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### Are Agreements to Keep Secret Information in Discovery Legal, Illegal or Something in Between?

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# ARE AGREEMENTS TO KEEP SECRET INFORMATION LEARNED IN DISCOVERY LEGAL, ILLEGAL, OR SOMETHING IN BETWEEN?

*Susan P. Koniak\**

## I. INTRODUCTION

For at least eight years before the public and government authorities learned of the apparently dangerous combination of Ford Explorer sport utility vehicles (“SUVs”) and their Bridgestone/Firestone brand of tires, Firestone had been settling lawsuits involving injuries and deaths caused by their tires failing on Ford SUVs.<sup>1</sup> These settlements included terms requiring the plaintiffs and their lawyers to keep quiet about the settlements and about information learned through discovery, including information that might have alerted the public or the government to just how unsafe the Explorer/Firestone combination actually was.<sup>2</sup> In some cases, these secrecy provisions were reinforced

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\* Professor of Law, Boston University School of Law. I am deeply indebted to Professor Alan E. Garfield. His article *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261 (1998), caused me to rethink the question of secrecy in litigation. Professor Garfield did not intend his work to challenge the general acceptance of agreements to keep litigation information secret, but one of the marks of truly good scholarship is that it has implications beyond those foreseen by the originating author. In addition to Professor Garfield, whom I do not know, I thank those whom I call on time and again to critique and help me with my work, two dear friends: George M. Cohen and Geoffrey C. Hazard, Jr. I also want to thank the participants at the Hofstra Symposium in New York, my colleagues at Boston University and the editors of this review. I am also indebted to Dora Lassalle, J.D. 2001, Boston University for her valuable research assistance.

1. See, e.g., Editorial, *Lessons from the Tire Fiasco*, BUS. WK., Sept. 18, 2000, at 178 [hereinafter *Lessons*]; *Sealed Court Records Kept Tire Problems Hidden*, USA TODAY, Sept. 19, 2000, at 16A [hereinafter *Sealed Court Records*].

2. See *Sealed Court Records*, *supra* note 1; see also Keith Bradsher, *S.U.V. Tire Defects Were Known in '96 But Not Reported*, N.Y. TIMES, June 24, 2001, at A1 [hereinafter *Bradsher, S.U.V. Tire Defects*]; James V. Grimaldi, *Recalls Spark Anti-Secrecy Bill*, WASH. POST, Sept. 18, 2000, at F35; Matthew L. Wald & Keith Bradsher, *Judge Tells Firestone to Release Technical Data on Tires*, N.Y. TIMES, Sept. 28, 2000, at C2.

by court protective orders issued upon joint application by both plaintiff and defendant.<sup>3</sup>

To ensure silence before settlement was reached (i.e., during discovery), the defendants in these cases either obtained court orders requiring silence regarding information learned in discovery (often with the tacit or explicit support of the plaintiffs' lawyers) or reached private agreements with the plaintiffs and their lawyers, and entered stipulations providing that both sides would keep quiet about matters learned in discovery.<sup>4</sup>

It now appears that this silence worked to keep information from both the public and the government that could have saved lives and prevented devastating injuries.<sup>5</sup> The Firestone/Explorer story finally broke when some reporters obtained documents uncovered by these earlier lawsuits—documents that were still protected by secrecy

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3. See *Lessons*, *supra* note 1.

4. See *id.* These practices are alive and well and still being employed by Firestone, Ford and the lawyers suing those companies. In June 2001, the district court with jurisdiction over the federal cases pending against Ford and Firestone, which were consolidated and transferred to that court for coordination of pretrial discovery, denied a motion brought by various news organizations to unseal discovery material on the ground that the material was being kept secret pursuant to a private agreement with which the court had no business interfering. See *In re Bridgestone/Firestone, Inc.*, 198 F.R.D. 654, 657-58 (S.D. Ind. 2001). Given that the cases were transferred by court order and often against the wish of the plaintiffs to the Indiana district court ostensibly to make discovery more efficient, see *In re Bridgestone/Firestone, Inc.*, No. 1373, 2000 WL 33416573, at \*2-3 (J.P.M.L. Oct. 24, 2000), and that the "private" agreement requiring secrecy had to be signed by anyone wishing to share in that discovery, see *In re Bridgestone/Firestone*, 198 F.R.D. at 657, the idea that the court was not involved in and indeed responsible for the continuing secrecy of discovery information seems ridiculous. If you file a suit, you get transferred to Indiana by court order so that you can participate in the joint discovery process, but you cannot participate in the Indiana discovery without signing the "private" agreement. How "private" an arrangement is that?

Moreover, there are numerous class actions included in the Indiana consolidation. Judges presiding over class actions are supposed to sit as fiduciaries for the absent class. See generally 7B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 1791, 1797.1 (2d ed. 1986). The absent class is not available to make "private agreements." The court certainly has the power under Rule 23 to mandate an end to secrecy, if it is not in the interests of the absent class. See FED. R. CIV. P. 23(d). Even Arthur Miller, a general defender of the ability of parties and courts to keep discovery information secret, has recognized that secrecy may be harder to justify in class action cases. See Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 498 (1991). Absent class members, who may well have to make decisions about whether to opt-out of any settlement reached, may well have no other reliable way of learning about the strength of the class's claims than through newspaper reports detailing what has been learned in discovery. The involuntary nature of the transfer in the name of making discovery easier and the inclusion of numerous class actions in the consolidation seriously undermine the Indiana court's position that the secrecy agreement was none of its affair.

5. See, e.g., Wald & Bradsher, *supra* note 2 ("Officials at the Department of Transportation say the sealing of documents in settled lawsuits is one reason they did not spot the pattern of scores of rollover deaths in Ford Explorers equipped with Firestone tires that failed.").

agreements that Firestone, its lawyers, plaintiffs, plaintiffs' counsel, and some judges had put in place.<sup>6</sup>

Put plainly, the documents were leaked to reporters in violation of secrecy agreements and court orders. The leaked documents detailed, among other things, how many tire-tread separations had been reported to Firestone.<sup>7</sup> They also described questions raised within Firestone and Ford about the safety of the Explorer/Firestone combination.<sup>8</sup> Once media accounts describing these documents were published, the government began looking into the Ford/Firestone record,<sup>9</sup> the public demanded some response from the companies, and ultimately Firestone, followed by Ford, instituted recalls of the tires on Explorer SUVs.<sup>10</sup> From this sequence of events, it seems obvious that the secrecy agreements and orders worked to delay the recall of these tires for years. In those years, 271 people died in accidents linked to Explorer/Firestone tire failure, and more than 800 people were seriously injured.<sup>11</sup>

Newspaper, magazine, and television reporters have interviewed the plaintiffs' lawyers who, on behalf of their injured clients, signed secrecy pacts (on material obtained in discovery) or who had remained quiet pursuant to court orders that they agreed not to contest.<sup>12</sup> These lawyers said more or less the same thing: their "first duty was to win as much money as possible for the crash victims whom they represented."<sup>13</sup> Plaintiffs' counsel said they did not disclose the pattern of failures of Firestone Tires and Ford Explorer SUVs out of concern that their

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6. See Keith Bradsher, *Documents Show Firestone Knew of Rising Warranty Costs*, N.Y. TIMES, Sept. 8, 2000, at C1 [hereinafter Bradsher, *Documents Show*]; see also Keith Bradsher, *2 Firestone Studies in 1999 Pointed to Tire Problems*, N.Y. TIMES, Oct. 2, 2000, at A25; James V. Grimaldi & Dina ElBoghdady, *Early Signs Given of Tire Problems*, WASH. POST, Sept. 9, 2000, at E1.

7. See Bradsher, *Documents Show*, *supra* note 6.

8. See *id.*

9. See *U.S. to Investigate 21 Deaths Tied to Tires on Sport Utilities*, N.Y. TIMES, Aug. 3, 2000, at C7; see also Editorial, *Congress Takes Up Defective Tires*, N.Y. TIMES, Sept. 7, 2000, at A30; *Senate Panel Plans to Hold Tire Hearings*, N.Y. TIMES, Aug. 24, 2000, at C5.

