

# The Elasticity of Contract

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## INTRODUCTION

It is not surprising that Carol Rose began this conference reflecting that she has spent her career looking at the importance of the language we use to explore property, since she is famous for explicating complexity through wonderfully simple, disarming language. Stuart Banner's observation that Professor Rose is one of the few people who speak two languages fluently and are taken as a native in both cultures nicely captures the way her work also bridges communitarianism and legal economic discourse.<sup>1</sup>

Appropriately, language used at this conference to describe Professor Rose and her work reflects this theoretical cosmopolitanism. Harold Koh described her as a "classic communitarian" and "priceless member of the community,"<sup>2</sup> while she herself noted her "peculiar relationship with law and economics," further explaining that "I'm kind of interested in the crass."<sup>3</sup> (If law and economics is not crass, I don't know what is.) Her ability to bridge legal economic and communitarian viewpoints is illustrated by the exchange between Rose and a commentator on her paper *Giving, Trading, Thieving and Trusting* in the *Florida Law Review*.<sup>4</sup> Rose efficiently countered the commentator's observation that Rose might have overlooked the fact that "market exchanges can be a pretty bad business":

All right, all right: no one but a fool would think that exchanges are all a matter of Pollyanna trading sweetly with Rebecca of

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1. Stuart Banner, *Commodification and the Media*, 18 YALE J.L. & HUMAN. 197 (2006); CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 5 (1994).

2. Harold Koh, Remarks at "The Properties of Carol Rose," Nov. 10, 2005.

3. Carol Rose, Remarks at "The Properties of Carol Rose," Nov. 10, 2005.

4. Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 304 (1992).

Sunnybrook Farm. But we are fooling ourselves too if we pretend that exchanges are all a matter of Simon Legree one-upping Scrooge McDuck.<sup>5</sup>

This refusal to either champion or condemn contract (or communitarianism) indicates that for her there are no simple answers, only an ongoing vacillation between simplicity and complexity, between crystals and mud.<sup>6</sup> In the same spirit, my response to Ian Ayres's contribution to this symposium looks to the pros and cons of expanding contract analysis to reporters' relations with sources. I use commodification theory to evaluate his proposal of contractually regulating news organizations' promises of confidentiality to sources, briefly touching on his companion proposal to contractualize media liability for misrepresentations. This exercise indicates that while recent commodification theory better addresses the issue than older texts, it does not offer definitive answers about whether contractualization is more friendly than hostile to the First Amendment interests that Ayres's proposal calls into play.

#### I. CONVENTIONAL APPROACHES TO COMMODIFICATION THEORY

Commodification theory explores normative issues that arise when we expand the scope of contract and property principles to new contexts such as parental rights, human organs, homemaking labor, cultural property, or ethnic identity.<sup>7</sup> Professor Rose recently pointed out that the term itself is a verbal giveaway, "like 'bourgeois,' or 'deconstruct,' or 'utility function,'" revealing a set of analytic commitments. Skeptics, rather than economists themselves, tend to use the term *commodification*, giving it an epithet-like quality that she invokes by calling it "the c-word."<sup>8</sup> But the latest generation of commodification theorists includes both free marketeers and others who worry about universal commodification, making commodification theory a versatile tool to evaluate Ian Ayres's proposal. Following his lead, I will focus on contractualism, although, as he suggests, one could as easily frame the issue in property terms.

Beginning in Chicago, as all discussions of law and economics must (a

5. Carol M. Rose, *Giving Some Back: A Reprise*, 44 FLA. L. REV. 365, 378 (1992).

6. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

7. The leading text on commodification is MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996), which engages canonical legal economic work such as GARY BECKER, *A TREATISE ON THE FAMILY* (1991); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1989) [hereinafter POSNER, *ECONOMIC ANALYSIS OF LAW*]; and RICHARD A. POSNER, *SEX AND REASON* (1992) [hereinafter POSNER, *SEX AND REASON*].

