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A CRITIQUE OF SOURCE CONFIDENTIALITY

EDWARD WASSERMAN*

INTRODUCTION

The exposure of CIA agent Valerie Plame by columnist Robert Novak has touched off a wave of media self-examination about the venerable practice of promising to withhold the names of news sources who insist on anonymity. The practice has become so routine¹ that it goes practically unnoticed even by sophisticated readers, who have grown used to assertions from “administration officials,” “a Western diplomat in Baghdad,” “financial experts,” “weapons scientists,” and the growing range of locutions used to authenticate informants and present their views without saying who they are, let alone what their agendas might be.²

The political atmospherics surrounding the Novak affair, however, have ensured both notoriety and hand wringing. An honored custom was apparently put to unsavory ends in a matter of the highest public concern. Robert Novak is a widely circulated, generally conservative commentator who is seen, perhaps unfairly, as an unswerving George W. Bush administration loyalist. His action in “outing” Valerie Plame—based on information he attributed to two unnamed administration officials—was widely denounced by administration foes as a harsh reprisal for her husband’s headline-grabbing claim that the President spoke falsely in offering a key justification for invading Iraq. Hence confidentiality, instead of shielding a whistleblower from punish-

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1. Randy Dounga, *Unnamed Sources: Essential or Overused?*, CHRISTIAN SCI. MONITOR, Aug. 12, 2004, at 3, available at www.csmonitor.com/2004/0812/p03s01-usju.html (citing estimate that 40% of *New York Times* A-section stories in December 2003 featured anonymous sources).

2. SUSAN D. MOELLER, CTR. FOR INT’L & SEC. STUD. MD., MEDIA COVERAGE OF WEAPONS OF MASS DESTRUCTION 44–49 (2004), available at http://www.cissm.umd.edu/documents/WMDstudy_short.pdf (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (discussing ways in which public understanding of the complexities of chemical, bacteriological, and nuclear weapons was harmed by the ability of prominent officials to get extensive publicity for their views without being associated with them).

ment, apparently facilitated that punishment.³ As a result of an ensuing investigation into the leak, reporters with a number of national publications faced intense prosecutorial pressure to give evidence about the sources they used for subsequent stories featuring the same disclosures about Plame.⁴

We will return in a moment to the details of this affair. My purpose here, however, is not to adjudicate a political dispute; it is to examine the ethics of the journalist's confidentiality pledge. Instead of asserting, as some have, that its status as a promise trumps competing ethical claims, I want to consider how to determine when the confidentiality promise is indeed ethically robust—and when it should yield to other ethical considerations.⁵

As a preliminary note, I should point out that although they may appear in discussions of this affair to be conjoined twins, confidentiality and promise-keeping are actually two very different things in the journalist's moral universe. Keeping a source secret need not involve a promise; promises may not entail secrecy. A journalist might, for instance, decide to conceal reliance on a document to avoid tipping off a competitor, to keep other potential informants from knowing how much the reporter already knows, or because possession of the document is illegal. We could evaluate that non-disclosure solely in terms of ethical

3. See Editorial, *Journalists Face Jail Time*, N.Y. TIMES, Aug. 11, 2004, at A18; Geneva Overholser, *The Journalist and the Whistle-Blower*, N.Y. TIMES, Feb. 6, 2004, at A27.

4. For a useful account of prosecutorial maneuverings, see Eric Boehlert, *Risky Business*, SALON, Aug. 13, 2004, at http://www.salon.com/news/feature/2004/08/13/plame_leaks/index.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy). See also Carol D. Leonnig, *Journalist Testifies in CIA Case*, WASH. POST, Aug. 25, 2004, at A2. A curious compromise appears to have been devised, under which reporters who had interviewed I. Lewis "Scooter" Libby, Chief of Staff for Vice President Dick Cheney and apparently a suspect in the case, submitted to interviews, with his approval, in which they cleared him of blame. The notion that reporters would feel free to talk about who was *not* their confidential source is troubling, since that investigative technique plainly seems intended to close the circle ever tighter and eventually leave the real informants exposed.

5. The supremacy of the promise is argued by David Shaw, media writer for the *Los Angeles Times*: "Once granted, that promise can't be withdrawn without significant and long-lasting consequences. A promise is a contract—not in a legal sense but in both a moral and a practical sense." David Shaw, *Promises of Confidentiality Aren't Made To Be Broken*, L.A. TIMES, Oct. 26, 2003, at E16. Lucy Dalglish of the Reporters Committee for Freedom of the Press notes, "Reporters can't maintain their credibility unless they keep their promises to sources." Eric Boehlert, *Bad News*, SALON, Jan. 22, 2004, at <http://archive.salon.com/news/feature/2004/01/22/confidentiality/index1.html> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

maxims such as truth-telling and ensuring accountability; neither has much to do with keeping one's word.

Likewise, journalists make plenty of promises—to sources, bosses, colleagues, competitors, even spouses—that bear on work product but have nothing to do with confidentiality. The reporter might promise a source to portray her in a certain light, to spin the story this way rather than that, or to play up some flattering detail. News organizations routinely embargo news until an agreed-upon release time, reporters agree to stay with the group during a press tour, and so forth. Any of those promises might have an ethical dimension, yet none involves secrecy.