10. See Caroline E. Mayer & Carrie Johnson, *Firestone to Recall More Tires: Agreement Ends U.S. Probe of Accidents*, WASH. POST, Oct. 5, 2001, at E1; Cindy Skrzycki, *Ford's Action Isn't Technically a Recall: No Federal Force Behind 'Notification'*, WASH. POST, May 23, 2001, at A17; Cindy Skrzycki, *6.5 Million Tires Are Target of Recall: Firestone Unable to Conclusively Explain Failures*, WASH. POST, Aug. 10, 2000, at A1; Matthew L. Wald, *Tread Failures Lead to Recall of 6.5 Million Firestone Tires*, N.Y. TIMES, Aug. 10, 2000, at A1.

11. See *Class Action Status Given to Ford and Firestone Suits*, N.Y. TIMES, Nov. 29, 2001, at C4 [hereinafter *Class Action Status*].

12. See generally Bradsher, *S.U.V. Tire Defects*, *supra* note 2 (interviewing Sean Kane, as one of the nation's top traffic-safety consultants, who identified problems with Firestone tires in 1996).

13. See *id.*

clients' suits would be adversely affected;<sup>14</sup> obviously they were concerned about getting as much money as possible for their clients in settlement. Secrecy was what the defendants demanded in exchange.

Ethics and litigation experts interviewed by the press have explained that nothing in the ethics rules or other law prevented or prevents these lawyers from doing just what they did.<sup>15</sup> Some of those interviewed even went further, claiming, in effect, that ethically they *had* to take the secrecy deal: "You're there to represent your client, not . . . the world, although you wish you could. . . . Ethically, there's no question that you have to do what's in the best interest of the client."<sup>16</sup>

Is this true? Not quite. The American Bar Association's ("ABA") *Model Rules of Professional Conduct* ("Model Rules") do not explicitly address, and therefore might be said to allow, privately negotiated secrecy agreements.<sup>17</sup> More important, the ethics rules that actually bind lawyers—rules that often diverge from the ABA's Model Rules, most notably on the issue of client confidentiality<sup>18</sup>—track the Model Rules in this area, saying nothing explicit about secrecy deals. Nothing in the ethics rules demands lawyers negotiate and sign such agreements.

Some states have already adopted laws restricting secrecy in civil litigation<sup>19</sup> (and more states and the United States Congress have recently considered such legislation<sup>20</sup>), but most jurisdictions in this

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14. *See id.*

15. *See id.* (quoting expert on lawyer's ethics, Professor Geoffrey C. Hazard, Jr., who said that the lawyers "had a civic responsibility the same as you or I do, but they didn't have a legal duty" to report the tire problems").

16. Davan Maharaj, *Firestone Recall Puts Spotlight on Secret Liability Settlements*, MILWAUKEE J. SENTINEL, Sept. 10, 2000, at 3A (quoting attorney Rowe Brogdon who represented the parents of a person killed in a Firestone/Ford accident and who accepted a settlement on their behalf requiring that discovery information be kept secret).

17. *See* discussion *infra* text accompanying notes 99-103.

18. The ethics rules that operate as law in state and federal courts are, in almost all jurisdictions, based on the ABA's Model Rules. *See, e.g.*, GEOFFREY C. HAZARD JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 15-16 (2d ed. 1994) (explaining the difference between the Model Rules and the ethics rules adopted by state courts).

19. *See, e.g.*, Sunshine in Litigation Act, FLA. STAT. ANN. § 69.081 (West Supp. 2002); TEX. R. CIV. P. 76(a). For a relatively complete list of the statutes and rules in the various states that regulate the extent to which court records may be sealed or must be open, see ROSCOE POUND INST., *MATERIALS OF SECRECY PRACTICES IN THE COURTS: STATE ANTI-SECRECY MEASURES* 101-03 (2000) (on file with Author).

20. *See, e.g.*, S.B. 1254, 1999-2000 Reg. Sess. (Cal. 1999); H.B. 3239, 91st Gen. Assemb., Reg. Sess. (Ill. 1999). The California bill is available for reconsideration in 2002. *See* Rebecca A. Womeldorf & William S.D. Cravens, *More Sunshine Laws Proposed*, NAT'L L.J., Nov. 12, 2001 at B14 (discussing introduction of sunshine statutes introduced in Arizona, Arkansas, California, Illinois, Massachusetts, Nevada, North Carolina, Rhode Island, Texas, Tennessee, and the U.S. Senate). The Illinois bill was introduced on January 10, 2001, and rereferred to Rules Committee on

country operate under a prosecrecy legal regime. By that, I mean that the majority of states and the federal government allow judges substantial leeway to issue protective orders preventing parties from disclosing information learned in discovery.<sup>21</sup> And among those states which do have laws restricting a judge's ability to issue such orders, very few have laws that explicitly<sup>22</sup> prohibit or restrict *private agreements* between the parties to litigation to keep discovery material or the details of a settlement secret.<sup>23</sup>

However, the fact that the current legal regime in most jurisdictions operates to allow defendants, plaintiffs, and the courts to hide information unearthed in lawsuits that might save lives does not make it right. Indeed, any legal regime that facilitates the keeping of secrets as lethal as the secrets Firestone was allowed to keep may be a legal regime in need of serious repair. Certainly, the public is likely to feel that way, and we insiders (by insiders I mean lawyers and judges), must recognize the possibility that the system we have lived with for years, the system we are comfortable with, may be just as perverse as our fellow citizens seem to think it is.

I hasten to add that I am not arguing that the public's reaction to our legal system is invariably filled with wisdom; I think it is not. Some aspects of our legal system that offend the public, can, in my opinion, be justified by principles that lawyers and judges understand and have a duty to defend and preserve, no matter how unpopular or misunderstood those principles may be to ordinary citizens. Moreover, I am not arguing, nor do I believe, that life and limb must trump all other values. To say that lives and limbs might well have been saved by another legal regime does not end the argument for me. I say that not just because many productive activities pose substantial risk to life and limb, but because some principles are worth the sacrifice of lives and limbs.

Surely, once we understand that a legal regime is contributing to the loss of life or the infliction of serious injury, it behooves us to make

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April 6, 2001. *See id.*; *see also* Maharaj, *supra* note 16 (describing Senator Kohl's efforts to pass federal legislation limiting secrecy in litigation).

21. *See* Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 480; Miller, *supra* note 4, at 429.

22. I use the word "explicitly" on purpose to limit my assertion to laws that are specifically directed at the parties to litigation. I mean to avoid any claim at this point about what other laws (laws of more general application) say about such agreements.

23. *See, e.g.*, ARK. CODE ANN. § 25-18-401 (Michie Supp. 2001) (restricting the ability of government lawyers to enter into agreements to keep litigation information secret); *id.* § 16-55-122 (restricting the ability of private parties to enter into agreements to keep litigation information secret when that information involves an environmental hazard, but not otherwise).

sure that the policies that justify that system make good sense. Here is where the problem begins; I believe that the policies justifying the current legal regime do not make sense, and that the current regime is not supported by principle. Instead, it is supported by an unproven set of assumptions about the benefits of the current regime in securing the swift and efficient settlement of cases, and the costs of all other models—models rarely delineated by those asserting the enormous costs that these poorly described models would involve.<sup>24</sup> Such sloppy, unsupported, overblown, justifications surely are insufficient to justify the costs of the current regime, even if we assume those costs are limited to the 271 deaths and over 800 injuries in the Firestone case alone.<sup>25</sup> And, of course, there is no good reason to assume that the Firestone costs are *sui generis*.<sup>26</sup>

Moreover, it is my position that the current regime is perverse not only because of the casualty toll it allows. I will argue that the current regime sets up perverse incentives to litigate cases, may encourage the filing of frivolous suits, and encourages waste and inefficiency by creating a market for information similar to the market that our blackmail laws are designed to outlaw. In short, the supposed benefits of the current regime, most notably: encouraging the swift and efficient operation of our court system and supporting the nation's economic productivity, are being touted without careful consideration of the negative effects of the regime not just on lives and limbs, but on the court system itself and on the efficient functioning of our economy.

## II. THE ACADEMIC DEBATE HAS FOCUSED ON THE WRONG QUESTION

The question of what our laws should allow and prohibit when it comes to secreting information discovered in civil litigation has been discussed rather thoroughly by legal scholars, generally by those who

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24. See Miller, *supra* note 4, at 483.