8. Carol M. Rose, *Afterword: Whither Commodification?*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 402, 402 (Martha M. Ertman & Joan C. Williams eds., 2005).

very good place to start, since Professors Ayres, Rose, and I all spent formative years in the Windy City), Chicago-style law and economics provides a baseline.<sup>9</sup> This school of thought would warmly receive Ayres's proposal; if babies are for sale, it is hard to see why sources' confidentiality or newspaper accuracy should be kept outside of the market.<sup>10</sup> Indeed, accepting legal economic assumptions that things should be marketized unless there is some efficient reason to keep them out of the market, such as moralism or paternalism,<sup>11</sup> contractualizing source-reporter relationships makes sense.<sup>12</sup>

But not everyone lives in Chicago, and grand thoughts occasionally emerge from the coasts, a fact vividly demonstrated by Peggy Radin's enormously influential resistance to legal economic hegemony in her 1996 book *Contested Commodities*.<sup>13</sup> Radin articulates reasons, beyond moralism and paternalism, for restraining marketization of some things, like babies, love, sex, and body parts.

Under Radin's domino theory, commodification can be contagious and omnipotent, so that the same thing cannot exist in both commodified and non-commodified forms. The commodified version will not only destroy the non-commodified version, but also deprive us of the ability to see anything wrong with everything being for sale.<sup>14</sup> Applying this domino theory to Ayres's proposal, one can view information that sources provide to the media on both marketized and nonmarketized terms. Michael Jackson might get paid to be interviewed on television, while Scooter Libby might reveal the identity of a CIA operative to Judith Miller for free.<sup>15</sup> Clearly these two types of information can and do co-exist. But one

9. Another reason to start in Chicago is that Ian Ayres's work has been central to forming the second generation of law and economics scholarship, sometimes called the New Chicago School. See Lawrence Lessig, *The New Chicago School*, 27 J. LEG. STUD. 661, 674 (1998). For an example of this work, which often looks to how the law might use markets and market rhetoric towards its own ends, see IAN AYRES, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001); and IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992). His approach in the present article, *First Amendment Bargains*, is consistent with what he calls "wimpy imperialist" claims for the expansion of contractualism beyond conventional contexts. Ian Ayres, *Empire or Residue: Competing Visions of the Contractual Canon*, in LEGAL CANONS 47, 49 (J.M. Balkin & Sanford Levinson eds., 2000).

10. Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, in RETHINKING COMMODIFICATION, *supra* note 8, at 46. Richard Posner has since clarified that this proposal concerned the transfer of parental rights and obligations, rather than babies themselves. POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 7, at 167-70.

11. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-14 (1972).

12. For a proposal to include noneconomic considerations such as citizenship and distributive justice in addition to moralism and paternalism when determining inalienability, see Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

13. RADIN, *supra* note 7.

14. *Id.* at 13-14.

15. The terms of these exchanges vary. CBS, for example, refused to broadcast Michael Jackson's entertainment special unless he agreed to be interviewed on 60 Minutes, while Fox Broadcasting Network paid "several million dollars" for Jackson interviews. Elizabeth Jensen &

is serious news, while the other is entertainment, so they are not the same. Or are they? The impeachment proceedings of President Clinton, which arose out of a nonmarital tryst with Monica Lewinsky, suggest otherwise. Still, celebrity interviews play a different role in democracy than White House coverage. If thorough and objective newsgathering is crucial to the smooth operation of democracy, a principle at the heart of First Amendment jurisprudence,<sup>16</sup> then contractualization of reporter relations with sources may threaten key democratic principles. But Ayres's proposal is not necessarily contractualizing *news*, focusing instead on contractualizing confidentiality.

