

Commodification and the Media

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I met Carol many years before Carol met me. In the fall of 1986 when I was starting my second year of law school I signed up to work on the law review, and my very first assignment was to check the accuracy of the footnotes in a manuscript called *Crystals and Mud in Property Law*.¹ I wish I could say that *Crystals and Mud* changed my life, but that would be putting it too strongly. It did nudge my life in a new direction a little bit, though. I didn't know anything about what law professors wrote. I had been through a year of law school, and I had read lots of those edited opinions in casebooks, so I guess I must have expected scholarship to be the same—kind of boring, in that pugnacious harrumphing lawyerly style. Of course *Crystals and Mud* turned out to be exactly the opposite. It was fascinating stuff, but for me the main thing wasn't the substance but the style. It was written in the voice of a person you'd actually want to meet, someone who wasn't trying to win an argument at all costs, but rather a person who was clearly amused by the people and the events she was describing but who at the same time retained enough empathy for them and their predicament to want to understand why they did what they did. I wanted to write like this mysterious Carol Rose. And that's what I've been trying to do ever since.

I'm going to limit my comments to the most Carolesque part of Ian's paper, the positive claim underlying the normative arguments.² Ian suggests that the people who work within news organizations disapprove of the commodification of ideas, and that this disapproval helps explain several features of their behavior, including their failure to pay for the information they report, their failure to abide by confidentiality agreements, and their failure to compensate people injured by their mistakes. But these are all behaviors that advance the interests of journalists at the expense of other people, so they are equally consistent with simple self-interest. Where the commodification of ideas is helpful to

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

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

journalists, they are usually eager commodifiers. Journalists don't object to being paid for their work; newspapers and magazines don't mind charging their readers; television stations don't turn away advertisers; and so on. One very rarely hears calls from within the media industry for the abolition of copyright. If I were asked to explain the origin of the sorts of conduct Ian finds so unappealing, I wouldn't trace it to anything as lofty as a preference for gift exchange over market exchange, or a theory of when the commodification of ideas is appropriate and when it is not. If journalists tend to be self-interested utility maximizers no less than the rest of us, you'd expect them to behave just as they do.

Of course, self-interest doesn't seem like a very good explanation for Judith Miller's decision to spend three months in prison rather than reveal the name of her confidential source. But a distaste for commodification doesn't seem like a good explanation either. I gather Miller was perfectly willing to treat her initial promise of confidentiality as part of a binding contract. Extremely binding, evidently, because she apparently refused to accept a written waiver of confidentiality from her source. I don't understand why she would only accept an oral waiver. If anything, I would have thought it would be the reverse—that someone in her position would prefer a written waiver, in case any disputes arose later on. Maybe she just got tired of living in prison and the call from Lewis Libby provided a face-saving occasion for changing her mind. In any event, whatever Miller's motivation was, it's hard to see how a view about commodification played much of a role.

Nor does an opinion about markets and commodification seem to play much of a role in the other areas of media practice Ian discusses. Media organizations don't usually pay for the information they report, but that's because the world is full of people who are happy to give it to them for free. I agree with Ian that we could call the relationship between journalists and sources a kind of gift exchange, in which sources give information to journalists in exchange for a set of benefits that journalists give to sources. But calling it gift exchange doesn't mean that such trades are insulated from market pressures or that they imply a non-commodificationist view of the information that is being traded. The market pressures are transparent. The more a source values the benefits a journalist can provide, the more willing the source will be to provide the information, and the greater the time and inconvenience the source will be willing to bear. Journalists must know that, and I would think that people who are regular sources must know that too. And if they know that, then they're self-consciously commodifying the information that they're providing and receiving.

Nor does a distaste for markets or for commodification seem to explain the failure of news organizations to compensate the people injured by their stories. If Congress were to pass a statute making airlines immune from

tort suits, airlines wouldn't compensate their victims either, but we wouldn't impute to pilots a distaste for markets. News organizations don't compensate their victims because the Supreme Court immunized them from suit in all but the most extreme cases. We can argue about whether that's a good idea, but from the perspective of a journalist it's a constituent part of the landscape. Nor is it surprising that news sources don't insist that news outlets compensate third parties for mistakes. If the benefits journalists provide to sources were suddenly to decrease, presumably the sources would begin demanding compensation for themselves before demanding compensation for others.

So I'm skeptical of the claim that these media practices can be explained with reference to the views of markets or of commodification possessed by the people who work in media organizations. It looks like plain self-interest to me.

