

First Amendment Bargains

Ian Ayres*

I. CAROL'S LAUGH

Before starting formally, let me pause to say that it is quite an honor to participate in this celebration. When I think of the properties of Carol Rose, I think first of her laugh. It is a wonderfully exuberant cackle which, when in full bloom, often causes her head to tilt slightly back. She has a way of laughing after delivering a tangy barb that somehow diffuses the sting. I know it's not possible, but sometimes I hear her laugh when I'm reading her footnotes.

This laugh is a great pedagogical gift. When Carol was teaching me property in, I believe, the fall of 1985, she would occasionally cold-call students in the very large class that filled Room 127. One day, Carol looked down at her class roster and called on my classmate Lisa Allred for the first time. Lisa was not prepared, or at least was not prepared to speak, and thought she would try to hide out in the masses and simply not respond, with the hope that Carol would think she wasn't in class that day. But Carol turned and looked at Lisa and said "Isn't that yooooouuu?" There was a scared silence in the class. And then Carol laughed. It was not a mean laugh, it was so full of sincere joy that it was very hard not to be pulled along.

I've been lucky to hear this same laugh many times over the years—often just after Carol has skewered a speaker with some particularly deflating retort. "Socrates, Shmocrates," she said in response to Robert Frank's Winner-Take-All theory. As Carol moves west, I'm going to miss the chance to hear her laugh.

* Townsend Professor, Yale Law School. Prepared for "The Properties of Carol Rose" Conference. Stuart Banner, Rick Brooks, Jennifer Brown, Martha Ertman, Owen Fiss, Robert Hemm, Jack Hitt, Gregory Klass, Edward Lazarus, Robert Post, Carol Rose, Henry Smith, April Triantis, and George Triantis provided helpful comments.

II. WHAT DO FIRST AMENDMENT BARGAINS HAVE TO DO WITH THIS CONFERENCE?

The central topic of this essay is Judith Miller's contretemps with contempt. As is now well-known, Miller, a reporter for the *New York Times*, went to jail because she refused to reveal the name of a confidential source.¹ After nearly three months of confinement, she testified and was released. Her decision to testify was prompted because the source—who we now know was Vice President Cheney's chief of staff, Scooter Libby—called her in jail and waived his right to confidentiality.²

One might reasonably ask why this has anything to do with property law or Carol Rose, much less the subject of this symposium panel: "Gifts, Bargains and Power." Free speech entitlements are to my mind a species of property law and are therefore fair game today. As Carol herself imperially claimed:

Property is the keystone right because it symbolizes all other rights. This argument for property rests on a phenomenon that one notices often in the rhetoric of rights. It may be a matter of human cognition, but property analogies have a way of creeping into people's talk about all kinds of rights. The most notable example is no doubt the Holmsean [sic] metaphor of "the marketplace of ideas," which suggests that free speech consists not merely of standing on soapboxes and speaking, but rather means hawking the ideas as if they themselves were so many boxes of soap.³

In this essay, I want to take the market metaphor seriously and interrogate the extent to which we should allow sources to barter or commodify their rights.

The particular setting of Judith Miller's struggles with waivers of confidentiality puts into play all three subjects of today's panel. First, the original confidentiality agreement itself is an interesting bargain. At first, it seems like the simplest kind of exchange: Libby agreed to provide

1. See, e.g., Don Van Natta, Jr. et al., *The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal*, N.Y. TIMES, Oct. 16, 2005, at A1.

2. *Id.* Miller's insistence that she speak in person with Libby was in sharp contrast to the behavior of Time Magazine reporter, Matt Cooper. Cooper's attorney, Richard Sauber, refused to allow Cooper to ask his source, Karl Rove, to release Cooper from a pledge of confidentiality because "Cooper's attorney believed that any conversation between the two men could be construed as obstruction of justice." Howard Kurtz, *Lawyers Secured Rove's Waiver; Executives Hear Reporter's Anger*, WASH. POST, July 16, 2005, at A6. Sauber was quoted as saying, "I forbid Matt to call him . . . I cringed at the idea. These two witnesses would have to explain their discussion before the grand jury." *Id.* Sauber has spotted a killer issue. Why aren't all promises not to testify obstructions of justice? Paying someone not to testify would generally be a slam dunk violation, but why does this change when the coin of the realm is information? Rove gave Cooper one piece of information (the identity of Valerie Plame) in return for Cooper's promise not to testify about another piece of information (the identity of Karl Rove). When does the First Amendment preempt obstruction of justice liability? This essay will not answer this question (but hints that the appropriate answer is neither "always" nor "never").

3. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 348 (1996).

information in return for Miller's promise not to reveal his identity. But while Miller took her confidentiality promise seriously—even accepting jail as preferable to breaking her promise—the law does not. In *Cohen v. Cowles Media Co.*, the Minnesota Supreme Court held that a reporter's promise of confidentiality to a source was not enforceable as a contract.⁴ The court, in concluding that the parties did not intend to contract, reasoned: "We are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract."⁵ This is nonsense on stilts; the outward manifestation of assent found in *Cohen* is precisely the type that gives rise to an inference of intent to be contractually bound in other contexts.⁶ There is no reason to think that the source did not intend to make a legally binding contract. The court in effect established a default that confidentiality agreements are not intended to be enforceable. The court might have defended this default by saying something like this:

Because of the exceptionally important role of newsgathering in a free society, it is necessary to strictly limit the prospect of legal liability for news organizations. We adopt this default of non-enforcement even though it is contrary to many sources' expectations and thus is likely to dupe some sources into revealing information that they would not have revealed if they had known that the news organization had no contractual duty to abide by its confidentiality promise.

