NON-DISCLOSURE AGREEMENTS, CATCH AND KILL, AND POLITICAL SPEECH

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I. INTRODUCTION

There are situations in which there is a legitimate need for confidentiality, and in those situations non-disclosure agreements (NDAs) serve a useful, and also reasonable, purpose. For example, an article in *Entrepreneur* says that an NDA "makes sense anytime you want to share something valuable about your business and make sure that the other party doesn't use it without your approval, or outright steal it."[1] The article adds some specificity by enumerating situations in which an NDA is needed:

> 1. Discussing the sale or licensing of a product or technology. . . . 2. When employees have access to confidential and proprietary information. . . . 3. Presenting an offer to a potential partner or investor. . . . 4. Receiving services from a company that has access to sensitive information. . . . 5. Sharing business information with a prospective buyer.[2]

All of these represent situations in which the disclosure of information could injure business interests, put one at a disadvantage in potential future negotiations, or harm the confidentiality of third parties.

NDAs are also, sometimes, part of the cost of reaching a settlement in litigation.[3] A defendant may be willing to compensate a plaintiff for some injury but not want the underlying conduct or settlement terms to be disclosed. The NDA may then help to reach an agreement, but it can also have its costs. It has been argued that NDAs in sexual assault and harassment cases leave defendants in positions where they can continue to harm future victims.[4] This has led to legislative attempts to limit the use of NDAs in this context.[5]

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[1] Jonathan Long, *5 Situations That Require a Non-Disclosure Agreement*, ENTREPRENEUR (Feb. 2, 2017), https://www.entrepreneur.com/article/288581.

[2] *Id.*

[3] *Id.*

[4] *See* Rebecca Beitsche, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws*, PEW TRUSTS (July 31, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws.

[5] *See id.*

"Catch and kill" is the purchase of the exclusive rights to an individual's story accompanied by the refusal, at least in the near term, to publish the account.[6] It is hard, if not impossible, to come up with legitimate purposes for this practice. It may be used by the capturer to gain influence over someone whom the story portrays in a bad light; the threat of exposure is a source of influence. It may, instead, benefit the person who is the subject of the story, in that the "killed" story never sees the light of day. Often, it would seem that these two factors go hand in hand. While useful to either of those parties, the practice does not serve any public interest. Certainly, when engaged in by a media entity, instead of the laudable function of the press in informing the public, the impact is the opposite; the information is kept from the public.

The tie to the issue of political speech is apparent in the fact that the current President of the United States is known to use NDAs as well as the fact that he may have benefitted from catch and kill. The President has a background in the real estate business and began his use of NDAs in that context.[7] In a post-election version, the Trump Organization requires all employees to sign an agreement or lose their jobs.

> Employees must agree to keep secret any information they learn about anyone in the "Trump family" and extended family, including their "present, former and future spouses, children, parents, in-laws." . . . Specifically off limits: "all political, legal, social, religious, health-related affairs, activities, views and/or opinions of any member of the Trump family . . . all photographs, movies, sketches, videos, sound or image recordings or likenesses of any member of the Trump family." The agreement lasts forever and is retroactive.[8]

The Trump Administration has also used NDAs.[9] While nondisclosure of classified material would seem necessary to the security of the country, these NDAs go far beyond such material. After leaving the White House, Omarosa Manigault Newman said she "was offered a job on the Trump campaign in exchange for signing a restrictive NDA that prevented her from criticizing Trump, Vice President Mike Pence or any of their family members

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[6] Brian Stelter, *'Catch and Kill': How a Tabloid Shields Trump from Troublesome Stories*, CNN: BUS. (Sept. 27, 2018), https://money.cnn.com/2018/02/16/media/trump-catch-and-kill/index.html.

[7] Julie Pace & Chad Day, *For Many Trump Employees, Keeping Quiet Is Legally Required*, AP NEWS (June 21, 2016), https://apnews.com/14542a6687a3452d8c9918e2f0bf16e6.

[8] Julianna Goldman & Laura Strickler, *Trump Organization Employees Must Agree to Keep Info about Trump Family Secret*, CBS NEWS (July 27, 2017), https://www.cbsnews.com/news/trump-organization-new-confidentiality-agreement-employees-family-secret/.

[9] *See* Victoria Guida, *Conway: Trump White House Requires Nondisclosure Agreements*, POLITICO (Aug. 12, 2018), https://www.politico.com/story/2018/08/12/conway-omarosa-non-disclosure-agreements-774148.

or companies affiliated with their families."[10] Kellyanne Conway seemed to treat such NDAs as normal practice. Responding to a claim that Manigault Newman had been offered hush money, she said that "everyone in the West Wing has signed an NDA."[11] This appears to go beyond what was required in past administrations.[12]

The Trump world's most notorious use of an NDA involved the attempted suppression of information regarding a sexual relationship between Donald Trump and Stephanie Clifford, an exotic dancer and adult film actress known professionally as Stormy Daniels.[13] The purported agreement, paying $130,000 in exchange for silence regarding their activities, was entered into just prior to the 2016 presidential election.[14] While the agreement and the damages Ms. Daniels faced (potentially more than $20,000,000[15]) did not keep the facts from eventually coming to light, in the context of an election that had passed, the delayed disclosure may have been as vital as no disclosure at all.

The catch-and-kill episode leading up to the 2016 presidential election involved another Trump extramarital affair, this time with a former *Playboy* model, Karen McDougal.[16] Ms. McDougal claimed to have had a nine-month affair with Donald Trump.[17] Three months before the election, she sold her story to American Media, Inc. (AMI), the parent company of the *National Enquirer*, a tabloid featuring sensational stories.[18] The contract gave AMI exclusive ownership of any story involving any romantic or sexual relationship with any married man in exchange for $150,000.[19] While she

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[10] *Id.*

[11] *Id.*

[12] *See* Jeremy Stahl, *Is It Normal for White House Officials to Sign Nondisclosure Agreements?*, SLATE (Aug. 14, 2018), https://slate.com/news-and-politics/2018/08/trump-white-house-ndas-are-these-nondisclosure-agreements-normal.html.