All that said, I agree completely that most journalists would recoil in horror if money were introduced into some of these transactions, even in situations where the money would be flowing toward the journalist. If a source were to offer to pay money for a promise of confidentiality, for example, or—the opposite and probably more likely scenario—if a source were to offer to pay money to have his name mentioned in an article, I doubt most journalists would accept the offer, and if they did they might feel some shame about it. But I don't think that feeling of shame would proceed from a view that the production of news is a non-market endeavor or that information is something that should not be commodified. It would, I think, be an instance of a different and narrower phenomenon, a view as to the appropriate uses of money. Life is full of relationships that are commodified but not monetized—that is, relationships that involve exchange, with all the associated issues of bargaining power, trading strategy, the taking on of reciprocal obligations, and so on, but that don't involve the transfer of money. We all know that monetary wealth is just one of several things we're maximizing, and that as a result money is just one medium of exchange among several, part of a class of currencies that also includes power, knowledge, esteem, fame, and so on.³ Journalists and sources have a lot to offer each other beyond money.

Our attitudes about the appropriate uses of money are complicated and contested.⁴ When I was a child I was taught that one should never give money as a birthday present, because it shows that you didn't want to take the time to think of what the recipient would like to receive as a gift. My wife was taught precisely the opposite, that giving money is the most considerate present of all, because it signals your willingness to let the

3. GEOFFREY BRENNAN & PHILIP PETTIT, *THE ECONOMY OF ESTEEM: AN ESSAY ON CIVIL AND POLITICAL SOCIETY* (2004).

4. VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* (1994).

recipient decide for herself what she would like. In some parts of the media world, the transfer of money in exchange for information is frowned upon; in others, it's the standard practice. The reluctance of mainstream journalists to allocate space in a newspaper by willingness to pay may have a simple explanation based on self-interest: the value of a newspaper's reputation for choosing its stories based on some criterion of newsworthiness, rather than on the willingness of sources to pay, may exceed whatever income could be gained from the sources. My point is only that if we're trying to understand why, in a given situation, journalists would be reluctant to accept money, the answer is more likely to be found in a norm about the narrow concept of monetization than in a norm about the broader concepts of commodification and market exchange. This may be no more than a terminological dispute between Ian and me, if what he means by commodification is the same thing that I mean by monetization. Even so, I think it's useful to separate the two, because the use of money is just one component of commodification or market-based thinking.⁵

And again, the particular practices Ian criticizes don't seem to be the ones most likely to be attributable to norms concerning money. He's wondering why journalists don't pay for information, rather than wondering why journalists don't accept cash in exchange for publicity. Even in a world where journalists felt no qualms about accepting money, they'd still presumably be happy not to shell out money where they didn't have to.

If we step back a bit, the disagreement between Ian and me is a familiar kind of disagreement, because Ian and I are playing stock roles in a stock debate. We're both observing certain forms of behavior out there in the world—that journalists don't pay for information or compensate the victims of their mistakes, and that some journalists (although evidently not Judith Miller) don't adhere to confidentiality agreements. Ian attributes that behavior to a distrust of market pressures; I attribute it to a reluctance to part with money. Ian is explaining people's actions with reference to their ideas; I'm explaining people's actions with reference to their interests. Ian sounds like a cultural historian; I sound like an economist. Or to characterize what we're saying at a much higher level of generality, a level that obviously simplifies things quite a bit, Ian is adopting a mode of explanation characteristic of the humanities, while I'm adopting a mode of explanation characteristic of the social sciences.

In this debate we're replicating the familiar divide in legal scholarship more generally, between humanities-based and social science-based approaches to law. When legal scholarship took the interdisciplinary turn, it incorporated a miniature version of C.P. Snow's two-culture problem,

5. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 118-20 (1996).

with, on one side, social scientists suspicious of the lack of rigor in the humanities, and, on the other, humanists suspecting that the apparatus of the social sciences isn't really as scientific as it's cracked up to be.⁶

One of the reasons I like Carol's work so much is that she is one of a very small number of people who transcends that divide. I think of her as our own version of Stephen Jay Gould or Richard Dawkins, not in the sense of being a popularizer, but rather in the sense of being one of the rare people who can speak both languages fluently and who is treated like an insider in both cultures. If you flip through the index to *Property and Persuasion* you'll find Ronald Coase and James Cook, Frank Easterbrook and the East India Company, Posner and Pocock, Harold Demsetz and Hayden White.⁷ Or to put it in terms I learned twenty years ago, some of us do crystals and some of us do mud, but Carol does crystals *and* mud. There are very few people like that.

So I hope Carol never really retires. A bunch of the people at this conference had Carol as a teacher when they were in school. I didn't. But someone asked me if I had been a student of Carol's, and I had to answer: Yes, I have been, and I still am.

6. C.P. SNOW, *THE TWO CULTURES AND THE SCIENTIFIC REVOLUTION* (1959).

7. CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* (1994).