But this more honest defense the *Cohen* court did not undertake. Instead, out of whole cloth, the court concluded that sources do not intend to be contractually protected when they provide information upon a condition that their names not be revealed.⁷ The appropriate role of First-Amendment bargains is even more in play in the last section of this piece—which suggests that newspapers should have the option to promise to compensate people that they have negligently harmed.

Second, the area of news sourcing is rife with gifts. Most news is a gift from sources to the news organization. But, as with many other gifts, they are suffused with implicit exchange and reciprocal altruism. If a source provides repeated, reliable information, a reporter is more likely to treat

4. 457 N.W.2d 199, 200 (Minn. 1990), *rev'd*, 501 U.S. 663 (1991).

5. *Id.*

6. See RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981) ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract.").

7. The Minnesota court, after intervention by the U.S. Supreme Court, found that a claim for promissory estoppel liability was colorable—but avoided finding a contract, which might have provided a wider array of remedial options. See *Cohen v. Cowles Media Co.*, 479 N.W.2d 387 (Minn. 1992). I thank Robert Hemm for pointing out to me that the state court's reluctance to find a contract in fact might have been driven by a preference for the less stringent, non-injunctive remedies of promissory estoppel.

the source kindly in the subsequent write-up. And of course, the waiver of confidentiality itself is a kind of gift; Libby, for example, did not have any legal obligation to let Miller off the hook.

Nonetheless, Miller worried about whether the waiver was in fact freely given. She apparently ignored both the written waiver that Libby provided (at the request of prosecutors and President Bush) and the waiver of Libby's lawyer.⁸ Miller was so worried about coercion that she refused to call Libby and ask for a waiver, choosing instead to sit around and wait for Libby's call. The Miller incident thus raises questions about power in both bargaining and gift-giving.

III. WHOSE AGENT WAS MILLER?

The central claim of this essay is that Miller has a misconceived notion of what journalistic ethics should require. Her concern about coerced waiver led her to ignore important questions about the agency relationship between Libby and the President. But before proceeding to analyze the import of the Libby/Bush agency relationship, let me pause to address an important question of Miller's own agency.

In short order my opinion of Miller has moved from hero, to fool, to knave. In the hero phase, I was impressed by Miller's self-sacrifice in protecting her source. In the fool phase, I was perplexed by her refusal to accept the waiver of Libby's lawyer. But most recently, I have been concerned about whether Miller sold her agency. At some point, it seems possible that Miller stopped being an agent of the *New York Times* and became an agent for the White House.

Let me emphasize that this conjecture is not yet proven even by a preponderance of the evidence. But there is some circumstantial evidence to support the concern. After all, Miller was reporting during an extraordinary period in our nation's history when the President's administration was making illicit secret payments to news commentators.⁹ Is it really unthinkable that members of the administration would try to subvert other reporters' loyalty? Her reporting (including her articles concerning weapons of mass destruction) often supported the

8. Matt Cooper thought he would "never be able to work" in journalism if he accepted the general waiver that Rove and other White House officials had given journalists. Cooper was quoted in the *Washington Post* as saying: "I just thought those blanket waivers handed out essentially by one's boss are hard to consider uncoerced." Howard Kurtz, *Lawyers Secured Rove's Waiver; Executives Hear Reporter's Anger*, WASH. POST, July 16, 2005, at A6.

9. Jim Drinkard & Mark Memmot, *HHS Says It Paid Columnist for Help*, USA TODAY, Jan. 28, 2005, at 1A (discussing payments to Armstrong Williams, Maggie Gallagher and Mike McManus); *Bush: Pundit Payments Will Stop*, CNN (Jan. 27, 2005), at <http://www.cnn.com/2005/ALLPOLITICS/01/26/paid.pundits>. It has been reported that the U.S. military was also making payments to place stories in Iraqi newspapers. Lolita C. Baldor, *Concern Voiced on Payment by US for Stories in Iraq*, BOSTON.COM (Dec. 2, 2005), at http://www.boston.com/news/world/articles/2005/12/02/concern_voiced_on_payment_by_us_for_stories_in_iraq.

administration's policies.¹⁰

The possibility that Miller was an agent of administration officials is also supported by the abrupt souring of her relationship with the *New York Times* subsequent to her release. The Executive Editor of the *New York Times*, Bill Keller, wrote in an email to his staff claiming that Miller seemed "to have misled" the newspaper's Washington bureau chief, Phil Taubman, when she told him in the fall of 2003 that she was not one of the recipients of a leak about the identity of covert CIA officer Valerie Plame.¹¹ Keller hinted that Miller had a conflict of interest when he wrote of her "entanglement with Libby": "[I]f I had known the details of Judy's entanglement with Libby, I'd have been more careful in how the paper articulated its defense, and perhaps more willing than I had been to support efforts aimed at exploring compromises."¹² This suggests that Keller was upset that Miller was serving two masters.

A White House correspondent for the *New York Times*, Dick Stevenson, expressed his sense of betrayal in words that particularly resonate with a breach of the agency relationship:

I think there is, or should be, a contract between the paper and its reporters. The contract holds that the paper will go to the mat to back them up institutionally—but only to the degree that the reporter has lived up to his or her end of the bargain, specifically to have conducted him or herself in a way consistent with our legal, ethical and journalistic standards, to have been open and candid with the paper about sources, mistakes, conflicts and the like, and generally to deserve having the reputations of all of us put behind him or her.¹³

It is hardly surprising that Miller was persuaded to "retire" from her position with the paper.¹⁴

The possibility (albeit a small possibility) that Miller had become a double-agent—an agent not just of the *Times* but of the Bush administration—also might help explain one of the biggest puzzles about her conduct: why in the world did she insist on speaking directly to Libby

10. Jack Shafer, *The Times Scoops That Melted*, SLATE (July 25, 2003), at <http://www.slate.com/id/2086110>.

11. *Judith Miller's Boss Says She Misled Newspaper*, MSNBC, Oct. 22, 2005, at <http://msnbc.msn.com/id/9778097>.

