of the First Amendment's reach as a defense for RNDA breach agents, *Rich* demonstrates the limits of that reach. The final Part draws conclusions about the defense's scope by focusing on several outcome-determinative issues for future litigation.

C. The Key First Amendment Issues for Breach Agents

This case law reveals several issues that will factor into a breach agent's First Amendment defense: First, *who* is eligible to raise the defense—only the press, or does the First Amendment's protection also extend to anyone who plays a role in a breach? Second, *what content* constitutes a matter of "public concern" such that the secret a breach agent reveals can receive constitutional protection? And third,

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[137] *See id.* at 125–26 (dismissing as "smokescreens" Fox News's arguments that it was protected by *Snyder v. Phelps*, 562 U.S. 443 (2011), and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), because plaintiffs could show the defendants' false statements and actual malice).

[138] *See id.* at 129.

[139] *Id.*

[140] *See, e.g.*, *Hustler Mag.*, 485 U.S. at 56 (constitutional protection is not available as a defense to an intentional infliction of emotional distress claim against a false statement of fact which was made with actual malice); New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (requiring a public official to show that a defamation defendant acted with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

[141] *See* 939 F.3d at 129.

what kinds of interference are eligible for the defense—specifically, what does the breach agent have to do, or not do, to warrant constitutional protection? A final issue arises not from the RNDA case law but from Supreme Court precedent concerning speech that creates civil liability and that could apply, at least in theory, to limit a First Amendment defense against a tort action.

1. Eligible defendants

Media companies were the defendants in the cases concerning tortious interference claims against breach agents described in Part IV.B. Some of the cases justify extending constitutional protection to non-parties by noting that to take advantage of its constitutional right to report the news, the press needs to gather it, and that this need is encompassed within the constitutional right.[142]

But the fact that journalists constitute most breach agents should not preclude parties who fall outside the traditional category of "the press" from using their free speech rights as a defense. The Court has recognized non-journalists' First Amendment defense against other types of tort claims. In *Snyder v. Phelps* and *Claiborne Hardware*, for example, protestors successfully raised a free speech defense.[143] The same was true in *Bartnicki*, in which the defendant who passed the audio recording to a radio show host was not a member of the press, and where the majority expressly stated that "we draw no distinction between the media respondents and [the non-media respondent]."[144]

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[142] *See, e.g.*, Jenni Rivera Enters. v. Latin World Ent. Holdings, 36 Cal. App. 5th 766, 796–800 (2019) (emphasizing the relationship between newsgathering and First Amendment protection); *cf.* Trump v. Trump, 79 Misc. 3d 866, 879–80 (N.Y. Sup. Ct. 2023) (noting the importance of newsgathering to New York's constitutional protections for a free press). *See generally* Baron, Lane & Schultz, *supra* note 20, at 1045–46, 1056 (emphasizing that the First Amendment protection against wrongful interference torts is tied to the press' rights to engage in newsgathering, rather than a more general right to speak).

[143] *See* Snyder v. Phelps, 562 U.S. 443, 454 (2011); NAACP v. Claiborne Hardware, 458 U.S. 886, 913 (1982).

[144] 532 U.S. 514, 525 n.8 (2001); *see also* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 512–16 (2012) (reviewing *Bartnicki* and other "communicative tort" precedents and finding the Supreme Court makes no significant distinction in its First Amendment analysis between the press and non-press speakers).

Indeed, distinguishing between journalists and non-journalists would be excessively formalistic in this context. A plaintiff will not invest the money that litigation demands nor risk the additional publicity created by filing a tortious interference with contract suit unless the breach agent publicizes the revealed information themselves or, like the *Bartnicki* defendant, passes it along to a journalist. A non-journalist breach agent who becomes the equivalent of a journalist by directly publicizing the information or serves as a source for a reporter plays an essential role in the journalistic enterprise by obtaining and revealing secrets. As such, there seems to be no reason to exclude them from constitutional protection simply because of their status outside a media institution.