[13] *See* Vanessa Romo, *Stormy Daniels Files Suit, Claims NDA Invalid Because Trump Didn't Sign At The XXX*, NPR: THE TWO-WAY (Mar. 7, 2018), https://www.npr.org/sections/thetwo-way/2018/03/07/591431710/stormy-daniels-files-suit-claims-nda-invalid-because-trump-didnt-sign-at-the-xxx.

[14] *See* Sarah Fitzpatrick, *Stormy Daniels Sues Trump Says Hush Agreement Invalid Because He Never Signed It*, NBC NEWS (Mar. 6, 2018), https://www.nbcnews.com/politics/donald-trump/stormy-daniels-sues-trump-says-hush-agreement-invalid-because-he-n854246.

[15] *See* Michael Finnegan, *Trump Seeks More Than $20 Million in Damages from Stormy Daniels*, L.A. TIMES (Mar. 16, 2018), https://www.latimes.com/politics/la-na-pol-trump-stormy-daniels-20180316-story.html.

[16] *See* Amy Held, *Alleged Ex-Trump Paramour Says 'Catch And Kill' Practice Kept Her Quiet*, NPR: THE TWO-WAY (Feb. 16, 2018), https://www.npr.org/sections/thetwo-way/2018/02/16/586501697/alleged-ex-trump-paramour-says-catch-and-kill-practice-kept-her-quiet.

[17] *Id.*

[18] *Id.*

[19] *Id.*

presumably expected that her story would be told, the story never appeared in print.[20]

While a magazine may have any number of reasons to choose not to publish a story it owns, the friendship between AMI's CEO and Donald Trump makes reasonable the belief that there was never any intent to publish and that the contract was, instead, a way to be sure the story did not come out and negatively impact the candidate.[21] AMI was not going to publish, and the contract for exclusive ownership of the story assured Ms. McDougal could not get her story published elsewhere.[22] The actions of the media company were in direct contrast to the actions that are seen as the benefits the press provides society and that justify the valuable litigation benefits afforded to libel defendants. Instead of assuring that information on issues of public interest reaches the public, catch and kill is intended to keep the public in the dark.

This Article argues that NDAs and catch-and-kill restrictions on other media organizations are invalid when the story at issue regards a public official, a public figure, or a matter of public concern. When the subject of an NDA is a government employee, there may be statutory provisions protecting disclosure.[23] Such provisions are beyond the scope of this effort, which will, instead, address constitutional protections.

It might be thought that this topic has little relevance to comparative free expression law, and at this point that might be true. However, the use of U.S. political consultants in elections in other countries could lead to future relevance of these attempts to limit access to information that could harm a candidate. Thus, at least some brief consideration of the application of arguments to be presented herein to other jurisdictions is worthwhile.

II. UNITED STATES LAW

A. Libel Law

As with almost any analysis of U.S. libel law, the initial consideration looks to the rule established in *New York Times Co. v. Sullivan*.[24] That case grew out of the civil rights struggles in the United States in the 1960s.[25] The *New York Times* published a full-page advertisement purchased by a group

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[20] *Id.*

[21] *See, e.g.*, Jeffrey Toobin, *The National Enquirer's Fervor for Trump*, NEW YORKER (June 26, 2017), https://www.newyorker.com/magazine/2017/07/03/the-national-enquirers-fervor-for-trump.

[22] *Id.*

[23] *See, e.g.*, The Whistleblower Protection Act of 1989, 5 U.S.C. § 2302 (2012); The Freedom of Information Act of 1967, 5 U.S.C. § 552 (2012).

[24] 376 U.S. 254 (1964).

[25] *Id.*

of civil rights advocates concerning the often violent response of Alabama to this political effort.[26] The ad, titled "Heed Their Rising Voices," never mentioned Sullivan, the Montgomery city commissioner who supervised certain departments including the police, but it did strongly criticize certain actions of the police.[27] Sullivan argued that the criticism would be seen as directed toward him and sued for libel.[28] He was awarded $500,000 in damages.[29]

Alabama libel law allowed a defense of truth, but the publication had to be true in all its details.[30] There were errors in the ad, but errors that would seem to have little independent impact on Sullivan's reputation.[31] The ad said that Dr. Martin Luther King, Jr. had been arrested seven times; in fact, it was four times.[32] The ad said protesting students sang *My Country, 'Tis of Thee*, although they actually sang the National Anthem.[33] These and similar errors were sufficient to defeat the defense of truth.[34]

The Supreme Court concluded that truth could not be required.[35] In public debate, there may be statements that turn out to be false.[36] Allowing liability for any false statement would have a chilling impact on free expression.[37] Rather than facing potential liability for a statement about which the speaker is not absolutely certain could keep that speaker from contributing to the debate.[38] The Court concluded that even requiring reasonableness as a defense was insufficient, and indeed the *Times* might have been seen as negligent in failing to check the ad against its own files.[39] Instead, the Court held that a public official libel plaintiff, with regard to statements regarding his or her official conduct, had to prove falsity and that the statement was made with "actual malice," which it defined as "knowledge that [the statement] was false" or "reckless disregard of whether it was false."[40]

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[26] *Id.* at 256–57.
[27] *Id.* at 254, 256, 258.
[28] *Id.* at 258.
[29] *Id.* at 256.
[30] *Id.* at 271.
[31] *Id.* at 254, 258.
[32] *Id.* at 259.
[33] *Id.* at 258–59.
[34] *Id.* at 258, 267.
[35] *Id.* at 278.
[36] *Id.* at 279.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 287–88.
[40] *Id.* at 280.