12. *Text of N.Y. Times Editor's E-mail to Staff*, MSNBC, Oct. 21, 2005, at <http://msnbc.msn.com/id/9778787>. Keller, however, subsequently retracted (or clarified) this statement:

First, you are upset with me that I used the words "entanglement" and "engagement" in reference to your relationship with Scooter Libby. Those words were not intended to suggest an improper relationship. I was referring only to the series of interviews through which you—and the paper—became caught up in an epic legal controversy.

Poynter Forums: Miller Retires from NYT, Nov. 9, 2005, at http://poynter.org/forum/view_post.asp?id=10616.

13. *Text of N.Y. Times Editor's E-mail to Staff*, *supra* note 12.

14. *Reporter at Center of CIA Leak Retires*, CNN (Nov. 10, 2005), at <http://www.cnn.com/2005/US/11/09/miller.retires/index.html>.

rather than relying on the repeated representations of waiver from Libby's personal attorney? One conjecture is that Miller wanted to make sure that if she revealed Libby's identity, Libby would not retaliate by revealing what he knew about her. Libby might have revealed the nature of Miller's "entanglement" with the Bush administration. If there was, in fact, an illicit entanglement, Miller might not have wanted to discuss it with anyone but Libby.

This agency theory might also help explain why Miller was so reluctant to testify. If Miller was an agent of Libby (or the Bush administration), then she herself might face criminal liability for conspiring to violate the non-disclosure statute. She knew or should have known that disclosing the identity of a CIA agent was crime. When Libby made this disclosure to her, Miller should have realized at a minimum that she was being played. Miller might have been better advised to "take the Fifth" and refuse to incriminate herself unless she were given immunity.¹⁵ But this Miller was not willing to do. It is possible that she rolled the dice on a strategy that preserved more of her reputation, but her decision not to take the Fifth may still subject her to a risk of future prosecution.

IV. WHOSE WAIVER IS IT ANYWAY?

While this rank speculation holds a certain fascination, it is not the subject of this essay.¹⁶ Let us put aside the troubling question of Miller's agency and assume that she remained a faithful agent of the *New York Times* throughout. Let us focus instead on Libby's agency relationship with the Bush administration.

How should Miller (and the *New York Times*) have responded to Libby's own agency status? I believe she should have presumptively deferred much more to the waiver wishes of the President. Giving principals the ability to waive their agents' confidentiality is at times a reasonable way to deter the agent's theft of information. The big problem is that when reporters ignore agency relationships, reporters ignore the possibility that they are reporting stolen information. Let me explain.

While normally the right to waive confidentiality is the right of the

15. Dan Cohen, the plaintiff in *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 200 (Minn. 1990), *rev'd*, 501 U.S. 663 (1991), has also thought in the aftermath of the Miller incident that the Fifth Amendment might "provide journalists and their sources with a protective shield. If breaking a promise of confidentiality to a source were made criminal—a gross misdemeanor—journalists would have a Fifth Amendment privilege against self-incrimination were the courts or its officers to demand that they provide the name of a source." Dan Cohen, *Those Anonymous Sources*, N.Y. TIMES, Dec. 11, 2005, at A12. Unsurprisingly, Cohen, who was fired when reporters breached their promise of confidentiality, would like to criminalize the breach of promise. But this shield would provide little protection to any journalist who was granted immunity from prosecution.

16. The possibility of Miller's double agency does, however, underscore the benefits of analyzing these issues through the lens of contracts.

source, this is not always the case in principal-agent relationships. For example, as a matter of professional conduct, it is the client/principal who has the right to decide whether to waive attorney-client privilege, not the lawyer/agent. Knowing who has the right to waive confidentiality is important because it not only defines who gets to decide, but also helps clarify what should count as coercive and non-coercive pressure.

Take, for example, the nomination of Harriet Miers. Many people wanted to see some of her work-product for her client, President Bush. It would have been inappropriate to pressure Miers to reveal these documents, because the lawyer-client privilege protecting them was not hers to waive. But it is a very different question to ask under what circumstances it is appropriate to pressure Bush to waive confidentiality. It would have been fine for the electorate to pressure its representative to waive *his* privilege. And it would be fine for Bush to respond to this pressure by either resisting or giving in. Political pressure that gains its power from democratic will is presumptively legitimate. Following Miller's tortured logic, however, she might argue that Miers should not violate attorney-client privilege (even if Bush made the political calculus that he wanted to waive) because the waiver was coerced.

Like Miers, Libby was also an agent of the President. To illuminate the question at hand, imagine that Libby, at the time of first taking his White House job, had entered into a contract with Bush in which Libby explicitly granted Bush the right to waive the confidentiality of any conversation that Libby would have with a reporter concerning information that Libby acquired through his work as Bush's agent. What should Miller do if: (1) Bush shows her his contract with Libby and (2) Bush tells Miller that he is waiving Libby's right of confidentiality? My central claim is that Miller should immediately reveal Libby's identity.

This hypothetical is not far-fetched. In fact, Bush demanded after the fact that all White House officials that might have been the source sign waivers of confidentiality. But Miller put no weight on these waivers because she worried that they might be coerced. Her central mistake was to ignore that Libby was an agent of the President. Under these facts, Libby had a right as part of his agency agreement with the President to contract away his waiver rights. Libby had a right to transfer his waiver rights to Bush. Miller should not have worried about whether Libby was coerced; she should have worried about whether Bush's waiver was coerced. And democratic pressure to waive should not count as improper coercion.