2. "Public concern"

The content of what breach agents disclose should matter for constitutional purposes, however. Third-party RNDA and disclosure case law emphasizes that the secrets revealed must be of "public concern," a category that lies "at the heart of the First Amendment's protection."[145] The category is not unique to this area of law; it is equally essential to the speech rights of public employees[146] and to the torts of

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[145] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (citing Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940)).

[146] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (establishing a balancing test "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"). In public employee speech decisions since *Pickering*, the Court has not so much defined the term as it has described "public concern" with reference to an extraordinarily broad set of circumstances. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 146 (1983) (stating that public concern can "be fairly considered as relating to any matter of political, social, or other concern to the community"); City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004) (characterizing public concern as "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public"). At the same time, cases in the decades since *Pickering* have repeatedly limited public employee speech rights by defining intra-office discussions and controversies about official business as outside the category. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 423 (2006) ("When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny."). The citizen/employee speaker distinction at the heart of this area of law does not easily translate to third party disclosure cases, suggesting that the capacious descrip-

interference with business relations[147] and defamation.[148] It is essential to privacy torts as well. In *Cox Broadcasting Corp. v. Cohn*, the Court found that the name of a rape victim, discovered in a publicly available indictment and broadcast by a television news channel, concerned the prosecution and adjudication of a crime and therefore "without question [concerned] events of legitimate concern" for the public. The Court thus found in favor of the press's First Amendment defense over the plaintiff's invasion of privacy claim.[149] And in *Snyder v. Phelps*, the Court found that Westboro Baptist Church's confrontational and offensive protest related to "broad areas of interest to society at large," allowing the Church a constitutional defense against an intentional infliction of emotional distress claim.[150]

Despite its trans-substantive prevalence, the "public concern" category has no clear definition. "Whether . . . speech addresses a matter of public concern," the Court has stated, "must be determined by [the expression's] content, form, and context . . . as revealed by the whole record."[151] And, unsurprisingly, such an inquiry is necessarily fact specific: "In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said."[152] Though nebulous, the category's parameters are broadly inclusive and encompass more than speech about traditionally "political" topics.[153]

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tions of the content of "public concern" in the government employee speech context might be relevant in a different context, but the limiting nature of the current iteration of the *Pickering* balance test likely is not.

[147] *Claiborne Hardware*, 458 U.S. at 913–15 (the nonviolent speech acts promoting a boycott constituted expression on public issues seeking to "vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment").

[148] *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (lead opin.).

[149] Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975).

[150] 562 U.S. 443, 454 (2011).

[151] *See Dun & Bradstreet*, 472 U.S. at 761 (describing public concern category in defamation case); *Connick*, 461 U.S. at 147–48 (discussing same in public employee speech case).

[152] *Snyder*, 562 U.S. at 454.

[153] *See Connick*, 461 U.S. at 147–49.

Rather than affirmatively define it, the Court has chosen to illustrate the category only by contrasting it to its opposite, matters of "purely private concern."[154] The adverb "purely"—in contrast to the unmodified "public concern"—limits the category's size; information that mixes public and private concern is not purely private. The Court has provided a limited number of examples. Narrowly distributed information about a small, private company was deemed purely private and therefore did not require the strict scrutiny for which the "actual malice" test for defamation would apply.[155] In dicta in *Bartnicki*, the Court offered hypothetical varieties of materials, "domestic gossip" and trade secrets, to illustrate the types of information that would constitute purely private information.[156] I consider the relevance of these hypotheticals in turn.

The parties to an RNDA often intend it to control the spread of information that could constitute gossip. "*Domestic* gossip," however, limits the universe of possible content to that which concerns the household and family.[157] Most of the RNDAs breached in recent years have resulted in the disclosure of more than innocuous details about, for example, marital infidelity. Rather, they had sought to suppress information about upsetting, harmful, and potentially illegal acts, including accusations of sexual assault and harassment, or embarrassing and perhaps actionable claims of employer racism and sexism, allegedly perpetrated by public figures and public or eminent companies keenly concerned with their reputational standing.