25. See *Class Action Status*, *supra* note 11.

26. Although Arthur Miller makes a valiant effort (writing pre-Firestone) to forward the position that there is little reason to think the prosecrecy regime we have lived with for some time has caused much harm, see Miller, *supra* note 4, at 478-79, I find his argument unpersuasive. See Daniel J. Wakin, *Secrecy Over Abusive Priests Comes Back to Haunt Church*, N.Y. TIMES, Mar. 12, 2002, at A1 ("That approach [of a Roman Catholic diocese settling cases of sexual abuse by priests and then sealing records], which is commonly used by many corporations and institutions in their legal battles, has now come back to haunt the church, as diocese after diocese has acknowledged the presence of priests accused of abuse within its ranks."); see also Editorial, *A Moral Issue and a Crime*, WASH. POST, Mar. 17, 2002, at B8; Dean E. Murphy, *Connecticut Report Revisits Egan's Role in Settling Abuse Cases*, N.Y. TIMES, Mar. 18, 2002, at B1.



write about either civil procedure<sup>27</sup> or legal ethics.<sup>28</sup> By and large, that literature precedes the Firestone tire debacle, which means that defenders of secrecy did not have to face this particularly dramatic example of how costly secrecy can be. However, the biggest problem with the debate in the literature is not that it downplays how dangerous to life and limb secrecy can be (although that is a flaw in some of the articles). The real problem, as I see it, runs much deeper.

The debate has been conducted along the wrong fault line. What I mean by that, is that most, if not all, of the participants in the debate, whether they are prosecretcy or antiseccrecy, seem to agree that the key to the problem is understanding the true function of courts in society.<sup>29</sup> In other words, proponents of the current regime, as it exists in most states and the federal system, begin by asserting that courts are designed to resolve disputes between parties, not to disseminate information.<sup>30</sup> According to those in support of secrecy, because secrecy agreements and secrecy orders tend to facilitate the prompt and efficient resolution of suits, they should be welcomed and not viewed with suspicion.<sup>31</sup> They further argue that antiseccrecy supporters are wrong because they fundamentally misconceive the true nature of courts.<sup>32</sup>

On the other hand, those against secrecy seem to agree with the prosecretcy advocates that the key question is the role courts play and are meant to play in our society, although they disagree on what that role is or should be.<sup>33</sup> The antiseccrecy camp demeans or at least downplays the idea that courts are designed to aid private parties in the resolution of

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27. See, e.g., Marcus, *supra* note 21; Miller, *supra* note 4.

28. See, e.g., RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER AND GREED* (1999); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

29. See Marcus, *supra* note 21 at 502. Professor Marcus notes:

There is no doubt that American judges, particularly federal judges, increasingly view settlement promotion as an important objective. There are also valid grounds for questioning this tendency in judicial activity, both because it can distort the proper role of the courts and because it does not measurably increase the frequency of the settlement.

*Id.* (footnote omitted).

30. Professor Marcus continues:

The primary purpose for which courts were created, distinguishing them from other organs of government, is to decide cases according to substantive law. The collateral effects of litigation [making information available to the public] should not be allowed to supplant its primary purpose.

*Id.* at 466-70 (footnote omitted); see also Miller, *supra* note 4, at 488 ("Courts are designed to resolve disputes; they are not information ombudsmen.").

31. See, e.g., Marcus, *supra* note 21, at 503; Miller, *supra* note 4, at 487.

32. See Miller, *supra* note 4, at 488.

33. See Luban, *supra* note 28, at 2648-58.

their conflicts, arguing that our courts were designed primarily to serve the public at large, not warring parties.<sup>34</sup> As institutions designed to produce public goods such as court precedents, legal rules, and factual accounts of contested events, and not private goods such as settlements, court processes must be open.<sup>35</sup> Otherwise, these public goods will be underproduced.<sup>36</sup>

The antisecrecy advocates also dispute that sunshine in litigation would be as disruptive to the goal of settling lawsuits as the prosecretary folks claim,<sup>37</sup> but they primarily stand on other ground—precisely the ground disparaged by the prosecretary supporters—the ground that insists that the true function of courts is something other than the resolution of private suits.<sup>38</sup> As those who support secrecy would expect and are waiting to find, those against secrecy also tend to criticize the system for producing too many settlements, too quickly.<sup>39</sup> The proponents of secrecy emphasize the antisettlement comments of their opponents,<sup>40</sup> as if those comments proved that criticizing the current regime meant one was litigation crazy—just another ivory tower, egghead (probably liberal), impractical, theory-driven (and not hallowed economic theory, but some mushy “policy” driven kind). Consequently, this has become a battle between the “real world, settlement-favoring, economic-minded academics” and the “pie-in-the-sky, litigation promoting, mushy theorists.” Guess who’s winning.

Back to the substantive point: I believe all of this fighting about the true nature of courts and whether we have too many or too few settlements is largely irrelevant to the question of whether the current legal regime allowing secrecy is perverse. To prove this, I am going to take the starting point of the prosecretary advocates as my own. I am, in other words, going to proceed by assuming that the primary (nearly sole) purpose of courts is the efficient settlement of private disputes. I think that position is wrong. It is entirely too simplistic an understanding of the role the judicial system is designed to play and does in fact play in our society. However, because the rightness or wrongness of this

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34. See RICHARD A. ZITRIN, *ROSCOE POUND INST., WHAT JUDGES CAN AND SHOULD DO ABOUT SECRECY IN THE COURTS* 1 (2000); see also Luban, *supra* note 28 at 2648-58 (acknowledging that courts must play both roles, but nonetheless seeing the function of courts as central to the question of how much secrecy should be allowed).

35. See Miller, *supra* note 4, at 485.

36. See Luban, *supra* note 28, at 2625.

37. See *id.* at 2655-56.

38. See *id.* at 2656.

39. See *id.* at 2621-22.

40. See, e.g., Miller, *supra* note 4, at 431-32.

position matters so little to the issue of secrecy and information discovered in litigation, I will adopt the “courts as private dispute resolvers” model in its extreme form for the sake of argument.<sup>41</sup> My claim is that this assumption does not justify the regime on secrecy in litigation that now exists.

### III. A BRIEF SUMMARY OF MY POSITION

First, it does not follow from the proposition that courts are designed to facilitate the resolution of private disputes that they should encourage, approve and allow any and all contractual promises that make settlement more likely. In other words, it is surely the goal of contract law to encourage the private formation of agreements, but that does not mean that any and all contracts should be considered legal and contract law does not consider all contracts legal. Central to my argument is the proposition that agreements otherwise prohibited by law (at least those prohibited for good reason by sound laws) should neither be allowed nor encouraged merely because they facilitate settlements. Indeed, unless the settlement context somehow removes the wrongs that cause us to treat such agreements as illegal or unenforceable in other contexts, the strong presumption should be that agreements otherwise illegal or unenforceable should not be treated as legal and enforceable merely because they were made in connection with litigation. That presumption should only be abandoned when we are confident that outlawing the settlement-connected secrecy agreements would have a great enough effect on the number of settlements to outweigh whatever dangers the laws against contracts for secrecy seek to prevent. Again, I am assuming, for the sake of argument, that settling lawsuits is nearly an unqualified good and the sole legitimate goal of judicial process.

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41. Whether parties should be allowed to bargain over keeping the amount of the settlement secret is a question that might require one to take a position on the public/private nature of courts to answer. Whether or not that is true, what is true is that my analysis, which assumes the information—to be kept secret—exists independently of the lawsuit cannot answer that question. On the other hand, I am not persuaded it is a terribly important question. At least, I think it pales in comparison to whether the law should allow parties to contract to keep discovery information secret, the question this Article does address. Settlement amounts are, at best, ambiguous signals about the existence of some “wrong” or “public danger.” I am not sure that they provide much useful information to anyone outside of future litigants and their lawyers. I am concerned with information that is much more valuable; information gleaned in discovery. First, I will discuss information on public dangers (crimes and torts) learned through discovery. I will then discuss trade secrets and what I call intimate secrets (information protecting some legitimate zone of personal privacy) learned in discovery. This Article will address the legality and sense of allowing private parties to bargain to keep either of those forms of information secret.

