

SILENCE AT OUR EXPENSE: BALANCING SAFETY AND SECRECY IN NON-DISCLOSURE AGREEMENTS

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INTRODUCTION

The recent sexual abuse scandal in the Catholic Church has put the enforceability of confidentiality agreements in settlement under the microscope.¹ For years, the Church used confidential settlements to silence abuse victims.² Although these agreements protected the identity of the victim, they also concealed the identities of the priests who often continued to serve at their parishes or other ministries.³ For example, in 1997, the Roman Catholic Diocese of Albany paid a confidential settlement of just under one million dollars to a man who alleged that “he had been sexually abused for six years” by a priest “who regularly plied him with drugs and alcohol.”⁴ The settlement fell just below the diocese’s one million dollar ceiling; above that amount it must seek the consent of its finance counsel, an eight-member board composed of the diocesan bishop and seven lay people, designed to provide accountability for the diocese’s decisions.⁵ Thus, the settlement was entirely insulated from any public scrutiny, allowing the abusive priest to remain anonymous and perhaps continue in his position.⁶

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¹ See Laurie Goodstein, *Albany Diocese Settled Abuse Case for Almost \$1Million*, N.Y. TIMES, June 27, 2002, at B1. The archdiocese’s alleged failure to report instances of sexual abuse involving former priest John Geoghan acted as a catalyst as much as any other single event for national debate on sexual abuse involving priests. Ralph Ranalli, *Judge at Center of Geoghan Case Considered a ‘Fresh-Air Person,’* BOSTON GLOBE, May 8, 2002, at A17. Approximately 300 lawsuits have been filed nationwide alleging sexual abuse by church officials. Fred Bayles, *Abuse Victims Flock to Lawyers*, USA TODAY, July 31, 2002, at 1D.

² Goodstein, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See United States Conference of Catholic Bishops, *Charter for the Protection of Children and Young People Revised Edition*, Preamble, available at

Recently, however, as the sexual abuse scandal in the Catholic Church has escalated in the media, there has been a public call for accountability.⁷ A recent survey found that “at least 850 U.S. priests have been accused of sexual misconduct with minors since the early 1960’s.”⁸ Because most victims signed confidentiality agreements, the Church has never had to disclose either the number of settlements or their cost.⁹ Financial experts, however, estimate that settlements have cost the Church between four hundred million to one billion dollars over the past two decades.¹⁰

At least two courts have begun to question the propriety of enforcing confidential settlements involving sexual abuse by priests.¹¹

<http://www.usccb.org/bishops/charter.htm> (last visited Mar. 28, 2003) [hereinafter *Charter*] (“In the past, secrecy has created an atmosphere that has inhibited the healing process and, in some cases, enabled sexually abusive behavior to be repeated.”); see also Ranalli, *supra* note 1 (discussing eighty-four lawsuits pending against former priest John Geoghan).

⁷ See Walter V. Robinson, *Crisis in the Church/Judicial Criticism; Conn. Courts Helped Hide Abuse, Judge Says*, BOSTON GLOBE, June 14, 2002, at A1. The United States Conference of Catholic Bishops recently adopted national standards addressing sexual abuse of minors by priests. See generally *Charter, supra* note 6. See also *Diocese Settles Sex Abuse Claims by Paying \$880,000 in Camden*, N.Y. TIMES, March 14, 2003, at B7; Iver Peterson, *Bishops Agree to New Rules on Reporting of Sex Abuse*, N.Y. TIMES, Dec. 3, 2002, at B5. Article 3 of the Charter provides that “Diocese/eparchies will not enter into confidentiality agreements except for grave and substantial reasons brought forward by the victim/survivor and noted in the text of the agreement.” *Charter, supra* note 6, at Article 3.

⁸ Cathy Lynn Grossman, *Advocates Withdraw from Suit vs. Bishops*, USA TODAY, June 10, 2002, at 3A.

⁹ Goodstein, *supra* note 1 (stating that confidential settlements have been the norm in sexual abuse cases for years). Settlements under one million dollars did not go before the Dioceses’ finance counsels, thus, insulating the settlement and its amount from disclosure. See Goodstein, *supra* note 1.

¹⁰ Gary Strauss, *What Happens if There’s a Lot Less in the Plate?*, USA TODAY, Aug. 1, 2002, at 8D. Generally, if a confidentiality agreement is broken, the victim or the victim’s family forfeits a substantial portion of the settlement. See Goodstein, *supra* note 1. Recently, however, many victims and lawyers have broken confidentiality agreements with little fear of repercussions due to a current climate that is sharply critical of the Catholic Church’s alleged cover-up. *Id.*; see also Adam Liptak, *Price of Broken Vows of Silence*, N.Y. TIMES, May 26, 2002, § 1 at 20 (stating that many victims have broken confidentiality agreements and have not been sued). Also, many victims have filed class-action lawsuits against the U.S. Conference of Catholic Bishops and dioceses to void confidentiality agreements. Grossman, *supra* note 8.

¹¹ See, e.g., *In re Application of the New York Times for Vacating Sealing Orders, Vacating Protective Orders and Requiring Filing of Discovery Materials*, No. X06CV020170932S, 2002 Conn. Super. LEXIS 1634, at *11 (Conn. Super. Ct. May 8, 2002) (unsealing documents in twenty-three cases involving sexual abuse of minors by priests based on clear public interest in disclosure) [hereinafter *In re New York Times*]; *Globe Newspaper Co. v. Clerk of Suffolk County Super. Ct.*, No. 01-5588-F, 2002 Mass. Super. LEXIS 6, at *30-32 (Mass. Super. Ct. Feb. 4, 2002) (terminating impoundment of confidential documents involving clergy sexual abuse based on

In a recent unpublished opinion, Connecticut Superior Court Judge Robert F. McWeeny accused the Connecticut judiciary of complicity in the Diocese of Bridgeport's efforts to cover up the extent of clergy sexual abuse.¹² Judge McWeeny, who ordered that seven boxes of documents containing information regarding confidential settlement of sexual abuse cases be unsealed,¹³ criticized what he called "a judicial model of cooperation with the Diocese in endlessly delaying litigation, sealing files and coercing victims into non-disclosure settlements."¹⁴ Judge McWeeny added that the Connecticut Appellate Court's decision to delay release of the documents on the basis of an appeal by the diocese was "elevating institutional interests in covering up a scandal over the legitimate public interest in the issue of the Church's response to sexual abuse of minors by priests."¹⁵ Judge McWeeny then asked if "it [can] seriously be maintained that secrecy at all costs was a wise or effective policy?"¹⁶

The alleged Catholic Church cover-up is only one example of the danger of routine enforcement of confidential settlement contracts without any consideration of the public's best interests. Although courts generally will not interfere with parties' freedom to contract as they see fit,¹⁷ in limited instances, courts have withheld enforcement in the name of public policy.¹⁸ Increasingly, however,

public interest and the First Amendment); Ranalli, *supra* note 1 (discussing Judge Constance M. Sweeney's decision to order the release of thousands of documents from sexual abuse suits against former priest John Geoghan).

¹² Robinson, *supra* note 7; *see also* In re *New York Times*, 2002 Conn. Super. LEXIS 1634, at *11 (unsealing documents involving clergy sexual abuse).

¹³ *See* In re *New York Times*, 2002 Conn. Super. LEXIS 1634, at *11.

¹⁴ *See* Robinson, *supra* note 7.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See, e.g.*, *Morehead v. New York*, 298 U.S. 587, 610-11 (1936) (stating that "[f]reedom of contract is the general rule and restraint the exception"). *But see also* *West Coast Hotel Co. v. Parish*, 300 U.S. 379, 392-93 (1937) (holding that freedom of contract is not an absolute right and it may be restricted when in the public interest); Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 116-18 (1988) (discussing the public policy exception as a "rare limitation on the freedom of contract").

¹⁸ *See, e.g.*, *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 880-81 (Ill. 1981) (allowing a claim for retaliatory discharge because public policy favors reporting criminal offenses); *Md.-Nat'l Capital Park & Planning Comm'n v. Wash. Nat'l Arena*, 386 A.2d 1216, 1228 (Md. Ct. Spec. App. 1978) (stating that judges should not be "restricted to the conventional sources of positive law (constitutions, statutes and judicial decisions)" and "are frequently called upon to discern the dictates of sound social policy and human welfare based on nothing more than their own personal experience and intellectual capacity"); *Bowman v. Parma Bd. of Ed.*, 542 N.E.2d 663 (Ohio Ct. App. 1988) (refusing to enforce a confidentiality agreement protecting teacher's pedophilia). *See generally* Walter Gellhorn, *Contracts and Public Policy*, 35

courts have become reluctant to interfere with contracts or to craft broad social policy in the absence of a clear, legislative articulation of the policies at stake.¹⁹

This Comment suggests that courts should adopt a more active role in shaping public policy by refusing to honor confidentiality agreements that threaten public safety, even in the absence of an authoritative legislative declaration. Part I examines the recent case *Giannecchini v. Hospital of St. Raphael*,²⁰ which suggests a useful judicial approach for evaluating non-disclosure contracts.²¹ Part II briefly discusses the evolution of the public policy exception to contract enforcement. Part III considers the balancing approach of the Restatement (Second) of Contracts (the “Second Restatement”), which provides guidelines for determining whether a non-disclosure provision is contrary to public policy.²² Part IV examines the employment-at-will doctrine, an area in which courts have taken a more active approach and carved out a public policy exception.²³

COLUM. L. REV. 679 (1935) (arguing that the modern statutory regime forces judges to act as mere arbiters of statutory law rather than framers of public policy). *See also infra* notes 61-64 and accompanying text; RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. a, b (1981) [hereinafter RESTATEMENT]. Historically, judges defined public policy based on their own perception of protecting public welfare. *See* RESTATEMENT § 179 cmt. a. Some important policies developed by judges over centuries, include “the policies against restraint of trade, impairment of domestic relations, and interference with duties owed to individuals.” *Id.* Today, public policy is generally defined by the legislature, in part, because it is equipped with superior resources to conduct investigations of the public interest. *See* RESTATEMENT § 179 cmt. b. Legislators, however, are often unaware of the contract law problems that may arise in connection with legislation. *Id.*

¹⁹ *See, e.g.,* *Muschany v. United States*, 324 U.S. 49, 66-67 (1945) (declining to invalidate government eminent domain contracts based merely on the gross disparity between the original cost of the property and the government’s purchase price because Congress did not pass legislation allowing private citizens greater recovery); *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 87 (N.Y. 1983) (declining to recognize a claim for wrongful discharge because the legislature had not yet done so). *See also* RESTATEMENT §179 cmt. b (explaining that judges today must carefully examine the relevant legislative scheme and legislative history in order to guide their decisions on public policy).

²⁰ 780 A.2d 1006 (Conn. Super. Ct. 2002) (holding a hospital liable for breaching a non-disclosure contract that protected a nurse’s personnel records after carefully considering the incidental effects enforcement could have on public health and safety); *see also supra* PART I (discussing *Giannecchini v. Hospital of St. Raphael*).

²¹ *Giannecchini*, 780 A.2d at 154-61.

²² RESTATEMENT § 178 (articulating a balancing test for determining whether to enforce a contract).

²³ *See, e.g., Palmateer*, 421 N.E.2d at 880-81 (holding that a claim for retaliatory discharge existed because public policy favors reporting criminal offenses); *Peterman v. Int’l Bd. of Teamsters*, 344 P.2d 25, 27-28 (Cal. Ct. App. 1959) (recognizing non-statutory wrongful discharge claim). *See also* EMPLOYMENT LAW, PRACTITIONER TREATISE SERIES 265 (Mark A. Rothstein ed., 2d ed. vol. 2 1999)

Part V then considers more specifically the whistleblowing exception to the employment-at-will doctrine, especially where confidentiality agreements are at issue.²⁴ This area is a particularly useful analog because courts must balance the public's interest in disclosure and the private contractual interests in secrecy.