Now of course not all rights of waiver should be contractible. Most clearly, an agent should have an inalienable right to be a whistle-blower if the agent learns of illegal activity by the principal. The criminal externality justifies limiting the principal-agent freedom of contract. We want the agent at any time to confidentially disclose principal wrongdoing

without fear that she will suffer retribution when her identity is exposed.

At the other extreme, there are classes of information that the principal has a right to be able to keep quiet. For example, imagine that a president has a list of undercover agents working for our government and that revealing their names could lead to losses of life.¹⁷ The president has a strong policy rationale for keeping this information out of the public sphere and therefore a strong rationale for learning of the names of any of his agents who leak this information.

Stepping back, we should see that contractibility of waiver should turn on a single question: does the principal have a legitimate right to keep the information that the agent revealed private?¹⁸

If the answer is yes, then the principal should have the right to contract for waivability. If the principal has a right to keep the information private, then the agent in disclosing the private information is stealing and the reporter is trading in stolen goods. The reporter gives a promise of anonymity in return for receipt of stolen goods. Principals who acquire agent waivability rights will better be able to deter agents from making unauthorized revelations.¹⁹

However, if the principal does not have a legitimate right to keep the information private, then the agent's revelation is not theft. The principal should not have the right to bargain to waive her agents' confidentiality—because we do not want the prospect of principal waiver to chill agents from disclosing this information.

So the hard question is to decide where to draw the line between what types of information a principal does and does not have a right to keep private. But before hazarding an answer, the big mistake Miller and other journalists have made is refusing to draw any line at all. They define the public's right to know as the set of all possible information. They view any chilling of sources to be a social bad. But from a truly ex-ante perspective, failure to allow a principal to acquire agents' waiver rights can chill principal-agent speech. A principal like Bush may not be willing to share the names of spies (or election strategy) with an agent if he lacks an effective mechanism to uncover unauthorized leaks.

To develop a jurisprudence to distinguish contractible versus non-

17. This hypothetical is closer to the case at hand than many might realize. The CIA operative in question (Valerie Plame) worked for a front corporation that employed dozens of employees whose lives may have been put at risk by the Novak disclosure. See Walter Pincus & Mike Allen, *Leak of Agent's Name Causes Exposure of CIA Front Firm*, WASH. POST, Oct. 4, 2003, at A3.

18. Note that the contract or contract law itself does not determine the types of waiver rights that are nonalienable; rather, the distinction is drawn from First Amendment and other constitutional principles (including privacy) that will mediate between the types of information that a principal does and does not have a right to keep private.

19. They may also deter agents from making authorized disclosures. Imagine that Bush told Rove to leak the CIA name. Rove, having given Bush a waiver right in advance, might reasonably worry that Bush would then be able to force Rove to fall on his spear.

contractible information, a natural place to start is to consider the origin of the source/agent's information. If the source/agent learned the information at issue because he or she was an agent, the principal at least enters the ballpark of contractibility.²⁰ An agent who confidentially discloses information learned through her agency is potentially misappropriating the informational property of her principal.²¹ Giving principals the option of acquiring the right to waive this confidentiality is simply a mechanism to police and potentially deter some of this misappropriation.

The misappropriation doctrine of insider trading has a similar logic: "Under this doctrine, a fiduciary who, in violation of the confidence of her principal, uses information gleaned from her role to profit from securities trading has violated Section 10(b). The misappropriation doctrine requires a fiduciary relationship between the trader and the source of the information"²² This insider misappropriation (which is sometimes described as fraud-on-the-source) at least potentially parallels the source/agent who journalistically trades on agency information.

But the idea of misappropriation—especially applied to a principal like Bush who is a public official—is double-edged. As James Lindgren points out in his illuminating analysis of blackmail,²³ private actors can also misappropriate information by keeping private information that rightfully belongs to the public. A principal might try to waive an agent's confidentiality as a way to chill the agent from revealing information that the public has a right to know.

So in the end, the question of whose waiver it is devolves into a question of whose information it is. With regard to traditional whistle-blowing on principal activity, the answer is clearly the public's—so principals should be foreclosed from purchasing agent's whistle-blowing rights (either directly or indirectly by acquiring the rights to waive agents' confidentiality). But with regard to the identity of a government agent, the answer is that the information is clearly the President's and so a contract

20. If the source learned the information at issue outside of the agency relationship, it is less clear that the principal can have a legitimate interest in deterring the disclosure.

21. The question of whether the agent learns the information because of her status as agent is quite distinct from the question of whether the agent's initial confidential disclosure to the press was authorized or unauthorized by the principal. In the specific Bush/Libby/Miller setting, it is possible that Libby's confidential disclosure was implicitly or explicitly authorized. But the case for allowing Bush to waive Libby's confidentiality is all the stronger if we believe that Libby was acting *ultra vires*. A principal has a particularly strong basis for trying to deter confidential disclosure of agency information that are more than mere "detours and frolics."

22. Ian Ayres & Joe Bankman, *Substitutes for Insider Trading*, 54 STAN. L. REV. 235, 239 (2001); see also *United States v. O'Hagan*, 521 U.S. 642, 643 (1997); *SEC v. Materia*, 745 F.2d 197, 199 (2d Cir. 1984); *United States v. Willis*, 778 F. Supp. 205 (S.D.N.Y. 1991); Richard W. Painter et al., *Don't Ask, Just Tell: Insider Trading After United States v. O'Hagan*, 84 VA. L. REV. 153 (1998).