To make the position I have just set out more concrete consider the following: would anyone say that our courts should encourage or allow terms in settlement contracts that provided that the parties would later cooperate in some criminal endeavor because such terms might make the settling of some lawsuits easier? I assume not. My point is simple: To assume that courts are designed solely to facilitate settlement does not justify ignoring the existing divisions between right and wrong conduct embodied in all of our other laws.<sup>42</sup>

Settlements are contracts regardless of whether they are entered into by two private parties with no court involvement or whether they are subject to court approval, as class action settlements and many divorce and custody settlements usually are.<sup>43</sup> Contract law has long recognized that some contracts should be unenforceable either because they are unconscionable<sup>44</sup> or are inimical to the public interest, i.e., void as against public policy.<sup>45</sup> I will argue that there is no reason why settlement contracts should be immune from challenges that would defeat the validity of other contracts. Further, my position is not merely limited to contract law. For example, a belief that courts should encourage agreements that settle lawsuits should not be sufficient to wipe out the goals embodied in criminal law, tort law, or any other part of our larger legal corpus. People and entities who make certain agreements, outside of the context of litigation, not only risk the voiding of those agreements, but also risk the imposition of other sanctions:

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42. For a general description of how the law treats contracts for secrets when they are made outside of the litigation setting, see the excellent article by Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261 (1998). As the biographical footnote to this Article acknowledges, it was Professor Garfield's article that allowed me to reimagine the problem of secrecy in litigation. Professor Garfield, not I, deserves the credit for the survey of the law on contracts for silence that I describe in the body of this article. What he did not do was apply that law to contracts for secrecy in litigation. *See id.* He accepts the unspoken assumption of the courts and other legal scholars that contracts for secrecy in litigation are somehow outside the reach of all that other law and are subject to their own legal regime. *See id.* And why not? As a practical matter, he is right. If the law is what courts do and say, then for some inarticulated reason the law stops at the courthouse door. This Article examines that unspoken assumption and concludes that the contrary position makes more sense, i.e., that the reasons for treating promises for silence as legally suspect or unlawful is as strong, if not stronger, when those promises are made in connection with litigation as they are when they are made in other settings.

43. *See, e.g.*, Susan P. Koniak, *The Lawlessness in Our Courts*, 28 STETSON L. REV. 283, 294 (1998) (noting that class settlements are not binding without court approval, "which is supposed to operate both as a check on collusion and as a substitute for individual assent to the contract's terms").

44. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) [hereinafter SECOND RESTATEMENT].

45. *See, e.g., id.* § 178.

penalties, fines, and sometimes imprisonment.<sup>46</sup> Why should those risks be removed merely because the contracts are connected to a lawsuit? I will argue that they should not.

Having stated where I am headed, the question becomes: How does our law and how should our law, outside of the litigation context, treat agreements to pay someone for remaining silent about another person or entity's wrongful conduct, such as an entity's creation of an environmental hazard, its production of a dangerous product, or its perpetration of a fraud on large groups of people?<sup>47</sup> The short answers to these questions are that generally speaking, such deals are treated and should be treated as legally void, i.e., unenforceable, and in some cases they are and should be classified as criminal.<sup>48</sup> I will argue that we should transfer our basically sound, if too lenient,<sup>49</sup> approach to these agreements from the nonlitigation context to the litigation context. Next, we should strengthen those laws to make them more likely to be obeyed, and we should adopt court procedures and practices that compliment the interests those laws are designed to protect.

#### IV. THE WISDOM OF THE LAW ON PROMISING SILENCE

Most environmental hazards and virtually all frauds are not just torts, they are also crimes.<sup>50</sup> The *Model Penal Code* and most state laws, which draw on the *Model Penal Code* for inspiration, include the crime of compounding: to "accept[] or agree[] to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or

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46. See, e.g., *Bankers Life & Cas. Co. v. Crenshaw*, 46 U.S. 71, 85 (1988) (upholding award of \$20,000 in compensatory damages and \$1.6 million in punitive damages for a successful bad faith breach of contract claim, due to the company's refusal to pay an insurance claim).

47. The "should" question is important because applying unsound laws to the litigation context makes no sense. Unsound laws should be rooted out where they exist, not transferred to a new environment.

48. When I say "are treated" I do not mean to suggest that there are many cases actually applying the laws I will discuss. By definition, contracts to keep secrets are not likely to be discovered and are thus unlikely to end up the subject of court opinions. What I mean when I say "are treated" is that the law on our books and the principles behind those laws condemn such contracts, which may be assumed to have some deterrent effect on their formation.

49. See, e.g., *infra* text accompanying notes 65-66 (critiquing the approach in the SECOND RESTATEMENT, *supra* note 44).

50. See, e.g., MODEL PENAL CODE § 224.2 (1980) (making it a misdemeanor to alter an object "so that it appears to have value because of antiquity, rarity, source or authorship which it does not possess"); *id.* § 224.4 (making it a misdemeanor if a person "falsifies, destroys, removes, or conceals any writing or record, with purpose to deceive or injure anyone or to conceal any wrongdoing").

information relating to an offense.” It is a misdemeanor.<sup>51</sup> In settling lawsuits and in agreeing to keep discovery secrets, many parties, and their lawyers, enter into agreements that seem to fall squarely within the definition just given. However, the *Model Penal Code* includes an exemption. The exception allows victims of a crime to promise not to report the crime in exchange for reasonable compensation for the harm caused by the criminal.<sup>52</sup> Although this seems to exempt all agreements connected to litigation that this Article is designed to address, that may be too hasty a judgment.

The Comments to the *Model Penal Code* explain the exemption by noting that it is not criminal to fail to report a crime out of affection or indifference, and the victim who fails to report because his loss has been made good, seems no more derelict in his societal duty than those who fail to report for other reasons.<sup>53</sup> I interpret this to mean that the law is not trying to eradicate receiving restitution from criminals, but instead is trying to eradicate receiving pecuniary gain for not reporting the crime. This is a sensible distinction. The idea seems to be that as long as the victim is being paid for the harm, as opposed to being paid for failing to talk, there is no crime.

Now, as we sophisticates all know, it is well nigh impossible to prove, discern, or even to speak sensibly about what portion of money paid by a criminal to a victim may be for compensation as opposed to silence (when the victim fails to report the crime), as long as the amount of money paid to the victim is “reasonable compensation.”<sup>54</sup> We all know that the absence of an explicit “silence” term doesn’t necessarily mean there wasn’t a silence bargain of some sort. Moreover, “reasonable compensation” is also a relatively elastic concept. Yet, despite all of these problems, the drafters of the *Model Penal Code* and the state legislatures that followed them did not simply exempt victims of crime from the crime of compounding. They allowed for the possibility that victims could be prosecuted for receiving a monetary bonus in exchange for agreeing not to report a crime to the authorities. Taking into consideration all of the difficulties of proof, the drafters must have thought the danger in openly endorsing such deals between victims and criminals was serious enough to do something to discourage such deals,

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51. See *id.* § 242.5; see also CAL. PENAL CODE § 153 (West 1999); FLA. STAT. ANN. § 843.14 (West 2000); N.Y. PENAL LAW § 215.45 (Consol. 2000).

52. See MODEL PENAL CODE § 242.5 cmt. 1.

53. See *id.* cmt. 3.

54. See *id.*

i.e., the inclusion of the words “reasonable compensation.”<sup>55</sup> They were right.<sup>56</sup> Shortly I will get to why, but there are other matters to cover first.

A good deal of the breadth in the exception to the crime of compounding comes from the elasticity in the concept of “reasonable compensation.” While the concept and the exception may be elastic, I do not believe it is a boundless elasticity. Consider *A*, a victim, who accepts payment from *X*, a criminal, in exchange for a promise to keep quiet about crimes committed by *X* against *B*, *C*, and *D*, in addition to the crime *X* committed against *A*. I submit that such an agreement does not fit naturally within the exception or the Comment’s explanation of the exception. Yet, these are precisely the settlement agreements that defendants are most interested in making and which cause the greatest harm to the public.