Finally, Part VI of this Comment suggests a new approach for evaluating non-disclosure agreements that threaten the public welfare. As the Second Restatement suggests, courts should first reference the relevant statutory provisions as guideposts.²⁵ Second, courts should determine whether, in light of the statutory scheme, the legislature has explicitly contemplated the policy questions before them. This analysis should roughly mirror federal preemption analysis.²⁶ Essentially, the courts should determine whether the relevant statutory scheme effectively "preempts" an independent, discretionary decision.²⁷ In the absence of such "preemption," courts should then perform the Second Restatement balancing test, weighing the potential adverse third-party effects of enforcement against an individual's rights to privacy and freedom of contract.²⁸ Courts should focus on whether the agreement creates a substantial health or safety danger outweighing enforcement.²⁹ This approach provides a framework for guided judicial activism, emphasizing a judge's duty to consider the best interests of the public before enforcing a confidential settlement contract.

[hereinafter Rothstein] (discussing the erosion of the employment at will doctrine).

²⁴ Rothstein, *supra* note 23, §§ 8.9, 8.11.

²⁵ RESTATEMENT § 179 cmt. b (1981).

²⁶ Under federal preemption analysis, courts determine whether a scheme of federal regulation displaces a state constitutional or statutory remedy. *See Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 203 (1983) (describing the three categories of federal preemption analysis); *see also* Candice S. Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 687, 699-700 (1991) (describing federal preemption analysis).

²⁷ *See infra* Part VI (discussing preemption as a model); *see also* RESTATEMENT § 178 cmt. a. (explaining that if legislation is found to be valid and applicable, courts must follow its legislative mandate).

²⁸ RESTATEMENT § 178; *see also* Stewart J. Schwab, *Searching for Public Policy: The Misguided Demand for Statutory Violations*, 74 TEX. L. REV. 1943, 1957-58 (1996) (arguing that courts should focus on the potential adverse third-party effects of enforcement).

²⁹ Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 672 (1999) (asserting that public health and safety is perhaps the most important in the hierarchy of public policies).

I. *GIANNECCHINI V. HOSPITAL OF ST. RAPHAEL*: STATUTORY ANALYSIS
AND NON-DISCLOSURE PROVISIONS

Michael Giannecchini worked as a nurse at the Hospital of St. Raphael (the "Hospital") in New Haven, Connecticut from early 1992 through March of 1993, when the Hospital terminated his employment.³⁰ In memorializing Giannecchini's dismissal, the Hospital's director of personnel (the "Director") executed a document containing a "Remarks" section evaluating Giannecchini's job performance.³¹ The document rated Giannecchini as "Average" with respect to 'Attitude', 'Personality' and 'Attendance' and 'Below Average' with respect to 'Ability' and 'Industry.'³² Most significantly, the document also indicated that Giannecchini had committed "[s]everal serious medication errors."³³

Upon dismissal, Giannecchini immediately obtained an attorney who successfully negotiated a non-disclosure agreement.³⁴ The agreement provided that future employers could not obtain the information contained in the Director's personnel evaluation.³⁵ Thus, the "Settlement Agreement and Release" essentially expunged all references to Giannecchini's termination and the reasons for such dismissal.³⁶ In addition, Giannecchini retained the right to sue for breach of contract should the Hospital disseminate his personnel file without permission.³⁷

Giannecchini then applied for a position with the Department of Veterans' Affairs Hospital (the "VA") in West Haven and listed the Hospital as a former employer.³⁸ As part of its standard application process, the VA required Giannecchini to sign an "Authorization for Release of Information," allowing the VA to inquire into the applicant's educational background and professional qualifications.³⁹

³⁰ *Giannecchini*, 780 A.2d at 1006.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* Non-disclosure agreements, also known as confidentiality agreements, are "instrument[s] to protect and preserve trade secrets and other valuable confidential information. Such agreements typically arise in employment relationships." See 2 MELVIN F. JAGER, TRADE SECRETS LAW § 13:3 (2002); see also Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 152-54 (1998) (discussing the increasing use of secrecy clauses).

³⁵ *Giannecchini*, 780 A.2d at 1009.

³⁶ Furthermore, in requests from inquiring employers, the Hospital's disclosures were limited to dates of service, title, position, and salary information. *Id.*

³⁷ *Id.* at 1009.

³⁸ *Id.* at 1010.

³⁹ *Id.*

The release also shielded from liability all those who provided information.⁴⁰

The VA then sent the Hospital a letter requesting information and attached a copy of the authorization.⁴¹ In response, the Director released Giannecchini's personnel file, including the negative information contained in the "Remarks" section of the termination document.⁴² As a result of the Director's disclosures, the VA did not hire Giannecchini.⁴³

Giannecchini commenced an action against the Hospital for breach of contract, breach of the implied covenant of good faith, and defamation.⁴⁴ At summary judgment, the court found for Giannecchini on the breach of contract claim, holding the Hospital liable for the Director's unauthorized disclosures, and found in favor of the Hospital as to the other counts.⁴⁵ The court was satisfied that

⁴⁰ *Id.* at 1011. The release provided:

In order for the Department of Veterans Affairs (VA) to assess and verify my educational background, professional qualifications and suitability for employment, I:

Authorize the VA to make inquiries concerning such information about me to my previous employer(s), current employer, educational institutions, State licensing boards, professional liability insurance carriers, other professional organizations and/or persons, agencies, organizations or institutions listed by me as references, and to any other appropriate sources to whom the VA may be referred by those contacted or deemed appropriate;

Authorize release of such information and copies of related records and/or documents to VA officials; "Release from liability all those who provide information to the VA in good faith and without malice in response to such inquiries; and

Authorize the VA to disclose to such persons, employers, institutions, boards or agencies identifying and other information about me to enable the VA to make such inquiries.

Id.

⁴¹ *Giannecchini*, 780 A.2d at 1011.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1009-10.

⁴⁵ *Id.* at 1013-16. The non-disclosure agreement provided that, "Any and all references in said file(s) to an involuntary termination of the employment of Giannecchini will be expunged." *Id.* at 1013. The Hospital had plainly agreed to "remove" any information related to involuntary termination from Giannecchini's personnel file under § 31-128e. *Id.* (citing CONN. GEN. STAT. § 31-128e (2001)). Thus, the court held that Giannecchini was statutorily permitted to assume that the Hospital had already removed this information when he signed the authorization and the Hospital's unauthorized disclosures constituted a breach of the non-disclosure contract. *Giannecchini*, 780 A.2d at 1013-16. The court stated:

the "authorization" must be read with Giannecchini's legitimate expectations—expectations legitimized by the provisions of positive

the legislature intended that this type of non-disclosure provision should be enforced as part of a “comprehensive legislative scheme . . . dealing with the integrity and disclosure of employee personnel files” and based its ruling on two statutory provisions.⁴⁶

Setting the issue of the authorization aside,⁴⁷ the court considered whether the Hospital had breached the non-disclosure agreement.⁴⁸ The court, however, first examined Connecticut General Statute Sections 31-128e⁴⁹ and 31-128f⁵⁰ to determine

law—in mind. In light of both the contract he had signed and the provisions of §§ 31-128e and 31-128f, Giannecchini could legitimately expect that references to his involuntary termination would no longer be contained in his file. We now know, of course, that this was not the case, but when he signed the “authorization” he had no way of knowing this. He was not the party maintaining the file. He had the right both contractual and statutory—to count on the hospital keeping its word. For this reason, his “authorization” did not authorize the disclosure of references to his involuntary termination.

Id. at 1014. The court noted, however, that numerous unflattering references to Giannecchini’s ability and industry were outside the ambit of paragraph 2 of the agreement, and were instead controlled by paragraph 3. *Id.* Although this information was presumptively confidential, it was still “contained” in the personnel file under § 31-128e. *Id.* (discussing § 31-128e). Thus, the Hospital was permitted to disclose this information under the authorization. *Id.*

⁴⁶ *Giannecchini*, 780 A.2d at 1011 (citing CONN. GEN. STAT. §§ 31-128e, f (2001)).

⁴⁷ *Id.* at 1010; *see also supra* note 45 (discussing the effect of the authorization).

⁴⁸ *Giannecchini*, 780 A.2d at 1010.

⁴⁹ CONN. GEN. STAT. § 31-128e (2001). The statute states the following:

If upon inspection of his personnel file or medical records an employee disagrees with any of the information contained in such file or records, removal or correction of such information may be agreed upon by such employee and his employer. If such employee and employer cannot agree upon such removal or correction then such employee may submit a written statement explaining his position. Such statement shall be maintained as part of such employee’s personnel file or medical records and shall accompany any transmittal or disclosure from such file or records made to a third party.

Id.

⁵⁰ CONN. GEN. STAT. § 31-128f (2001). The statute states that as follows:

No individually identifiable information contained in the personnel file or medical records of any employee shall be disclosed by an employer to any person or entity not employed by or affiliated with the employer without the written authorization of such employee except where the information is limited to the verification of dates of employment and the employee’s title or position and wage or salary or where the disclosure is made: (1) To a third party that maintains or prepares employment records or performs other employment-related services for the employer; (2) pursuant to a lawfully issued administrative summons or judicial order, including a search warrant or subpoena, or in response to a government audit or the investigation or defense of personnel-related complaints against the employer; (3) pursuant to a request by a law enforcement agency for an employee’s

whether the agreement could be enforced consistent with public policy.⁵¹ Section 31-128e provides that an employer and employee may agree to remove or correct any disputed information in a personnel file and, in the event that an agreement cannot be reached, the employee may submit a written explanation that must be attached to the file.⁵² Generally, Section 31-128f provides that, absent the written authorization of the employee, employers should not disclose information from a personnel file other than verification of dates of employment, title, and wage or salary.⁵³ After hearing arguments from both sides, the court determined that the Connecticut legislature had explicitly considered all issues regarding disclosure of employee personnel records.⁵⁴ Thus, the court held that the Hospital had breached its agreement with Mr. Giannecchini.⁵⁵

Significantly, the court articulated a broader concern regarding the societal impact of this type of non-disclosure agreement.⁵⁶ The court was concerned that potential patients were unrepresented at the bargaining table when the agreement was executed. The court emphasized that patients are utterly dependent on the competence of healthcare professionals.⁵⁷ Although this type of non-disclosure agreement may expeditiously resolve a conflict between the contracting parties, it also exposes society to significant risks, such as treatment by incompetent healthcare professionals.⁵⁸

The court's analysis illustrates the proper role that public policy and legislation should play when courts evaluate non-disclosure contracts. Rather than mechanically enforcing the contract, the

home address and dates of his attendance at work; (4) in response to an apparent medical emergency or to apprise the employee's physician of a medical condition of which the employee may not be aware; (5) to comply with federal, state or local laws or regulations; or (6) where the information is disseminated pursuant to the terms of a collective bargaining agreement. Where such authorization involves medical records the employer shall inform the concerned employee of his or his physician's right of inspection and correction, his right to withhold authorization, and the effect of any withholding of such authorization upon such employee.

Id.

⁵¹ §§ 31-128e, f.

⁵² § 31-128e.

⁵³ § 31-128f.

⁵⁴ *Giannecchini*, 780 A.2d at 1011.

⁵⁵ *Id.* at 1014.

⁵⁶ *Id.* at 1010.