Thus the confidentiality promise is a hybrid and requires examination from a number of ethical perspectives: the obligation, if any, to protect sources; whether concealment conflicts with other professional duties; the circumstances under which secrecy ought to be compromised; and confidentiality as itself an instrument of promise-breaking.

Ultimately, our discussion will suggest that the ethical stature of a confidentiality promise depends, first, on an *informational* analysis: Does the secrecy it ensures facilitate or impede the journalist's core duty, which is to gather and make public important information? In that respect, source confidentiality is similar to a reporter's agreeing not to divulge certain awkward facts an informant is providing solely because the source insists they be withheld, even though they would otherwise be part of the story. The question of whether doing so is appropriate can be analyzed within the broad lines of a craft-based critique: Did the agreement help, or hinder, the reporter in doing his or her job? Did the arrangement, on balance, benefit the public by bringing to light important governmental information? The specific question raised by the Novak-Plame affair is what to make of the promise to conceal a source when the identity of the source rivals in significance the information the source provided—and indeed, if made public, would likely become the focus of the affair.

On a second level, the judgment depends on a *relational* analysis: Does the confidentiality agreement privilege the journalist-source relationship at the expense of the journalist's relationship to the public? Here we will evaluate the agreement by whether it is consistent with the larger, contextual trust relationship between journalist and public. I will adapt the approach to *trust*—defined as a relationship of generalized reliance involving parties of unequal status and power—as developed by moral phi-

osopher Annette Baier⁶ and apply a variant of her expressibility standard: The morality of the promise depends on whether disclosing the understandings, expectations, and motives for it would undermine the trust on which the journalist-public relationship is built.

The expressibility standard offers the beginnings of an analysis of practical value to reporters and editors trying to decide which confidentiality agreements are consistent with their obligation to their public: Would your readers understand and accept the value and propriety of the arrangement if they knew why you and your source were making it?

I. THE WILSON-PLAME AFFAIR

A retired career diplomat named Joseph C. Wilson IV was sent to Niger by the U.S. Central Intelligence Agency in February 2002 to investigate a report attributed to Italian intelligence that Saddam Hussein's regime had been trying to buy yellowcake uranium for weapons. Wilson reported back that he found no evidence of such an effort.⁷

Nevertheless, President Bush in his State of the Union Address in January 2003 spoke of Iraqi attempts to buy uranium in West Africa as evidence of Saddam's hunger for strategic weapons, a principal justification for the pre-emptive war that followed in March.⁸ Several months after Mr. Bush's speech, Wilson wrote an opinion piece in the *New York Times* wondering aloud why the administration had advanced claims that he, as its designated investigator, had determined were baseless.⁹

Wilson's July 6th op-ed column was published at a time of growing disquiet within the United States over the postwar failure of U.S. and British forces to discover the weapons of mass destruction that had been identified as a major threat to regional and world peace and brandished as a *casus belli*. His statement—

6. ANNETTE BAIER, *MORAL PREJUDICES: ESSAYS ON ETHICS* 120–25 (1994) (discussing the expressibility test).

7. For a useful chronology of Wilson's inquiries, see James Risen, *How Niger Uranium Story Defied Wide Skepticism*, N.Y. TIMES, July 14, 2004, at A14.

8. *Id.* President Bush credited the information to British intelligence: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." Wilson said he had learned that the Iraqis had put out feelers in 1999 about establishing expanded commercial relations with Niger. Those had been interpreted as potentially involving uranium, but Niger had never responded, perhaps because its uranium industry is under the control of a French consortium. *Id.*

9. Joseph C. Wilson IV, *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, at WK9.

"I have little choice but to conclude that some intelligence related to Iraq's nuclear weapons program was twisted to exaggerate the Iraqi threat"¹⁰—fed widening doubts about the administration's claims.

On July 14, *Chicago Sun-Times* columnist Robert Novak, one of the country's best-read pro-administration commentators, wrote a syndicated column in which he reported, apparently in an attempt to cast doubt on Wilson's bona fides, that the former ambassador got the assignment to Niger thanks to the intervention of his wife, Valerie Plame. Novak described her as "an Agency operative on weapons of mass destruction."¹¹ In fact, she was a fully-trained, veteran intelligence agent with extensive experience in foreign postings under diplomatic cover. In short, she was a U.S. spy.¹²

In the aftermath of Novak's column, Wilson charged, as did other administration critics, that Plame's cover was deliberately blown in an effort to discredit her husband's uranium allegations and to depict him as the undeserving and under-qualified beneficiary of her backroom influence-peddling.¹³ This suggests that Plame was exposed as a political action calculated to dampen dissent within the government, that Novak was the instrument by which that action was taken, and that his confidentiality pledge was an element essential to the success of the action, since it enabled the question of calculated, high-level administration involvement to remain unanswered.

Depending on the circumstances, exposing an undercover U.S. intelligence agent may be illegal under the Intelligence Identities Protection Act of 1982,¹⁴ though there is real question as to that law's applicability to this affair.¹⁵ Still, the origin of the

10. *Id.*

11. Robert Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31.

12. Vicky Ward, *Double Exposure*, VANITY FAIR, Jan. 2004, at 74.

13. *Id.*

14. 50 U.S.C. § 421 (2000).

15. For background on the law, see Jack Schafer, *Free Matt Cooper!*, SLATE, Aug. 10, 2004, at <http://slate.msn.com/id/2104982/> (on file with the Notre Dame Journal of Law, Ethics & Public Policy). See also the *Wall Street Journal's* polemic in *The Novak Exception—II*, WALL ST. J., Mar. 11, 2004, at A16 (citing opinion that law was not intended to muzzle reporters).