Moving away from criminal law for the moment, although we will return to it, and looking instead at contract law, the *Restatement (First) of Contracts* (“First Restatement”) was unambiguous on the unenforceability of contracts that trade silence about crimes for monetary or other pecuniary benefit.<sup>57</sup> Such contracts were considered unenforceable, void as against public policy.<sup>58</sup> In lay terms: not worth the paper they were written on. In addition, no exception was made for victims of crime who, according to the First Restatement, were free to settle civil claims arising out of acts that were crimes as well as torts,<sup>59</sup> but any such settlement that included a promise to conceal or compound the offense was unenforceable.<sup>60</sup> Williston<sup>61</sup> and Corbin<sup>62</sup> both agreed with this approach. Williston even went so far as to note that any bargain to conceal a crime is unlawful even if “no crime in fact has been

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55. Indeed, it can be argued that the exception goes too far in that it seems to condone explicit agreements for silence connected to the exchange of “reasonable compensation,” leaving too much room for buying silence. It may well be that any overbreadth in the exception was a bow to the ubiquitous process of settling lawsuits for such promises, although I do not know that to be true. If the exception’s scope is connected to settlement agreements, notice that the litigators did not gain a complete exemption from the criminal law.

56. See *infra* notes 75-84 and accompanying text.

57. RESTATEMENT (FIRST) OF CONTRACTS § 548(1) (1932) [hereinafter FIRST RESTATEMENT].

58. See *id.* § 548 cmt. a.

59. See *id.* § 548(2).

60. See *id.* § 548 cmt. a, illus. 1.

61. See 6 SAMUEL WILLISTON, LAW OF CONTRACTS § 1738 (rev. ed. 1938).

62. See 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1430 (1962).

committed.”<sup>63</sup> This I will argue presently is a wise approach, but there is more law to get on the table before we get to that.

The *Restatement (Second) of Contracts* (“Second Restatement”), unlike its predecessor, is elusive on the topic of contracts to conceal crimes. It does not abandon the approach found in the First Restatement but it does not quite restate it either.<sup>64</sup> The Second Restatement refers the reader to the *Model Penal Code*’s provision on compounding, which I discussed above.<sup>65</sup> This, of course, suggests that contracts to conceal crimes are not just unenforceable, as the First Restatement said, but criminal as well. But the Second Restatement is nonetheless ambiguous. Why was the First Restatement’s provision not repeated? And more important, did the drafters intend to engraft the *Model Penal Code*’s exception for victims of crimes into the law of contracts? The result is that it is unclear whether contract law, according to the drafters of the Second Restatement, does or should continue to treat as unenforceable a contract that pays a victim of a crime “reasonable compensation” in exchange for silence. Are victims who make such bargains exempt from the crime of compounding but subject to a claim of damages for breach of contract, if they take the money and report the crime to the police? We are not told. Moreover, the opaqueness of the Second Restatement also leaves us with no clear statement on the matter I raised above: the inapplicability of the *Model Penal Code* exception to contracts calling for victim A to keep silent about crimes against victims B, C, and D. I attribute the wishy-washiness of the Second Restatement to the increasingly common practice of settling lawsuits in exchange for silence—a practice that I suspect the members of the American Law Institute (“ALI”), with their insider’s perspective on the functionality of such agreements, were loathe to condemn despite contract law’s general and longstanding prohibition against bargains to conceal crimes.

Staying with contract law, what about contracts to conceal torts? Neither the First nor the Second Restatement specifically addresses such contracts,<sup>66</sup> an omission I attribute again to the failure of the drafters to rethink the ubiquitous practice of including promises of silence in settlement agreements and the ALI’s insider bias. However, contract law, including its codification in the Restatements, does speak to related matters. For example, a contract to commit a tort is unenforceable as

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63. 6 WILLISTON, *supra* note 61, § 1718, at 4857.

64. See SECOND RESTATEMENT, *supra* note 44, ch. 8, introductory note.

65. See *id.*

66. See Garfield, *supra* note 42, at 294-95.



against public policy.<sup>67</sup> That prohibition includes contracts to conceal information, when concealing that information is the heart of a fraud that one of the two contracting parties is committing or about to commit.<sup>68</sup> More interesting, a contract to conceal information from a third party may be unenforceable even when the concealment is not itself fraudulent.<sup>69</sup> According to Corbin, even when there is no public or private duty to disclose certain facts, a bargain not to disclose the facts is illegal if its purpose is to bring off a profitable sale of shares or other property by one of the two parties to the silence bargain.<sup>70</sup> As this point may be difficult to grasp at first, let me provide the example used in the first Restatement to illustrate the kind of bargain Corbin had in mind: A wants to buy land from B at a low price. C is aware of facts, which, if told to B, would make B demand a much higher price. A promises C \$500 for C's promise not to tell B the crucial facts. C does not tell B. The agreement is illegal.<sup>71</sup>

This example may sound surprising to some of you. It may, on first reflection, seem wrong to say that C cannot contract to do something that she has a perfect right to do (i.e., keep her mouth shut and tell B nothing). Moreover, I think it may be particularly difficult for modern lawyers to accept this illustration as sensible, precisely because it is so analogous to the kind of agreements that plaintiffs make everyday in settling tort suits. Plaintiffs agree for pecuniary benefit to keep quiet about something that they have a perfect right to keep quiet about (i.e., no legal duty to reveal), and about which the defendant may also have a perfect right not to disclose (although that is not always true).

Does the law really treat such bargains as unenforceable? Did it ever? If either is so, is that crazy?

Let's return to the criminal law as a way to unravel the Restatement's perhaps puzzling example. Compounding is a mere misdemeanor,<sup>72</sup> a minor crime. Blackmail, its big cousin, is a felony, a much more serious offense.<sup>73</sup> What is blackmail? The paradigmatic case of blackmail involves a threat by A, that A will disclose something about B that A has a perfect right to disclose, unless B pays A money to keep quiet. Much ink has been spilled in academic journals and books trying

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67. See *id.* at 325.

68. See *id.*

69. See 6 WILLISTON, *supra* note 61, § 1738.

70. See 6A CORBIN, *supra* note 62, § 1455.

71. See FIRST RESTATEMENT, *supra* note 57, § 577, illus. 4.

72. See MODEL PENAL CODE § 242.5 (1980).

73. See 18 U.S.C. § 873 (1994).

to explain the supposed paradox of blackmail.<sup>74</sup> Why is it criminal for *A* to bargain with *B* to do something *A* has a perfect right to do absent a payment of money (i.e., talk or remain silent about *B*'s affairs)?

If *A* can either talk or keep quiet as he chooses, why shouldn't he be free to offer to sell his silence to *B* for money? A variety of explanations for this paradox have been offered. First, note that scholars from both the right and the left, however different their reasons are, tend to agree that blackmail is bad and should remain a serious crime. Moreover, this view is shared by scholars representing a wide variety of jurisprudential views, ranging from those who use the tools of philosophy to analyze law, like Leo Katz,<sup>75</sup> to those who are adherents and major players in the law and economics movement, such as Richard Epstein<sup>76</sup> and Judge Richard Posner.<sup>77</sup>

Of the various solutions to the so-called paradox of blackmail, the most telling for present purposes is one offered by Richard Epstein in an article aptly titled, *Blackmail, Inc.*<sup>78</sup> Epstein argued that a regime in which blackmail were legal would be seriously inefficient, wasteful, and bad, because such a regime would encourage institutions to spring up whose sole purpose was the collecting of information about people that those people wanted to keep private,<sup>79</sup> these institutions are the Blackmail Inc. of his title. Blackmail, Inc. would collect information with no other purpose than to suppress that information for money.<sup>80</sup> Such an institution would produce no social benefit, but would impose substantial costs. The costs, according to Epstein include: significant and expanded encroachments on the privacy of individuals and entities, and significant expenditures on security measures to prevent those intrusions.<sup>81</sup> Epstein also predicts that such institutions would increase crime rates as people would find themselves in need of money to pay off the blackmailers and might be driven to crime to get that money.<sup>82</sup>

I agree that legalizing blackmail would increase the crime rate, but unlike Epstein, I would predict a rise in homicide rates, not property

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74. See generally Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663 (1993). See also sources cited *infra* notes 75-77.