In its analysis, the Court emphasized the importance of not allowing the threat of legal liability to interfere in public debate.[41] The Court quoted Justice Brandeis:

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[42]

The Court particularly addressed the ability to question the character of political candidates.[43] In highlighting the broad importance of such speech, it quoted the Kansas Supreme Court case *Coleman v. MacLennan*:

> [I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.[44]

The conclusion to be drawn here is that the Supreme Court was willing to modify, indeed strongly modify, existing law to protect public political debate,[45] including protecting the right of individuals to call into question the

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[41] *Id.* at 279.

[42] *Id.* at 270 (quoting Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

[43] *Id.* at 281.

[44] *Id.* (quoting Coleman v. MacLennan, 98 P. 281, 286 (Kan. 1908)) (opinion of Burch, J.).

[45] In subsequent decisions, the Court extended the actual malice requirement to defamation suits by public figures, and it discussed what makes an individual a public figure. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Without going into that analysis, suffice it to say that a candidate for public office is a public figure. This point is affirmed in *Monitor*

character and fitness of public officials and candidates for public office. It is clear that the Court knew this is what it was doing. In addressing an argument that the First Amendment did not apply to a private libel action, the Court stated:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.[46]

B. Intentional Infliction of Emotional Distress

The Court's willingness to modify common law, or statutory law of common law origins, to match the dictates of the First Amendment is also found in *Hustler Magazine, Inc. v. Falwell*.[47] In that case, Jerry Falwell, a prominent minister and public figure by virtue of his political prominence,[48] brought suit against the magazine based on an advertisement parody. The parody was of a series of ads by Campari liquor in which celebrities discussed their "first times."[49] Although, on the surface, "first time" seemed to reference the individuals' first time tasting Campari, the innuendo was that they were referencing their first sexual experiences.[50] The ad, seemingly not appreciative of undertone or subtlety, portrayed that Falwell's "first time" was with his mother in an outhouse.[51]

Falwell sued on a number of grounds: invasion of privacy, defamation, and the intentional infliction of emotional distress.[52] The trial court directed a verdict against Falwell on the privacy claim,[53] and the jury found against the libel claim, determining that the parody could not reasonably be seen as stating factual claims regarding Falwell.[54] On the intentional infliction claim,

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Patroit Co. v. Roy, 401 U.S. 265 (1971). That case also indicated a wide scope of protection for statements regarding political candidates under the "actual malice" standard. *See id.* at 273 ("Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks.").

[46] *Sullivan*, 376 U.S. at 265 (internal citations omitted).

[47] 485 U.S. 46, 50 (1988).

[48] *Id.* at 47.

[49] *Id.* at 48.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 47–48.

[53] *Id.* at 49.

[54] *Id.*

Falwell was awarded significant compensatory and punitive damages.[55] It was this verdict in his favor that reached the Supreme Court.[56]

Falwell argued that the rationale for the adoption of the "actual malice" standard from *Sullivan* did not apply to this action, because the law of intentional infliction was not aimed at protecting reputation but, instead, at protecting individuals from suffering extreme emotional distress.[57] The Court of Appeals had agreed that, if an utterance was intended to inflict emotional distress, did so, and was outrageous, truth or falsity made no difference.[58] In reversing the lower court's decision, the Supreme Court recognized that statements made with the intent to inflict emotional distress might be seen as being of questionable value but held that they were still protected.

> Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.[59]

While intentional infliction was a well established cause of action, the Court was again willing to use the First Amendment to alter that law.[60] Even speech that is motivated by hatred has to be protected.

> Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. Webster's defines a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided.[61]

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[55] *See id.*
[56] *Id.* at 49–50.
[57] *See id.*
[58] *Id.*
[59] *Id.* at 53.
[60] *See id.*
[61] *Id.* at 53–54 (quoting WEBSTER'S NEW UNABRIDGED TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 275 (2d ed. 1979)).

The Court concluded that neither public officials nor public figures may recover for intentional infliction of emotional distress without also showing that the publication contained a false statement of fact made with "actual malice."[62] It stressed that this conclusion was not the "blind application" of *Sullivan* but, rather, an independent determination that protection was required "to give adequate 'breathing space' to the freedoms protected by the First Amendment."[63] Therefore, this can be seen as a second area in which existing law was modified in light of the First Amendment.

The Court extended its analysis to bar recovery for intentional infliction of emotional distress in *Snyder v. Phelps*.[64] The plaintiff in that case was neither a public official nor a public figure. He was the father of a United States Marine killed in Iraq.[65] The defendant, Phelps, was the pastor of Westboro Baptist Church, a congregation that made a practice of picketing at the funerals of U.S. troops killed in combat.[66] The group was motivated by a belief that the deaths were God's punishment for the country's acceptance of homosexuality.[67] The group stood along the route followed by the funeral procession with signs that were, for the most part, not aimed directly at Snyder's son. The signs read, "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," and "Thank God for Dead Soldiers."[68] There were also signs aimed at the Catholic Church—"Pope in Hell," "Priests Rape Boys"—and signs aimed at those of same sex orientation—"God Hates Fags."[69] The only ones that might be seen as aimed at the younger Snyder were "You're Going to Hell," and "God Hates You."[70]

While the elder Snyder did not see the signs that day, he saw news coverage that included the signs.[71] He sued Phelps and the church for, among other things, the intentional infliction of emotional distress.[72] In that regard, he testified that he was "unable to separate the thought of his dead son from his thoughts of Westboro's picketing, and that he often becomes tearful, angry, and physically ill when he thinks about it."[73] Expert testimony backed up his claim, stating "Snyder's emotional anguish had resulted in severe

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62 *Id.* at 56.
63 *Id.*
64 562 U.S. 443 (2011).
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.* at 448.
69 *Id.*
70 *Id.* at 454.
71 *Id.* at 449.
72 *Id.* at 449–50.
73 *Id.* at 450.

depression and had exacerbated pre-existing health conditions."[74] The jury found for the plaintiff on several grounds—intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy—and Snyder was awarded $2.9 million in compensatory damages and $8 million in punitive damages.[75]

The plaintiff did not do as well at the Supreme Court. Despite the fact that the plaintiff was not a public figure, the Court cited *Falwell* for the proposition that "[t]he Free Speech Clause . . . can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress."[76] The First Amendment would serve as a defense if the speech was on a matter of public concern.[77] The Court found that this was the case here.