⁵⁷ *Id.*

⁵⁸ See Dworkin & Callahan, *supra* note 34, at 171-91 (discussing the public policy dangers of routinely enforcing confidentiality agreements).

court recognized the adverse impact that enforcement could have on public welfare and referenced the relevant statutory provisions for guidance.⁵⁹ Essentially, the question that the *Giannecchini* court considered, and other courts should consider, is whether non-disclosure agreements can be enforced consistent with public policy, particularly when they implicate public health and safety.⁶⁰

II. THE EVOLUTION OF THE PUBLIC POLICY EXCEPTION: THE DECLINE OF JUDICIAL ACTIVISM IN SHAPING PUBLIC POLICY

As an early English court observed, public policy “is a very unruly horse, and when once you get astride it you never know where it will carry you.”⁶¹ The judicial conception of public policy has proved an amorphous, ever-changing concept, characterized by uncertainty and unpredictability.⁶²

The power to invalidate contracts based on public policy can be traced to the English common-law.⁶³ For many years, the judiciary was the embodiment of the public conscience and, as such, dictated the contours of public policy.⁶⁴ The birth of the modern regulatory regime, however, altered the public policy landscape.⁶⁵ In this new regime, the legislature has replaced the judiciary as “the authoritative denouncer of conduct” because it possesses superior resources with which to discern the prevailing mores of society.⁶⁶ The legislature,

⁵⁹ *Giannecchini*, 780 A.2d at 1011.

⁶⁰ *Id.* at 1010 (“[I]s judicial enforcement of . . . the . . . agreement . . . consistent with public policy?”).

⁶¹ *Richardson v. Mellish*, 130 Eng. Rep. 294, 303 (1824) (quoted in *Giannecchini*, 780 A.2d at 1010).

⁶² 1 W. STORY, A TREATISE ON THE LAW OF CONTRACTS § 675 (5th ed. 1874). For a more detailed discussion of the public policy doctrine, see generally Gellhorn, *supra* note 18; John Shand, *Unblinking the Unruly Horse: Public Policy in the Law of Contract*, 30 CAMBRIDGE L.J. 144 (1972); George A. Strong, *The Enforceability of Illegal Contracts*, 11 HASTINGS L.J. 347 (1961).

⁶³ See *Willey v. Collier*, 7 Md. 273, 278-79 (Md. 1854) (holding that when there is a conflict between private contractual rights and public policy, the public policy is paramount); see also *Md.-Nat'l Capital Park & Planning Comm'n v. Wash. Nat'l Arena*, 386 A.2d 1216, 1228 (Md. Ct. Spec. App. 1978) (“From the dawn of the common law tradition in England, courts have refused to implement those private contractual undertakings which, when measured against the prevailing mores and moods of society, contravene judicial perceptions of so-called ‘public policy.’”) (citing 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND: A COMMENTARY UPON LITTLETON 19 (Thomas ed. 1827)); Gellhorn, *supra* note 18, at 679 (discussing the public policy exception at English common-law); Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 79 (1928).

⁶⁴ Gellhorn, *supra* note 18, at 679; see also RESTATEMENT § 179 cmt. a, b.

⁶⁵ Gellhorn, *supra* note 18, at 679.

⁶⁶ *Id.*

however, often makes policy decisions with little understanding of possible contract law implications.⁶⁷

Walter Gellhorn argues that the modern statutory regime relegates judges to the role of interstitialists; that is, judges act merely to fill in gaps in statutory language rather than to craft broad social policy.⁶⁸ Thus, statutes, not judicial decisions, have become the embodiment of the public conscience.⁶⁹ Gellhorn asserts that the greatest problem with this dichotomous approach is that most judges choose to mechanically apply statutes, ignoring the reality that the legislature is often unaware of the effects such proclamations can have on contract law.⁷⁰ As a result, public policy is confused further by counterintuitive results, or what Gellhorn calls “patent inanities.”⁷¹ Gellhorn advocates instead that although statutes must be “the starting point of the judges’ excursion into territory uncharted,” courts should use statutes only as a factor when scrutinizing a

⁶⁷ See RESTATEMENT § 179 cmt. b (“When proscribing conduct, however, legislators seldom address themselves explicitly to the problems of contract law that may arise in connection with such conduct.”); see also Gellhorn, *supra* note 18, at 684.

⁶⁸ Gellhorn, *supra* note 18, at 684. There is much debate regarding the role of judges as interpreters of the law. See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997). In one of the most famous articulations of the limited role that judges should play in creating law, Oliver Wendell Holmes wrote:

I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here en bloc.

OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920). Justice Scalia advocates a philosophy of interpretation known as textualism. SCALIA, *supra*, at 22-23. Textualism emphasizes that judges need not inquire into legislative intent; instead, they should merely determine what the statute means as written. *Id.* at 23. Justice Breyer, on the other hand, argues that courts should interpret statutes by inquiring into legislative intent. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848-61 (1992).

⁶⁹ Gellhorn, *supra* note 18, at 684.

⁷⁰ *Id.*; see also RESTATEMENT § 179 cmt. a.

⁷¹ See, e.g., *Short v. Bullion-Beck & Champion Mining Co.*, 57 P. 720 (Utah 1899). In *Short*, the plaintiff worked twelve hour days and brought suit seeking to recover overtime pay. *Id.* at 720. The court held that the employee, despite working overtime at his employer’s request, was also guilty of violating a statute providing that a maximum of eight hours a day could be worked in institutions for reduction or refining of metal or ore. *Id.* at 721. Although it seems obvious that the statute was intended to protect employees from abuses by their employer, the court held that the employee was not entitled to the overtime pay because the contract for the overtime hours contravened public policy as manifested by the statute. *Id.* at 723; see also Gellhorn, *supra* note 18, at 688.

contract that may violate public policy.⁷²

A few courts have assumed an even more active approach, invalidating contracts in the absence of explicit statutory guidance.⁷³ For example, in *Bowman v. Parma Board of Education*,⁷⁴ an Ohio Court of Appeals panel unequivocally refused to enforce an agreement precluding a school board from disclosing a teacher's history of pedophilia to other school districts.⁷⁵ The court stated that "the only possible conclusion under the circumstances of the instant case is that the non-disclosure clause is void and unenforceable and no cause of action will lie for its breach."⁷⁶ The *Bowman* court clearly exercised its own judgment in recognizing its duty to protect the interests of the public despite the absence of a clear legislative articulation of the policies at stake.⁷⁷

Many courts, however, often exercise restraint in the absence of legislative action.⁷⁸ Cautious not to offend separation of powers principles, courts have cynically posited that "public policy . . . is but a shifting and variable notion appealed to only when no other argument is available, and which, if relied upon today, may be utterly repudiated tomorrow."⁷⁹ In fact, some courts have deliberately

⁷² Gellhorn, *supra* note 18, at 685.

⁷³ See, e.g., *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 880-81 (Ill. 1981) (allowing a retaliatory discharge claim based on public policy); *Md.-Nat'l*, 386 A.2d at 1228 (stating that judges should not be restricted to positive law when crafting public policy); *Bowman v. Parma Bd. of Ed.*, 542 N.E.2d 663 (Ohio Ct. App. 1988).

⁷⁴ 542 N.E.2d 663.

⁷⁵ *Id.* at 666-67.

⁷⁶ *Id.*

⁷⁷ *Id.* Similarly, Connecticut Superior Court Judge McWeeny's decision to order disclosure of the secret documents related to the Church's alleged cover-up of rampant sexual abuse is motivated by a similar reluctance to allow behavior as extreme as sexual abuse of minors to be contractually shielded from public awareness. See *Robinson*, *supra* note 7.

⁷⁸ See, e.g., *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 87 (N.Y. 1983) (declining to recognize wrongful discharge in the absence of legislative declaration); *Geary v. U.S. Steel Corp.*, 319 A.2d 174, 176 (Pa. 1974) (disallowing a wrongful discharge action, and asserting the importance of legislative or statutory guidance).

⁷⁹ *Md.-Nat'l*, 386 A.2d at 1228 (quoting *Kenneweg v. Allegany County*, 62 A. 249, 251 (Md. 1905)). The *Md.-Nat'l* court explained that Maryland courts have invalidated voluntary agreements on public policy grounds only sparingly, "[f]earing the disruptive effect that invocation of the highly elusive public policy principle would likely exert on the stability of commercial and contractual relations." *Id.* Maryland courts have only invoked public policy when the agreement was patently offensive to "the common sense of the entire community." *Id.* (citing *Estate of Woods, Weeks & Co.*, 52 Md. 520, 536 (Md. 1879)); see also *Trupp v. Wolf*, 24 Md. App. 588, 616, *cert. denied*, 275 Md. 757 (1975). The court explained that judicial reluctance to nullify voluntary contractual arrangements protects the clear public interest in allowing private parties to contract freely. *Md.-Nat'l*, 386 A.2d at 1228-29

ignored policy considerations, choosing instead to adopt a policy of inaction in the absence of a clear legislative declaration.⁸⁰ For instance, in *Murphy v. American Home Products Corp.*,⁸¹ the court declined to follow the modern trend toward recognizing a claim for wrongful discharge of an at-will employee and decided instead to wait for legislative action.⁸² Although the court recognized the tenuous situation of an at-will employee, it declined the invitation to act because, in the court's opinion, it is the duty of the legislature to resolve public policy issues.⁸³ The court reasoned that the legislature is ultimately in a better position to make a significant change in the law.⁸⁴

Unfortunately, although modern courts and legislatures have recognized that freedom of contract must sometimes yield to public policy, albeit in rare circumstances, it remains unclear when public policy actually suggests non-enforcement of certain contracts.⁸⁵ The balancing approach of the Second Restatement attempts to provide judges with guidance in balancing public policy and contractual guarantees.⁸⁶

(citing RESTATEMENT, Introductory Note to Ch. 14, at 46 (Tent. Draft No. 12, 1977)). Thus, the *Md.-Nat'l* court asserted that it is ultimately the court's responsibility to balance public and private interests in certainty when executing a contract against those policies favoring non-enforcement. *Id.* at 1229; *see also* *Muschany v. United States*, 324 U.S. 49, 66 (1945) ("Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.") (citing *Vidal v. Philadelphia*, 43 U.S. 127, 197-98 (1844)).

⁸⁰ *See, e.g., Murphy*, 448 N.E.2d at 89; *Geary v. U.S. Steel Corp.*, 319 A.2d 174 (Pa. 1974).

⁸¹ 448 N.E.2d 86 (N.Y. 1983).

⁸² *Id.* at 87.

⁸³ *Id.* at 89.

⁸⁴ *Id.* at 89-90.

⁸⁵ *See, e.g., Palmateer*, 421 N.E.2d at 878-79 (acknowledging that public policy lacks a precise definition and asserting that public policy must be a matter that "strike[s] at the heart of a citizen's social rights, duties, and responsibilities"); *Geary*, 319 A.2d at 180 (declining to define the parameters of at-will employment); *see also* *Kostritsky*, *supra* note 17, at 116-18 (discussing the public policy exception as "a rare limitation on the freedom of contract"). *Kostritsky* suggests that courts should consider efficient deterrence as a method for deciding whether to invalidate contracts on grounds of public policy. *Kostritsky*, *supra* note 17, at 121-22. The efficient deterrence model suggests that the illegal contracts doctrine is wrongly rooted in public policy. *Id.* at 117-21. Instead, *Kostritsky* posits that "a graduated relief structure will maximize *efficient* deterrence—allocating the risk of nonenforcement to the cheapest cost avoider, rather than to both parties in all instances." *Id.* at 122. This system, *Kostritsky* urges, conserves judicial resources and reframes the illegal contracts doctrine to be compatible with traditional notions of autonomy and freedom of contract. *Id.* at 163.

⁸⁶ RESTATEMENT § 178.