Victoria Toensing, who helped draft the bill as chief counsel to the Senate Intelligence Committee, says its narrow language is no coincidence. "The language was specifically designed to distinguish between exposures that came in the course of legitimate journalism and those intending to subvert our intelligence services," she says. "And it was shaped by concerns we heard expressed at the time by the leading newspapers."

leak became the subject of investigation by a special prosecutor appointed by Attorney General John Ashcroft. By late summer 2004 the prosecutor was calling witnesses before a grand jury in Washington, D.C. Several prominent members of the Washington press corps were subpoenaed, purportedly because Novak was not the only journalist to whom Plame's job as a spy was disclosed.¹⁶

II. FACTUAL DISPUTES

Some significant facts about the Plame outing are in dispute. First, the circumstances under which Novak learned about her undercover job are unclear. He never really says how he came by the information. In his original column Novak simply asserts that she is a CIA "operative" and offers no attribution. In a follow-up column in October 2003 addressing the controversy his first column triggered,¹⁷ he writes that a "senior administration official" had told him that "Wilson had been sent by the CIA's counterproliferation section at the suggestion of one of its employees, his wife." Novak adds that a second official, also unnamed, subsequently agreed that Plame had a role in getting Wilson the assignment.

Hence, there is no clarity as to whether Novak discovered the information about Plame himself, or was instead sought out as a sympathetic conduit for a leak the administration wanted to make, confident that its messengers would be protected by an anonymity pledge.¹⁸

Id.

16. See Matthew Cooper et al., *A War on Wilson?*, TIME, July 17, 2003, available at <http://www.time.com/time/nation/article/0,8599,465270,00.html> (on file with the Notre Dame Journal of Law, Ethics & Public Policy). The *Time* article, by implication, ranges Novak among the weapons the administration deployed in trying to counter Wilson's charges.

It is notable that other news organizations have not tried aggressively to identify the source of the Plame disclosure, even though doing so might implicate high-ranking administration officials in illegal conduct and, in that regard, would be a sensational and important story. The restraint implies that in practice, entities that are not parties to a confidentiality agreement may nevertheless feel honor bound to respect it by proxy, as a deformed kind of professional courtesy. That is a disturbing aspect to this affair—one that lies outside the bounds of this Essay. Such deference, in my view, is bereft of moral logic and seems to have more to do with a misplaced, clubby collegiality than with professional ethics.

17. Robert Novak, *Columnist Wasn't Pawn for Leak*, CHI. SUN-TIMES, Oct. 1, 2003, at 49.

18. See Ward, *supra* note 12. In one account, Novak said that his administration sources had sought him out, and in another he insisted they had not.

It has been reported that the allegation that Plame pushed to get her husband the job had been offered to a half-dozen Washington journalists—who declined to publish it—before Novak agreed to run it.¹⁹ Novak explicitly denied that contention in his follow-up column, and subsequent reporting suggests that administration operatives did aggressively shop the story, but only *after* Novak reported it, because they wanted to ensure the Plame connection got wide attention.²⁰ If so, that would alter the character of the intrigue: Instead of an orchestrated intimidation campaign we would have a post facto effort to get mileage from a fortuitous indiscretion. So the jury, grand and otherwise, is out.²¹

Second, Novak's statements suggest he might not have fully realized Plame was a spy and that her job was truly covert. He admits a CIA spokesman who was assigned to talk to him before the first column ran had implored him not to identify Plame. "He asked me not to use her name," Novak wrote, "saying she probably never again will be given a foreign assignment but that exposure of her name might cause 'difficulties' if she travels abroad."²² But according to Novak, because the spokesman did not specifically say Plame's life might be put at risk, he ignored the request and identified her.²³

Third, the question of whether Plame actually did play some role in her husband's selection is controversial. The CIA spokesman had flatly denied that she had anything to do with the

19. See, e.g., Mike Allen & Dana Priest, *Bush Administration Is Focus of Inquiry: CIA Agent's Identity Was Leaked to Media*, WASH. POST, Sept. 28, 2003, at A1.

Yesterday, a senior administration official said that before Novak's column ran, two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife 'Clearly, it was meant purely and simply for revenge,' the senior official said of the alleged leak A source said reporters quoted a leaker as describing Wilson's wife as 'fair game.'

Id.

20. Michael Isikoff & Mark Hosenball, *Criminal or Just Plain Stupid?*, NEWSWEEK, OCT. 8, 2003, available at <http://msnbc.msn.com/id/3158220/> (on file with the Notre Dame Journal of Law, Ethics & Public Policy). *Newsweek* determined that the calls to the half-dozen journalists came after Novak's column had appeared. That is also when MSNBC talk show host Chris Matthews allegedly told Wilson that Bush chief of staff "Karl Rove . . . said your wife was fair game." *Id.*

21. For a discussion about the discrepancies between the *Newsweek* and *Post* accounts, see Murray Waas, *Plugging Leaks*, AM. PROSPECT ONLINE, Mar. 8, 2004, at <http://www.prospect.org/webfeatures/2004/03/waas-m-03-08.html> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