> The "content" of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of "purely private concern." . . . While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro's position on those issues, in a manner designed . . . to reach as broad a public audience as possible. And even if a few of the signs—such as "You're Going to Hell" and "God Hates You"—were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues.[78]

For that reason, the speech was protected, despite the emotional pain it inflicted. "As a Nation we have chosen," the Court wrote, "to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[79]

C. NDAs and Catch and Kill

The takeaway from the foregoing is that the Supreme Court has been willing to change or limit well established causes of action to protect speech regarding public officials, public figures, or matters of public concern. Actions to enforce contracts that constitute an NDA or that promise not to provide a personal story to another publisher may be well established, but

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[74] *Id.*
[75] *See id.*
[76] *Id.* at 451 (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50–51 (1988)).
[77] *See id.*
[78] *Id.* at 454 (internal citations omitted).
[79] *Id.* at 461.

where they limit speech regarding such individuals or on such matters, they too should be limited and in some situations deemed unenforceable, at least where the material is not false and offered with actual malice. At least some NDAs and catch-and-kill contracts involving the President or a presidential candidate may fall within that class, but that may not be true of them all. Plausibly, some such contract may not speak to fitness or character but could pertain to private business affairs with no public interest value. But the examples that introduced this analysis do speak to fitness and character and are of great public concern.

There is, of course, a difference between defamation and intentional infliction law on the one hand and, on the other, the contract law that underlies the enforcement of NDAs and the rights of story purchasers in catch and kill. Defamation law is a direct regulation of expression, allowing for a cause of action when that expression harms reputation.[80] Emotional distress may be inflicted through any number of means, but expression is often central to that infliction. It would seem necessary to put limits on causes of action in areas in which the law is so directed.

Contract law is of a different variety. It is not aimed, in general, at expression; it simply establishes ways in which individuals can enter into enforceable agreements. Many, or most, agreements have nothing to do with expression. So, the Court's willingness to limit the impact of law in those other areas may not carry over.

There are two responses. First, the fact that an area of law is not, in the abstract, aimed at expression does not mean that it should escape the sort of examination and subsequent limitations faced by defamation and intentional infliction law. The impact on public debate is the same. If protecting that debate is sufficient to demand that the law be modified in the areas in which the Court has acted, it should also be sufficient to lead the Court to protect political speech from the chilling effects of this sort of contract. Where the NDA or the exclusive publication agreement would prevent the release of information relevant to the conduct or fitness of public officials or figures or to an issue of public concern, the Court should hold such contracts unenforceable.

The second response is to note that there are a number of areas of law that, when enforced in a particular context, may lead to a constitutional violation, even though the general provisions of the law are neutral in terms of constitutional values. An example is found in *Shelley v. Kraemer*.[81] The

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[80] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Snyder v. Phelps, 562 U.S. 443 (2011).

[81] 334 U.S. 1 (1948).

case involved restrictive covenants running with land.[82] The law of such covenants is, like contract law, neutral with regard to constitutional values. Such law can, however, have constitutional implications. In *Shelley*, the covenant was one that barred selling property to non-white purchasers.[83] There was a seller willing to sell to a non-white buyer, but another landowner asked state courts to bar the sale.[84]

Clearly, a state cannot segregate a neighborhood without violating the Equal Protection Clause of the Fourteenth Amendment, but the simple existence of a racially restrictive covenant in a deed for property is not itself a violation of that clause.[85] However, the Court held that it becomes a constitutional violation *when it is enforced* by a court.[86] That enforcement constitutes action by the state that brings with it constitutional limitations.

> [T]hese are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.[87]

It is true that what was sought in the restrictive covenant cases was a ruling that voided the sales to non-whites—an equitable remedy—whereas a judgment based on an NDA or exclusive publication agreement might be an injunction, but it could also be a remedy for damages.[88] That should not really matter; a sufficiently large monetary judgment would be as chilling on speech as a court order. Furthermore, the *Shelley* Court concluded more generally "that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand."[89] Enforcement would seem to exist where there is a monetary penalty for an action.

The conclusion here is not that the subject of an NDA or the monetary beneficiary of a catch-and-kill publication should have carte blanche to

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[82] *Id.* at 4.
[83] *Id.*
[84] *Id.* at 5–7.
[85] *Id.* at 13.
[86] *Id.* at 20.
[87] *Id.* at 19.
[88] *Id.* at 6–7.
[89] *Id.* at 20.

ignore the agreement with no repercussions. Where nondisclosure was specifically bargained for, allowing an individual to disclose material subject to the NDA, while keeping the money paid for the silence, might be seen as an unjust enrichment.[90] This would distinguish the case in which everyone in an organization is required to sign an NDA in order to keep a job from the situation in which an individual benefited financially from a specific agreement to remain silent. Similarly, a person who had sold his or her story, on the condition of exclusivity, probably ought not be allowed to resell the story and keep the money from the first sale. There is a difference, however, between the return of payment and the imposition of huge liquidated damages. Return of payment undoes an unjust enrichment; large liquidated damages are a penalty on speech that may be protected by the First Amendment.

There may be an argument that the person who violates an NDA or resells an exclusive story, however, should have to disgorge the profits from the violation or resale. Consider *Snepp v. United States*,[91] which involved a former employee of the Central Intelligence Agency who wrote a book based on his experiences with the agency.[92] The book disclosed only non-classified material, but his employment agreement included a provision that he not publish anything based on his agency experiences without submitting the work for prepublication review.[93] The Court found that his failure to do so justified imposing a constructive trust on his profits in favor of the agency.[94] That remedy struck the right balance.