23. James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 671 (1984). But cf. Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935 (1993) (arguing that in some cases blackmail does not misappropriate public interest but harnesses it toward criminal deterrence).

assigning a waiver right to the President should be enforced. I admit that a large swath of information lies between these two points—the contestability of what does and does not constitute “whistle-blowing” information is vividly illustrated by the post-conference disclosure that the Bush administration has conducted thousands of warrantless wiretaps of U.S. citizens.²⁴ President Bush characterized the leak of the wiretapping program as a “shameful act.”²⁵ But to my mind, this is just the type of information that deserves to fall into the whistle-blower category.²⁶ Regardless of the ultimate legality of warrantless searches, this example underscores the importance of broadly defining the category of inalienable waiver information that could plausibly lead to waivable information. Difficulty in delineating the tough cases should not keep ethics or the law from responding to extreme situations where reporters knowingly report stolen information of agents who do not have even the remotest claim to whistleblower status.²⁷

I also admit that my analysis, if accepted, would have (and is intended to have) a chilling effect—in that it would eliminate the publication of many articles that are currently published largely on the basis of information leaked by agents that principals had a legitimate right to conceal. For example, CBS News recently published an article reporting that Yahoo had broken off its negotiations over buying a stake in America Online.²⁸ The article included the core claim that “[t]wo people close to the discussions told The Associated Press that a key stumbling block was Time Warner’s . . . insistence that it retain majority ownership in the AOL unit. They spoke on condition of anonymity because public discussions of any private negotiations were contrary to their companies’ policies.”²⁹

Reporting of this kind might often cease if my waiver theories were adopted. But the employers have a right to chill the reporting of this stolen

24. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 15, 2005, at A1.

25. *Bush Says Leaking Spy Program a “Shameful Act,”* MSNBC (Dec. 20, 2005), at <http://www.msnbc.msn.com/id/10530417>.

26. Bruce Ackerman, *The Secrets They Keep*, SLATE (Dec. 20, 2005), at <http://www.slate.com/id/2132811/>.

27. While Miller’s central ethical error was not to consider carefully the question of *who* had the waiver rights, she also misidentified *what* should be sufficient for waiver. She seems to have an unduly cramped conception of what constitutes coercion. It is reasonable for her to insist that the person who holds the waiver rights should send her a private signal of waiver. So if it were whistle-blowing information (where I have argued the source necessarily retains the waiver right), then Miller should insist that the source privately waive. Bush could require all potential whistle-blowers to publicly waive, but since Bush does not know who the whistle-blower is, a private waiver (like the private voting booth) preserves the whistle-blower’s power to resist. But Miller’s requirement that she be called directly by Libby and not accept the private waiver of Libby’s lawyer seems unduly formalistic.

28. *Yahoo “Politely Passes” on AOL*, CBS NEWS (Nov. 10, 2005), at <http://www.cbsnews.com/stories/2005/11/10/business/main1034545.shtml>.

29. *Id.*

information. Yahoo and Time Warner have a legitimate interest in keeping this negotiation stance private and should be able to contract for the waiver rights of their employees with regard to this information. Employees, knowing that reporters would reveal their identity, would be less inclined to betray their employers' confidences. The public's right to know should not trump the principal's right to keep certain non-whistle-blowing information private.³⁰

What is extraordinary about the CBS News quotation is that the newspaper reporter at the time of reporting knew that she was reporting stolen information and the paper was allowing her sources to speak on condition of anonymity "because" they were stealing their employers' information. This example of knowingly reporting stolen information is far from an aberration. In the wire-tapping case discussed above, the *New York Times* reported that "N.S.A. technicians, besides actually eavesdropping on specific conversations, have combed through large volumes of phone and Internet traffic in search of patterns that might point to terrorism suspects."³¹ The article reporting this information went on to say that "[t]he current and former government officials who discussed the program were granted anonymity because it remains classified."³²

It turns out the *New York Times*, in the wake of the Jayson Blair fiasco, decided to explain to its readers "why The Times believes a source is entitled to anonymity."³³ The wonderful use of the passive voice covers not only the *Times*' own agency but also the contractual nature of the arrangement. In effect, the Grey Lady is saying that "[t]he newspaper has agreed to promise anonymity because" I applaud the *Times* for including these explanations, but their justifications are often unpersuasive.

The fact that the information is stolen should not count as a justification for granting a source/agent anonymity. The idea that the agent would not

30. But again, drawing the line between the alienable and non-alienable types of information will often be difficult. Recently, the *New York Times* published an article divulging the contents of a Microsoft memo. John Markoff, *Internet Services Crucial, Microsoft Memos Say*, N.Y. TIMES, Nov. 9, 2005, at C5 (describing the contents of a confidential Microsoft memorandum suggesting that "Microsoft must fundamentally alter its business or face being at a significant competitive disadvantage to a growing array of companies offering Internet services"). The memo did not directly suggest any illegal action that Microsoft planned in response to Google's competition—and hence one might conclude that Microsoft should have a right like AOL to keep this business strategy private. But Microsoft's pattern of responding illegally to competitive threats might counsel toward protecting not just whistle-blowers, but also sources who disclose information within the whistle-blowing penumbra. The danger to my theory is that this penumbra may in effect cover so much of the informational landscape that it is not worth the effort to carve out a set of information that is subject to waiver. The facts of the Libby disclosure suggest to me, however, that the set of legitimately privatizable information is not null.

31. Eric Lichtblau & James Risen, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. TIMES, Dec. 24, 2005, at A1.

32. *Id.*

33. Byron Calame, *Anonymity: Who Deserves It?*, N.Y. TIMES, Nov. 20, 2005, at D12.

have been willing to steal the information unless she could do it with impunity hardly legitimates the theft or anonymous publication.³⁴ Rather the justification for anonymity should turn on whether the information the agent divulged was rightfully the principal's to conceal (or perhaps, whether there was an overarching public interest in disseminating the information, regardless of whether the principal "owned" it).