Might confidentiality itself be subject to the domino effect, so that marketizing confidentiality will destroy non-market confidentiality? Confidentiality seems to be beyond the market, since it often occurs in personal relationships such as friendship or romance that are governed more by social norms than by law.<sup>17</sup> But marketized confidences exist alongside these non-market confidential relationships, apparently without threatening the other's existence. Like friendship confidences, confidentiality between clergy and congregants is not for sale.<sup>18</sup> Clergy do get paid, but congregants do not pay directly for the confidences.<sup>19</sup> Other confidential relationships are more fully marketized, such as those between attorneys and clients or doctors and patients. Yet while most people pay their attorneys and doctors for services (and likely for confidentiality as part of the package), the confidentiality applies with equal force when they get those services for free.<sup>20</sup>

So far things look good for contractualizing reporter/source relationships. But Michael Sandel's 1998 Tanner lecture at Oxford, *What Money Can't Buy: The Moral Limits of Markets*, a leading defense of communitarianism, suggests possible problems with it. I will focus on Sandel's corruption-based opposition to commodification.<sup>21</sup> Sandel's

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Chuck Philips, *CBS Denies It Paid Singer for Interview*, L.A. TIMES, Jan. 1, 2004, at 1. For a summary of the Judith Miller/Scooter Libby arrangement that Ayres uses to justify his proposal, see Michael Duffy, *Let's Make a Deal*, TIME, Oct. 10, 2005, at 24.

16. N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

17. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996).

18. Clergy confidences are further removed from public consumption through legal doctrines preventing clergy from divulging congregants' secrets. WEINSTEIN'S FEDERAL EVIDENCE 506-1 (Joseph M. McLaughlin et al. eds., 2005).

19. Tithing, however, may be an indirect payment for clergy confidentiality, assuming that tithing establishes and maintains religious standing that facilitates the sharing of confidences.

20. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2004).

21. Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, in RETHINKING COMMERCIALIZATION, *supra* note 8, at 122. Sandel's coercion-based critique of commodification seems inapplicable because it focuses on the invalidity of consent given in a desperate exchange, and neither reporters nor sources seem desperate. While an informant might be trying to save his job, that effort

corruption analysis sheds light on the advisability of contractualizing reporters' promises of confidentiality to their sources. According to Sandel, "[C]ertain moral and civil goods are diminished or corrupted if bought and sold for money. . . . If the sale of human body parts is intrinsically degrading, a violation of the sanctity of the human body, then kidney sales would be wrong for rich and poor alike."<sup>22</sup>

This observation goes right to the heart of Ayres's proposal, in particular to the First Amendment considerations. News media are essential to the public participation in government that makes democracy possible, so source confidentiality seems like the kind of thing that Sandel would say is corruptible through commodification.<sup>23</sup> Jim Salzman's paper in this symposium similarly addresses the question of whether water is sufficiently crucial for sustaining life that it should not be marketized.<sup>24</sup> In making this point, Sandel voices a longstanding communitarian view that society is better off if some things are understood as gifts, rather than exchanges, a view epitomized by Richard Titmuss's canonical work critiquing the sale of human blood.<sup>25</sup> But if a free press is so important, we should not have to pay for our newspapers. As Ayres argues, this point, taken to its logical conclusion, suggests that the *New York Times* should not be liable if its delivery truck hits a pedestrian.<sup>26</sup> Moreover, money may purify on occasion, rather than corrupt. Newsgathering might be protected more by contractualization than by the current regime of informal agreements, if contractualization encourages more reporters to keep their confidentiality agreements.<sup>27</sup> Assuming more news is reported with promises of confidentiality, and that news organizations are liable for inaccuracies, contractualizing both confidentiality and accurate reporting seems to support rather than detract from the integrity of the press, and thus the smooth functioning of democracy.

## II. WHAT WOULD CAROL DO?

If traditional commodification theory does not yield definitive answers, perhaps Rose's unique blend of communitarianism and legal economics

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hardly seems equivalent to selling a kidney or cornea to feed one's family.

22. *Id.* at 122-23.

23. Sandel similarly argues that military service should not be commodified because doing so compromises norms of civic republicanism. *Id.* at 124-26.