22. Novak, *supra* note 17.

23. *Id.*

appointment, a response Novak left out of his first column. That was a disturbing omission, since the hint of nepotism was Novak's only valid reason for identifying her at all, and the agency denial was categorical. A Senate Intelligence Committee report subsequently offered some support for the notion that Plame helped Wilson get the assignment—which was unpaid—inasmuch as the committee found she had indeed written a memo to superiors extolling his qualifications.²⁴ Novak's position was that because Wilson had served under President Clinton and had recently indicated his support for the presidential candidacy of Democratic Senator John Kerry, selecting him to go to Niger was "an otherwise incredible choice," if not for his wife's influence.²⁵

Attempting to resolve these factual disputes is beyond the scope of this discussion. What is noteworthy is that much of the commentary on the ethics of Novak's confidentiality agreement assumes facts strongly unfavorable to him—and then asserts that they do not matter and the ethical status of his confidentiality pledge is unimpaired. Hence, even if Plame was indeed outed as part of a calculated, political smear; even if Novak knew that she was an undercover agent and that publishing her name was illegal; indeed, even if the assertion that she helped get her husband the Niger assignment was false and the leaker who said as much was lying; the sanctity of Novak's promise *still* obliges him to protect his informant.²⁶

24. Mary Jacoby, *Joseph Wilson vs. the Right-Wing Conspiracy*, SALON, July 16, 2004, at http://www.salon.com/news/feature/2004/07/16/wilson/index_np.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (offering a useful summary of the Senate Intelligence Committee findings concerning whether Plame nominated her husband for the assignment, and Wilson's response to those). The internal memo from Plame to her superiors stated, in part: "[M]y husband has good relations with both the [Nigerien] PM (prime minister) and the former Minister of Mines (not to mention lots of French contacts), both of whom could possibly shed light on this sort of activity." *Id.* Wilson, a former ambassador to Gabon, had been honored by President George H.W. Bush for his service as the number two U.S. official at the Baghdad embassy on the eve of the first Gulf War. *Id.*

25. Novak, *supra* note 17.

26. See, e.g., Boehlert, *supra* note 5. Referring to the Novak case and that of Wen Ho Lee, the former weapons scientist who is suing the government for defaming him through confidential leaks, Aly Colon, ethics group leader at the Poynter Institute, the highly regarded journalism training center in St. Petersburg, Florida, said that together these cases create "one of those situations where people are holding their noses because the stench is so bad But the consequences of not defending the principle that you've made a promise is even worse. Because if you don't defend the ones that stink, how do you defend that ones that don't?" *Id.*

As we will argue, the notion that the ethics of a confidentiality agreement can be evaluated without considering what information it secured, why the information was sought or proffered, and whether it was even true is untenable. Promise-keeping deserves an honored place in any hierarchy of journalistic maxims, but close analysis suggests that it must bow to other considerations if the journalist's defining duty—to maintain the trust with the public that derives from honestly gathering and delivering information that, in his or her judgment, a self-governing polity must know—is to prevail.

In the following section, I will discuss the ethics of the confidentiality promise from several perspectives. Then I will return to the Novak-Plame case and offer some conclusions.

III. CONFIDENTIALITY SCRUTINIZED

PROTECTING SOURCES: Source confidentiality's most obvious function is to shield informants from potential harm. "Source protection" has an ethical ring to it, but journalists do not, by and large, recognize any generalized obligation to look out for the well-being of their sources. I think the silence of journalism ethics in this regard is regrettable. After all, many people who come forward with information are apprehensive, naïve, and ripe for exploitation. Unsophisticated sources may unwittingly say things that expose them to ridicule, trusting the amiable and knowledgeable reporter who is encouraging their candor to warn them when they cross the line.²⁷ Too, a source may be vulnerable, and the relationship may develop in ways similar to some lawyer-client and doctor-patient relationships, with the informant susceptible to improper, extra-curricular approaches from the reporter.²⁸

27. For an exception that is thoughtful and provocative, see generally JANET MALCOLM, *THE JOURNALIST AND THE MURDERER* (1990). Malcolm is especially eloquent on the notion that some measure of deceit is involved in even routine reporter-source relations. True, articulating a standard of care owed to informants would be difficult. Even a seasoned journalist cannot know in advance what harm—or benefit, for that matter—might befall a source. A formulaic "warning label" to sources, telling them that their lives might change fundamentally or not at all, would have little practical value. Moreover, the journalist's job is to get information, not perform counseling work with conflicted informants. Still, it does seem that the problem at least of naïve sources is worth addressing, and it should be possible to formulate some reasonable procedures, based perhaps on a distinction analogous to the public vs. private figure distinction central to contemporary libel law.

28. The Bob Greene affair is on point. Greene was a widely syndicated columnist with the *Chicago Tribune* who was fired in 2002 when it was revealed that he had had a sexual encounter with a woman who was a subject of his

Nevertheless, the boundary of journalistic solicitude for the well-being of sources is defined by the reporter's desire to preserve the conditions under which accurate information can be gathered. It follows that a reporter is more protective of an informant's interests if the source seems likely to be useful in the future. That implies greater consideration for officials and other consistently valuable informants. Sources are awarded protection based not on their needs, but on their abilities.

