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POLITICS, LAW, AND AN ANONYMOUS SOURCE

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Secrets. The American culture probably has a love-hate relationship with them. We respect and even admire the fact that national security requires secrecy. But in most respects we honor a more open society—putting the facts on the table, so to speak.

The press, in particular, deplors secrecy (except in some cases about its own business) and often applies its resources to exposing secrets. According to opinion surveys, the American press does not have a very good image among the public. Nevertheless, dogged reporting that brings light to dark places brings great respect. Consider instances such as the *Washington Post's* revelations regarding Watergate in 1974 and more recently, the *Boston Globe's* exposure of the sexual abuse by members of Roman Catholic clergy.

Central to much of this kind of reporting is the press's own version of secrecy—the unidentified source. One of the tenets of journalism is that an anonymous source, one who has been promised anonymity, will not be revealed under any circumstances or within any timeframe. On a number of occasions, reporters have gone to jail to avoid breaking this code. In the summer of 2003, the issue of national security secrecy and the principles of source protection by the press crossed paths in a controversy that smoldered around syndicated columnist Robert Novak.

A few words of background on the issue:

In July of 2003, former career diplomat Joseph Wilson revealed that he was the envoy sent by the CIA to Niger in 2002 to investigate whether Iraq had been trying to obtain yellowcake ore from Niger to use in weaponry. President Bush, in his January 2003 State of the Union address, made this claim regarding Iraq's intentions. It was later widely reported that Wilson's CIA mission had cast doubt on this report. Indeed, the accuracy of

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President Bush's claim has been in wide dispute. While a high-level British investigation in July 2004 declared the Bush claim to be justified, that question is not relevant to the issue we will examine here.

Days after Wilson began to undermine publicly the President's statement, Novak revealed in a July 14, 2003, column that Wilson's wife was a CIA "operative."¹ Wilson then declared his outrage that Novak had allegedly "outed" his wife and possibly endangered her life. There has also been debate about exactly what Wilson's wife, Valerie Plame, did at the agency, but that too is irrelevant here. Eventually, the Justice Department was ordered to investigate whether a crime had been committed—presumably by someone in the administration—revealing the identity of a covert CIA employee. As of this writing, that investigation is ongoing.

The issue to be explored here is whether, given the criminal investigation, Novak should reveal his source. Some journalists, most prominently Geneva Overholser, a former editor of the *Des Moines Register*, have taken the position that he should. Overholser, also a former chair of the Pulitzer Prize Board and a former editorial writer for the *New York Times*, stated this view in a piece for the *New York Times* published on February 6, 2004.² Now a professor at the University of Missouri School of Journalism, she defended the practice of protecting sources but said that "it is also in the public interest for journalists to speak out against ethical lapses in their draft."³ She argued that Novak was protecting a lawbreaker and that journalists should urge him to reveal his source.

I believe Overholser, whom I generally admire, is wrong in this case. There are two basic problems with her position.

First, at the time of her article in the *New York Times* (and as of this writing), there has been no actual finding that a crime was committed in the disclosure of Valerie Plame's employment by Novak, despite his admission that a "senior administration official" provided him with the information. In its lead editorial on July 15, 2004, the *Wall Street Journal* argued that there was no crime, focusing on a Senate report that says Ms. Plame advocated for her husband's being given the Niger assignment. The *Journal*

1. Robert Novak, *Mission to Niger*, TOWNHALL.COM, July 14, 2003, at <http://www.townhall.com/columnists/robertnovak/printtrn20030714.shtml> (last visited Feb. 27, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

2. Geneva Overholser, *The Journalist and the Whistle-Blower*, N.Y. TIMES, Feb. 6, 2004, at A27.

3. *Id.*

said: "We'd argue that once her husband broke his own cover to become a partisan actor, Ms. Plame's own motives in recommending her husband deserved to become part of the public debate. She had herself become political."⁴

Novak, writing for Townhall.com on October 1, 2003, said he was motivated to ask about Ms. Plame by what he thought were the odd circumstances of a former Clinton appointee (Wilson) being given a sensitive assignment by the Bush administration.⁵

The underlying weakness of Overholser's opinion is the issue of who determines when a crime has been committed. That is usually the function of a judge and jury, not a newspaper columnist.

Second, there is ample precedent for journalists using information from a source when the actions of the source itself may not be ethical or legal. During the *Washington Post's* Watergate investigation, reporters Bob Woodward and Carl Bernstein wrote about grand jury proceedings, information that by law was to be shielded from the public. Perhaps a more relevant case is the June 13, 1971, publication of stories concerning the so-called "Pentagon Papers," the Defense Department's seven thousand page history of the United States' involvement in Vietnam. The Nixon administration, embarrassed by the revelations in the documents, went all the way to the Supreme Court of the United States to block continued publication of the papers.⁶ Eventually, the documents were distributed to the *Washington Post*, *Boston Globe*, and other newspapers. The Supreme Court finally ruled in a 6-3 vote that publication could not be prohibited.⁷

The Pentagon Papers were government property. The person who leaked them to the *New York Times* had systematically and surreptitiously copied thousands of pages and spirited them out of the Department of Defense offices. This was a crime, and eventually there would be an attempt by the government to prosecute this individual, but there was little or no outcry in the press.