24. James Salzman, *Thirst: A Short History of Drinking Water*, 18 YALE J.L. & HUMAN. 94, 94-6 (2006). On the relatively low price most people pay for water, see Robert Glennon, *Water Scarcity, Marketing, and Privatization*, 83 TEX. L. REV. 1873 (2005).

25. RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1996).

26. Ian Ayres, *First Amendment Bargains*, 18 YALE J.L. & HUMAN. 178, 193 (2006).

27. This analysis would apply with equal force to Ayres's proposal regarding media liability for inaccuracies.

can resolve this type of quandary. Indeed, her signature blend of game theory and communitarianism (with a pinch of feminism) in *Women and Property* explains a good deal of gender inequity due to the zero sum game contained in the positive sum game of exchange.<sup>28</sup> Given that Ayres focuses on a woman reporter (with a side reference to Harriet Miers, briefly nominated to the Supreme Court before withdrawing from consideration), it is tempting to analyze this question on gender grounds.<sup>29</sup> Another fruitful line of inquiry would be to mine her work identifying the blurry line between gift, exchange, and theft, suggesting that whether we view confidentiality as a gift or an exchange, it is bound to be a bit of both.<sup>30</sup> But she's not dead; she's just moving west. So it makes more sense to focus on her most recent work than to dig through the archives.

### III. NEW VOICES IN COMMODIFICATION THEORY

New commodification theory offers insights that supplement traditional commodification theory. Coincidentally, I have co-edited a volume retheorizing commodification, and Professor Rose did us the great honor of synthesizing the recent work retheorizing commodification, offering a gem that sheds light on the advisability of contractualizing reporter/source relationships.

Traditional commodification theory travels on fixed rails, vacillating between the antimonious goods of freedom (of contract) championed by legal economists and equally important values of equality, dignity, and solidarity asserted by commodification skeptics.<sup>31</sup> More recent thinking on

28. Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992). Her argument suggests that if women have a greater taste for cooperating (or are perceived as having this taste) women give up more in exchanges, and consequently women lose ground, owning less property than men on average. This tendency toward cooperation, Rose argues, in turn creates "hostages," whose interests women protect by getting less themselves in particular bargaining. Under this reasoning, it might be that Judith Miller either had a greater taste for cooperation or was perceived to have that taste, and thus might get less out of contractualization than her source.

29. But Judith Miller is reputedly no shrinking violet, and it hardly seems that she has an above-average taste for cooperation, real or perceived. Maureen Dowd, *Judith Miller Has Harmed the New York Times and Its Trust with Readers*, PITTSBURGH POST-GAZETTE, Oct. 24, 2005, at B7 (describing Miller's "traits that drive many reporters at the New York Times crazy—her tropism toward powerful men, her frantic intensity and her peculiar mixture of hard work and hauteur"). Miller herself described her relationship with the *New York Times* in gendered terms upon her departure from the *Times*, describing herself as free from "the convent of The New York Times, a convent with its own theology and its own catechism." Katharine Q. Seelye, *Times Reporter Agrees To Leave the Paper*, N.Y. TIMES, Nov. 10, 2005, at A21.

30. Rose, *supra* note 4, at 304. As Rose explains, legal doctrine tends to be suspicious of gifts (e.g., wills) and tests their validity through doctrines that enforce good gifts that look like exchanges (e.g., a devoted niece caring for an ailing aunt), and refuses to enforce bad "gifts" that look like larceny, as when "some smoothtalking or handsome or beautiful young thing pays extraordinary attention to the befuddled old testator, and just coincidentally talks the testator into changing the will." *Id.*

31. Martha M. Ertman & Joan C. Williams, *Freedom, Equality, and the Many Futures of Commodification*, in RETHINKING COMMODIFICATION, *supra* note 8, at 2.