CONFIDENTIALITY AS SOURCE PROTECTION: It follows that although confidentiality may protect a source, journalists accept no freestanding obligation to withhold an informant's identity even if they believed—or would believe, if they gave it any thought—that secrecy would be in the source's best interests. A reporter would not, for example, urge a source to demand concealment if the reporter understood—and the source did not—that exposure could be perilous. Confidentiality is nothing more than a valuable information-gathering technique; its claim to ethical standing derives solely from the enhanced information its judicious use brings to the public. It does not reflect an obligation owed to the source, unless the source insists on it as a condition of providing that information. In that regard it is a technique of source self-defense, which the reporter accedes to and does not proffer.²⁹

If instead the journalist did recognize an independent ethical duty to the informant to withhold the source's name if disclosure might be harmful, the source would not need to demand anonymity. That is not the case. In fact, journalists are typically admonished to grant confidentiality only if necessary.³⁰ Confi-

column a decade before, when she was a high school student in her late teens. Although the sexual liaison began only after he had written about the young woman, his conduct was condemned as a betrayal of trust. Precisely whose trust Greene betrayed is not clear—it is hard to argue, for instance, that the public was harmed—but some impropriety may arise from the vulnerability of an unsophisticated source to the predations of a celebrity journalist. For an account of the affair, see Jim Kirk & Monica Davey, *Breach of Trust Ends Greene's Career at Tribune*, CHI. TRIB., Sept. 16, 2002, §1, at 1.

29. One might try to ground a source-protection ethic in the maxim that journalists should seek to "minimize harm" occasioned by their own efforts. See SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (1996), available at http://www.spj.org/ethics_code.asp (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

30. The *New York Times'* code, for instance, states:

In routine interviewing—that is, most of the interviewing we do— anonymity must not be automatic or an assumed condition. In that kind of reporting, anonymity should not be *offered* to a source. Exceptions will occur in the reporting of highly sensitive stories, when it is we who have sought out a source who may face legal jeopardy or loss of liveli-

dentiality is part of a negotiation over the release of information and owes its ethical standing to the quality of the information it makes public—and to its being secured by a promise. In a moment we will look at the curious ethical status of that promise.

CONFIDENTIALITY AS INCONSISTENT WITH OTHER OBLIGATIONS: Certain kinds of reporting routinely incorporate routine reliance on informants who will not talk unless they are assured of anonymity.³¹ Although sensitive political and governmental stories are the areas that first come to mind, business and financial news—especially coverage of closely-held companies, professional firms and the like—would be difficult if not impossible to assemble without source concealment. Yet confidentiality poses ethical conflicts, chiefly because it may clash with two professional norms: accountability and verifiability.³² The result may impede truth-telling.

Accountability involves an obligation to ensure that the ledger of significant actions and assertions be reported publicly in such a way that their authors are linked to them. Confidentiality enhances accountability when it helps expose subterranean agreements, decisions, and actions that would otherwise go unreported. But secrecy may also hinder accountability by interposing the journalist between informant and public, and preventing third-parties from challenging sources over inaccuracies, indiscretions, or lies. It may also scrub the record clean of grudges and personal agendas that have bearing on the information, and thereby prevent dishonest or tainted informants from being exposed as such.

Verifiability, which is the closest journalism comes to offering a functional equivalent to the standards of social science, usually is premised on associating information with the person who provides it. That enables third-parties to determine that the

hood for speaking with us. Similarly they will occur in approaches to authoritative officials in government who, as a matter of policy, do not speak for attribution.

The N.Y. Times Company, *Confidential News Sources* (Feb. 25, 2004), at <http://www.nytimes.com/company-properties-times-sources.html> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

31. For a strong defense of the use of confidential sources offered by an unusually accomplished investigative reporter, see Affidavit of Scott Armstrong, *Lee v. United States Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003) (No. 99-3380(TPJ)).

32. A contrary position was advanced in a *Los Angeles Times* editorial: "Leaks are not only the vital fuel of investigative journalism, they are an essential mechanism for holding powerful institutions accountable." *All Leaks Are Not Alike*, L.A. TIMES, Aug. 13, 2004, at B12.

words were spoken, just as reported, by the person who was said to have uttered them.

Here again, confidentiality may impair accuracy. It can impede testing the truthfulness of information; nobody else can phone the reporter's secret source to confirm, refute, or modify the original information. Anonymity, *USA Today* founder Al Neuharth observed, enables sources to say more than they know and reporters to write more than they hear.³³

THE ETHICS OF THE CONFIDENTIALITY PROMISE: It is understandable that press commentators should be adamant about the importance of journalists' honoring their word. After all, promise-keeping is a square-sounding maxim that seems to go to the white-hot core of truth-telling that is journalism's noblest mission—and to the credibility that is its greatest contemporary challenge.

Still, the morality of keeping a promise is logically dependent on the morality of the conduct that the promise is meant to secure. It would be hard to defend a promise to commit murder as an ethical one unless the murder itself was warranted. The morality of that promise could not rest solely on the notion that failing to honor it might cause others to doubt one's resolve to keep non-homicidal commitments.

Imagining confidentiality agreements that a journalist *ought* to break is not hard. Suppose exposing an informant would save a life, prevent a serious crime, or free an innocent prisoner. The argument for guarding those secrets seems grounded largely in concern for the reputational harm the journalist might sustain by burning the source, and whether that might cripple his or her future effectiveness. That is not chiefly an ethical calculation, however; it is an operational one.³⁴ There is, in short, nothing about promise-keeping in itself that privileges it above such maxims as telling the truth, avoiding unnecessary harm, respecting privacy, and other imperatives that journalists embrace as profes-

33. Neuharth's full quote is: "Anonymous sources . . . inevitably lead to lies. Here's why: The anonymous source, if in fact one exists, generally is a coward who tells more than he or she knows. The reporter permitted to use such sources often writes more than he or she hears." Al Neuharth, *How to Detect Lies in Your Newspaper*, *USA TODAY*, May 23, 2003, at 15A.