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[154] *See* Bartnicki v. Vopper, 532 U.S. 514, 533 (2001) ("We need not decide whether that interest [in preserving privacy] is strong enough to justify the application of [18 U.S.C. § 2511(c) [prohibiting the knowing disclosure of intercepted cell phone conversations] to disclosures of . . . purely private concern."). The adverb "purely" is integral to the category's narrowness. As the Court stated in *Connick*, "We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction." 461 U.S. at 147.

[155] *See, e.g.*, *Dun & Bradstreet*, 472 U.S. at 759.

[156] *See Bartnicki*, 532 U.S. at 533.

[157] *See Domestic*, OXFORD ENG. DICTIONARY, https://perma.cc/8HQY-PC4Y (defining "domestic" as "[o]f or belonging to the home, house, or household; existing, occurring, or produced in the home or within a household; relating to or characteristic of home life, family life, or cohabitation").

In their effects on public opinion, the disclosures thus resemble defamation, the tort with free speech implications that is most concerned with reputation. To evaluate whether an otherwise private matter would become a matter of public concern, a court is more likely to allow enhanced constitutional protection if the perpetrator and/or victim of these allegations falls within defamation's capacious public official or public figure categories, which require a plaintiff to prove a defendant's "actual malice."[158] That is, the more prominent the affected party's reputation, the less the disclosure seems merely "domestic gossip" and the more it resembles the kinds of statements on matters of public concern for which the First Amendment requires a court's application of strict scrutiny to civil liability that would limit speech. The converse is true as well: The Court has declared in cases brought by defamation plaintiffs who do not fall into the public figure or public official categories that the defendant's statements do not concern matters of public concern.[159]

Indeed, the fact that one or both parties signed an RNDA to keep certain information confidential strongly suggests that at least the *parties* believed the information to be of interest to the broader public, and especially to the press.[160] RNDAs

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[158] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (establishing a heightened standard for defamation claims brought by a "public official"); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (extending *Sullivan* to "public figures"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 335–36 (1974) (same). On the history of this development, see generally Catherine Hancock, *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, 50 N.Y.L. SCH. L. REV. 81, 83–85 (2006); SAMANTHA BARBAS, ACTUAL MALICE: CIVIL RIGHTS AND FREEDOM OF THE PRESS IN *NEW YORK TIMES V. SULLIVAN* 224–26 (2023).

[159] *See, e.g.*, *Dun & Bradstreet*, 472 U.S. at 758–59 (lead opin.) ("It is speech on matters of public concern that is at the heart of the First Amendment's protection.") (internal quotations and citations omitted); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 768–69 (1986) (holding that a private plaintiff still must prove falsity "where a newspaper publishes speech of public concern"); Milkovich v. Lorain J. Co., 497 U.S. 1, 20 (1990) (in decision holding that "opinion" is not a protected category of speech, noting that "*Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection").

[160] It is possible, of course, that in some instances one or both parties' main intent was to prevent only one or a small number of individuals, rather than the public, from learning of their secret. *See* Fla. Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in the judgment) (hypothesizing that a rape victim's concern about having her name disclosed "among friends and acquaintances" would be at least as great "as her discomfort at its publication by the media to people to whom she is only a name"). The intimates from whom the party or parties hope to keep the secret, of course, are themselves part of the broader public. Unless the party is a purely private

are an expensive means to control information. They require one party to retain an attorney who negotiates and drafts terms; in most cases, the other party also seeks professional counsel both to protect their interests and to help ensure the enforceability of the resulting contract against later claims that it was the result of coercion, fraud, or misrepresentation. One or both parties must therefore have public reputations that need the protection that RNDAs promise and that are worthy of the costs that the contract's drafting and execution exact. Assuming one or both parties are likely to be public figures or large companies whose livelihoods depend on their public standing, most if not all the confidential information released via breach would be matters of public concern rather than domestic gossip.