III. THE BALANCING APPROACH OF THE RESTATEMENT (SECOND) OF CONTRACTS

The First Restatement of Contracts articulated the traditional rule regarding non-enforcement of a contract on grounds of public policy.⁸⁷ The First Restatement stated that: “[a] party to an illegal bargain can neither recover damages for breach thereof, nor, by rescinding the bargain, recover the performance . . . thereunder or its value,” subject to various exceptions.⁸⁸ The Second Restatement, however, shifts away from emphasizing “illegal” contracts and focuses instead on whether a contract is unenforceable as contrary to public policy.⁸⁹ The Second Restatement adopts a balancing test aimed at guiding a judge’s determination as to whether a contract should be unenforceable as contrary to public policy.⁹⁰ The drafters suggest that the courts “consider the importance of any policy as reflected in legislation or judicial decision.”⁹¹

Section 178 of the Second Restatement indicates that in weighing the significance of the public policy, the court should consider the following factors: 1) the strength of the policy as embodied in legislation or decisions; 2) the likelihood that non-enforcement will further the policy at stake; and 3) the seriousness of the misconduct at issue and its causal connection to the terms of the contract.⁹² Courts, however, should balance these considerations against traditional contract concerns such as preserving parties’ justified expectations, any forfeiture that may result, and the possible existence of a specific public interest favoring enforcement.⁹³ Using these factors to guide and manage its discretion, the court should deny enforcement only if the public policy at stake “clearly outweigh[s]” the necessity of preserving the integrity of traditional contract law principles.⁹⁴

An analysis of *Maryland-National Capital Park and Planning Commission v. Washington National Arena*⁹⁵ illustrates how the balancing approach of the Second Restatement should be applied.⁹⁶ In *Md.-*

⁸⁷ RESTATEMENT (FIRST) OF CONTRACTS (1932).

⁸⁸ *Id.* § 598; see also 6 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 7 (Richard A. Lord ed., 4th ed. 1995).

⁸⁹ RESTATEMENT §§ 178, 179.

⁹⁰ RESTATEMENT § 178.

⁹¹ WILLISTON, *supra* note 88, at 10 (discussing RESTATEMENT §§ 178, 179).

⁹² RESTATEMENT § 178.

⁹³ *Id.*; see also WILLISTON, *supra* note 88, at 10.

⁹⁴ RESTATEMENT §178 cmt. a, illus.1.

⁹⁵ 386 A.2d 1216 (Md. 1978).

⁹⁶ *Id.*

Nat'l, a taxpayer agreed to waive his right to contest any determination by the Supervisor of Assessments concerning the taxability of a parcel of land.⁹⁷ Despite the agreement, the taxpayer sued, arguing that any term contracting away an individual's due process rights is contrary to public policy.⁹⁸ In holding that the noncontestability clause was not void as against public policy, the Maryland Supreme Court balanced the public policy concerns favoring non-enforcement of the contract against the policies favoring enforcement.⁹⁹ The court began by noting the "reluctance on the part of the judiciary to nullify contractual arrangements on public policy grounds" in order to protect the strong public interest in allowing individuals to structure their own relationships through contracts.¹⁰⁰ The court then reasoned that the danger of enforcing a clause that deprives a party of his right to appeal a judgment did not "clearly and unequivocally outweigh the reasons for giving effect to the plain and unambiguous intention of the parties manifested by the language" of the provision.¹⁰¹

Section 179 of the Second Restatement further clarifies the balancing test.¹⁰² A contract term should not be enforced if indicated in relevant legislation,¹⁰³ or if the interests in enforcement are clearly outweighed by the public welfare.¹⁰⁴ Although conceding that legislators do not typically act with contract enforcement in mind, the drafters rely on the notion that the legislature is in a better position

⁹⁷ *Id.* at 1220.

⁹⁸ *Id.* at 1221.

⁹⁹ *Id.* at 1229.

¹⁰⁰ *Id.* at 1228-29.

¹⁰¹ *Md.-Nat'l*, 386 A.2d at 1229.

¹⁰² RESTATEMENT § 179. Entitled "Bases of Public Opinion," this section enumerates the bases for carving out a public policy favoring non-enforcement. *Id.*

¹⁰³ *Id.* § 178 cmt. a. The section states the following:

The term "legislation" is used here in the broadest sense to include any fixed text enacted by a body with authority to promulgate rules, including not only statutes, but constitutions and local ordinances, as well as administrative regulations issued pursuant to them. It also encompasses foreign laws to the extent they are applicable under conflict of law rules.

Id. (citing RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 202, 203 (1971)).

¹⁰⁴ *Id.* § 179. Section 179 elaborates three examples of well-established judicial policies that may weigh against enforcement of a contractual provision: restraint of trade, impairment of family relations, and interference with other protected interests. *Id.* § 179 (b) (i), (ii), (iii). According to the comments and illustrations, certain policies against enforcement were developed by judges on the basis of their own perception of the significance of protecting the public in certain instances. *Id.* § 179 cmt. a. The examples listed in § 179(b) are "now rooted in precedents accumulated over centuries." *Id.*

than the judiciary to represent the public.¹⁰⁵ The drafters clarify, however, that legislation should not be dispositive.¹⁰⁶ Instead, the drafters urge that legislation should only be used to “enlighten [judges]. . . concerning the specific policy to which it is relevant.”¹⁰⁷ Thus, despite emphasizing the necessity of legislation, judicial discretion is preserved as a basis for non-enforcement of a contractual provision.¹⁰⁸

In sum, the Second Restatement framework emphasizes legislation as a judicial guidepost.¹⁰⁹ It does not, however, completely displace a judge’s exercise of independent discretion in the absence of legislative guidance. Despite the comments to Section 179, which clarify that legislation need not be controlling as to the disposition of the case, courts have been reluctant to assume an active role in defining public policy.¹¹⁰ Rather than using legislation as an aid in determining public policy, courts have typically declined to exercise any independent discretion in policy determinations.¹¹¹ These courts have instead chosen to leave public policy determinations for resolution by the legislature.¹¹² A notable exception to this judicial restraint is the active role that courts play in carving out exceptions in

¹⁰⁵ RESTATEMENT § 179 cmt. b; *see also* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 92-97 (1982), *reprinted in* RUGGERO J. ALDISERT, THE JUDICIAL PROCESS: TEXT, MATERIALS, AND CASES, 175-80 (2d ed. 1996). Judge Calabresi asserts that judges, as a result of the manner of their selection and lengthy terms, follow “longer-run majoritarian sentiments than . . . congressmen.” *Id.* Further, judges are more likely to follow their own principles rather than being directly responsive to modern sentiments. *Id.* at 176-77. Judge Calabresi, however, does not go so far as to assert that judges are entirely immune from “majoritarian pressures.” *Id.* at 177. *See generally* ARTHUR T. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE (1953).

¹⁰⁶ RESTATEMENT § 179 cmt. b.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* §179.

¹¹⁰ *See, e.g., Murphy*, 448 N.E.2d at 87 (declining to recognize the tort of abusive or wrongful discharge of an at-will employee despite the modern trend towards recognition); *Geary*, 319 A.2d at 180 (disallowing a wrongful discharge claim despite the danger of allowing a possibly defective product to remain on the market); Rothstein, *supra* note 23, § 8.9 (citing *Adler v. Am. Standard Corp.*, 432 A.2d 464, 472 (Md. 1981)) (“[R]ecognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and declaration of public policy is normally the function of the legislative branch.”).

¹¹¹ *See, e.g., Murphy*, 448 N.E.2d at 89 (declining to recognize a cause of action for wrongful discharge because public policy is more appropriately resolved by the legislature). *See also Geary*, 319 A.2d at 180-81 (disallowing a wrongful discharge claim because it was not embodied in legislation or statute).

¹¹² *See, e.g., Murphy*, 448 N.E.2d at 89; *see also Geary*, 319 A.2d at 180.

the employment-at-will context.

IV. THE EMPLOYMENT CONTEXT: CARVING OUT A PUBLIC POLICY EXCEPTION

Courts actively have carved out public policy exceptions in the employment context.¹¹³ Most notably, courts have created exceptions to the employment-at-will doctrine.¹¹⁴ Horace G. Wood is credited with formulating the employment-at-will doctrine,¹¹⁵ which provides that an employee hired for an indefinite term may be freely terminated for any reason or no reason at all.¹¹⁶ Grounded initially on “the concept of freedom of contract and a laissez-faire socioeconomic view,” the traditional rule gained acceptance towards the end of the nineteenth century.¹¹⁷ For many years, the courts continued to adhere to this approach, choosing not to interfere with the power of either party to freely terminate an employment contract.¹¹⁸

Legislative developments in the beginning of the twentieth century, however, extended greater protections to employees.¹¹⁹ First, after the passage of the National Labor Relations Act in 1935,¹²⁰ collective bargaining agreements often contained “just cause”

¹¹³ See, e.g., *Palmateer*, 421 N.E.2d at 880-81; *Peterman*, 344 P.2d at 27-28. See also Rothstein, *supra* note 23, § 8.9.

¹¹⁴ See *supra* note 113.

¹¹⁵ See generally HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877). There is debate regarding whether Horace G. Wood actually invented the at-will doctrine. See *Munoz v. Expedited Freight Sys., Inc.*, 775 F. Supp. 1181, 1185 (N.D. Ill. 1981) (citing LEX K. LARSON, UNJUST DISMISSAL (1991)). The six cases that Wood relied on when formulating the doctrine do not actually support the proposition. *Id.*

¹¹⁶ See generally WOOD, *supra* note 115.

¹¹⁷ For example, in the seminal case of *Henry v. Pittsburgh & Lake Erie Railroad Co.*, a railroad employee challenged his dismissal, alleging that he was discharged “maliciously and without probable cause.” 21 A. 157, 157 (Md. 1891). The court emphasized that the railroad was free to discharge an employee with or without cause in the absence of a contract to the contrary. *Id.* at 158. The court discounted the employee’s arguments concerning the unfairness of his dismissal and added that it could not see “that the questions of malice and want of probable cause have anything to do with the case.” *Id.*; see also Reid Anthony Muoio, *An Independent Auditor’s Suit for Wrongful Discharge*, 58 ALB. L. REV. 413, 429 (1994) (discussing the development of an at-will employee’s right to sue for wrongful discharge).

¹¹⁸ See, e.g., *Murphy*, 448 N.E.2d at 87; *Geary*, 319 A.2d at 180; see also Rothstein, *supra* note 23, § 8.1 (“For the first half of the twentieth century the employment at will rule was virtually unchallenged . . .”).

¹¹⁹ Rothstein, *supra* note 23, § 8.1.

¹²⁰ 29 U.S.C. §§ 151-69 (1988).

clauses.¹²¹ Second, the emergence of state and local civil service protection laws insulated even more workers from arbitrary discharge.¹²² Later, civil rights legislation re-enforced the principle that an employer's discretion in hiring and firing must sometimes give way to societal interests.¹²³

Beginning in the latter half of the twentieth century, tort and contract theories gradually eroded the doctrine.¹²⁴ Recognizing that the economic underpinnings of the at will doctrine had changed drastically,¹²⁵ courts began to carve out an exception to the at-will employment relationship.¹²⁶ *Peterman v. International Brotherhood of Teamsters*¹²⁷ was "the first major judicial crack in the employment at will rule."¹²⁸ In *Peterman*, the court recognized a non-statutory cause of action based on public policy when a union local dismissed an

¹²¹ Rothstein, *supra* note 23, § 8.1.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896 (2d Cir. 1983) ("Once the common-law cornerstone of employment relations not covered by either civil service laws or the National Labor Relations Act, the at-will doctrine has been significantly eroded by both tort and contract theories . . ."). The major contract theories that eroded the at-will doctrine are: "(1) breach of an express or implied promise, including representations made in employee handbooks; (2) discharge in violation of public policy; and (3) breach of the implied covenant of good faith and fair dealing." Rothstein, *supra* note 23, § 8.1. Courts also began to use torts such as "interference with economic advantage or contractual relations, fraud and misrepresentation, invasion of privacy, defamation, and intentional infliction of emotional distress" in the employment context. *Id.*

¹²⁵ The *Geary* court explained that since the time of *Henry*, "huge corporate enterprises . . . have emerged . . . [that] wield an awesome power over their employees." *Geary*, 319 A.2d at 176. In response to the emergence of huge corporate enterprises, F. Tannenbaum, in his treatise, *A Philosophy of Labor*, argued:

we have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands.