> A constructive trust . . . deals fairly with both parties by conforming relief to the dimensions of the wrong. If the agent secures prepublication clearance, he can publish with no fear of liability. If the agent publishes unreviewed material in violation of his fiduciary and contractual obligation, the trust remedy simply requires him to disgorge the benefits of his faithlessness. Since the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk. And since the remedy reaches only funds attributable to the breach, it cannot saddle the former agent with exemplary damages out of all proportion to his gain.[95]

This speaks against liquidated damages in the NDA case. The question is whether it would also justify a constructive trust in the profits of disclosure beyond the return of the original payment. Since there is not the same sort of

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[90] Shelly v. Kraemer, 334 U.S. 1, 6–7 (1948).
[91] 444 U.S. 507 (1980).
[92] *Id.* at 507.
[93] *Id.* at 507–08.
[94] *Id.* at 515–16.
[95] *Id.*

sensitive material, in the national security sense, at risk, the balance may not favor the same sort of trust.

III. OTHER JURISDICTIONS

American political consultants have been involved in elections in other countries since at least the mid-1980s.[96] Successful consultants in U.S. elections seem easily to find work in other countries.[97] By 2013, there was some recognition that this may not be something with only a positive side,[98] but the practice and problems of such consulting came to public attention more strongly after the 2016 election.[99] This participation of U.S. political consultants in foreign elections makes it likely that any negative aspects of U.S. politics not barred by the law of the countries involved will affect politics there. Such aspects could include the use of NDAs in the political context and catch-and-kill agreements, making it worthwhile to consider how the law of other jurisdictions might address these cases. Two jurisdictions will be considered here.

A. The European Court of Human Rights

European human rights law has its own free expression provision, and the European Court of Human Rights has applied it not only to government attempts to interfere but also to actions brought by individuals.[100] Article 10(1) of the European Convention on Human Rights provides:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.[101]

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[96] *See* Bill Peterson, *U.S. Campaign Consultants Branching Out Overseas*, WASH. POST (Dec. 30, 1985), https://www.washingtonpost.com/archive/politics/1985/12/30/us-campaign-consultants-branching-out-overseas/de48e9d6-630a-4a53-b2dd-e6d25f1a500f/?noredirect=on&utm_term=.9fb01d2c87e4.

[97] *See* Ben Smith & Kenneth P. Vogel, *Obama Consultants Land Abroad*, POLITICO (Nov. 18, 2009), https://www.politico.com/story/2009/11/obama-consultants-land-abroad-029410.

[98] *See* Jean MacKenzie, *US Political Consultants Mucking Things Up Abroad*, PUB. RADIO INT'L (Feb. 3, 2013), https://www.pri.org/stories/2013-02-03/us-political-consultants-mucking-things-abroad.

[99] *See* Linda Feldman & Francine Kiefer, *For American Political Consultants Abroad, Manafort a Cautionary Tale*, CHRISTIAN SCI. MONITOR (Oct. 31, 2017), https://www.csmonitor.com/USA/Politics/2017/1031/For-American-political-consultants-abroad-Manafort-a-cautionary-tale.

[100] A clear example is found in *Bergens Tidende & Others v. Norway*, 31 Eur. Ct. H.R. 16 (2001), a defamation suit by a plastic surgeon against a newspaper.

[101] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221.

That right is, however, limited by the terms of Article 10(2), which provides:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[102]

Given the seeming applicability of Article 10 to an attempt to prevent the imparting of information subject to an NDA or exclusivity provision, it would be useful to consider the impact of the fact that the person protected by the agreement is a public official or public figure, or that the information is on a matter of public concern. Guidance in that regard may be found in the European Court's analysis of those factors in defamation cases.

A major factor in considering the impact of section 10(2) in defamation cases is the requirement that a limitation on expression be "necessary in a democratic society."[103] *Lingens v. Austria*[104] provides an example. This case involved a private prosecution, under a criminal statute, brought by the retiring Chancellor of Austria, Bruno Kreisky.[105] The statute provided:

> Anyone who in such a way that it may be perceived by a third person accuses another of possessing a contemptible character or attitude or behavior contrary to honour or morality and of such a nature as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine.[106]

The statute did allow a defense if the statement was shown to be true or if the defendant had sufficient reason to assume its truth.[107]

The events immediately leading to the allegedly defamatory statements began with a television interview in which well-known Nazi hunter Simon Wiesenthal accused the president of the Austrian Liberal Party of having served in the SS.[108] Kreisky came to the defense of the party's president and accused Weisenthal and his organization of being a "political mafia" and

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[102] *Id.* at art. 10(2).
[103] *Id.*
[104] Lingens v. Austria, 8 Eur. H.R. Rep. 407 (1986).
[105] *Id.* at para. 20.
[106] *Id.* (quoting Article 111 of the Austrian Criminal Code).
[107] *See id.*
[108] *Id.* at para. 9.

engaging in "mafia methods."[109] Lingens, an Austrian journalist, then published two articles in a Vienna magazine, accusing Kreisky of protecting Wiesenthal's original target and other former SS members.[110] He criticized Kreisky's support of the party's president and accommodation of former Nazis, adding that Kreisky's behavior was irrational, immoral, and undignified and that he lacked tact in his treatment of Nazi victims.[111] Lingens also said that Austrians had generally refused to accept their guilt and that Austrian political parties should be criticized for the presence of former Nazis as leaders.[112]

The European Court had no difficulty seeing the original action as an interference with Lingens' free expression rights.[113] The action was prescribed by law and aimed at the legitimate Article 10(2) protection of reputation.[114] The issue of whether the interference was "necessary in a democratic society" required proportionality.[115] Thus, the Court had to "determine whether the interference at issue was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the Austrian courts to justify it [were] 'relevant and sufficient.'"[116] In this analysis, the Court said that the fact that Kreisky was a politician was relevant.