commodification, in contrast, rejects the on/off quality of traditional commodification discussions, asking instead questions about who controls and gains from commodification.<sup>32</sup> As Joan Williams and Viviana Zelizer put it, “Indian arts and crafts are going to be sold, native plants made into medicines, and blue corn sold. In each context, the key issue is not whether or not to marketize, but who controls the process and proceeds of marketization.”<sup>33</sup> Much of the latest work on the appropriate scope of contract (and thus property, since something must be property before it can be conveyed through contract) abandons the old question of whether the market should be expanded, preferring to focus on ways that have-nots might enjoy the bounty of that expansion.<sup>34</sup> As Rose describes this work, “Three cheers for commodification? No, but perhaps one or two.”<sup>35</sup>

One of the important contributions Carol Rose made to the new commodification scholarship was identifying how the new theory reshapes economic theory of the second best. Under traditional second best analysis, the first best option is a free market, and second best, given constraints of *X* regulation, is *Y* regulation.<sup>36</sup> Thus, for many legal economists, the first best treatment of prostitution might be deregulation, a free market (without, however, worker protections such as those provided by OSHA and Title VII).<sup>37</sup> Second best, given the transmission of venereal disease in prostitution, might be a licensing scheme under which prostitutes undergo periodic testing and treatment for disease.<sup>38</sup>

The new wave of commodification theorists, Rose points out, flips second best analysis. They designate first best as *no market*, so that in the prostitution context first best would be sexual relations conducted for “love, which of course cannot be bought but is instead freely and passionately *given*.”<sup>39</sup> Rose then points out that if love freely shared between equals is not a possibility, second best is “getting paid.”<sup>40</sup> As Martha Nussbaum observes in her orderly argument that prostitution is not

32. Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not To Commodify: That Is Not the Question*, in RETHINKING COMMODIFICATION, *supra* note 8, at 362, 373.

33. *Id.* at 373.

34. Examples of this new approach include Martha M. Ertman, *What's Wrong with a Parenthood Market?*, in RETHINKING COMMODIFICATION, *supra* note 8, at 303; Linda R. Hirshman & Jane E. Larson, *Hard Bargains*, in RETHINKING COMMODIFICATION, *supra* note 8, at 345; Katharine Silbaugh, *Commodification and Women's Household Labor*, in RETHINKING COMMODIFICATION, *supra* note 8, at 297; Madhavi Sunder, *Property in Personhood*, in RETHINKING COMMODIFICATION, *supra* note 8, at 164; and Nancy Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

35. Rose, *supra* note 8, at 402, 403.

36. THE HARPER COLLINS DICTIONARY OF ECONOMICS 479 (C. Pass et al. eds., 1991); Rose, *supra* note 8, at 405.

37. See POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 7, at 174, 735.

38. POSNER, SEX AND REASON, *supra* note 7, at 209. Posner notes that such licensing schemes in Europe have not worked well because the intrusive examinations and labeling involved pushed most prostitutes back into the black market.

39. Rose, *supra* note 8, at 406.

40. *Id.*

morally suspect because we all use our bodies for money one way or another:

[T]here is nothing wrong per se with taking money for the use of one's body. That's the way most of us live, and formal recognition of that fact through contract is usually a good thing for people, protecting their security and employment conditions. What seems wrong is that relatively few people in the world have the option to . . . hav[e] some choices about the work to be performed, some reasonable measure of control over its conditions and outcome, and also the chance to use thought and skill rather than just to function as a cog in a machine.<sup>41</sup>

Under this analysis, in our system of imperfect justice, where some sex is for pay and some for love, payment for sex should go to the person who performs services, and who gives up some of her personhood in the process, thus to the prostitute herself rather than her pimp and corrupt police officers who must be paid off in a prohibition regime that purports to enforce the first best option of all sex being in the context of love.

How does this reworked second best analysis apply to Ayres's proposed contractualization of relationships between reporters and sources? In the new commodification theory's twist of second best analysis, first best would be reporters and sources exchanging confidentiality and information as gifts, a pure gift being understood as "unforced, one-sided transfer, motivated by generosity and a spirit of selfless love without thought of reciprocity."<sup>42</sup> The love could be a many-splendored thing: the informant's love for his boss or administration policy, the reporter's love of the First Amendment, the reporter's love of the source,<sup>43</sup> and either one's love of democracy or the American people. In this scheme, reporters would freely give confidentiality out of love and without a thought of reciprocity, and sources would give information out of love without a thought of their own interests.