34. True, one could argue that there is an ethical dimension to the consequences of a journalist's behaving in untrustworthy ways. If the behavior brings discredit to the profession and makes journalism's social mission harder to fulfill, that is no mere operational problem; it has caused an impairment that has moral consequence. Still, building an ethical argument on speculation about how the public might perceive a particular action seems too unsteady to be useful. The spectacle of a reporter whose confidentiality promise shields wrongdoing might just as easily deepen public disdain for the profession.

sional norms. Breaking a promise might simply make it difficult for the journalist to continue practicing a certain kind of journalism.

What if the source is breaking the law? Is the confidentiality promise still binding? There is a tradition of judicial reluctance, under certain circumstances, to enforce contracts that are contrary to law or public policy.³⁵ It might be argued that the alleged illegality of the Plame disclosure thus trumps any other question about its ethical status.³⁶ Under that logic Novak should not have made the agreement because he thereby colluded in—indeed, was the instrument of—an illegal act. While that might be valid as a matter of law, it is not helpful as a question of ethics which, in part, is in the business of sorting out what the law should be.³⁷ This reasoning also would have barred Neil Sheehan of the *New York Times* from helping Daniel Ellsberg release the in-house history of the Vietnam War known as the Pentagon Papers in 1971.³⁸ It would leave us unable to distinguish genuinely toxic disclosures from unauthorized releases of vital information that expose important governmental wrongdoing, and which violate only ill-founded secrecy laws intended to save officials from embarrassment. Plus, as a practical matter, basing moral judgments on apparent legalities would reduce ethics to speculating about how judges, juries, and appeals courts may eventually rule. In this case, as noted, outing Valerie Plame may not have broken any law, in that her exposure was not intended to subvert U.S. intelligence operations but to illuminate the reasons behind an act of non-classified, public agency decision-making.

CONFIDENTIALITY AS A TOOL OF PROMISE-BREAKING: The paradox of the journalist's confidentiality agreement is that it often represents not only a promise, but a critique of promise-keeping. That is because it is frequently a device to provide cover for informants so they can break prior agreements of their own with

35. "The power to contract is not unlimited. While as a general rule there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by public policy, and by the nature of things. Parties cannot make a binding contract in violation of law or of public policy." *Sternamen v. Metropolitan Life Ins. Co.*, 62 N.E. 763 (N.Y. 1902), *quoted in* 2 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 5.01 (3d ed. 2004).

36. *See, e.g.*, Moeller, *supra* note 2.

37. My colleague Louis Hodges, Knight Professor of Journalism Ethics Emeritus at Washington and Lee University, made this point in discussion during the 37th Institute on Ethics in Journalism on March 27, 2004.

38. For an account of Ellsberg's dealings with the *New York Times*, see DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* ch. 26 (2002).

impunity. Its claim to superior ethical standing rests on a presumption that all promises do not have equivalent moral weight.

Why do reporters promise confidentiality? Informants may sometimes insist on anonymity simply to avoid the awkwardness that may come with notoriety. They may have personal reasons to keep out of the news. They may not want to spend time fending off other reporters once they are named publicly. Perhaps they are settling scores and do not want their targets to know the origin of the attack. Sometimes they are sharing painful and intimate experiences—sickness, poverty, the death of loved ones—and would not do so if they were to be identified.

But often, especially when the stories involve insider news from powerful institutions, sources insist on confidentiality because they are betraying prior commitments by giving away information that they have agreed, sometimes explicitly, to keep private. The journalist's secrecy pledge is, in this respect, an offer to shelter the informant from the consequences of dishonoring agreements of his or her own. It is a promise meant to induce promise-breaking.

So, implicit in the confidentiality agreement is the insight that not all promises are equal. The conscience-stricken executive decides that his or her duties to the corporation, which certainly involve discretion and may also oblige silence, are less important than disclosing accounting chicanery or environmental felonies. The whistle-blower demands one promise from the reporter to enable him or her to break another to the corporation. The ethics of that exchange have much to do with the weight attached to such maxims as truth-telling and affirming community norms, as compared with employee loyalty and, yes, promise-keeping.

CONFIDENTIALITY PRIVILEGES SOURCE RELATIONS: Source confidentiality necessarily privileges the relationship of reporter to informant over the relationship of reporter to public. That is not only because reporter and source agree—conspire, really—to keep to themselves, for reasons internal to their transaction, information that would normally be made public. It is also because the journalist—instead of presenting supporting information to authenticate a report and maintaining the usual professional stance as skeptical interlocutor—lines up alongside the unnamed source in asserting the information's truthfulness, while denying the public any independent way to evaluate whether that truth claim is valid. The reporter invests reputation in the information; correcting it if it proves inaccurate becomes especially awkward, since that correction involves repudiating a source who has never been identified and may require the jour-

nalist to admit to having been taken.³⁹ That makes fixing mistakes harder, which impedes truth-telling.