Bartnicki also used trade secrets to illustrate the nature of purely private secrets.[161] Holders of commercially valuable confidential information use state trade secret law, and the right afforded under federal trade secret legislation, to protect against competitors' access to their intellectual property.[162] Indeed, companies typically require their employees to agree to NDAs as part of the reasonable measures the law requires for their proprietary information to be eligible for trade secret status.[163]

But the content of trade secrets is not "purely private" like "domestic gossip," the value of which would be negligible because public interest would be limited to the household. Rather, confidential information can only enjoy the legal status of trade secrets if it has economic value that is enhanced by its holder's keeping it secret.[164] The additional value that the holder enjoys implies a public interest in its

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figure, the fact that their main concern was with one or a few friends and acquaintances is irrelevant to the question of whether the secrets are matters of public concern.

[161] *See Bartnicki*, 532 U.S. at 526.

[162] *See* Defend Trade Secrets Act of 2016, 18 U.S.C. § 1836(b)(1) (providing a federal cause of action against trade secret misappropriation); UNIF. TRADE SECRETS ACT § 2(a) (1979) (uniform act adopted by majority of states that provides a cause of action against misappropriation of trade secrets).

[163] UNIF. TRADE SECRETS ACT § 1(4)(iii) (requiring reasonable measures to secure confidential information to meet definition of trade secret); ALAN S. GUTTERMAN, BUSINESS TRANSACTIONS SOLUTIONS § 200:1 (Aug. 2019) (describing NDAs as "essential to a company's efforts to preserve its rights in trade secrets and other confidential information that must be disclosed in its relationships with consultants, vendors, customers, licensees, and other strategic partners").

[164] *See id.* UNIF. TRADE SECRETS ACT § 1(4)(i) (defining trade secret as information that "derives independent economic value, actual or potential, from not being generally known to, and not being

disclosure, because access to that information would allow other companies to produce competing products. Having decided against seeking patent rights to the information, the procedure for which would result in the information's public disclosure,[165] or being unable to gain those patent rights,[166] the trade secret owner might still have a cause of action for breach of contract against the party that disclosed it. But the First Amendment should protect the third party (or a second party unbound by an enforceable promise) from liability for dissemination of a valuable secret that the holder failed to adequately protect.[167]

Two factors may limit this conclusion. First, this analysis rests in part on the viability of *New York Times v. Sullivan* and its progeny as foundational logic and precedent for RNDA breach agents,[168] a foundation that may not exist in its current form if several Justices who have advocated for overruling *Sullivan* persuade a majority of their colleagues to join them in doing so.[169]

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readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use").

[165] *See* 35 U.S.C. §§ 112(a), 122(b)(1)(A) (requiring specification of invention in patent application and publication of application 18 months after filing date).

[166] On the differences between patent and trade secret protection and why information holders choose one over the other, see Andrew Beckerman-Rodau, *The Choice Between Patent Protection and Trade Secret Protection: A Legal and Business Decision*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 371, 407 (2002); Gideon Parchomovsky & Peter Siegelman, *Towards an Integrated Theory of Intellectual Property*, 88 VA. L. REV. 1455, 1494 (2002); Andrew A. Schwartz, *The Corporate Preference for Trade Secret*, 74 OHIO ST. L.J. 623, 636 (2013).

[167] *See* Derek E. Bambauer, *Secrecy Is Dead—Long Live Trade Secrets*, 93 DENV. L. REV. 833, 847 (2016) (noting likelihood that free speech interests would trump trade secret protection in litigation against those who disseminate trade secret information); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred*,* 44 Liquormart*, and* Bartnicki, 40 HOUS. L. REV. 697, 740–41 (2003) ("I think the First Amendment should generally preclude such lawsuits [against the press for disclosing trade secrets]. While organizations may understandably want to keep certain information secret, the public may often benefit from its revelation.").

[168] *See* David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 759, 784–86 (2020) (critiquing the expansion of categories of public officials and figures to whose defamation claims strict scrutiny would apply).

[169] *See* Berisha v. Lawson, 141 S. Ct. 2424 (2021) (Gorsuch, J., dissenting from the denial of certiorari); McKee v. Cosby, 586 U.S. 1172 (2019) (Thomas, J., concurring in the denial of certiorari).