Id. (quoting F. TANNENBAUM, *A PHILOSOPHY OF LABOR* 9 (1951)).

¹²⁶ See, e.g., *Geary*, 319 A.2d at 176; *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425, 427-28 (Ind. 1973) (holding that plaintiff was retaliatorily discharged for filing a workers compensation claim); *Monge v. Beeber Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974) (holding that "[a] termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation . . . constitutes a breach of the employment contract"); *Nees v. Hocks*, 536 P.2d 512, 515-16 (Or. 1975) (holding that plaintiff was wrongfully discharged for serving jury duty); *Peterman*, 344 P.2d at 27-28.

¹²⁷ 344 P.2d 25 (Cal. Ct. App. 1959).

¹²⁸ Rothstein, *supra* note 23, § 8.1.

agent for refusing to commit perjury.¹²⁹ The court emphasized that the employer's actions violated the clear public interest in encouraging truthful testimony.¹³⁰

Today, nearly every state recognizes the public policy exception to the employment-at-will rule in some form, whether at common law or by statute.¹³¹ Although each state implements the public policy exception differently, most cases involving the exception can be grouped into one of four broad, non-exclusive categories: (1) refusing to perform unlawful acts; (2) reporting illegal activity (whistleblowing); (3) exercising legal rights; and (4) performing public duties.¹³²

Despite recognizing a public policy exception to the employment-at-will rule, many courts still remain reluctant to restrain an employer's broad discretion to fire in the absence of an explicit legislative declaration to the contrary.¹³³ For example, the *Murphy* court declined to recognize the tort of abusive or wrongful discharge of an at-will employee because the "perception and declaration of relevant public policy . . . [was] . . . best and more appropriately

¹²⁹ *Peterman*, 344 P.2d at 27-28; see also Muoio, *supra* note 117, at 429 (internal citation omitted).

¹³⁰ *Peterman*, 344 P.2d at 27-28.

¹³¹ Rothstein, *supra* note 23, at 261-62. Every state except Alabama, Florida, Georgia, Louisiana, New York, and Rhode Island recognize some type of public policy exception to the employment-at-will rule. See *id.*; see also Muoio, *supra* note 117, at 430. A public policy exception to the employment-at-will doctrine has been recognized in the following circumstances:

where an employee was fired for refusing to participate in an illegal price fixing scheme, for failing to vote stock in accordance with dictates of management, for refusing to "pack" insurance policies, for refusing to make a commercial bribe, for threatening to notify the Food and Drug Administration of an employer's falsification of test results, for refusing to pump bilges in violation of federal law, for refusing to sign a false statement, for refusing to testify untruthfully in court, for refusing to alter state-required pollution control reports, for attempting to report a salesman's improper conduct to the state insurance commission, for union membership and activity, and for filing a worker's compensation claim, among others.

Rothstein, *supra* note 23, at 261-62.

¹³² Rothstein, *supra* note 23, at 261-62. For example, this Comment suggests that courts should question the enforceability of non-disclosure provisions involving medical care professionals. See *supra* PART II (discussing *Giannecchini*, 780 A.2d 1006).

¹³³ See *Murphy*, 448 N.E.2d at 89 (declining to recognize a wrongful discharge action in the absence of legislature guidance); see also *Geary*, 319 A.2d at 180 (declining to recognize a cause of action for wrongful discharge because of the importance of legislative or statutory guidance).

resolved by the legislative branch.”¹³⁴ Judges began to walk a metaphoric tight rope in order to avoid acting without the stamp of legislative approval. Also, in *Geary v. United States Steel Corp.*,¹³⁵ the plaintiff was fired for voicing his concerns about a product’s safety.¹³⁶ The court disallowed a cause of action for wrongful discharge despite its clear interest in protecting the public from the marketing of a possibly defective product.¹³⁷ The majority reluctantly conceded that there may be situations where an employer’s discretion to discharge must be restrained in the face of public policy concerns, noting:

[i]t may be granted that there are areas of an employee’s life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer’s power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened.¹³⁸

The court explicitly asserted, however, the importance of a statutorily conferred right¹³⁹ or “clear and compelling” mandate of public policy.¹⁴⁰

In light of this dilemma, the *Geary* court fashioned a narrow holding to avoid decisively resolving the case.¹⁴¹ The court stated that the plaintiff’s policy argument did not rise to the level of a “clear and compelling” mandate of public policy.¹⁴² The absence of a legislative mandate justified the court’s decision not to define the parameters of the employer’s privilege of hiring and firing employees.¹⁴³

The dissent attacked the majority’s reluctance to respond to the realities of the twentieth century¹⁴⁴ and criticized the majority’s concerns about overburdening the courts with complex litigation

¹³⁴ *Murphy*, 448 N.E.2d at 89.

¹³⁵ 319 A.2d 174 (Pa. 1974).

¹³⁶ *Id.* at 175.

¹³⁷ *Id.* at 181.

¹³⁸ *Id.* at 185.

¹³⁹ *Id.* at 180 (discussing *Frampton*, 297 N.E.2d at 427-28) (recognizing a non-statutory cause of action for wrongful discharge when an employee was discharged because she filed a claim against her employer under Indiana’s workmen’s compensation statute).

¹⁴⁰ *Id.*

¹⁴¹ *Geary*, 319 A.2d at 180. The *Geary* court, despite recognizing that the plaintiff had sought to prevent the defendant from marketing a product that could be dangerous, inferred that the company must have dismissed plaintiff because he “made a nuisance of himself” and to preserve administrative order. *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 183 (Roberts, J., dissenting) (discussing Lawrence E. Blades, *Employment-at-Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1418 (1967)).

“[as] nothing more than an unarticulated fear of the mythological Pandora’s box.”¹⁴⁵ The dissent argued that the court should recognize that freedom of contract cannot insulate an employer’s arbitrary and abusive actions.¹⁴⁶ In stressing the need for a case-by-case analysis, Justice Roberts emphasized that a court is obligated to qualify even what appears to be an absolute right if it contravenes public policy.¹⁴⁷ Justice Roberts then urged the court to “fulfill its societal role and its responsibility to the public interest by recognizing a cause of action for wrongful discharge.”¹⁴⁸

In sharp contrast to the timid views expressed by the *Geary* majority, the court in *Palmateer v. International Harvester Co.*¹⁴⁹ articulated perhaps the most expansive view of public policy.¹⁵⁰ In *Palmateer*, the plaintiff alleged that he had been fired because he supplied information to the authorities and agreed to cooperate in the investigation of an employee’s criminal activity.¹⁵¹ Acknowledging that the “Achilles heel” of retaliatory discharge cases is the lack of a precise definition of public policy, the court posited that public policy must be a matter that “strike[s] at the heart of a citizen’s social rights, duties, and responsibilities.”¹⁵² In concluding that a claim for retaliatory discharge existed, the court emphasized that public policy clearly favors reporting criminal offenses.¹⁵³

Interestingly, the dissent in *Palmateer* echoed the concerns of the *Geary* court.¹⁵⁴ The dissent feared that the decision would upset the balance between employer and employee interests, forcing employers to defend all personnel decisions against claims for retaliatory discharge.¹⁵⁵ The dissent then argued that because the concept of public policy is vague and uncertain, the judiciary should refrain from interfering with the discretion of an employer in the absence of a policy found in a legislative enactment.¹⁵⁶ Despite conceding that the plaintiff’s conduct was at least commendable, the dissent emphasized that such a claim should not be sustained “in the vague

¹⁴⁵ *Id.* at 182 (Roberts, J., dissenting).

¹⁴⁶ *Id.* at 185 (Roberts, J., dissenting).

¹⁴⁷ *Geary*, 319 A.2d at 183 (Roberts, J., dissenting).

¹⁴⁸ *Id.* at 185 (Roberts, J., dissenting).

¹⁴⁹ 421 N.E.2d 876 (Ill. 1981).

¹⁵⁰ *Id.* at 878-79.

¹⁵¹ *Id.* at 877.

¹⁵² *Id.* at 878-79.

¹⁵³ *Id.* at 880.

¹⁵⁴ *Id.* at 881 (Ryan, J., dissenting).

¹⁵⁵ *Palmateer*, 421 N.E.2d at 884-85 (Ryan, J., dissenting).

¹⁵⁶ *Id.* at 885 (Ryan, J., dissenting).

belief that public policy requires that we all become ‘citizen crime-fighters.’”¹⁵⁷

These cases illustrate the opposing judicial attitudes regarding the appropriate role of legislation in shaping public policy.¹⁵⁸ As a result of these two distinct approaches, no consistent public policy doctrine has emerged.¹⁵⁹ Yet, at least some courts have been willing to apply the public policy doctrine in the employment context, limiting what would otherwise be unlimited employer discretion to hire and fire employees.¹⁶⁰

Although the creation of a tort action in the employment context is not perfectly analogous to carving out a public policy defense to enforcement of a non-disclosure contract, in both contexts the courts must resolve the tension between their duty to protect the public and preserving the freedom of the parties.¹⁶¹ Whether the courts create an affirmative tort or allow a contract defense based on public policy, the courts are making a judgment that there is something problematic or unjust about enforcing a particular type of contract.

In the employment context, the courts have made a determination that, despite principles of freedom of contract, the at-will doctrine may offend public policy in certain instances.¹⁶² As a result, the courts, and ultimately the legislature, have chosen to undermine the at-will doctrine by carving out a public policy exception.¹⁶³ This Comment suggests that courts should similarly recognize that the harm that confidential settlement contracts have on society clearly outweighs an individual’s privacy interests. In addition, courts should recognize their broad discretion and duty to protect the public even in the absence of a statutorily conferred right or clear legislative declaration of the policy at stake. Thus, courts should recognize public policy as an exception to the enforcement of non-disclosure provisions which may prove harmful to public welfare.

¹⁵⁷ *Id.* at 881 (Ryan, J., dissenting).

¹⁵⁸ There are two distinct judicial attitudes towards articulating public policy. The first is actively articulating public policy in response to social realities. *See Geary*, 319 A.2d at 180. The second is declining to frame public policy in the absence of statutory or legislative guidance. *See Palmateer*, 421 N.E.2d at 880; *see also* 1 W. STORY, *supra* note 62, § 675.

¹⁵⁹ *See supra* note 158.

¹⁶⁰ *See, e.g., Palmateer*, 421 N.E.2d at 880-81; *Peterman*, 344 P.2d 27-28.

¹⁶¹ *See infra* notes 192 & 214 and accompanying text.

¹⁶² *See, e.g., Palmateer*, 421 N.E.2d at 880-81; *Peterman*, 344 P.2d at 27-28. *See also* Rothstein, *supra* note 23, § 8.9.

¹⁶³ *See supra* note 162.

V. WHISTLEBLOWING AS A MODEL

Whistleblowing is one of the most common forms of the public policy exception.¹⁶⁴ The whistleblower exception protects employees who are discharged for reporting illegal or harmful activity.¹⁶⁵ Employers' increasing use of confidentiality agreements over the last ten years, however, undermines this protection; many recent cases involve confidentiality provisions that prohibit employees from blowing the whistle.¹⁶⁶ As a result, these cases weigh contractual protections against the protections afforded by whistleblower statutes.¹⁶⁷ This delicate balancing illustrates how courts should resolve the tension between the public's interest in disclosure and private contractual interests in secrecy. In addition, whistleblowing is a useful model because the federal government and all fifty state legislatures have enacted legislation in response to judicial

¹⁶⁴ Rothstein, *supra* note 23, § 8.9.