One way to illuminate the importance of agency is to recast Miller herself as a betrayed principal. Imagine, for example, that Miller's secretary confidentially revealed to the *New York Post* the names of some whistle-blowers who had spoken confidentially to Miller, and that the *Post* refused to reveal its source (for the list of Miller's sources) without appropriate waiver. Who should have the right to waive—Miller or her secretary? I think that Miller should at least have the right to contract for her secretary's waiver right. Giving the secretary inalienable waiver rights is a sure way to let the secretary's betrayal go undiscovered. Inalienable waiver rights in this example might even chill the incentive of future whistle-blowers (whose identity really deserves to be protected) to come forward—because newspaper sources would never be sure whether their names would become public through an unauthorized disclosure by an associate of the reporter they provided with information.

What does this have to do with law? A lot. In the wake of the Miller incident, journalists are stumping for unconditional source protection, and Congress is responding.³⁵ My analysis suggests that the proposed legislation is massively over-inclusive. Instead, Congress should think about only protecting sources that deserve protection. When a principal has: (1) bargained for waiver rights with regard to agency information and (2) waived the agent's confidentiality, the reporter should not be shielded from being held in contempt for refusing to identify the source. Lowering

34. Byron Calame, the public editor for the *New York Times*, extols this stolen information justification:

Or take a July 27 article about the relocation of 50,000 soldiers to United States bases from Germany and South Korea: "The relocation, to be completed by 2008, was described by two Pentagon officials who have worked on the project and were granted anonymity so they would describe the changes before an official announcement expected later this week." Straight shooting, I would say. I like the Pentagon article's use of "granted anonymity"—wording that makes clearer to the reader that The Times was indeed deciding the two officials were entitled to remain anonymous.

Id. It is strange for the editor to argue that the use of the passive voice makes clear that it was the *Times* that made this decision. The editor, however, goes on to suggest that "'granted anonymity because'" should become "the default language for explanations." *Id.* Interestingly, Calame feels that this default would "help limit confidential sourcing to the kinds of coverage where it's vital: national security, intelligence, investigative articles and classic whistle-blower projects." *Id.* This last standard resonates strongly with just the broad standard that I embrace in this article, but as applied to the base relocations it would suggest that the article should have said that anonymity was granted not because the information was stolen but because, despite being stolen, the information was vital to the public interest in national security and intelligence.

35. See Lorne Manly, *Bill To Shield Journalists Gets Senate Panel Hearing*, N.Y. TIMES, July 21, 2005, at A13.

the contempt shield when the court sees adequate waiver is as important as raising the shield with regard to whistle-blowing information.

Indeed, I am intrigued by the idea of subjecting a reporter to civil damages if she fails to reveal the identity of a source after receiving sufficient evidence of waiver. Confidentiality agreements with reporters already include an implicit subsidiary promise from the reporter to verify the name of a source if the source waives confidentiality. Let us call this the waiver promise. Woodward felt the appropriate duty to verify Deep Throat's identity once Mark Felt went public.³⁶ If contract law included a mandatory rule making a principal a third-party beneficiary of this waiver promise, then a newspaper reporter would have a contractual duty to respect the waiver wishes of the principal (with regard to the limited types of information described above).³⁷ This waiver promise to the principal could not be specifically enforced or constitute a prior restraint, but it would subject a reporter to civil damages—aimed at compensating the principal for damages caused by a reporter's breach of promise.

Even more directly, a newspaper might be jointly and severally liable for knowingly publishing stolen information. An interesting byproduct of the *Times*' new "anonymity was granted because" policy is that several articles on their face establish that the *New York Times* has scienter in knowingly publishing information that was being misappropriated by an agent. Moreover, in withholding the identity of the misappropriating agent, the newspaper impedes the principal's ability to sue the agent for the misappropriation. Forcing the newspaper to stand in the shoes of the agent and legally defend the agent's dissemination forces at least one actor (the newspaper) to consider the misappropriation issue. The newspaper might still publish if it believes that it will be able to successfully raise a whistleblower defense. But imposing potential liability might appropriately chill newspapers' current willingness to publish stolen information where the public interest in dissemination does not outweigh the principal's interest in privacy.

V. COMPENSATION PROMISES

The Miller/Libby episode is an example of a larger reluctance on the part of news media and sources to think contractually about their ethical and legal duties. There is a strong resistance to commodification of First

36. Bob Woodward, *How Mark Felt Became "Deep Throat,"* WASH. POST, June 2, 2005, at A1.

37. The notion of civil liability also resonates with traditional notions of tort law. There is a sense in which reporters who willingly report stolen information are tortiously interfering with agency contracts. The foregoing Yahoo example underscores the point. Promises of confidentiality are often intended to protect information thieves. In the Yahoo case the reporter knew that his sources were speaking "on condition of anonymity because public discussions of any private negotiations were contrary to their companies' policies." Yahoo "Politely Passes" on AOL, *supra* note 28 (emphasis added).

Amendment rights. This is partly self-interested; many “legitimate” news outlets do not want to be in the business of paying sources for news. The outlets may say that they are worried about the biasing impact of payments, but it may also be that—like countries which refuse to bargain with terrorists—the news organizations worry that if they start paying some sources, they will have to pay others who would have been willing to talk for free.