Tortious interference with an RNDA and defamation are, to be sure, distinct torts: While the latter concerns the publication of false information, the former concerns disclosure of true information. But they have similar ends: Plaintiffs rely on both to seek redress for reputational damage, while defendants rely on the First Amendment to avoid liability for both causes of action, to protect speech about individuals and issues of public concern. If the Court decides that the federal constitutionalization of defamation law has swung too far towards speech and should be rebalanced in favor of protecting privacy and reputation, it might strike a similar balance with tortious interference. Accordingly, if the Court contracts the categories of "public official" and "public figure" and eliminates or narrows the heightened standard applied to those categories of plaintiffs, the "public concern" element of breach agents' First Amendment defense might shrink by association.

Second, and relatedly, the presumption of a broadly inclusive understanding of public concern itself presumes a broad judicial understanding of the First Amendment's purpose that limits the expanse of state tort law.[170] If the Amendment's scope were seen as primarily furthering "the formation of democratic public opinion," as Robert Post characterizes *Bartnicki*,[171] then the definition of "purely private concern" (or "domestic gossip"[172]) might expand to encompass a larger amount of

[170] The issue raises the question of how best to resolve the protections offered plaintiffs under state tort law when they conflict with the speech rights provided by the First Amendment, an issue whose resolution is inevitably fact-specific and contingent. *See generally* David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755 (2004) (extensively reviewing the relationship between tort and First Amendment law and concluding that, short of attempting the impossible task of imposing a rule-based approach, the Supreme Court must choose among substantive values and institutional competencies). Describing the history of this dilemma and offering a solution to it are beyond the scope of this Article. *See generally* Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 363–72 (2019) (describing how the "constitutional tidal wave" of late twentieth century First Amendment law "diminished" the common law of dignitary torts); Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650 (2009) (summarizing existing theories of the relationship between free speech and civil liability and offering one based on the nature and extent of the government power exercised in the tort's enforcement).

[171] Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 484 (2011).

[172] Bartnicki v. Vopper, 532 U.S. 514, 533 (2001).

information.[173] A narrower understanding of free speech would lead to a concomitant rebalancing of the relationship between speech and privacy rights, thereby shrinking the scope of First Amendment protections.

My argument in favor of broad First Amendment protection for breach agents rests on the Court's favoring free speech over the private interests in contract enforcement and personal privacy. It also presumes the judiciary's resistance to making empirical and normative judgments of what constitutes public and private when someone who is not party to a contract publishes or spreads information that is simultaneously a private secret and publicly relevant.[174] The information RNDAs protect may resemble gossip, but its significance often exceeds the merely "domestic." Its facial appearance should not prevent constitutional protection for disclosure by a non-party to the contract.

One or both parties invest in an RNDA to protect against the disclosure of secrets. If the investment proves a failure because one party breaches, the remedy for the person not in breach lies in contract. If the information is plausibly a public concern and not merely private "domestic gossip," punishing a party's breach of the contract should suffice and does not justify the censorship of someone who was not a party to it.[175]

3. Character of the interference

Courts will also consider how the disclosure occurs and, specifically, how a breach agent interacts with the breaching party. The Supreme Court's third-party disclosure cases are illustrative. With respect to the press, the Court declared in *Smith v. Daily Mail* that a newspaper utilizing "routine newspaper reporting techniques" should receive broad protection from legal punishment under the First

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[173] *See* Richard J. Peltz-Steele, *The New American Privacy*, 44 GEO. J. INT'L L. 365, 384–85 (2013) (critiquing the "free speech absolutism" enshrined in *Daily Mail* and *Sullivan* because it too often and mechanically overlooks "Internet-age worries over reputation, security, and privacy").

[174] *See* Eugene Volokh, *The Trouble with "Public Discourse" as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567, 579–80 (2011).

[175] *Cf.* Volokh, *supra* note 167, at 742 (arguing that although trade secret law and employee non-disclosure agreements may provide critical incentives for innovation by preventing outsiders from gaining access to confidential information, those reasons are not "compelling enough to justify suppression of speech").