¹⁶⁵ *Id.* § 8.11.

¹⁶⁶ See, e.g., *Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, 914 F.2d 556, 563 (4th Cir. 1990). In *Sumitomo*, the court laid out the following three-factor test for assessing the reasonableness of confidentiality provisions:

1. Is the restraint on circumvention no broader than is necessary, from the standpoint of the trade secret holder, to protect the holder from the disclosure of its confidential information?
2. From the standpoint of the party that received the confidential information, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing the legitimate efforts of that party to conduct its business?
3. Is the restraint reasonable from the standpoint of sound public policy?

Id.; see also *Follmer, Rudzewicz & Co. v. Kosco*, 362 N.W.2d 676, 683 (Mich. 1984) (holding that courts should enforce confidentiality provisions only to the extent reasonably necessary to protect the confidential information); *Durham v. Stand-By Labor, Inc.*, 198 S.E.2d 145, 149-50 (Ga. 1973) (holding that courts should determine whether "the restraint [on disclosure] is reasonably related to the protection of information"); *Dworkin & Callahan*, *supra* note 34, at 152-53, stating:

The use of secrecy clauses has been growing over the past ten years. At the same time, there has been increased legislative and judicial activity encouraging employees to come forward and blow the whistle when the organizations for which they work engage in wrongdoing. These trends to encourage and to thwart employee disclosures have led to conflicts . . . in which the courts are asked to determine the enforceability of whistleblowers' confidentiality agreements. At present, it is unclear under what circumstances, and to what extent, such provisions will be enforced.

Id.; see also *Bast*, *supra* note 29, at 639-42 (discussing how some courts carefully scrutinize confidentiality agreements to ensure that protection is reasonable in light of the information that is being shielded and the public interest).

¹⁶⁷ See, e.g., *Sumitomo*, 914 F.2d at 563; *Follmer*, 362 N.W.2d at 683; *Durham*, 198 S.E.2d at 149-50. See also *Dworkin & Callahan*, *supra* note 34, at 152-53.

recognition of the whistleblower exception.¹⁶⁸

A. *Whistleblower Legislation: Recommending Emphasis on Public Health and Safety*

Whistleblowing considerations played a role in the early judicial erosions of the employment-at-will doctrine.¹⁶⁹ Widespread encouragement of whistleblowing in order to protect the public good, however, did not gain momentum until the 1980's.¹⁷⁰ Although the same general objectives underlie all whistleblowing protections, there is great inconsistency between the laws of each state and the corresponding judicial interpretations.¹⁷¹

At the core of whistleblowing analysis is the conflict between the interests of the employer, the employee and society.¹⁷² Ultimately, whistleblowing endeavors to protect the public's clear interest in exposing, deterring, and curtailing wrongdoing.¹⁷³ Additionally, Professor Carol Bast suggests that whistleblower protection is also rooted in the basic moral principle that an employee has a right to blow the whistle when an organization engages in illegal or immoral conduct.¹⁷⁴ These propositions, however, only represent a small

¹⁶⁸ See Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 100 (2000). For examples of statutory provisions, see Callahan & Dworkin, *supra*, at app. A (charting whistleblower protections in all fifty states); Schwab, *supra* note 28, at 1957-58. Twenty-six states have continued to recognize a whistleblowing public policy exception at common-law. See Bast, *supra* note 29, at 627. These twenty-six states are:

Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and West Virginia.

Id.

¹⁶⁹ See, e.g., *Peterman v. Int'l Bhd. of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959). See also *supra* note 26 and accompanying text; Callahan & Dworkin, *supra* note 168, at 105-06.

¹⁷⁰ Callahan & Dworkin, *supra* note 168, at 99.

¹⁷¹ *Id.* at 99-100. Whistleblowing legislation, in general, follows one of two models: those using incentives to encourage whistleblowing and those seeking to protect against the retaliation of the employer. *Id.* at 100. Perhaps the most significant and effective of federal whistleblower legislation is the False Claims Act (FCA), which accomplishes its goals through a complex use of incentives. *Id.* (discussing FALSE CLAIMS ACT, 31 U.S.C.S. § 231 (2003)) (revised § 3729). Most state legislatures, however, have chosen to follow the anti-retaliation model, focusing instead on deterring and uncovering wrongful conduct. *Id.* at 108-09.

¹⁷² Bast, *supra* note 29, at 660.

¹⁷³ Callahan & Dworkin, *supra* note 168, at 100.

¹⁷⁴ Bast, *supra* note 29, at 645 (discussing Nicholas M. Rongine, *Toward a Coherent Legal Response to the Public Policy Dilemma Posed by Whistleblowing*, 23 AM. BUS. L.J. 280, 286 (1985)).

portion of the complex considerations surrounding whistleblowing.¹⁷⁵

On the one hand, whistleblowing can interfere with an employer's traditional concerns for productivity, efficiency, and authority over his employees, and may create the danger of false negative publicity resulting from disclosures.¹⁷⁶ Moreover, whistleblowing may obscure the employee's inherent duties of obedience, loyalty, and confidentiality to his employer.¹⁷⁷ On the other hand, whistleblower protection enhances the employee's job security and expectations of fair treatment in the workplace.¹⁷⁸ Additionally, society can reap broad benefits from whistleblowing when it safeguards public health and safety and discourages improper or illegal conduct.¹⁷⁹ If, however, employers act too cautiously in their hiring and firing practices because of whistleblower protections, it may harm the public by creating an incompetent workplace.¹⁸⁰

Interestingly, some courts only recognize the whistleblower exception when the employee reports violations affecting public health and safety.¹⁸¹ For example, although New York has yet to recognize a wrongful discharge action based on public policy,¹⁸² the legislature has adopted twelve whistleblower-related statutes emphasizing public health and safety.¹⁸³ The statutory scheme requires the employee prove a clear connection between the conduct

¹⁷⁵ *Id.*

¹⁷⁶ *See id.* at 660-68.

¹⁷⁷ *See id.* at 661, 663. Employees' recognition and understanding of whistleblower protections may cause them to dismiss the importance of their obligations to the employer, such as loyalty and obedience. *Id.*

¹⁷⁸ *Id.* at 666.

¹⁷⁹ *Id.*

¹⁸⁰ Bast is essentially arguing that whistleblower protections may disproportionately chill employers from discharging employees for legitimate reasons. *See* Bast, *supra* note 29, at 665-66.

¹⁸¹ *See, e.g.,* Palmer v. Brown, 752 P.2d 685, 690 (Kan. 1988) (holding that an employee must prove that a "a reasonably prudent person would have concluded the employee's co-worker or employer was engaged in activities in violation of rules, regulations, or the law pertaining to public health, safety, and the general welfare"); Mitishen v. Falcone Piano Co., 630 N.E.2d 294, 295 (Mass. App. Ct. 1994) (holding that public policy exception did not apply because the unfair labor practices that the employee reported did not present a threat to public health and safety); Kraus v. New Rochelle Hosp. Med. Ctr., 216 A.D.2d 360 (N.Y. App. Div. 1995).

¹⁸² *See, e.g.,* Lobosco v. N.Y. Tel. Co., 751 N.E.2d 462, 464 (N.Y. 2001) (noting that New York does not recognize the tort of wrongful discharge); Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 87 (N.Y. 1983) (declining to recognize a tort for abusive or wrongful discharge). *See also* Callahan & Dworkin, *supra* note 168, at 115.

¹⁸³ This statutory scheme creates a confusing array of standards regulating the relationship between employers and employees. *See, e.g.,* N.Y. LAB. LAW § 740 (McKinney 2003); N.Y. CIV. LAW § 75-b (McKinney 2003); N.Y. LAB. LAW § 740 (McKinney 2003) (covering whistleblowing involving certain health care workers).

reported and the promotion of health and safety concerns.¹⁸⁴ Although New York courts resist the public policy exception¹⁸⁵ and the statutory scheme is complex,¹⁸⁶ the emphasis on public welfare and safety provides a useful paradigm.

Accordingly, the development of the whistleblower exception to at-will employment is evidence that courts can actively carve out public policy exceptions that effect a legislative response.¹⁸⁷ In addition, tying the whistleblower exception to public health and safety limits its application to instances where disclosure will actually further a substantial public interest.

B. Whistleblowing and Confidentiality Agreements: A Delicate Balance

As mentioned above, the whistleblowing analysis is complicated by employers' increasing use of confidentiality agreements to protect information from public exposure.¹⁸⁸ Like any other contract clause, however, a confidentiality agreement can be set aside based on public policy.¹⁸⁹ Thus, despite the courts' disinclination to interfere with private parties' freedom to define the contours of their relationships, an employee who exposes an employer's wrongful conduct in breach of a non-disclosure contract may still legitimately argue that societal

¹⁸⁴ *Kraus*, 216 A.D.2d at 116-18. For example, New York Labor Law Section 740(2)(a), provides as follows:

An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:

(a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety

§ 740(2)(a). An illustrative case is *Kraus v. New Rochelle Hospital Medical Center*, where the hospital vice-president of nursing was terminated for following standard procedure in reporting health violations; specifically, a doctor's failure to properly document or get informed consent before performing bronchoscopies. 260 A.D.2d at 361. In order to establish a violation under New York Labor Law Section 740, the nurse was required to prove that "the violation is one that creates and presents a substantial and specific danger to the public health or safety." *Id.* at 364 (quoting § 740). In holding that the nurse had presented sufficient evidence to proceed, the court emphasized that the doctor's actions created a substantial and specific danger because the procedure "can result in death, cardiac arrest, and hemorrhage." *Id.* at 365. *Contra* *Green v. Saratoga A.R.C.*, 233 A.D.2d 821 (N.Y. App. Div. 1996); *Connolly v. Harry Macklowe Real Estate Co.*, 161 A.D.2d (N.Y. App. Div. 1990).

¹⁸⁵ See *supra* note 182 and accompanying text.

¹⁸⁶ See *supra* note 183 and accompanying text.

¹⁸⁷ See Callahan & Dworkin, *supra* note 168, at 99-100 (discussing the emergence of whistleblower protection in all fifty states).

¹⁸⁸ Dworkin & Callahan, *supra* note 34, at 152-53.

¹⁸⁹ *Id.* at 162.

interests outweigh the employer's interest in privacy.¹⁹⁰

Some commentators have attempted to reconcile the competing interests at stake and offer creative approaches for determining the enforceability of confidentiality agreements.¹⁹¹ For example, Professor Terry Morehead Dworkin analyzes the balancing approach of the Second Restatement in an attempt to determine definitively when the consequences of silence are too high.¹⁹² Professor Dworkin advocates the use of a two-tiered inquiry for evaluating the strength of a public policy.¹⁹³ First, Professor Dworkin emphasizes that both a general analysis of public policies favoring whistleblowing and a broad examination of "specific evidence of societal repudiation" of the employer's conduct are relevant in weighing the importance of the Restatement policies opposing enforcement.¹⁹⁴ Second, Professor Dworkin suggests courts should void a contract when non-enforcement will actually "impact" the policy at stake;¹⁹⁵ that is, courts should choose non-enforcement when there is "a likelihood that a refusal to enforce the term will further that policy."¹⁹⁶ This approach recognizes, however, that the factors of the Restatement, despite their usefulness, are not dispositive.¹⁹⁷ In essence, the core of the inquiry must be directed at curtailing and correcting misconduct while preserving the certainties of contract law and protecting the secrecy of legitimately confidential information.¹⁹⁸

¹⁹⁰ *Id.* at 161-62.