> The limits of acceptable criticism are . . . wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 . . . enables the reputation of others—that is to say, of all individuals—to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.[117]

While not adopting a different rule for public officials and politicians, the Court did hold that their status as plaintiffs does impact the proportionality of any penalties imposed.[118]

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[109] *Id.* at para. 10.
[110] *Id.* at paras. 11–14.
[111] *Id.* at paras. 14–15.
[112] *Id.* at paras. 16–17.
[113] *Id.* at paras. 34–35.
[114] *Id.* at para. 35.
[115] *Id.* at paras. 36–37.
[116] *Id.* at para. 40.
[117] *Id.* at para. 42.
[118] *Id.* at para. 43.

The fact that the comments at issue were made in the context of a debate or in an election also made a difference. The Court said that "in this struggle each used the weapons at his disposal; and these were in no way unusual in the hard-fought tussles of politics."[119] Given the context, the Austrian court's imposition of a fine and order of confiscation were disproportionate, "likely to deter journalists from contributing to public discussion of issues affecting the life of the community," and "liable to hamper the press in performing its task as purveyor of information and public watchdog."[120]

Another European Court case demonstrates that public interest, even without the prominence of a former chancellor or participation in a public debate, may play a role in the Article 10 analysis. *Bergens Tidende v. Norway*[121] resulted from newspaper articles that described complaints over results by former patients of an identified cosmetic surgeon.[122] An earlier article had described the same surgeon's practice and discussed the benefits of cosmetic surgery, and the complaints were the result of the earlier article.[123] On the same page as one of the later, allegedly defamatory articles was an additional article by another cosmetic surgeon discussing how demanding such cosmetic surgery is and suggesting patients may have unrealistic expectations.[124] The cosmetic surgeon facing the complaints argued he had been defamed by allegations of incompetence and lack of care and won in the national courts.[125]

The European Court found a violation of Article 10(1) and said that it was not justified under Article 10(2).[126] In doing so, it invoked public interest.

> Although the press must not overstep certain bounds, particularly as regards the reputation rights of others . . . its duty is nevertheless to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest. . . . [J]ournalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. In cases such as the present one, the national margin of appreciation is circumscribed by the interests of a democratic society in enabling the press to exercise its vital role of "public watchdog" by imparting information of serious public concern.[127]

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[119] *Id.*

[120] *Id.* at para. 44. The Court also recognized that the statements were value judgments and, thus, opinion. It noted that while the Austrian Criminal Code provided a defense of truth, truth is not provable in the context of opinion. *See id.* at para. 46.

[121] Bergens Tidende and Others v. Norway, 31 Eur. Ct. H.R. 16 (2000).

[122] *Id.* at paras. 9–11.

[123] *Id.*

[124] *Id.* at para. 15.

[125] *Id.* at para. 20.

[126] *Id.* at paras. 32–33.

[127] *Id.* at para. 49 (internal citations and quotation marks omitted).

The Court said that "the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism."[128] Here, the newspaper had accurately reported the women's complaints, and the Court said that the surgeon's reputational interest was insufficient to overcome the public interest on matters of legitimate public concern.[129]

While the cases discussed up to this point recognized a restriction on expression and addressed attempts to justify the restriction under the Article 10(2) reputation provision, another line of European cases relied on the justification of "preventing the disclosure of information received in confidence."[130] The issue at the heart of this analysis is an attempt to keep information confidential, so the cases may be of more direct relevance.

Stoll v. Switzerland[131] involved a journalist who had come into possession of a paper marked "confidential" that contained details of negotiations between the World Jewish Conference and Swiss banks regarding compensation for Holocaust victims.[132] There seemed to be some violation of confidence, but where that occurred and the source of the document were not clear.[133] The document was used as the basis for criticizing the Swiss ambassador to the United States, who was involved in the negotiations.[134] The journalist was charged and convicted under a provision of the Swiss Criminal Code providing:

> Anyone who, without being entitled to do so, makes public all or part of the proceedings of an investigation or of the deliberations of any authority which is secret by law or by virtue of a decision taken by such authority acting within its powers shall be punished with imprisonment or a fine.[135]

The journalist's case before the European Court of Human Rights asserted a violation of Article 10.[136] The Court accepted, as a legitimate aim, the prevention of the disclosure of information that has been received in confidence.[137] The issue came down to whether or not the infringement

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[128] *Id.* at paras. 53 (internal citations and quotation marks omitted).
[129] *Id.* at paras. 54.
[130] *Id.* at paras. 32.
[131] Stoll v. Switzerland, 44 Eur. Ct. H.R. 53 (2007).
[132] *Id.* at paras. 14–15.
[133] *Id.* at para. 17.
[134] *Id.* at paras. 18–19.
[135] *Id.* at para. 35 (quoting Schweizisches Strafgesetzbuch [STGB] [Criminal Code] Dec. 21, 1937, SR 311, *as amended* July 1, 2019, art. 293, para. 1 (Switz)).
[136] *Id.* at para. 45.
[137] *Id.* at paras. 51–62.

represented by the fine was necessary in a democratic society.[138] In that consideration, the Court recognized the importance of protecting the press:

> [T]here is little scope under Art. 10(2) of the Convention for restrictions on political speech or on debate of questions of public interest. The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.[139]

The Court accepted that protecting the confidentiality of diplomatic reports is justified in principle but also noted that the media's role as a watchdog applies even to foreign policy.[140] The Court found a lack of proportionality, and in doing so expressed a concern over chilling effect:

> While the penalty did not prevent the applicant from expressing himself, his conviction nonetheless amounted to a kind of censorship which was likely to discourage him from making criticisms of that kind again in the future. In the context of a political debate such a conviction is likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, it is liable to hamper the press in the performance of its task of purveyor of information and public watchdog.[141]

Regarding the use of NDAs under consideration here,[142] the interest in protecting the confidentiality of the material may not be as strong as that of protecting the confidentiality of diplomatic material. Because of the strong public interest in robust political debate, the balance should be against the enforcement of, or a fine based on violation of, an NDA.

