The Public Voice of Contract Law

Author : Hila Keren

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David A. Hoffman & Erik Lampmann, *Hushing Contracts*, __ **Wash. U. Law Rev.** __ (forthcoming), available at SSRN.

Contracts should not be confused with contract law: contracts are private tools, but contract law is public. This distinction is particularly evident when the legal system provides enforcement services to parties who cannot work out their relationship without seeking state help. What, then, is this legal system supposed to do when asked to enforce a private contract that threatens to harm the public? While this question is centuries old, it has re-surfaced in recent years with unusual urgency. The contemporary rise of the issue may be linked to peak levels of inequality: in their carefully drafted contracts, stronger parties use their power not only at the expense of their counter-parties, but many times also in ways that negatively impact the wellbeing of third parties and the fundamental values that support our social existence.

In *Hushing Contracts,* David Hoffman and Eric Lampmann provide an important case study of this problem by closely examining the practice of using non-disclosure agreements in the context of sexual misconduct in a deliberate effort to conceal sexual misbehaviors. To elicit our most intuitive ability to recognize the predicament, the authors powerfully open with a reminder of the USA Gymnastics sexual abuse scandal. They invite us to recall the "national furor" that followed the revelation that USA Gymnastics used a contract to buy the silence of McKayla Maroney, a gold-medal winning American gymnast, in an effort to hide the sexual scandal from the public eye. Such national furor in and of itself evidences a core idea of the article: that private contracts have the potential to infringe upon matters the public strongly and justifiably cares about.

Moreover, Hoffman and Lampmann highlight the point that, when exposed, hushing contracts that were drafted to hide sexual misconduct generate an *emotional* public response of disgust. The reported appearance of disgust, which is a *moral* emotion, is meaningful. It signals that at least in our #MeToo times the act of burying wrongdoing by contract is widely perceived as morally wrong, as adding an insult to an injury. As the article updates, such view of hushing contracts as wrongful has already induced legislative responses in a variety of jurisdictions. However, the article also makes clear that hushing contracts are "hard to kill" via legislation (read the article to see why). That leaves us with the authors' main proposal: to revive the doctrine of public policy and use it to invalidate those hushing contracts that create the externality of harming the public. Fears of the unruly horse of public policy aside, the challenge is, of course, defining with enough carefulness and respect for contracts (as private tools) the reasons that may justify a refusal of contract law (as a public institution) to enforce hushing contracts. It is concerning this challenge that the article offers a particularly inspiring analysis.

Victims of sexual harassment may keep their injuries to themselves not only out of fear or shame but also because their lips "[are] sealed with a signature." Such a mechanism of contractual silencing, the article argues, carries significant *antisocial* consequences. First and most directly, it allows the original wrongdoing to continue and expand because it operates "to leave in place abusers." (P. 12.) Second, the investment in concealing the problem by definition impedes any hope for finding solutions such as organizational engagement in preventive interventions. Instead, "firms send a message to would-be harassers that they too will find protection—rather than accountability—in management." (P. 17.) Ultimately, "a culture of complicity" develops, in which victims more generally feel themselves unwelcome. (P. 14.) In support of these alarming claims, the authors share data that have illuminated some of the possible costs of this contractual way of enabling, or even fostering, sexual harassment. For example, they describe a few studies that show that the problem amounts to "an organizational stressor that has significant negative outcomes," and additionally cite an estimation that in just two years the damage caused by workplace sexual harassment reached

a total of $327.1 million. (Pp. 16-17.) Finally, the authors emphasize the long-term emotional and political consequences of hushing contracts. Drawing a fascinating comparison between LGBTQ people and sexual harassment survivors, they explain how, in both contexts, silencing—as opposed to the freedom to speak by "coming out"—disempowers not only the suppressed individuals but also the social movements that fight for bringing about change on their behalf. For all these reasons combined, the article makes a very persuasive call for limiting the enforcement of hushing contracts.

The last part of the article broadens the discussion and importantly adds to the emerging literature regarding the expressive role of law in general and of contract law, and contract law's defenses, in particular. The argument on this point beautifully adheres to the theme of favoring voice over silence. Shifting the focus from survivors' voice to that of the judiciary, the authors posit that "when courts believe that there is significant third-party harm, they ought to *loudly proclaim* that public policy is violated." (P. 47)(emphasis added). As powerful social institutions that are heavily involved in the shaping of social norms and deeply impact people's behavior, courts should send a clear message that contract law is "infused with concerns for social welfare." (P. 58.) Framed that way, judicial refusal to enforce contracts that threaten fundamental societal values does not stand in conflict with the central idea of freedom of contract but rather operates to enhance it—restoring the social value of the practice of contracting and with it the legitimacy of contract law. Such a re-legitimization project is, according to Hoffman and Lampmann, "an urgent social task" in an era that is flooded by "click-to-consent" agreements and other unauthentic acts of "consenting" that have even become the subject of widespread ridicule (on this point the authors dedicate a footnote to an episode from the satirical show of South Park). (P. 56, 58.) What's necessary in this moment of increasing suspicion towards the contractual system, is what the authors call "a way to shock the audience": a judicial creation of "a counter-story" to the myth of consent, one that underscores contract law's "concern for social welfare." (P. 58.)

Throughout the article, the authors do not shy away from discussing possible objections to their argument. Indeed, they originally raise one of the most severe problems: that hushing contracts may never get to courts to allow judges to scrutinize them for public policy concerns, as proposed by the authors. The risk stems from the rapidly growing use of arbitration clauses by stronger parties who utilize their dominance to mute their challengers and insulate themselves and their contracts from judicial review. I would therefore suggest that the next step should be to overcome the arbitration problem by applying the article's proposal to arbitration clauses, especially those that also include one of the most aggressive hushing techniques—class action waivers. In other words, the authors' compelling conclusion—"that courts should generally refuse to enforce contracts which create particularly egregious third-party harms"—is valuable beyond the scope of their case study. (P. 61.) Courts should be able to exercise similar refusal powers against other methods of using contracts to silence people. First and foremost, the judiciary should take a stand against attempts to contractually to prevent cases from even arriving in courts—attempts that are increasingly threatening *to hush contract law itself*.

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