Amendment when it "lawfully obtains truthful information about a matter of public significance."[176] As with "public concern," the meaning and contours of "routine . . . reporting techniques" is exceedingly unclear. Journalists do more than passively receive information when their reporting leads to an RNDA breach; as *Trump v. Trump* and *Seminole Tribe of Florida v. Times Publishing Company* demonstrate, investigative reporters seek potential sources and then contact and coax them to disclose. Merely receiving information—an official's negligent disclosure of a sheriff's report (*Florida Star*) or an audio recording of an illegally intercepted phone conversation (*Bartnicki*)—and using well-established investigative techniques—interviewing witnesses and law enforcement agents (*Daily Mail*)—seem to fall squarely within the boundaries of "routine."[177] Lower courts have similarly extended First Amendment protection to media defendants that persuaded a source to breach her NDA (*Trump v. Trump*) and that contracted at arms-length with the manager of a deceased pop star subject to an NDA (*Jenni Rivera Enterprises*).

The logic of "routine reporting techniques" is in tension with language in *Bartnicki* stating that the fact that defendants had played no role in the illegal intercept of the plaintiffs' conversation was constitutionally significant and helped to tip the balance in favor of speech rather than privacy.[178] The investigative journalists who enjoyed constitutional protection for contacting parties to NDAs and coaxing them to disclose, like the *Times* reporters in *Trump v. Trump*, clearly promoted those parties' breach of contractual obligations. At the same time, they acted within the professional norms of investigative journalists. The emphasis courts have placed on *routine* techniques in extending First Amendment rights suggests that mere contact falls within that right's parameters. But extending constitutional protection only to investigative journalists might in turn leave non-journalists more vulnerable to tort liability, thereby curbing the flow of information—even to investigative journalists who would rely on family members and friends to learn of RNDAs' existence and the secrets those contracts attempt to protect. Mere contact and inquiry by friends and family should therefore also be protected by a First Amendment defense.

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[176] Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979).

[177] *See* William E. Lee, *Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes*, 36 AM. J. CRIM. L. 129, 161–62 (2009).

[178] Bartnicki v. Vopper, 532 U.S. 514, 525 (2001).

Journalists are still liable, but only for actions that stand apart from professional and ethical norms. Fox News's fraudulent scheme to create a sham confidentiality agreement in *Rich* illustrates a non-routine, unethical, and ultimately wrongful technique. As with the "wrongful motive and means" element in the interference tort itself,[179] such actions are independent wrongs. In *Rich*, the defendants fraudulently misrepresented to grieving parents that the investigator would keep confidential their communications with him about their son. Such willful actions are more analogous to the Court's concern in *Bartnicki* about third parties who played some role in the illegal interception of a private conversation[180] than to mere contact with a contracting party. A closer case would be if a third party indemnified a party against legal liability for their disclosure,[181] which might suggest the agent was not only encouraging but inducing breach.[182] Indemnifying against liability is not an independent wrong, however, especially if the resulting disclosure serves the public interest.[183]

A breach agent's motive might not be pure. They may seek attention, fame, and fortune while they aggressively pursue information that would uncover the secrets of the famous and infamous they and their editors have targeted. But without interference that is malicious or outside the bounds of routine reporting techniques, the mere desire to disclose private information of public concern would not itself be wrongful, nor sufficiently wrongful to warrant punishing speech.

4. Speech creating civil liability

Two lines of Supreme Court precedent might also limit the First Amendment's availability as a defense against liability for tortious interference: *Cohen v. Cowles*

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[179] *See supra* Part III.C.

[180] *Bartnicki*, 532 U.S. at 525.

[181] *See, e.g.*, Gleeson, *supra* note 41 (discussing Chrissy Teigen's offer to pay damages owed if sexual assault victim breached her RNDA).

[182] *See, e.g.*, Edward Vantine Studios, Inc. v. Fraternal Composite Serv., Inc., 373 N.W.2d 512, 515 (Iowa App. 1985) ("Our acceptance of [a third party's indemnifying a breaching party to gain customers from a competitor] would render the notion of sanctity of contract a nullity and would indicate that a contract could be breached with impunity merely by having the party inducing the breach assume the financial consequences of such breach.").

[183] *Cf.* Baron, Lane & Schultz, *supra* note 20, at 1044–45 (arguing that even if indemnification might be deemed wrongful under one of the second Restatement's factors, other factors, including the media's and society's broader interests, weigh against liability).