¹⁹¹ *Id.*; see also Bast, *supra* note 29.

¹⁹² Dworkin & Callahan, *supra* note 34, at 171.

¹⁹³ *Id.* at 181. The first tier, "clarity," assesses the definiteness and weight of the policy at issue by first looking to the explicitness of the policy as articulated by the legislature or the courts, and then at its relative importance. *Id.* Dworkin argues that recent legislative and judicial positions unequivocally establish the importance of whistleblowing. *Id.* Thus, the considerations in favor of enforcement should be evaluated on a case-by-case basis in light of societal disapproval of the wrongful conduct at issue. *Id.*

The second tier of the analysis, "impact," is particularly relevant in employment-at-will cases, and further explicates the Restatement inquiry into "the likelihood that a refusal to enforce the term will further that policy." *Id.* (citing RESTATEMENT § 179 cmt. b.). In assessing the impact of non-enforcement on the overall furtherance of the public good, Dworkin asserts that the most important considerations are the "job description of the whistleblower and the power to respond possessed by the party to whom the whistle is blown." Dworkin & Callahan, *supra* note 34, at 181-84.

¹⁹⁴ Dworkin & Callahan, *supra* note 34, at 179.

¹⁹⁵ *Id.* at 181-84; see also *supra* note 183 (discussing "impact").

¹⁹⁶ See RESTATEMENT § 179 cmt. b.

¹⁹⁷ Dworkin & Callahan, *supra* note 34, at 187.

¹⁹⁸ Bast notes:

two lines of inquiry are most relevant to the decision whether a confidentiality promise should be enforced against a whistleblower in a

In contrast to Professor Dworkin's emphasis on the balancing approach of the Restatement as a useful guide, Professor Carol M. Bast chooses a more ambitious route and proposes a new test for evaluating non-disclosure provisions.¹⁹⁹ First, Professor Bast observes that one must begin with the premise that the agreement is generally enforceable but then asserts that public policy should reflect fundamental public values, regardless of whether it is reflected in legislation.²⁰⁰ Bast finds support for this proposition in the work of Professor Stewart J. Schwab.²⁰¹ Professor Schwab criticizes the insistence on the part of many courts that a public policy exception must be grounded in positive law.²⁰² He emphasizes that a demand that employees reference specific statutory violations "can lead to awkward or even tortured analysis" and "can sidetrack the case from the real issues."²⁰³ Instead, Schwab argues, courts should focus on the effects of such conduct on third parties, and resolve the issues based on whether enforcement of the contract will have "substantial adverse third-party effects."²⁰⁴

Expanding Professor Schwab's thesis, Bast argues that judicial reluctance to exercise discretion in the absence of positive law may be underinclusive where positive law does not suffice to protect against a substantial health or safety danger.²⁰⁵ Bast asserts that "in the hierarchy of public policies, safety from physical harm and death ranks at or near the top."²⁰⁶ The possible safety risks of enforcement, however, may sometimes be too remote or speculative to justify non-

particular case. Both address the conflict between societal interests in reducing and deterring organizational misconduct, on one hand, and in contract enforcement, on the other. The essence of this accommodation is to curtail and correct misconduct while minimizing the disclosure of legitimately confidential information.

Bast, *supra* note 29, at 708.

¹⁹⁹ *Id.* at 708; *see also supra* note 198 and accompanying text.

²⁰⁰ Bast, *supra* note 29, at 700-01.

²⁰¹ Schwab, *supra* note 28; *see also* Bast, *supra* note 29, at 707 (discussing Schwab).

²⁰² Positive law is statutes, legislation, and judicial decisions. Schwab, *supra* note 28, at 1958.

²⁰³ *Id.* at 1959. Schwab relies on *Wagenseller v. Scottsdale Mem'l Hosp.*, to demonstrate this point. *Id.* (discussing *Wagenseller*, 710 P.2d 1025 (Ariz. 1985)). In *Wagenseller*, a nurse was fired for refusing to participate in a skit that involved mooning the audience. 710 P.2d at 1029. The court insisted on determining whether there was a statutory violation, and ultimately had to determine whether mooning violated an Arizona statute against indecent exposure of the anus or genitals. *Id.* at 1035 n.5.

²⁰⁴ Schwab, *supra* note 28, at 1958.

²⁰⁵ Bast, *supra* note 29, at 706.

²⁰⁶ *Id.* at 707.

enforcement.²⁰⁷ Thus, courts should only invalidate confidentiality agreements when they present a substantial and imminent threat to public health and safety.²⁰⁸

In her conclusion, Professor Bast proposes a six-part test for determining whether confidentiality agreements should be enforced.²⁰⁹ The test seeks to balance the employer's interest in secrecy against the employee's and society's interests in disclosure.²¹⁰ To determine whether a confidentiality agreement should be enforced, a court should examine the following six factors:

1. what information the parties reasonably expected to be protected under the confidentiality agreement (reasonable expectations);
2. any loss to the employer that would result if enforcement were denied (loss to the employer);
3. the extent to which the information is protectable as a trade secret or proprietary information (protectability);
4. any substantial adverse third party effect enforcement of the term would have on third parties (substantial adverse effect on third parties);
5. the likelihood that a refusal to enforce the term will contribute to the effect (exacerbation of adverse effect);
6. whether limited disclosure would guard against the effect while still protecting employer's information (limited disclosure).²¹¹

Thus, Bast elucidates a test that provides the judiciary with greater flexibility in a framework of guided discretion.²¹² Most significant to the analysis is Bast's recognition of the significance of third party effects, especially health and public safety.²¹³

In sum, that many courts continue to protect whistleblowers despite the existence of confidentiality agreements suggests that courts are capable of qualifying private contractual guarantees in light of a clear, countervailing public policy.²¹⁴ Some courts, however,

²⁰⁷ *Id.* at 705-06 ("Health and safety threats should certainly be disclosed where the danger is substantial and imminent.").

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 709.

²¹⁰ *Id.* at 708.

²¹¹ Bast, *supra* note 29, at 709.

²¹² *Id.* at 703-04.

²¹³ *Id.* at 706-07.

²¹⁴ See Dworkin & Callahan, *supra* note 34, at 152-53; see also Bast, *supra* note 29, at 639-42 (discussing how some courts carefully scrutinize confidentiality agreements to ensure that protection is reasonable in light of the information that is being shielded and the public interest).

continue to exercise a stubborn reluctance to act in the absence of a clear legislative articulation.²¹⁵ Commentators have posited other considerations and even advanced new tests of enforceability that are useful in attempting to resolve the court's conundrum.²¹⁶ Ultimately, however, courts must strike a balance that protects public health and safety and yet does not trample parties' legitimate interests in confidentiality.²¹⁷

VI. ESTABLISHING A ZONE OF JUDICIAL DISCRETION

It is clear that the pervasive judicial reluctance to act in the absence of a clear legislative articulation forces courts to indulge in constrained reasoning.²¹⁸ Despite the majoritarian principle that the legislature is in a superior position to perceive the general needs of the public in a representative society, judicial activism can stimulate democracy in appropriate instances by responding to public concern and inducing the legislature to act.²¹⁹ Although the judiciary should not be vested with the same unsupervised power it possessed before the evolution of the modern statutory regime,²²⁰ judges must strive to adopt a more active role in shaping public policy, especially when

²¹⁵ See, e.g., *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86 (N.Y. 1983) (declining to recognize a claim for wrongful discharge because the legislature had not yet done so); *Geary v. U.S. Steel Corp.*, 319 A.2d 174 (Pa. 1974) (disallowing a wrongful discharge action, and asserting the importance of legislative or statutory guidance). See also Schwab, *supra* note 28, at 1958 (discussing judicial reluctance to act in the absence of positive law).

²¹⁶ See Bast, *supra* note 29, at 708; see also Dworkin & Callahan, *supra* note 34, at 181; Schwab, *supra* note 28, at 1958.

²¹⁷ Bast, *supra* note 29, at 708; see also *supra* note 198.

²¹⁸ See, e.g., *Murphy*, 448 N.E.2d at 89; *Geary*, 319 A.2d at 180. See also Schwab, *supra* note 28, at 1958 (discussing how statutory reliance can result in awkward results); Gellhorn, *supra* note 18, at 684 (arguing that reliance on statutes can result in illogical results).

²¹⁹ See ALDISERT, *supra* note 105, at 178. Judge Aldisert argues that, although it might seem antidemocratic, putting lawmaking power in the hands of judges is not necessarily inconsistent with democracy because they are not creating final rules. *Id.* Judges merely create starting points "that are subject to legislative revisions and about allocating the burden of inertia." *Id.*; see also Alan B. Handler, *Judicial Jurisprudence*, N.J. LAW., Oct. 2000, at 22 ("Even a court's provisional answer to social problems can be a part of a dynamic by which policy is forged and law, as an expression of public policy and social authority, evolves and progresses."); Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73 (2000); Erin Rahne Kidwell, *The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review*, 62 ALB. L. REV. 91 (1998).

²²⁰ See 1 W. STORY, *supra* note 62, at 675; see also Gellhorn, *supra* note 18, at 679 (arguing that with the birth of the modern regulatory regime the legislature replaced the judiciary as the dictator of public policy).

public danger is evident.²²¹

The sexual abuse scandal within the Catholic Church highlights the problems that arise when courts enforce contracts without considering the public welfare.²²² Courts must recognize their duty to scrutinize any agreement that would sacrifice safety in favor of secrecy.²²³ For example, the non-disclosure agreements used in *Giannecchini*²²⁴ and in Catholic Church settlements²²⁵ pose obvious dangers to public health and safety by depriving society of vital information. The difficulty is striking the proper balance between contractual guarantees and the public's right to know.²²⁶

In fashioning a new approach, the analysis in *Giannecchini* provides a good reference point.²²⁷ Aware of the danger to the public in enforcing a provision that would protect a medical professional's record of poor performance, the *Giannecchini* court did not

²²¹ Several recent cases indicate a growing judicial disinclination to enforce confidentiality agreements that present a substantial likelihood of public harm. *See, e.g.,* EEOC v. Astra U.S.A., Inc., 929 F. Supp. 512 (D. Mass.), *modified*, 94 F.3d 738 (1st Cir. 1996); EEOC v. Rush Prudential Health Plans, No. 97 C 3823, 1998 U.S. Dist. LEXIS 4170, at *8-12 (E.D. Ill. April 1, 1998) (voiding a confidentiality clause that prohibited disclosure of the amount of settlement). *See also* Dworkin & Callahan, *supra* note 34, at 163. For example, in *EEOC v. Astra U.S.A., Inc.*, 929 F. Supp. 512 (D. Mass.), *modified*, 94 F.3d 738 (1st Cir. 1996), the Equal Employment Opportunity Commission sought to prevent enforcement of confidentiality agreements that prohibited current and former Astra employees from cooperating in an investigation of wrongful conduct. *Id.* The fact that a government agency was the party seeking relief is significant, but the court's reasoning is still quite relevant. *Id.* In granting the injunction against enforcement of the agreements, the court stressed that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by the enforcement of the agreement." *Id.* at 518 (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987)).

²²² *See* Goodstein, *supra* note 1 (discussing how confidentiality settlements allows pedophile priests to remain anonymous); *see also* Robinson, *supra* note 7 (discussing Judge McWeeny's decision to unseal documents relating to sexual abuse of minors by priests); Ranalli, *supra* note 1 (discussing sexual abuse suits against former priest John Geoghan).

²²³ *See generally* Bast, *supra* note 29 (arguing that courts should focus on public health and safety when evaluating non-disclosure provisions).

²²⁴ *Giannecchini v. Hosp. of St. Raphael*, 780 A.2d 1006, 1010 (Conn. Super. Ct. 2000) (discussing that allowing medical professionals to shield records of their poor job performance through the use of non-disclosure agreements may lead to unreliable medical care).