There is also a French case decided by the European Court of Human Rights that is relevant to this issue. The charges in *Fressoz and Roire v. France*[143] were for knowingly handling goods obtained through serious crime.[144] The defendants handled photocopies of tax returns provided by a tax official in breach of confidence.[145] The defendants were journalists, and the tax returns were those of the chairman of Peugeot.[146] There was industrial

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[138] *Id.* at para. 63.
[139] *Id.* at para. 106 (internal citations omitted).
[140] *See id.* at para. 128.
[141] *Id.* at para. 154.
[142] *See supra* Part I.
[143] Fressoz and Roire v. France, 31 Eur. Ct. H.R. 2 (2001).
[144] *Id.* at para. 15.
[145] *Id.* at para. 14.
[146] *Id.* at paras. 8–10.

unrest at the time, and the article based on the tax returns compared the Chairman's salary to those of workers.[147]

The journalists' convictions were challenged as a violation of Article 10.[148] The Court accepted the offered justification for the restriction on expression as furthering the legitimate aim of protecting reputational rights and preventing the disclosure of confidential information but held that the conviction was not proportionate to the interest.[149] The Court stressed the importance of the press and its contributions to public debate and noted that the article had been not so much about the chairman as it was the company.[150]

The Court noted that although the defendants should have realized the suspect origin of the photocopies, under French law, individuals had a right to consult a list of individual taxpayers that disclosed their taxable income and liability.[151] This meant that while "publication of the tax assessments in the present case was prohibited, the information they contained was not confidential."[152] The Court suggested an illicit motive for the prosecution.[153] It seemed the chairman's complaint was over the disclosure of his income, and the Court said: "The fact that applicants had been convicted of the purely technical offense of handling photocopies disguised what was really a desire to penalise them for publishing the information, although publication in itself was quite lawful."[154] The impact of such a conviction on the press was simply unacceptable under the protections of Article 10.[155]

It would seem then that if the law of a member state allowed for the enforcement of NDAs in this sort of political situation, the European Court would entertain and, under the right circumstances, accept an Article 10 defense to a court order or the imposition of a fine. Under either the 10(2) justification of protection of the reputation of a public official or candidate or of protecting confidential information, proportionality would be required. Where the information actually speaks to fitness for office, the balance should favor the release of the information.

As with U.S. law, based on the *Snepp* case, there is an argument that any consideration for signing the NDA or the exclusivity agreement in a catch-and-kill situation would have to be returned. For example, in one of the cases growing out of the publication of Peter Wright's book *Spycatcher*, the

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[147] *Id.* at para. 10.
[148] *Id.* at paras. 28–29.
[149] *Id.* at para. 56.
[150] *Id.* at para. 46.
[151] *Id.* at paras. 52–53.
[152] *Id.* at para. 53.
[153] *See id.* at para. 47.
[154] *Id.* at para. 46.
[155] *Id.* at paras. 54–56.

government of the United Kingdom had enjoined publication.[156] The European Court of Human Rights, in examining the validity of the injunction, noted that the United Kingdom had sought an accounting of profits against the newspaper that published excerpts and suggested that such an accounting was acceptable.[157]

Another European Court of Human Rights case may be seen to speak to accounting for profits. *Blake v. United Kingdom*[158] involved an individual who was a member of the Secret Intelligence Service, while also spying for the Soviet Union.[159] His activities on behalf of the Soviet Union led to a prison sentence of forty-two years, but he escaped to the Soviet Union.[160] He later wrote an autobiography based in substantial part on information acquired while in the Service.[161] In 1991, the government sought to prevent him from receiving any financial benefits and eventually, in 1997, received an injunction to that end.[162] The House of Lords, in 1998, allowed an appeal.[163]

When the case went to the European Court, the Court found a violation of the European Convention, but not based on Article 10.[164] Instead, there was a violation of the Article 6 right to a hearing within a reasonable time on matters of civil rights and obligations.[165] The fact that the European Court did not even consider Article 10 may indicate that that court also saw no violation of expression rights in the accounting for profits.

B. Canada

At first blush, it might seem that Canadian law should work in much the same way as European law. As with the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms provides both for free expression and for limitations on that right.[166] Section 2 of the Charter provides: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful

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[156] *See* Observer and Guardian v. United Kingdom, 14 Eur. Ct. H.R. 153 (1991).
[157] *Id.* at para. 53.
[158] Blake v. United Kingdom, 44 Eur. Ct. H.R. 29 (2007).
[159] *Id.* at paras. 6–7.
[160] *Id.* at para. 7.
[161] *Id.* at para. 8.
[162] *Id.* at paras. 11, 28.
[163] *Id.* at para. 29.
[164] *Id.* at para. 46.
[165] *Id.*
[166] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 c 11 (U.K.).

assembly; and (d) freedom of association."[167] And Section 1, serving the limitation role more generally than Article 10(2) of the Convention, provides: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[168] Thus, there would seem to be the need for an analysis that parallels that of Article 10: whether there was proportionality between the limits on expression and what was furthered by the restriction.[169]

The need to balance, however, would arise only if the limitation was one imposed by the government. The argument under U.S. law was that legal enforcement was action by the state, and European law seems to take the same position, at least seeing any order or penalty as requiring justification under Article 10.

However, under Canadian law, a court ordering the enforcement of, or penalizing the violation of, an NDA would not raise a Section 2 issue. In *R.W.D.S.U. v. Dolphin Delivery LTD.*,[170] the Supreme Court of Canada considered whether or not secondary picketing by a labor union was protected by Section 2(b).[171] The Court took a broad view of expression for purposes of that section but concluded that there could be no violation of the Charter in the issuance, in a civil action, of an injunction against picketing.[172]

The Court maintained that position in *Hill v. Church of Scientology*,[173] but went on to do something that makes the case relevant here. *Hill* was based on a press conference by a barrister who, representing the Church of Scientology in a government action against the Church, alleged misconduct

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[167] *Id.* § 2.

[168] *Id.* § 1.