75. See generally LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* (1996).

76. See generally Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983).

77. See generally William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975).

78. Epstein, *supra* note 76.

79. See *id.* at 562-63.

80. See *id.*

81. See *id.* at 564.

82. See *id.*

crimes.<sup>83</sup> Because the blackmail victim has no way to enforce the contract without revealing the secrets she is paying to keep private, it is reasonable for her to fear that the blackmailers will keep coming back for more money. Moreover, I am unconvinced that any reputational concerns of blackmailers would cause them to keep promises, because the victim cannot choose to do business with only those blackmailers with “good” reputations for keeping their word. Blackmail just doesn’t work that way. The Blackmailer chooses his “customer”—not the other way around. Thus, I believe that killing the blackmailer would remain the one good solution to the victim’s enforcement problem.

To minimize the threat of homicide, blackmailers (in a regime making their conduct legal) might set up institutions, just like the institutions Epstein describes. A person can be killed; it is harder to stop an institution. On the other hand, institutions can be bombed and burned, and their agents eliminated. In other words, violent crime might still work. Moreover, minimizing the risk of homicide by replacing individual blackmailers with institutions might not be as easy as it sounds. Blackmail institutions might be plagued by particularly serious agency problems, such as freelancing, side deals, and skimming off payments. The extreme price elasticity of the product being sold, silence, would make these agency problems particularly difficult to control. The threat of those serious agency problems might effectively limit the size of blackmail organizations, which in turn would diminish the protection from homicide that the institutional structure might otherwise provide.

Of course, the question of whether or how the crime rate might increase is tangential to our main focus: Why it is wise for the law to prohibit certain contracts for silence. Even without any increase in crime rates, I believe Epstein’s argument about the inefficiency of institutionalized blackmail is unassailable. If Epstein is right, we have to ask whether the willingness of courts to accept, and enforce, litigation-related agreements that compensate people in part for keeping quiet about information that they would otherwise be free to speak about (or not, as they choose) transforms litigation into precisely the kind of institution from which our blackmail laws are designed to save us—an

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83. Epstein may be right that property crimes would rise too, but I would think that most blackmail enterprises would target those who could afford to pay and leave “poor risks” free to keep their dirty (or not so dirty) secrets. Perhaps, some low-rent, fly-by-night enterprises would arise to plague middle- and lower-class folks who would then have to resort to crime to pay off these companies and perhaps the wealthy would be so besieged by blackmail threats that they too would have to commit crimes to pay off their blackmailers. I am just not as convinced of all that as I am of the increased risk of homicide that I describe in the text.

institution that is wasteful, that needlessly encroaches on privacy, and that encourages wasteful expenditures to protect truly private matters and (even more costly) matters that society has a great interest in bringing to light.

This interest, the interest in discouraging wasteful institutions, supports our blackmail laws, explains why "compounding" is a sensible crime to keep on our books and justifies reading the exception to the crime of compounding narrowly. Indeed, Epstein's argument may support narrowing, or even eliminating, the exception to the crime of compounding to make it clear that any explicit promise of silence about criminal conduct is a crime itself. Epstein's argument also supports the First Restatement's blanket condemnation of contracts to conceal crimes.<sup>84</sup>

Blackmail law has more to teach us. Thus far, I have been concentrating on agreements to keep silent about criminal and tortious conduct, not agreements to keep quiet about trade secrets or matters traditionally considered part of an individual's legitimate zone of privacy. It is important to note that blackmail that involves payment in exchange for silence about criminal or tortious conduct is more wasteful and socially harmful than blackmail about more benign information, such as embarrassing personal information or blackmail that threatens a company's competitive advantage by threatening the disclosure of a trade secret. While the preceding statement needs little elaboration, one aspect of the increased cost may not immediately spring to mind.

## V. AN INTERLUDE ON MORE DISTANT RELATIVES: CONSPIRACY AND OBSTRUCTION OF JUSTICE

Consider the crime of conspiracy. The illegal act in a conspiracy is the agreement to accomplish an illegal act or to accomplish a legal act through illegal means.<sup>85</sup> The agreement is punished as an offense separate from the crime that is the agreement's subject.<sup>86</sup> The reason the agreement is punished separately and severely (conspiracy, like

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84. See Epstein, *supra* note 76, at 560.

85. See 18 U.S.C. § 371 (1994); see also N.J. STAT. ANN. § 2C:5-2 (West 1995); WYO. STAT. ANN. § 6-1-303 (Michie 2001).

86. See, e.g., *Burk v. State*, 848 P.2d 225, 235 (Wyo. 1993) ("All that is necessary to prove a *prima facie* case of conspiracy is any overt act that establishes the agreement was acted upon in some way. Thus, 'it is not necessary that an overt act be the substantive crime charged. . . .'" (quoting *Yates v. United States*, 354 U.S. 298, 334 (1957))); see also *Pinkerton v. United States*, 328 U.S. 640, 643-44 (1946).

blackmail, is a felony)<sup>87</sup> is that the agreement makes it much more likely that the criminal enterprise will succeed because two minds (as well as four arms and four legs) are better than one (or two, in the case of limbs).<sup>88</sup> Also, all conspiracies involve an implicit promise of silence about the wrongs committed by one's co-conspirators, and that too justifies treating conspiracy as a wrong separate from the underlying offense in that such promises of secrecy increase the likelihood that the underlying crime will go undetected, unpunished, and undeterred.<sup>89</sup> Agreements to keep criminal or tortious conduct secret that are made in connection with litigation share at least this much in common with conspiracy: they make it more likely that the crime or tort will go undetected, more likely, if you will, that the criminal or tortfeasor will be successful. This, of course, is another way of stating what I said earlier: Blackmailing someone about a crime or tort creates greater social harm than blackmailing someone about benign conduct. That is not, however, to say that blackmail about benign conduct is okay.

Here, the crime of obstruction of justice is also instructive. Obstruction of justice, also a felony,<sup>90</sup> is considered a serious offense because, by definition, it is action intended to frustrate or impede the working of the institutions society has established to resolve disputes (criminal wrongs or civil) peaceably.<sup>91</sup> Now remember for purposes of this Article I am assuming that the sole purpose of our civil court system is the resolution of private disputes. But if, as I have argued, secrecy agreements made in connection with litigation are akin to blackmail in their propensity to encourage wasteful institutions, the wasteful institution encouraged by secrecy agreements is an institution that has a pre-existing, non-wasteful—indeed essential—purpose. The institution that becomes the vehicle for waste is our court system when we allow it to become the means by which it is “legal” for people to get paid for having stumbled upon embarrassing information (whether that information is malevolent or benign). I am saying this: The protection we give our court system with our obstruction of justice statutes is undermined by allowing litigation to become a bazaar for trading silence about information. I hasten to add that I am not arguing that this trading

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87. See 18 U.S.C. § 371; see also N.J. STAT. ANN. § 2C:5-2; 18 PA. CONS. STAT. § 903 (2001); WYO. STAT. ANN. § 6-1-304 (Michie 2001).

88. See *United States v. Rabinowich*, 238 U.S. 78, 88 (1915); *Sneed v. United States*, 298 F. 911, 913 (5th Cir. 1924).

89. See *Rabinowich*, 238 U.S. at 88.

90. See 18 U.S.C. §§ 1501-18.

91. See *Sneed*, 298 F. at 912.

is obstruction of justice; it isn't. I am not arguing that this trading should be treated as a felony as blackmail, conspiracy and obstruction of justice are.

What I have argued thus far is that the conduct we so readily accept, trading secrecy in settlement agreements, may amount to the misdemeanor of compounding, a crime now on our books. Understanding how startling a notion that must be and how difficult many will find it to reimagine as criminal (or even a civil wrong that would render a contract void) something so seemingly "legal" as the practice of trading secrecy while settling a lawsuit, I have tried to explain how these commonplace agreements are first cousins to the felony of blackmail, second cousins to the felony of conspiracy, and distant relatives to the felony of obstruction of justice.

We want to enforce and encourage them for what reason? To clear court dockets, encourage settlements, and discourage trials? Fostering settlements at any price makes little to no sense, particularly when the device used to foster those settlements might well be responsible in the first place for there being a lawsuit that needs to be settled. To elaborate that point, we must return to the topic that led me to the digression on conspiracy and obstruction of justice: the wrong of secrecy agreements that do not involve concealing crimes or torts.