But on occasion first best is not possible. Second best, in these circumstances, would be getting paid. Under this regime, reporters would be legally bound to confidentiality promises, and would be liable for money damages upon breach. Similarly, media would be legally bound to promises of accurate reporting and liable for money damages for breach.

But this conclusion may be premature. What about the real parties in interest, namely the American Congress, who authorized the war in Iraq

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41. MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 298 (1999).

42. Rose, *supra* note 4, at 302.

43. Judith Miller's boss, executive editor of the *New York Times* Bill Keller, suggested that Miller had an "entanglement" with Libby, a term that calls to mind emotional binds. Ayres, *supra* note 26, at 182; Katharine Q. Seelye, *Times Editor Expresses Regret over Handling of Leak Case*, N.Y. TIMES, Oct. 22, 2005, at A13.

based in part on Miller and other reporters' stories?<sup>44</sup> What about the Iraqi people? The thousands of people who have died thus far in the conflict? Americans who were affected by the information (and lack thereof) in media coverage leading up to the war? Valerie Plame and other CIA operatives whose lives may have been endangered by publicly identifying her?

If the new commodification theory suggests that every market has winners and losers, that markets are inevitable, and that the goal should be to better help the traditional losers in the market, then it is hard to say how paying Scooter Libby money for a breach of confidentiality, or putting Judith Miller in jail for refusing to honor his waiver of confidentiality, helps the underdog, especially if the real loser in the Libby/Miller escapade is the American people. It may ease newsgathering and facilitate the free exchange of information, but it also might work in the opposite direction. If small papers cannot afford to pay the market rate for confidentiality, they will not get scoops—or will get fewer of them—and perhaps scoops will not get printed at all if big corporate advertisers squelch stories at national news organizations. If mostly big news organizations can get stories, that seems bad for the First Amendment and democracy itself. The key commodification question thus seems to go beyond the interests of the parties to the contract, coming down instead to whether the third party beneficiaries of any contract between Judith Miller and Scooter Libby can get paid, or at least recover restitution damages to disgorge bad actors of ill-gotten gains. Important third party beneficiaries in the case at hand are the American people (and indeed others around the world, in particular Iraqis). Perhaps stretching the elasticity of contract to a breaking point, one even might say that ideals, such as democracy and freedom of the press, might constitute beneficiaries to a contract. While it is hard to see how such diverse interests might recover contract damages, it may be possible that the marketplace of ideas can render payback where it is due—voting politicians out of office for example if they leak information or mislead the press to pursue an unjustified war.

#### CONCLUSION

Contract may be sufficiently elastic to hold reporters liable for breach of promises to keep source confidentiality and to hold media liable for breach of promises to accurately report information. Traditional approaches to commodification yield inconclusive answers to whether this expansion of contract is advisable, and newer theorizing suggests looking at who benefits and loses from contract expansion, rather than whether or not to

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44. James Rainey, *Reporter's Strength May Also Be Her Weakness*, L.A. TIMES, Oct. 23, 2005, at A22.

commodify. Under this reasoning, the slim chance that reporters and sources exchange information for confidentiality in open-hearted gift exchanges means that they may as well be protected through contract. But if the American public and democracy itself are the real parties in interest in these contracts, as First Amendment jurisprudence suggests,<sup>45</sup> perhaps those contracts might do more harm than good. On the other hand, courts represent the interests of the American people and democracy (at least in theory), and their use of contempt powers to incarcerate or fine reporters or media who violate these contracts, as Ayres suggests, seems entirely appropriate. If there is no crystal-clear answer, then at least we take comfort that this is not the only muddy corner of legal theory and doctrine.

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45. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