[169] Indeed, the Canadian Supreme Court established such an analysis in *Regina v. Oakes*, [1986] 1. S.C.R. 103, 139 (Can). As summarized in a later case, under *Oakes*,

> it must first be established that the impugned state action has an objective of pressing and substantial concern in a free and democratic society. The second feature of the Oakes test involves assessing the proportionality between the objective and the impugned measure. The inquiry as to proportionality attempts to guide the balancing of individual and group interests protected in s. 1, and in Oakes was broken down into the following three segments: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance."

Regina v. Keegstra, [1990] 3 S.C.R. 697, 735 (Can.) (internal citations and quotation marks omitted).

[170] RWDSU v. Dophin Delivery LTD., [1986] 2 S.C.R. 573 (Can.).

[171] *Id.* at 574.

[172] *Id.* at 574–75.

[173] Hill v. Church of Scientology, [1995] 2 S.C.R. 1130 (Can.).

by Hill, a Crown Attorney.[174] The Court found that the statements were directed at Hill, as an individual, and that he had sued on his own behalf.[175] The government was seen as not having instigated or controlled the suit, even though it had been funded by the Ministry of the Attorney General.[176]

The relevant part of the case is that the Court determined that, while there could not have been a violation of Section 2(b), there was an issue of whether a conflict existed between the common law of defamation and the values enshrined in the Charter.[177] In looking at those values, the Court stated:

> [D]efamatory statements are very tenuously related to the core values which underlie s. 2(b). They are inimical to the search for truth. False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests in a free and democratic society.[178]

Perhaps much the same could be said of the enforcement of NDAs involving public officials and public figures and the catch-and-kill agreements for stories regarding such individuals. They are certainly "inimical to the search for truth."[179] They limit "healthy participation in the affairs of the community" and "are harmful to the interests in a free and democratic society."[180] The Court adopted a reasonableness rule for defamation cases.[181] Perhaps the Court would adopt a Section 2(b) motivated rule that would allow a reasonable decision to divulge material that would otherwise be protected by an agreement. A balance might be struck between the importance of the information to the public debate, including with regard to the fitness of an individual for public office, and any interests the protected individual may have that are unrelated to that matter.

The Canadian Court has also recognized the need to protect statements on matters of public concern. In *Grant v. Torstar*,[182] the Court again said that the Charter does not apply to legal actions between private individuals but

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[174] *Id.* at para. 1.
[175] *Id.* at para. 75.
[176] *Id.*
[177] *Id.* at para. 82.
[178] *Id.* at para. 106.
[179] *Id.*
[180] *Id.*
[181] *See id.* at para. 137 ("Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility.").
[182] Grant v. Torstar Corp., [2009] 3 S.C.R. 640 (Can.).

that the common law may have to adapt to Charter values.[183] The plaintiffs in *Grant* were a forestry company and its owner, who wanted to expand an existing golf course, an expansion that would require both government approval and the purchase of government land.[184] A newspaper article on the expansion contained comments by some nearby residents claiming that the process lacked integrity and that there were ties between the owner and government officials.[185] The plaintiffs sued for defamation and were awarded $1.475 million (CAD).[186]

The Supreme Court decided that Charter values required a "defence of responsible communication on matters of public interest."[187] The defense, which the Court characterized as new, had two essential elements; it must be on a matter of public interest and the defendant had the burden of showing the publication was responsible.[188]

> The defence of public interest responsible communication . . . will apply where:
> A. The publication is on a matter of public interest, and
> B. The publisher was diligent in trying to verify the allegation, having regard to:
> (a) the seriousness of the allegation;
> (b) the public importance of the matter;
> (c) the urgency of the matter;
> (d) the status and reliability of the source;
> (e) whether the plaintiff's side of the story was sought and accurately reported;
> (f) whether the inclusion of the defamatory statement was justifiable;
> (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
> (h) any other relevant circumstances.[189]

The Court concluded that the defense was available; that is, the article was on a matter of public interest, and returned the case for a new trial on responsible publication.[190] Again, a restructuring of the law might be required in the situations under consideration.

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[183] *Id.* at 663.
[184] *Id.* at 649–50.
[185] *Id.* at 651, 654.
[186] *Id.* at 649.
[187] *Id.* at 650.
[188] *Id.* at 684.
[189] *Id.* at 694.
[190] *Id.* at 699–700.

IV. CONCLUSION

Democracy requires that the members of society have access to certain information. If people are going to vote for their leaders, they need information regarding the fitness of public officials and candidates for public office. If society is to come to a democratic consensus on issues of public concern, information on those issues must also be freely accessible.

NDAs and the signing of an exclusivity contract for a story, with the potential publisher having no intent to release the story, deprive the public of information necessary for the functioning of a democracy. The law needs to recognize this and provide for access to the information that candidates, public officials, or the proponents of positions on issues of public interest may seek to hide from the populace.

The U.S. Supreme Court has recognized the need to protect this information. It has made it more difficult for public officials and public figures to sue for defamation.[191] It has also protected criticism of such individuals, even when that criticism is intended to, and does, inflict extreme emotional distress.[192] The Court has similarly protected speech regarding issues of public interest in these contexts.[193] In each instance, the approach involved a constitutional examination and revision of the law. The Court has also recognized that the enforcement of individual actions through a court may be governmental action that requires this same constitutional analysis.[194]

The European Court of Human Rights lacks the same power to change the law, although it can declare that the law of member states violates the European Convention on Human Rights.[195] It has done so in cases involving defamation and the need to protect materials received in confidence.

The Canadian Supreme Court's decisions regarding the applicability of the Canadian Charter of Rights and Freedoms may make it more difficult for Canada to protect this sort of information. It seems to have left itself with only the possibility of changing this area of law to comport with Charter values. It just may not be as clear that contract law, generally, is as closely related to Charter values as is the law of defamation.

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[191] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).
[192] *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).
[193] *See* Snyder v. Phelps, 562 U.S. 443, 458–59 (2011).
[194] *See* Shelley v. Kraemer, 334 U.S. 1, 25 (1948).
[195] *See* Stoll v. Switzerland, 44 Eur. Ct. H.R. 53 (2007).