## VI. AGREEMENTS TO KEEP SECRET BENIGN INFORMATION: TRADE AND INTIMATE SECRETS

Agreements to keep secret the fruits of discovery, entered into during discovery as well as pursuant to settlement, protect much more than information about crimes and torts. They also and often protect legitimate trade secrets<sup>92</sup> of businesses and legitimate privacy rights<sup>93</sup> of ordinary people. Discovery is so open and wide-ranging (nearly unlimited in scope, according to the prosecretary advocates),<sup>94</sup> that some argue that private agreements to keep matters secret are essential to maintaining the competitive position of American business and the ordinary privacy interests of those who seek redress for wrongs in our courts.<sup>95</sup>

To understand the flaw in that argument for secrecy agreements, one must note that the argument is based on an unspoken assumption

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92. See Marcus, *supra* note 21, at 488-93; Miller, *supra* note 4, at 433-34.

93. See Marcus, *supra* note 21, at 486; Miller, *supra* note 4, at 464-67.

94. See Miller, *supra* note 4, at 440.

95. See *id.* at 475.

that is seriously flawed: that the information gleaned in discovery should be treated as an asset of the party who makes the discovery request, an asset that that party then has the right to sell back to the party from whom it was elicited. The information that is being sold in settlements that promise secrecy is information that came into the plaintiff's (or defendant's hands) incidentally. That is, the would-be seller of secrecy acquired the information she is now trading upon as an incident to a process that exists so that she and others can peaceably resolve legitimate, or even colorable, legal claims—the claims that supported the underlying litigation. Does it make sense to treat this byproduct of litigation as an asset that a party obtains apart from the merits of the underlying claim?<sup>96</sup>

My answer is that it does not. First, let us assume that it is the plaintiff who is selling back to the defendant the right to keep information to itself, or more accurately, secure from the threat that the plaintiff will disclose the information.<sup>97</sup> Although it sometimes is the defendant who is selling silence, for simplicity's sake I will assume here that it is the plaintiff, which is often the case. Giving plaintiffs an asset to sell, or a good chance of securing such an asset, for the mere price of filing suit, creates perverse incentives to file suits. In concrete terms that is what Epstein's blackmail argument means in this context.

As important, and perhaps more important, allowing plaintiffs to treat as an asset information gleaned as a byproduct of litigation undercuts the efficiency of tort law, employment law, and every other kind of law that allows private causes of action. It overcompensates victims and sometimes compensates those who have not been victimized at all. When it is the defendant who gains information to sell back to the plaintiff, it undercuts the efficiency of law by undercompensating

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96. It is precisely because I have framed the question this way that my analysis does not reach the question of keeping the amount of the settlement secret. *See supra* footnote 41 (explaining that this Article would not reach that question). The amount of the settlement is a byproduct of litigation, but access to the information is not. It is information that may be said to belong jointly to both parties in a way that discovery information does not—because it is jointly created by them (and does not pre-exist the dispute in any form). Discovery information, in contrast, preexists (in some form) the lawsuit and “belongs” to one party and not the other. The discoverer is provided access to it through compulsory court process solely for the purpose of asserting a claim, not for sale. It is for those reasons that I call it a byproduct of litigation and maintain that it is a byproduct that should be distinguished from the settlement amount, a different sort of “byproduct.”

97. I say “more accurately” because if plaintiff *A* got the material through discovery, one may readily imagine that plaintiffs *B*, *C*, and so on, may also have a right to receive this information in the discovery process. Moreover, the information may be information that the defendant has no right to keep secret, e.g., some law may require that the information be disclosed to a government agency.

victims who presumably pay defendants for keeping plaintiffs' secrets by accepting smaller settlements than they would otherwise demand or by dropping their lawsuit altogether to buy back their privacy. Creating perverse incentives to file suit is bad, as is distorting settlement amounts by allowing the sale of the information that is a byproduct of having filed suit. To do this in the name of resolving lawsuits efficiently is illogical, to put it mildly. The *raison d'être* of courts cannot be to settle disputes that exist only because the law allows parties access to information when they sue and then allows them to sell it.

## VII. SUGGESTIONS ON REFORM

So how would I protect the legitimate interest that parties might have in keeping trade secrets, and private information, private? Trade secrets (read broadly) and private information of the sort traditionally treated as private by tort and other law should remain in the control of the party who is forced to reveal it in discovery. In other words, the party producing the information should retain whatever legitimate rights he or she had prior to its production to keep the information secret.

As things stand now, given our strong commitment to public trials, I see no way to avoid this hard reality: Going to trial will always involve some cost to legitimate privacy interests. That means that people and entities will still have an incentive to settle, created by the desire for secrecy, when the other side's claims are only weakly supported by evidence. Public trials also mean that settlement amounts will be skewed because some legitimate secrets, whether trade or intimate, may be kept only by settling. At least that will be true as long as that information is otherwise admissible at trial, unless we make it easier for courts to close trials when such information is introduced—an option that might be too costly to other important values served by public trials. However, our inability to avoid that reality does not excuse us from fixing what we can.

Accepting the prosecrecy supporters' understanding of the role of courts, i.e., that they exist to resolve private disputes, a party should have to do nothing more than identify the alleged trade secret or private information to a judge or magistrate to obtain a court order protecting the information from disclosure. To minimize the incentive to file frivolous objections to such designations and thereby minimize payoffs that might be made to avoid those objections, heavy fines should be imposed on parties who file frivolous objections to requests for protective orders. Moreover, lawyers should have to affirm to the court,



on penalty of being held in contempt, that no agreement has been struck to avoid the filing of objections. This would help avoid collusion that might otherwise occur between parties: payoffs to get the opposing party to agree to a protective order for trade secrets or other legitimately private information.

The judge or magistrate should make an *in camera* examination of the designated material. If it is found to be a trade secret or information traditionally considered private under our laws, the magistrate should issue a protective order preventing the other party from disclosing the information prior to trial. In addition, parties should not be allowed to refer to such material in open court without first securing a ruling that the evidence is admissible.

The plaintiff should not be able to make the defendant pay to keep legitimate secrets hidden nor should a defendant be able to discourage plaintiffs from pursuing their claims with the threat that it may reveal private information about the plaintiff, if the plaintiff pursues his case or insists on reasonable compensation. The law should do what it can to minimize these risks, by making it easy for a party to obtain court ordered protection for legitimate secrets and penalizing both parties, as well as their lawyers, for entering into private deals to protect that same information.

As for illegitimate secrets, agreements to keep secret material indicating the existence of a public danger (whether past, present, or future) should be illegal.<sup>98</sup> Public danger, as I am using that term, includes torts as well as crimes, negligent conduct, and intentional wrongs. Moreover, by “illegal” I mean more than merely unenforceable. I do not believe it is enough to make such agreements unenforceable. My argument suggests that such agreements are sufficiently harmful and create perverse enough incentives for the law to do all it can to ensure they are not made. Merely rendering them unenforceable in court is simply not enough. Parties could work around that too easily, by providing for payments over time to ensure that the party promising silence kept her bargain without a court’s intervention. Also, third parties might never learn of the agreement in order to bring a third party challenge, although I believe the law should allow such challenges and indeed encourage them by providing that the parties to any such agreement must pay a substantial sum to the third party challenger.

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98. I recognize the drafting problems inherent in defining how “indicative” of a tort or crime the information must be to trigger the restrictions and fines I suggest in this Part, but those problems are not insurmountable. Statutes now exist that do a fairly good job at delineating the information I have in mind here. Cf. Sunshine in Litigation Act, FLA. STAT. ANN. § 69.081 (West Supp. 2002).

However, even that is not enough. Since those contracts involve secrecy, they might not be discovered by a third party. In order to deter the making of such agreements, the law should go further and provide sanctions: civil or criminal fines of substantial amounts. Considering the likelihood that the agreement will go undetected, substantial fines would be necessary to create an adequate disincentive to the creation of these bargains.

What about all those hard cases where the information at issue involves a danger to the public and also implicates valuable trade secrets? Again, because I would outlaw private agreements about either type of information, this problem is not as great as it might first appear. Courts would have to decide whether the danger or potential danger to the public outweighs the claim that privacy as to the information is a party's right. To discourage either party from lightly asserting that both interests are present, frivolous arguments of this type should also be heavily sanctioned. Moreover, whenever a party makes such a claim, the judge should have to write an opinion detailing the evidence presented to justify any decision to keep the information quiet, and the fact that such a decision has been rendered should be made public, so that third parties can be alerted to the possibility that the ruling was in part a product of collusion between the parties, which the judge did not discern. Such collusion would be an illegal agreement that would trigger the fines and payment to successful third party challengers, as I described above.