4. Editorial, *The Yellowcake Con*, WALL ST. J., July 15, 2004, at A10, available at http://www.opinionjournal.com/forms/printThis.html?id=110005_354 (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

5. Robert Novak, *The CIA Leak*, TOWNHALL.COM, Oct. 1, 2003, at <http://www.townhall.com/columnists/robertnovak/rn20031001.shtml> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

6. See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

7. Sanford J. Unger, *The Papers & The Papers: An Account of the Legal and Political Battle over the Pentagon Papers*, 136-38 (1972).

A few days after the *New York Times*' scoop, the name of the source, Daniel Ellsberg, was revealed on a radio program by Sidney Zion, a former *Times* reporter. He was widely criticized by journalists. Arthur Gelb, metropolitan editor of the paper, said that Zion was "never to set foot into the *Times* again."⁸

From my own experience as metropolitan editor of the *Globe* at the time, I can attest that Ellsberg was accorded a hero's role in the eyes of most reporters and editors who expressed an opinion. I shared that view personally. This adulation by the press may have prompted Ellsberg to ultimately concede that he was the *Times*' source.

As even Overholser concedes, the protection of anonymous sources is a guiding principle for contemporary journalists. There is debate about the prevalence of these unnamed sources in much of the daily reporting from Washington, D.C., and elsewhere—particularly in the *Times* and the *Washington Post*. There is general acceptance in the press, and I believe the public, of the notion that serious investigative reporting would be greatly inhibited by a newspaper's prohibition against the use of anonymous sources. And if one is to accept the value of such sources, one must also adhere to the principle of source protection under virtually all circumstances. The reason is obvious: If a source does not have full confidence in his or her anonymity, then confidential information is unlikely to follow.

In thirty-one states and the District of Columbia, so-called "shield laws" have been enacted to protect reporters in these situations. According to a survey in 2001 by the Reporters Committee for Freedom of the Press, the quash rate for subpoenas to news organizations was twenty-two percent in shield law states, compared to five percent in other states.

The report quoted an unidentified "newspaper editor in Maryland," who said: "The shield law is immensely useful in prompting lawyer[s] to withdraw subpoenas without a fight."⁹

Clearly, the frequent use of anonymous sources in the reporting of news can lead to abuses, but the enactment of thirty-one shield laws in the United States is indicative of the public value attached to the investigative work of journalists. Many journalists have gone to jail rather than reveal a source. In one of the more notable such cases, Myron A. Farber, a reporter for the *New York Times*, spent forty days in jail in 1978, rather than turn over notes from his reporting on a murder case. The accused in the

8. *Id.*

9. REPORTERS COMM. FOR FREEDOM OF THE PRESS, A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001, at 1 (2003).

case was ultimately acquitted, but Farber argued that his material had no critical value to either the defense or prosecution. The *Times* paid fines of \$285,000 in the case.¹⁰

There was a spirited debate over this case in, among other venues, the *New York Review of Books*. In one letter to the *Review*, Virginia Held of the philosophy department at City University of New York gave an eloquent description of what was at stake from the journalist's point of view:

What a reporter does in inviting, persuading, coaxing, encouraging, enabling another person to talk is often a delicate and subtle activity. To be able to promise confidentiality to the person being encouraged to talk may be completely crucial to the process. In the moment of conversation, a reporter must be able to offer to take upon himself or herself from the person considering whether to speak or not speak the burden of pressure for further disclosure and further information which may result from this initial opening, pressure which the person speaking may greatly fear. And the reporter must be able to engender trust that any promises of confidential that are made will be steadfastly honored.¹¹

In this particular case, Professor Held argued that a reporter could not say, in effect, "I won't reveal your identity unless a court says I have to." She said this would have a "devastatingly chilling effect" on journalists.¹²

Much like a court ruling might cause a chilling effect, some would argue that the accusation or allegation that information given to the reporter was conveyed in an illegal manner would have a devastating effect. Would that be enough to erase the commitment of confidentiality? I would argue emphatically no.

There were those who said in the Farber case that policy ramifications—in this instance, the guilt or innocence of the defendant—should trump the principle of protecting a source. But a principle is just that, a moral standard that must be held to. To my mind, it is conceivable that the reporter, in a life or death situation, might determine as a matter of conscience to reveal a source. It is hard to dictate otherwise. But it should be his or her choice, and he or she should make every effort to obtain the per-

10. Lee Lescaze, *Doctor Acquitted in Murder Case Involving Free Press, Fair Trial*, WASH. POST, Oct. 25, 1978, at A1.

11. Letter from Virginia Held, *The Rights of M.A. Farber: An Exchange*, N.Y. REV. BOOKS, Dec. 7, 1978, at 39, available at <http://www.nybooks.com/articles/7974>.

12. *Id.*

mission of the source. Again, this should happen in the rarest circumstances.

The Novak case was certainly not such an instance. Though there is a legal issue involved, no one has argued that Ms. Plame's life was in fact endangered. And while there are legitimate and serious issues involved, can anyone argue that this would be a celebrated case, one that would even attract the attention of an observer such as Ms. Overholser, without the political issues surrounding not only the Iraq War but also the then-upcoming presidential election?

The investigation of the "leak" and the issue of whether a law was broken will proceed along conventional, if not politically sensitive, grounds. As for Mr. Novak, he is fully justified in remaining silent concerning his source. In fact, he is morally obligated to do so. As his editor, I might have warned Mr. Novak to be careful in writing about a CIA employee, knowing from my own experience that this is sensitive territory. But were I his conscience, journalistic or otherwise, I would exhort him: "Stand your ground."