The unwillingness to pay arises in other contexts as well. Miller would never dream of paying Libby to waive his confidentiality. Such unwillingness might again be justified by reporters not wanting to be held up for waiver in the shadow of judicial contempt proceedings by sources who, in the absence of a payment prospect, would have waived for nothing. But one gets the feeling in listening to Miller that she would resist instead because she would feel that a purchased waiver was per se coercive.³⁸

Much more troubling is the unwillingness of news organizations (or reporters) to compensate people that they injure through negligent misrepresentation.³⁹ The news media is the only for-profit business that can recklessly injure someone without having to pay tort damages.⁴⁰ The law immunizes the media from defamation damages if they recklessly misrepresent facts about a public figure—even if that public figure is truly injured by the misrepresentation.⁴¹

This last section takes up the possibility that enforceable promises might usefully be used to respond to this problem. Readers should not look for a deep link between this and the previous sections. If there is a connection, it may just be a cautionary tale about the risks of ignoring the contractibility of First Amendment rights. The Miller analysis suggested that journalists and lawyers should pay more attention to agency contracts

38. See Van Natta, Jr. et al., *supra* note 1.

39. The idea in this section began as blog postings to Balkinization. See posting of Ian Ayres to Balkinization, at http://balkin.blogspot.com/2005_02_27_balkin_archive.html (Mar. 2, 2005); Posting of Ian Ayres to Balkinization, at <http://balkin.blogspot.com/2005/02/compensating-for-reckless-reporting.html> (Feb. 21, 2005).

40. Shortly after I presented this line at Carol Rose conference, Justice Scalia is reported to have said to an audience of newsmen: “The press is the only business that is not held responsible for its negligence.” Lloyd Grove, *What You Might Hear if Scalia Held Court*, N.Y. DAILY NEWS (Nov. 23, 2005), at 21, available at <http://www.nydailynews.com/news/gossip/story/368170p-313281c.html>.

41. See N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). The Constitution allows a greater potential for liability with regard to non-public figures. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), the Supreme Court held, “[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” The prohibition of liability without fault has the potential for limiting strict liability for misrepresentations as a matter of tort law. But nothing in the Supreme Court’s jurisprudence suggests that a newspaper could not as a matter of contract law promise to compensate anyone they have injured by even non-negligent misrepresentations. After all, breach of contract is traditionally a strict liability defense—in that even non-negligent breaches can give rise to duties to pay compensation.

and this section will suggest that journalists and lawyers should pay more attention to the possibility of compensation contracts.

Some people might feel that regardless of the law they have a moral duty to compensate people who are injured by their negligence. Miller, who is in many ways an admirable extremist on protecting her sources' confidentiality, shows no interest at all in compensating the victims of her misrepresentations. But guess how many dollars the news media voluntarily have historically paid to people that they injured? I would be willing to bet that the *New York Times* has never voluntarily compensated anyone whom they have negligently harmed.

Why not?

One response is that journalists do not make mistakes. But every correction disproves this hypothesis. More often, journalists cling to a second defense, the notion that there is no harm done—once a timely retraction is printed.

Now it is true that timely retractions often mitigate the injury of misrepresentations. But do not kid yourself. If a newspaper recklessly prints that a public figure is a suspected child molester or that her restaurant has a rat infestation problem, the timely retraction does not make the person whole. People who did not hear about the retraction or who question its accuracy are likely to stay clear.

We lack good information on the amount of uncompensated harm wrought by newspapers, in large part because newspapers refuse to report it. If getting out the news is so important, why do the media not disseminate information about the amount of injury that has gone uncompensated? The number of people whom have been injured by media misrepresentations and left uncompensated seems to be eminently newsworthy information, and there is a conflict of interest in the newspapers' choice not to pursue this kind of story.

Imagine instead a world where each correction included a statement from both the victim and the newspaper about how much the misrepresentation injured the victim (even after a correction) and a disclosure of whether or not the newspaper had chosen to compensate the victim. Stepping back, imagine a world where at least some apologies came with a price tag (even if the price were never paid). At the end of the day, it is ridiculous to think that the dollar value of harm from negligent misrepresentation is zero.

The third and final argument for why newspapers do not pay is that the production of news is somehow special. One journalist (with whom I confidentially discussed the idea of compensation) had the chutzpah to tell me that journalistic ethics demands that journalists not pay for their mistakes. He told me that getting out the news is too important to be

chilled by the prospect of legal damages. It was almost with a sense of pride that he pointed to the tradition of never paying money.⁴²

A stronger version of the argument runs like this: a newspaper only captures a fraction of the social benefits that it creates; therefore we cannot expect it to pay its full costs. But the same is true of car manufacturers (or physicians), and we do not give them a free ride. Indeed, if news is so important, why do we not also immunize the newspaper delivery truck if it negligently injures someone while it is disseminating the news? The “newspaper is special” argument proves too much. Why not generally immunize them from negligent torts? It is fine for the government to subsidize the public good of news. But there is not a reason in the world that this should be done on the backs of the individuals who are harmed.

The non-compensation problem that currently grips the production of news cries out for more commodification. Imagine what would happen if potential news sources responded to interview requests with the following email:

I would be happy to be interviewed. But I am concerned about the ability of the print media to harm public and non-public figures by negligent misrepresentations of fact without compensating them for their injury. I therefore propose the following contract that I have offered in the past:

Agreement to Compensate for Negligent Misrepresentation

In this agreement: _____ shall be referred to as “the reporter”;
_____ shall be referred to as “the publication”; and _____
shall be referred to as “the source.”