Still, those risks may be worthwhile if the pledge creates a protected refuge for individuals who otherwise would not come forward with sensitive and publicly important information. The test, when confidentiality is analyzed by which relations it privileges, is whether the flow of significant news is facilitated. Is the journalist empowered or neutered? Is the main beneficiary the public—in which case the reporter is functioning as its good-faith proxy—or the shielded source? These are qualitative assessments, which require looking at the information sought, obtained, and withheld. As noted earlier, confidentiality means some information is kept back so that other information can be published. The rightness of the arrangement cannot be appraised without judging whether the bargain between concealment and publication has been struck so as to benefit public enlightenment—rather than, say, easing access to news outlets for powerful insiders who have intrigues to pursue, or burnishing the credential of a particular reporter as a trustworthy courtier in the demimonde of palace politics.

CONFIDENTIALITY AND TRUST: Finally, I suggested earlier that confidentiality can be examined in terms borrowed from Annette Baier's thoughtful analysis of trust relationships. The relationship between journalist and public seems to comport more satisfactorily with Baier's description of trust than with a more contractarian model. That is, the relationship is one of a generalized reliance that is not formal or explicit and is not specific as to what particular behavior it covers; nor is it between parties of roughly equivalent power. Here it is built on the public's expectation that journalists will use their best judgment to gather and present an honest rendering of information that they believe the public needs to have.

Baier suggests that the morality of a trust relationship can be assessed by applying what she terms the expressibility test: Would the relationship withstand having its foundations laid bare? The hard-charging executive who trusts her chief aide without reservation because she secretly believes the assistant is too unimaginative to pose a threat—that is not a morally robust trust relationship and would crumble if its premises were articulated.

39. See *The Times and Iraq*, N.Y. TIMES, May 26, 2004, at A10. The *New York Times'* recent mea culpa regarding its flawed prewar coverage of Iraq's weapons programs is an unusual and praiseworthy example of a news organization owning up to the difficulty of both reporting and evaluating the information offered by sources it agreed to keep secret.

Similarly, Baier's expressibility test is a promising way to examine a confidentiality agreement. A source who bases his reliance on the courage and honesty of a reporter enters into a morally different relationship than does one who relies on an avowedly partisan journalist's gullibility and blind loyalty. Suppose you, the reporter, are agreeing to withhold the name of the politician who is giving you a self-serving leak because you wish to endear yourself to the office-holder and get preferential access to information in the future. Is that something you would be comfortable disclosing to your readers, or would it undermine the trust they confer on you?

Naturally, applying this test raises problems. After the fact, either party to the agreement can buff his or her view of the relationship to make it morally pristine. Just as Kant could not prescribe precisely how the maxim underlying a given action might be framed as a universalized imperative,⁴⁰ so this formulation is slippery and subject to abuse. But expressibility offers a place to stand in examining the ethics of confidentiality arrangements, and post-facto explanations can be scrutinized for their plausibility and reasonableness.

IV. NOVAK-PLAME RECONSIDERED

The implication of the preceding is not that confidentiality promises should be broken readily, but that they are powerful and morally complex matters and should not be made lightly.⁴¹ I have not focused on whether Robert Novak ought to reveal who told him Valerie Plame was a spy. Still, in the absence of anything approaching an overriding public benefit to be served by disclosure, I think the answer is no. Clearly, the argument for breaking this promise fails the most dramatic tests of public benefit; it would not, for example, enable police to disarm a time-bomb, unmask a dangerous criminal in high places, or avert

40. IMMANUEL KANT, *Fundamental Principles of the Metaphysics of Morals*, in *BASIC WRITINGS OF KANT* 180–82 (Allen W. Wood ed., 2001). Cf. JOHN STUART MILL, *UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 4 (Gedaint Williams ed., 1993). Mill writes of Kant: "When he begins to deduce from this precept [the categorical imperative] any of the actual duties of morality, he fails, almost grotesquely, to show that there would be any contradiction, any logical (not to say physical) impossibility, in the adoption by all rational beings of the most outrageously immoral rules of conduct." *Id.*

41. *All Leaks Are Not Alike*, *supra* note 32, at B12. As the *Los Angeles Times* editorialized: "Journalists . . . could help by being less promiscuous with offers of anonymity in the first place. If it is information you believe should not be out there—because it endangers lives (of a covert agent's contacts, for instance) or because it is wrong or deeply misleading—why should you even consider going to jail to protect the source?" *Id.*

other serious harm. Nor would it undo damage already done to a covert operative. True, disclosure would short-circuit a costly federal investigation into the source of the leak and make it more likely that the people responsible for it were taken to task. But it is difficult to see those gains as substantially more than conveniences, insufficient to justify Novak's declaring his promise void, even if he were prepared for the professional harm that doing so might cause an inside-the-Beltway columnist who routinely traffics in whisperings.

But how ethical was the agreement in the first place? Let me stipulate that this is an accurate description of the essentials of the affair:

That certain high-level administration officials, embarrassed by Joseph Wilson's column repudiating the President's claims, sought to quell further dissent from the intelligence community, which was eager to distance itself from false claims about Iraqi weapons programs;

That they specifically wanted to punish Wilson both by characterizing him as a superannuated beneficiary of nepotism and by thwarting his wife's career as an intelligence operative;

That Novak understood these motives, and was glad to help discredit Wilson;

That his determination to protect his sources reflected, in part, a wish to cushion the administration from political repercussions for moving against a disaffected, but truthful, whistle-blower.