²²⁵ *See, e.g.,* Ranalli, *supra* note 1 (discussing the use of confidentiality agreements in connection with twenty-four cases of sexual abuse brought against former priest John Geoghan); *Charter*, *supra* note 6, at Preamble ("In the past, secrecy has created an atmosphere that has inhibited the healing process and, in some cases, enabled sexually abusive behavior to be repeated.").

²²⁶ Bast, *supra* note 29, at 708.

²²⁷ *Giannecchini*, 780 A.2d at 1010-13.

reflexively enforce the contract.²²⁸ Instead, the court went one step further and referenced the relevant statutory provisions regarding disclosure of employee personnel records.²²⁹ Both parties argued that the legislature had explicitly contemplated the protection of an employee's personnel records by a non-disclosure contract.²³⁰ Although it is arguable whether Connecticut law clearly answered the question, the court's careful consideration of public safety and its thorough examination of the relevant statutes provide a useful paradigm for evaluating non-disclosure provisions.²³¹

Courts must begin with a few necessary concessions to the law's interests in certainty and predictability. First, as Professor Bast acknowledged, the courts must start with the general proposition that the agreement is enforceable.²³² Second, as Walter Gellhorn asserted, courts should reference any relevant legislation as the "starting point" of any inquiry into uncharted territory.²³³ Finally, as the drafters of the Second Restatement have suggested, judges should utilize legislation to enhance their understanding of the policy at stake.²³⁴ Unless it clearly dictates a particular result, however, legislation should only be a judicial guidepost—one factor considered in the analysis.²³⁵ Judges must have discretion to void a contract that is injurious to fundamental public interests, even if legislation does not reflect an applicable policy.²³⁶

The issue then is how courts should utilize relevant legislation when evaluating a non-disclosure contract. Federal preemption doctrine provides a sound theoretical approach to determining the effect legislation should have on the analysis.²³⁷ Under federal preemption analysis, courts determine whether a federal regulation

²²⁸ See *id.* at 1011.

²²⁹ *Id.* (discussing CONN. GEN. STAT. §§ 31-128e, f (2001)); see *supra* notes 49-54 and accompanying text.

²³⁰ *Giannecchini*, 780 A.2d at 1011; see also *supra* notes 46 & 54 and accompanying text (discussing the *Giannecchini* court's conclusion that the Connecticut legislature had explicitly considered all issues regarding disclosure of employee personnel records).

²³¹ *Giannecchini*, 780 A.2d at 1011.

²³² Bast, *supra* note 29, at 700.

²³³ Gellhorn, *supra* note 18, at 685.

²³⁴ RESTATEMENT §179 cmt. b.

²³⁵ Gellhorn, *supra* note 18, at 685.

²³⁶ Bast, *supra* note 29, at 706 (arguing that positive law may be underinclusive when it fails to protect against substantial health and safety dangers).

²³⁷ See, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 203 (1983) (discussing federal preemption analysis). See also Hoke, *supra* note 26, at 699-700 (laying out the three categories of federal preemption).

or legislative scheme displaces a state constitutional or statutory remedy.²³⁸ Federal preemption can be used as a defense when a federal law bars compliance with, or relief on the basis of, a state or local law.²³⁹ Thus, in determining whether to enforce a non-disclosure contract, courts should first look to the relevant state and/or federal statutory provisions to determine if the regulatory scheme in effect “preempts” an independent discretionary judgment that a contract is unenforceable as contrary to public policy.

Preemption analysis generally divides into three categories: express preemption, implied field preemption, and conflict preemption.²⁴⁰ The court, focusing on the plain meaning of the statutory language, will find express preemption when a federal statute clearly and explicitly preempts state law.²⁴¹ When there is no express preemption provision, the court looks to whether the federal statute impliedly preempts the state law.²⁴² Implied field preemption occurs when a federal regulatory scheme is so pervasive as to displace all state regulation.²⁴³ Conflict preemption occurs when state and federal law are inconsistent, thus rendering compliance with both an impossibility.²⁴⁴

Ultimately, preemption analysis determines whether Congress intended to supersede state law.²⁴⁵ In order to ensure that congressional intent is clear, courts employ the “clear statement” rule.²⁴⁶ The “clear statement” rule ensures that “the legislature has in

²³⁸ See *Pacific Gas*, 461 U.S. at 203; see also Hoke, *supra* note 26, at 699-700.

²³⁹ See Hoke, *supra* note 26, at 691.

²⁴⁰ Betsey J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 566 (1997).

²⁴¹ *Id.* For example, in *Jones v. Rath Packing Co.*, the Supreme Court held that the Federal Meat Inspection Act (FMIA), 21 U.S.C.S. § 606 (2003), preempted a state law allowing deviations from weights stated on meat packaging. 430 U.S. 519 (1977). Specifically, Section 678 of the FMIA expressly prohibits “[m]arking labeling, packaging, or ingredient requirements in addition to, or different than, those made under” the Act. *Jones*, 430 U.S. at 530 (citing 21 U.S.C.S. § 678 (2003)); see also THE LAW OF PREEMPTION 16 n.60 (Appellate Judges Conference, American Bar Association eds., 1991) (“Other well-known preemption provisions are found in the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a) (1982), the Occupational Safety and Health Act, 29 U.S.C. § 667 (1982), and the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a) (1988).”).

²⁴² Grey, *supra* note 240, at 566.

²⁴³ *Id.* See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (holding that the United States Warehouse Act preempted state law by occupying the field because not only did it make federal law paramount over state law in event of conflict but it also terminated the dual system of regulation).

²⁴⁴ Grey, *supra* note 240, at 566.

²⁴⁵ *Id.* at 564.

²⁴⁶ *Id.* at 609.

fact faced, and intended to bring into issue, the critical matters involved in the decision.”²⁴⁷ Courts begin with the assumption that federal regulation does not supersede the states’ police powers unless Congress’ intent is absolutely clear.²⁴⁸ In the absence of preemption, states retain the Tenth Amendment right to protect the safety and welfare of its citizenry.²⁴⁹

Using federal preemption analysis as a guide, courts should first determine if a statute expressly dictates a particular result and, if so, apply the statute.²⁵⁰ If there is no clear legislative articulation of the policy at stake, courts should next determine whether there is field preemption; that is, whether the relevant statutory scheme is so pervasive that it dictates a particular result.²⁵¹ The ultimate goal of referencing statutes should be to determine whether the legislature has already considered and made a clear determination of the competing policy interests at stake.²⁵² If it has, the court is bound to adhere to that judgment.

If the legislature is silent on the issue or has not clearly elucidated a relevant policy, however, courts should have broad discretion to balance the equities in favor of and against enforcement. Judges should begin with the general assumption that, in the absence of a clear expression of statutory intent, they retain the discretion to void a contractual provision that offends public policy. Essentially, the absence of a definitive legislative articulation creates a zone of judicial discretion.²⁵³ Judges should not ignore their duty to the public and decline to act because the legislature has not provided an answer. When the legislature has not clearly spoken, the

²⁴⁷ *Id.* at 610.

²⁴⁸ 16A AM. JUR. 2D *Constitutional Law* § 242 (1998) [hereinafter 16A AM. JUR.]. For example, in *P.R. Dep’t. of Consumer Affairs v. ISLA Petroleum Corp.*, the Supreme Court held, which although ISLA presented fragments of legislative history that supported their assertion that the Emergency Petroleum Allocation Act preempted Puerto Rico’s regulation of gasoline prices, the statutory language was not sufficiently clear to support a finding of preemption. 485 U.S. 495, 501-03 (1988). The Supreme Court emphasized that congressional intent could not be ascertained by viewing legislative history in a vacuum, without referencing statutory text “to which expressions of preemptive intent in legislative history might attach.” *Id.*; see also THE LAW OF PREEMPTION, *supra* note 240, at 17-18 (discussing *P.R. Dep’t. of Consumer Affairs*, 485 U.S. 495).

²⁴⁹ 16A AM. JUR., *supra* note 248, at 142.

²⁵⁰ See *supra* note 246 & 247 and accompanying text.

²⁵¹ Grey, *supra* note 240, at 566. Conflict preemption is clearly inapplicable because its application is limited to statutory conflict. *Id.*

²⁵² *Id.*

²⁵³ See Gellhorn, *supra* note 18, at 685 (“Public policies may well be served by the existence of a twilight zone in which steps are taken but cautiously.”).

courts should speak as the voice of the public.

In the absence of statutory “preemption,” the courts’ main inquiry should be whether the agreement before them creates a substantial health or safety danger which outweighs enforcement, similar to the approach taken by the New York courts.²⁵⁴ As Professor Bast notes, the significance of the public policy behind protecting the public from physical harm and death is paramount.²⁵⁵ Following the suggestions of Professor Schwab, the court should focus its inquiry on the potential adverse third-party effects of the agreement.²⁵⁶ Ultimately, even if the potential harms are speculative, the manifest importance of safeguarding the public from harm must supersede any private interests at stake.²⁵⁷ The courts are best equipped to decide when the causal connections between non-disclosure and public harm become too attenuated to interfere with enforcement of a contract.²⁵⁸

As illustrated by the overwhelming response of all state legislatures in the whistleblowing context, the courts have the power to respond to modern realities and provide the impetus for effective legislative response.²⁵⁹ A judicial policy of deference to the legislature perpetuates a cycle of inaction—the courts refuse to act, defer to the legislature, and then the legislature declines the invitation to act.²⁶⁰ Judicial activism in this area will re-enforce democracy because it will force the legislature either to remain silent or to speak clearly on policy questions before them.²⁶¹ The judiciary must force the legislature to act by making a clear statement that contractual secrecy is not absolute when public safety is at stake.

²⁵⁴ See, e.g., *Kraus v. New Rochelle Hosp. Med. Ctr.*, 216 A.D.2d 360 (N.Y. App. Div. 1995) (discussing New York’s whistleblowing statutory scheme’s emphasis on public health and safety). See also Callahan & Dworkin, *supra* note 168, at 116-18.

²⁵⁵ Bast, *supra* note 29, at 707.

²⁵⁶ Schwab, *supra* note 28, at 1958 (asserting that courts should focus on whether enforcement of a non-disclosure contract will have adverse third party effects).

²⁵⁷ See Bast, *supra* note 29, at 706 (arguing that “[b]ecause of the importance of health and safety, perhaps disclosure should be allowed where the danger is not quite so substantial or so imminent”).

²⁵⁸ *Id.*

²⁵⁹ See generally Callahan, *supra* note 168, 99-100 (discussing the emergence of whistleblower legislation in all fifty states).

²⁶⁰ See *supra* note 219 and accompanying text.

²⁶¹ *Id.*

CONCLUSION

There has never been a better time for brave judges to acknowledge the societal risks involved in enforcing confidential settlement contracts.²⁶² The sexual abuse scandal in the Catholic Church has exposed the severe consequences of allowing parties to use confidentiality contracts to silence abuse victims at the expense of the public.²⁶³ The danger of routine enforcement of confidentiality contracts, however, is much more pervasive and extends beyond this single scandal. Judges must strive to adopt a more active role in crafting broad social policy by refusing to enforce non-disclosure contracts that threaten public welfare, even in the absence of an authoritative legislative declaration. In the absence of a clear expression of legislative intent, courts should be vested with broad discretion to balance contractual guarantees and public welfare. When public health and safety is at stake, a contract should never outweigh the public's right to know.

²⁶² See Robinson, *supra* note 7 (discussing Judge McWeeny's decision to unseal documents concealing sexual abuse by priests).

²⁶³ See Goodstein, *supra* note 1; see also Grossman, *supra* note 8; Robinson, *supra* note 7.