In return for the participation of the source as an interviewee, the publication promises to compensate anyone who is damaged by a factual misrepresentation printed in an article that expressly quotes the source. Compensation for factual misrepresentations is to be measured by the dollar amount required to make the damaged person whole, but in no event shall be less than \$100. Damages might be mitigated by timely retractions of the misrepresentation. Anyone explicitly named in an article quoting the source is an express third-party beneficiary of this contract and thereby has a right to directly

42. Is it ethical to leave people that you have harmed uncompensated? Even if the law does not require it, do ethics require it? At the conference, Owen Fiss took me to task for suggesting that ethics could demand more than the law. Fiss argued that the same chilling concerns that justified the Court in setting a low liability standard in *Sullivan* also justified a low ethical standard for payment. But there are distinct reasons for setting a low legal standard. The Supreme Court might not be willing to put the health of the press under the control of runaway juries—who might overcompensate. But an ethical standard of compensation is in the control of the tortfeasor itself. Compensation is not an all or nothing concept. The idea that ethics requires the *New York Times* not to pay even a symbolic dime of compensation is ludicrous.

sue the publication if it breaches its promise to compensate. The publication and the source intend for this to be a legally binding agreement. The reporter, in agreeing to this contract on behalf of the publication, represents that the reporter has actual and apparent authority to enter into this contract on behalf of the publication.

To accept this contractual offer (and thereby create a legally binding contract between the publication and the source), please reply to this email with a subject line that states "On behalf of the publication, I accept the Agreement to Compensate for Negligent Misrepresentation."

This simple contract would protect anyone who was named in an article quoting the source. Of course, if you are the only source that offers this contract, the newspaper is going to worry that you will be an overly sensitive, high-maintenance, pain-in-the-neck and will avoid dealing with you. I know, I have offered this contract and you should hear the shock and indignation in the voice of the reporters.

The news media may have a constitutional right to print reckless misrepresentations without paying compensation, but you and I do not have to cooperate with the enterprise. Imagine how sources might react if every interview began with the reporter's disclaimer: "I can recklessly misrepresent facts about you and others without any legal duty to compensate you." Would you eagerly participate?

Let us be clear: I am arguing that contracting for compensation is constitutional. Or put differently, I am arguing that *New York Times v. Sullivan* is just a default. The immunizing First Amendment rule laid out in *New York Times v. Sullivan* is at least subject to some types of contracting. If it is constitutional for Michael Jackson to sell an interview for an unconditional payment, it is constitutional for me to sell an interview for a conditional payment to cover my costs of injury from falsehood. Sources are free to contract for compensation if they or anyone else is harmed by news media misrepresentations.

Even though the form contract presented above is between sources and reporters, a similar contract could be created by newspaper subscribers and newspapers—again promising to compensate as express third-party beneficiaries any named person who was injured by a negligent misrepresentation. Indeed, it would be very strange if free speech prohibited people from opting to stand behind the truthfulness of their statements. It would improve the marketplace of ideas because listeners could give more credence to reporters who promised to pay if they negligently misrepresented the truth.

But again, the news media would be sure to holler "market coercion." They would somehow argue that it would be a bad thing if newspapers were forced by reader demand to promise compensation. But to my mind

this is a place where giving the consumers what they want is a great thing. Just as broad-based voter pressure on Bush to waive confidentiality is a good kind of coercion, broad-based reader demand to stand behind the truthfulness of your assertions is a good kind of coercion. If listeners want more credible reporting or more ethical compensation, the law should help them get it.

While I doubt that the *Sullivan* court understood that they were merely setting a default rule, the *Sullivan* standard is particularly appealing as a contractible minimum. The *Sullivan* standard defines the irreducible minimum level of liability but allows a true marketplace of ideas to produce more liability if the nexus of contracts among listeners, speakers, and sources so ordains.

If just one source or just one reader demands misrepresentation compensation, she is a weirdo who is refusing to be interviewed. But if a larger group of readers or sources decided it was immoral to assist in the production of a for-profit product that refused to be legally accountable for its negligence, who knows what might transpire.

Contractual ethics is not just for the other guy. Promising to compensate should begin at home. Academic authors also misrepresent facts from time to time and harm people. Academic journals, law reviews, and blogs might also consider commitments to compensate those they negligently harm.

CONCLUSION

The news media shows a deep-seated antipathy to agreement. They deny that their promises of confidentiality are contractual. They ignore the contractual agency relationship between their sources and the principals of their sources. They resist attempts to contract for compensation.

In large part, this antipathy stems from a distrust of market pressures in the marketplace of ideas. But in this essay, I have tried to argue that selective use of commodification is a good thing.⁴³ In particular, certain forms of decentralized demand can promote both democratic and free speech values. Political pressure by voters on Bush to waive Libby's confidentiality (or waive attorney-client privilege with respect to Harriet Miers' work-product) is a good kind of coercion. A generalized demand by readers or by a broad set of sources that newspapers stand behind the truthfulness of their representations by compensating those that are negligently harmed is also a good kind of coercion.

The news media prefer to operate a gift exchange that is insulated from market pressures. They want sources to gift their information to

43. I emphasize the "selective" use of commodification. Recall that I have expressly argued for inalienable waiver rights with respect to whistle-blowing by an agent about a principal's illegal activity. *See supra* note 18.

journalists. They want their promises of confidentiality and even their willingness to go to jail to be a non-contractual gift. They want the waiver of confidentiality to be an inalienable and unassignable gift of the source. And, above all, they insist that any compensation for harms done by their negligent reporting not be a legal duty but merely a gratuity paid only if they feel like paying it.

But thwarting the market and “giftifying” all these dimensions of the media does not eradicate power or power imbalances. In some contexts, the pressures brought to bear by commodifying free speech are preferable to those brought to bear in the absence of the market.⁴⁴

44. The essay can be seen as part of a larger project of mine arguing for the selective commodification of speech. *See, e.g.*, Ian Ayres & Matthew Funk, *Marketing Privacy*, 20 YALE J. ON REG. 77 (2003); Ian Ayres & Jennifer Gerarda Brown, *Marketing Nondiscrimination*, 102 MICH. L. REV. (forthcoming 2005).