Media,[184] which refused to immunize the press from a promissory estoppel claim, could extend to breach agents' actions; and a breach agent's speech could be considered integral to conduct that creates tortious liability. The application of either doctrine might limit First Amendment protection, leaving breach agents vulnerable to liability for their speech.

Like the RNDA cases, *Cohen* concerned a broken promise. After a newspaper assured an anonymous source that it would not release his name if he disclosed to its reporter information about a candidate for public office, it publicly identified him.[185] Unlike in the RNDA cases, the agreement in *Cohen* was not enforceable as a contract. Instead, when the source's identity was disclosed and he was fired from his position, he was forced to seek compensation for his detrimental reliance on the newspaper's promise of anonymity under a promissory estoppel theory.[186] In *Cohen*, the Supreme Court refused to allow the newspaper protection from liability under the First Amendment because the press enjoyed no special constitutional immunity from a generally applicable law like promissory estoppel.[187] As with a wide range of civil laws, from tax to labor to antitrust to copyright, promissory estoppel applies generally.[188] The same is true for claims of tortious interference with contract that begin, inevitably, when a non-party communicates with someone subject to a contract.

Despite its superficial similarity with RNDA cases—and especially to *Rich*, whose plaintiffs were similarly the victim of a media institution's false or broken promise—and its broad applicability, *Cohen* is distinguishable from most breach agent cases. Factually, *Cohen* concerns two parties to a promise, while RNDA breach agents, who are neither parties to the breached agreement nor made any

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[184] 501 U.S. 663 (1991).

[185] *Id.* at 665–66.

[186] *Id.* at 666–67.

[187] *See id.* at 670–71.

[188] *See id.* at 669–70 (citing precedent in each area of law).

promise to the non-breaching party, do not face liability in contract or quasi-contract.[189] Their obligations, whether in law or equity, are neither as direct nor as clear as those in *Cohen*.[190]

That factual distinction should place the breach agent cases outside of *Cohen*'s refusal to extend First Amendment protections to *some* generally applicable laws. *Cohen* itself concedes that although some generally applicable laws allow for no First Amendment defense, plenty of them do;[191] those include, as this Article has demonstrated, defamation, invasion of privacy, intentional infliction of emotional distress, and tortious interference with business relations.[192] *Cohen* also neglects the Court's own holdings recognizing a right to newsgathering as a necessary corollary to the press' First Amendment rights to publish.[193]

Most importantly, *Cohen* does not, by itself, dictate a different result for breach agents from *Bartnicki* and the directly applicable lower court rulings. Although it

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[189] On contract law liability for when a party to an NDA breaches, see Fenster, *supra* note 13. For a critique of *Cohen* and its application to newsgathering, see Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts*, 32 HARV. J.L. & PUB. POL'Y 1093, 1095 (2009).

[190] *Cf.* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1199 (2016) (noting, in an argument identifying the limitations of contract law as a means to protect privacy, that if *Cohen* concerns the enforceability of contract and quasi-contract rights, then a party who lacks contract and quasi-contract rights against disclosure has "no constitutionally enforceable right" against someone who discloses private information).

[191] *See Cohen*, 501 U.S. at 669–70 (citing defamation, interference with business relations, and third party disclosure cases).

[192] *See supra* Part IV.C.2 (discussing generally applicable sources of liability from which the press enjoys First Amendment protection).

[193] *See*, *e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) ("we have recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated'"); Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 189–90 (1998) (noting that *Cohen* ignores the Court's recognition of a news gathering right in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and that this principle is at least in tension with *Branzburg*'s decision to reject a reporter's privilege to resist grand jury subpoenas seeking information obtained from confidential sources).

represents the Court's most press-skeptical tendencies,[194] it still acknowledges that its precedents require a court to consider now-familiar issues: whether the disclosed information is "'truthful information about a matter of public significance,'"[195] and whether the information was "lawfully acquired."[196] For a breach agent not to "lawfully acquire" information by tortiously interfering with an RNDA wrongful interference, they would need to act "wrongfully."[197] The newspaper's breaking the promise on which Cohen had reasonably relied appeared sufficiently wrongful to the *Cohen* majority; but that is less clear with regard to a breach agent's allegedly tortiously inducing the breaking of such a promise. Assuming the disclosure involves a matter of public concern, the value of the breach agent's speech should outweigh the importance of enforcing this generally applicable law—especially because, unlike in *Cohen*, the plaintiff can still claim breach of contract against the other party to the RNDA.