Hence, Novak, as his fiercest critics allege, entered into a confidentiality agreement with the specific intent of helping out his administration friends by attacking a critic they wanted attacked. Note that is an altogether different situation from one where his intent was to enlighten his readers about how a well-connected but unqualified bureaucrat, who was predisposed to harm the administration, got a key assignment due to improper influence.

The latter is not the story Novak wrote. He did not lay bare the supposedly corrupt mechanics of Wilson's selection, and, deplorably, he did not even mention the straight-up denial—which the CIA gave him before he wrote his first column—of the anonymous claim that Wilson's wife influenced the process. Had he fully reported that story and found out whether indeed the country's chief intelligence agency set out to discredit the President, he might have produced a valuable account of dissent, disenchantment, double-dealing, and perhaps nepotism. But he

did not. The fatal flaw in Novak's work is not that he was over-zealous, but that he was lazy. And the ready availability of confidential insider sources who stand ready to reward compliant members of the press with self-interested leaks helps to perpetuate just that style of journalistic indolence.

The Novak-Plame affair is remarkable for the way it telescopes so much that is ethically dubious about confidential source-driven journalism into a single case. Such journalism thrives on and in turn nourishes tight bonding between journalist and informant, rewards the reporter who writes principally for his or her sources, and converts the reporter from skeptic to partisan. It makes journalists guarantors of secrecy rather than independent tribunes of accountability, leaves accuracy suspect, and renders independent verification difficult. It frustrates efforts to illuminate the ways that information is released or held back as an instrumentality of power and how news is used to buttress or undermine factions within officialdom.

Novak struck a deal in which he promised to withhold the identity of government officials who were exposing a secret U.S. agent—who herself had done no wrong and was not really the subject of the column. In exchange, he received a modest, and perhaps inaccurate, scoop about what was at worst a not terribly important impropriety. The part of the story he withheld—his sources—might have been hugely revealing of the character and intensity of political brawling in Washington. In short, the story that was not told was substantially more significant than the story that was.

Moreover, Novak's agreement fares poorly when held to Baier's expressibility standard. The evidence of nepotism was slight, and making the case would require far stronger indications than he provided that Valerie Plame had the clout and standing to actually influence her husband's selection. Plus, the entire favoritism scenario, even if true, remains pointless, unless one accepts the notion that senior American intelligence officers essentially conspired to bury evidence of a grave strategic weapons threat by sending as their lead investigator on a critical mission a Foreign Service retainer who was ideologically predisposed to ignore the truth. Quite a story. But none of that was even hinted at in Novak's reporting, and it is indeed difficult to infer any valid reportorial motive from the sparse information he assembled. That evidentiary failing suggests that the column represented not independent journalism, but a partnership between political operatives who were eager to impugn a critic and a compliant journalist who was seeking to sustain a longstanding and beneficial alliance with sources. Expressed that way, the relation-

ships would be unlikely to inspire reader trust, and the confidentiality agreement's claim to being ethically aboveboard seems weak indeed.⁴²

It might be objected that all and all, Novak's reporting nevertheless correctly told the public that the Bush administration was trying to nail a critic. Even without naming his informants, Novak's column did make it plain for whom the leakers toiled. To the degree that his reporting then triggered a federal investigation, perhaps the cause of accountability was served and the public benefited. Maybe so. But I would insist that it is individuals, not institutions, that must be held accountable. Attributing the attack to "administration sources" does nothing to tell us what we most need to know: Who did this? How high in the government did the recklessness extend?⁴³ We must not lose sight of the fact that the attack directed at Wilson and Plame was unleashed from behind cover, and the cover was provided by an honorable journalistic principle whose fundamentals deserve serious re-examination.

42. I have taken liberties with Baier's own formulation of the expressibility test. She writes: "The moral test of such trust relationships which I have proposed is that they be able to survive awareness by each party to the relationship of *what* the other relies on in the first to ensure their continued trustworthiness or trustiness." BAIER, *supra* note 6, at 128. And later, "[T]rust is morally decent only if, in addition to whatever else is entrusted, knowledge of each party's reasons for confident reliance on the other to continue the relationship could in principle also be entrusted" *Id.* Hence, the test is proposed as a way for the parties to a trust relationship to assess its morality. I am suggesting an extension of that test. For the public's trust in the journalist to be, as Baier puts it, "morally decent," the undertakings that the reporter makes must be ethically sturdy enough to withstand disclosure to those who trust him or her. Suppose the reporter purloins documents, smuggles hidden cameras into a private home, combs through trash. A test of the acceptability of those techniques is the willingness of the journalist to reveal them. By the same token, if a confidential source relationship is based upon the informant's confidence in the reporter's gullibility and the reporter's eagerness to endear himself to high-level political hacks, the relationship would not survive having its bases revealed to the two participants. Nor, in the extension I am proposing, would it withstand disclosure to the public for which the entire arrangement is ostensibly undertaken.

43. In a letter to the *Wall Street Journal*, Christopher Wolf, attorney for Joseph Wilson and Valerie Plame, wrote: "A free press has a compelling interest in exposing the government's deployment of a newspaper columnist to attack administration critics." Christopher Wolf, *A Hollow Defense of Journalistic Integrity*, WALL ST. J., Mar. 11, 2004, at A17.