#### VIII. CONCLUDING REMARKS ON THE ETHICS OF LAWYERS, PARTIES, AND LEGAL INSIDERS, SUCH AS OURSELVES

In concluding, I wish to return to an issue raised in my introduction, but not addressed explicitly as of yet: should the ethics codes applaud, encourage, and allow, as all seem to agree they do, what I have argued the law, at least, as written in books, seems to prohibit and should prohibit. Further, do those rules really now allow what the law (even in books) does not? The latter question cannot be answered without taking a position on whether something that seems illegal under any sensible reading of a statute is illegal when no court or government agent is prepared to act as if it were. One's answer to that question depends on one's jurisprudential stance. In other words, I do not believe that there is a right and a wrong answer to the question of whether something courts assume is legal, is. It really depends on what you think "law" is. That makes the question about the ethics rules hard, if not impossible, to answer. To a large extent the ethics rules piggyback on the law. Simply

put, to say whether the ethics rules make it “unethical” for a lawyer to promise secrecy in exchange for a good settlement of her client’s case depends on whether such deals are legal or illegal under other law. Moreover, just as one’s jurisprudential view determines one’s answer to whether an unenforced law remains law, one’s jurisprudential view determines whether something is “unethical” that courts and lawyers alike insist on treating as ethical. Thus, we have a double conundrum. What everyone has assumed is an easy question is not so easy after all. There is no simple answer to the question of whether the ethics rules “allow” lawyers to participate in the making of such agreements. The simple answer persists only so long as we ignore the law, the law of compounding, the law of contracts, and the lessons embedded in the laws against blackmail too.

Having been unable to answer the question of what the ethics rules currently allow, perhaps I can answer the question of what the rules should allow. This is easier. Richard Zitrin proposed an ethics rule that would have prohibited lawyers from entering into settlement agreements that concealed conduct or information likely to result in loss of life or substantial bodily harm.<sup>99</sup> The Ethics 2000 Commission rejected that proposed rule on the ground, I am told, that because it is legal for clients to enter such agreements, it should be ethical for a lawyer to help the client with such an agreement by drafting it and agreeing to abide by its terms. Again, that argument assumes, without examining, that these agreements are “lawful,” a point I have tried to demonstrate is cloudier than everyone assumes.

However, there is another point I want to make about the ethics rules. The ABA has given approval to a proposal the Ethics 2000 Commission made, which I believe changes the analysis of what the ethics rules say about some of the agreements I’ve been criticizing here,<sup>100</sup> although neither the ABA House of Delegates nor the Commission was thinking about these agreements when they passed the amendment to the ethics rules to which I refer.<sup>101</sup> The new amendment changes the rule on confidentiality to give lawyers discretion to disclose

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99. See ZITRIN, *supra* note 34, app. A; Mark Hansen, *And Now the Feedback: Proposed Model Rules Changes Draw Plenty of Comments*, A.B.A. J., Apr. 2001, at 88, 88.

100. See COMM’N ON EVALUATION OF THE RULES OF PROF’L CONDUCT, ABA, REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES 42 (2001) (R. 1.6), available at [http://www.abanet.org/cpr/e2k-whole\\_rpt.doc](http://www.abanet.org/cpr/e2k-whole_rpt.doc) (last visited Mar. 22, 2002); see also *Ethics 2000: February 2002 Report*, at [http://www.abanet.org/cpre/e2k-202report\\_summ.html](http://www.abanet.org/cpre/e2k-202report_summ.html) (last visited Mar. 20, 2002).

101. Mark Hansen, *Let the Debate Begin: Report on ABA Ethics Rules is Ready for the House*, A.B.A. J., Aug. 2001, at 80, 80.

information about any act likely to result in death or substantial bodily injury.<sup>102</sup>

If adopted as law in any state, I believe that exception would make it unethical (by which I mean, it should be interpreted to make it unethical) for a lawyer to enter into an agreement (with his client or the opposing party or any third party for that matter) not to disclose any information that might reasonably protect a third party's life or body. Any discretion given a lawyer by the ethics rules for the purpose of protecting the courts, third parties, or society as a whole should not be available as an asset for the lawyer to trade away for her own pecuniary benefit or that of her client. Reading the ethics code to allow lawyers to trade any such discretion given by any of the ethics rules makes no sense.<sup>103</sup>

First, as my colleague George Cohen put it when I discussed this with him, if lawyers could trade away the exceptions to client confidentiality designed to protect courts or third parties, clients would be justified in suspecting that we wrote these exceptions into the rule on confidentiality for the purpose of jacking up our fees, thereby creating assets we could sell away. The same could, of course, be said about any discretion given lawyers under other ethics rules, i.e., was it written in to provide us with an asset to sell to clients who wanted a different variety of "professional." Second, if the point of giving the lawyer discretion under any particular ethics rule is to encourage lawyers to consider interests other than their clients, it would seem inconsistent to read this rule as allowing lawyers to sell that discretion to one's client or to anyone for monetary gain. Therefore, it is my position that the sensible way to read the ABA's new amendment to the confidentiality rule is that it would be unethical for a lawyer to participate in drafting or being a party to any agreement that binds the lawyer to conceal information that might protect third parties from serious physical harm or death if revealed. The discretion to protect third parties from such harm, given to lawyers by the ethics rules, has not been given to help lawyers make money nor to help them get their clients bigger settlements.

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102. *See id.*

103. A number of rules provide lawyers with discretion to be exercised against the client's interests in favor of the court's interests or the interests of a third party. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(c) (2001) (giving the lawyer discretion to reveal to the court the lawyer's suspicion that false evidence has been offered); *id.* R. 1.16(b)(1) (giving the lawyer discretion to withdraw if she reasonably believes, but does not clearly know, that the client is using her services to commit a fraud or crime). *But cf. id.* R. 1.16(a)(1) (*requiring* withdrawal when the lawyer is sure).

Finally, as should be clear by now, I believe that it is wrong for lawyers to agree to keep information about crimes or torts secret for pecuniary benefit even when life and limb are not at stake. I agree with Richard Zitrin that the ethics rules should condemn and punish that wrong. However, I believe that it is even more important for other law to address and outlaw these agreements.

The reason I think other law needs to outlaw these agreements is that our world is made more dangerous and otherwise impoverished by these agreements whether the agreement is made by a lawyer or layman, an individual or a corporation. If plaintiffs' lawyers must bear some responsibility for the deaths and injuries that might not have occurred but for the secrecy agreements they signed and abided by, they are not alone. The defendant's lawyers are also to blame. Firestone's already considerable blameworthiness and Ford's is increased by the participation of these two corporations in agreements to keep information from the public that might have prevented serious harm. The injured plaintiffs and their families are also to blame.

Finally, you and I, we too must bear some blame—we, insiders, who too readily accept the status quo. We, who might make a difference, by raising our voices, we too are partially to blame. People are dead because of practices we condone; practices that serve no legitimate principles; practices that not only risk life and limb but which distort our judicial process, produce perverse incentives, and threaten legitimate secrets as well. It is time we looked anew at what we have accepted for too long. Complacency can be costly too.<sup>104</sup>

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104. The secrecy continues, even in cases involving Firestone's tires and Ford's SUVs. See discussion *supra* note 4 (describing the ruling of the Indiana district court handling the multidistrict litigation on these tires that upholds the "private" secrecy agreement). See also *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1305, 1307-09 (11th Cir. 2001) (vacating and remanding a decision of the district court that would have lifted a protective order entered by a court pursuant to a stipulation entered by the parties in connection with settling a lawsuit brought by the parents of an eighteen-year old who had died in a roll-over car accident allegedly caused by faulty Firestone tires on the ground that the district court had required that the continued secrecy be justified by some compelling reason when any good cause would do).

Finally, this Article was written prior to all the horrific disclosures about priests molesting minors and the Church covering up those wrongs. See, e.g., Murphy, *supra* note 26; Wakin, *supra* note 26. Secrecy provisions in settlements played an important part in the Church's efforts to conceal these wrongs and thus contributed in some measure to the victimization of more children.

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