The exception to constitutional protection for speech integral to criminal conduct, and its extension to speech integral to civilly actionable conduct, should play a similarly limited role in adjudicating RNDA breach agent disputes. The doctrine holds that speech that advances or is part of illegal acts has no social value and therefore enjoys no constitutional protection.[198] The doctrine primarily concerns speech related to criminal conduct—solicitation of criminal activity and threats of illegal conduct, for example—that either can be prosecuted or constitute important

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[194] The majority opinions in *Cohen* and *Branzburg* were both authored by Justice White, who expressed the most skepticism among his peers about the press' operations and functions in a democracy. *See* RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court's Characterizations of the Press: An Empirical Study*, 100 N.C. L. REV. 375, 419–422 (2022).

[195] *Cohen*, 501 U.S. at 668–69 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

[196] *See id.* at 669.

[197] *See supra* Part III.C.

[198] *See* United States v. Hansen, 599 U.S. 762, 783 (2023); United States v. Williams, 553 U.S. 285, 298 (2008); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

evidence of prohibited conduct.[199] The Supreme Court has suggested that the doctrine extends to civilly actionable conduct,[200] while one federal appellate court has applied it to the publisher of a manual for contract killers whose instructions were deemed "tantamount to legitimately proscribable nonexpressive conduct" after a murderer followed them.[201] The Court has not yet indicated how far the doctrine extends to tortious conduct. But if it covers only the most extreme and explicit forms of civil liability,[202] the doctrine will simply parallel, if not duplicate, the existing First Amendment defense to the tortious interference doctrine, which attempts to draw a line between independently wrongful interference and permissible conduct and speech.

Conclusion

RNDAs are imperfect, transactional means to keep secrets.[203] If one party breaches, the non-breaching party's reliance on consideration and contract did not ensure them confidentiality. The remedy for an RNDA's failure due to one party's breach, assuming the RNDA's enforceability, lies in contract law.

Third parties who might otherwise "interfere" with contracts by encouraging or assisting public disclosure constitute a risk that the parties should and often do contemplate during negotiation. A party who shares the information with an outsider is in breach. But the outsider who serves as an agent of breach is under no contractual obligation to remain silent and, absent the third party's independent wrongful act or the disclosure of purely private secrets, should face neither censorship nor punishment by speaking or publishing the information they learn. The

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[199] For a thorough canvassing of the history and application of this doctrine, see Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981 (2016) (summarizing doctrine); *see also* Eric Franklin Amarante, *The Absurdity of Criminalizing Encouraging Words*, 2023 Cato Sup. Ct. Rev. 69, 83–86 (critiquing *Hansen*, the Court's most recent application of the doctrine, as insufficiently protective of speech).

[200] *See* Rumsfeld v. FAIR, 547 U.S. 47, 62 (2006) (offering hypothetical example of speech incidental to civilly actionable conduct).

[201] Rice v. Paladin Enters., 128 F.3d 233, 243 (4th Cir. 1997).

[202] *See* Volokh, *supra* note 199 (advocating for a narrowly limited scope to this doctrine).

[203] On the difficulty of keeping secrets, see Jana Costas & Christopher Grey, Secrecy at Work: The Hidden Architecture of Organizational Life (2016) (private secrets); Mark Fenster, The Transparency Fix: Secrets, Leaks, and Uncontrollable Government Information 118–24 (2017) (public secrets).

damage the breach agent's actions might do to a private contract or, more broadly, to the sanctity and security of contract law, is ultimately dwarfed by the value of their speech if it informs the public of important information relating to a matter of public concern that an RNDA failed to protect.