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“Catch and Kill”: Does the First Amendment Protect Buying Speech to Bury It?

BY LEN NIEHOFF

The news media usually chase stories in order to publish them—but sometimes not so much. In some instances, media entities vigorously pursue a story—and purchase the source’s right to tell it—for the specific purpose of ensuring that it does not see the light of day. This practice, commonly called “catch and kill,” has recently come under close scrutiny and raises a host of questions.

These include pragmatic questions: Does the practice work? Can the media entity (or a third-party beneficiary) really enforce the underlying contract? Doesn’t the source’s willingness to abide by the contract come down to a simple economic calculation: He or she will honor the agreement until it becomes more profitable to breach it? If the source chooses to breach the contract, does the public disclosure of the effort to suppress the story do more harm than the story itself would have done? Oh, and there’s this question: Can someone go to prison for engaging in catch and kill if a specific use of it runs afoul of campaign finance regulations or other laws? That seems like something worth considering.

Other questions go to normative issues: Is catch and kill journalistically ethical? Indeed, does it have anything to do with “journalism” at all? If we think it ethically problematic, then why? Is it because the media entity pays for the story? Is it because the entity does so with no intent to publish the information? Or is it because the practice can too easily lead to extortionate and other malignant behaviors?¹ All of the above? Do

valid ethical arguments in support of the practice exist? Or do they all come down to this: “Ethics problem? No ethics, no problem.”²

Still other questions associated with the practice—the ones explored in this article—go to the very foundations of constitutional doctrine: Does the First Amendment protect catch and kill? If so, then how is that consistent with the informative, instructive, and educative values that we think free speech serves and that our First Amendment doctrine seeks to advance? If not, then how do we distinguish this practice from other, more commonplace editorial decisions to withhold publication—which the First Amendment plainly *does* protect? Is catch and kill speech at all—or is it conduct in the form of thinly veiled influence peddling? Is it a muscular exercise of First Amendment rights—or a callous defiance of everything for which the First Amendment stands? We have a lot to ponder here.

Catch and Kill Goes to Hollywood. Oh, and Washington. A Brief History.

Two phenomena have recently put a spotlight on “catch and kill”: the #MeToo movement and the election of Donald Trump. The practice certainly preceded both of these: For example, in 2005 it was reported that American Media, Inc. (AMI), which publishes *The National Enquirer*, had approached two women—who had information concerning the extramarital affairs of gubernatorial candidate Arnold Schwarzenegger—about entering into paid confidentiality agreements.³ Another decade passed before catch and kill took center stage in popular discourse, but then it did so spectacularly.

For many years, film mogul Harvey Weinstein had sexually harassed and assaulted women in the

entertainment industry but had managed to keep word of it from leaking into the public sphere.⁴ In 2015, however, his “secrets began seeping out” after New York City police questioned him over allegations that he had groped Italian model Ambra Battilana.⁵ Earlier that year, Weinstein had entered into a business deal with AMI, which “scrambled to buy her story”—unsuccessfully because her “price was too high.”⁶

Then, later in 2015 and in 2016, as the #MeToo movement took on increasing momentum,⁷ Ashley Judd and Rose McGowan came forward with allegations that an unnamed top studio executive had sexually harassed and assaulted them.⁸ Matters further escalated when, in October 2017, the *New York Times* published a story in which Ms. Judd identified Harvey Weinstein as the executive and described his conduct in detail.⁹ Allegations against dozens of celebrities, political figures, and other high-profile individuals followed: Olympic gymnastics team doctor Larry Nassar, actor Kevin Spacey, comedian Louis C.K., *Today* show host Matt Lauer, Senator Al Franken, chef and restaurateur Mario Batali, Metropolitan opera conductor James Levine, musician R. Kelly, CBS CEO Les Moonves, Fox chief Roger Ailes, Fox pundit Bill O’Reilly, and so on and so on.¹⁰

The most notable name to emerge in the rogue’s gallery of those accused of sexual harassment and assault, however, belonged to one Donald Trump—at the time, candidate for the office of president of the United States. In October 2016, the *Washington Post* obtained a video recording of Trump bragging in vulgar terms about kissing and groping women and observing that “when you’re a star they let you do it.”¹¹ The release of the tape prompted numerous women

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(one article puts the number at 19) to come forward with accusations that Trump had harassed, groped, and/or assaulted them—all allegations that Trump or his spokespersons denied.¹²

With news of these accusations of sexual misconduct came correspondingly alarming reports about efforts to hush them up.¹³ In October 2017, the *New Yorker* published an expansive and groundbreaking piece by Ronan Farrow that detailed Weinstein's decades of abuse and his use of threats, settlements, and non-disclosure agreements to keep his harassments and assaults quiet.¹⁴ Two months later, a long report followed in the *New York Times* that exposed the use of catch-and-kill strategies by Weinstein supporters (including AMI) to silence his accusers.¹⁵

Efforts by Trump allies (again, including AMI) to take stories about him out of circulation through the use of catch-and-kill strategies also came to light, with lots of journalistic and legal fanfare. Reports identified at least three instances of the practice being used on Trump's behalf: Late in 2015, AMI paid former Trump Tower doorman Dino Sajudin \$30,000 for exclusive rights to information he had been told about Trump fathering a child with a former employee; in August 2016, AMI paid Karen McDougal, a former Playboy model, \$150,000 for rights to her story about her affair with Trump; and in October 2016, Trump's personal attorney and "fixer" Michael Cohen paid Stephanie Clifford, an adult film actress who performs under the name Stormy Daniels, \$130,000 to keep secret the story of her sexual liaisons with the candidate.¹⁶ (It was subsequently learned that AMI was involved in the payments to Clifford as well.)¹⁷ After the payments were publicly revealed, AMI took the position that it found neither Sajudin's nor McDougal's story credible and so did not publish them.¹⁸

The Clifford and McDougal payments resulted in litigation. The former remains pending. The latter was resolved by the parties agreeing that McDougal could publicly tell her story.¹⁹

The payments to suppress stories about Trump raised distinct legal issues because of his candidacy for

president. Specifically, such payments could qualify under the law as campaign contributions that have to be reported. Indeed, in August 2018, Michael Cohen pleaded guilty to campaign finance law violations related to his role in brokering the deal with McDougal; and David Pecker—the CEO of AMI and publisher of the *National Enquirer*—entered into an immunity agreement with prosecutors looking into the payments.²⁰

One set of questions received relatively little attention amid this flurry of legal activity: Does catch and kill implicate First Amendment protections and, if so, how and to what extent? In the McDougal case, AMI filed an anti-SLAPP motion to dismiss her complaint that raised a number of First Amendment arguments, but the case settled before the plaintiff filed an opposition to the motion or the court ruled.²¹ We turn to those questions now.

The Arguments for First Amendment Protection

In order to determine whether the First Amendment protects catch and kill, it may be useful to divide the practice into two discrete activities: first, contracting with the source of information and paying for the exclusive right to use it, and, second, electing to withhold the information from publication. Legally and logically distinct arguments inform our thinking about whether the First Amendment protects each of these activities.

Contracting with the Source

The Supreme Court has recognized on a number of occasions that collecting information from sources—newsgathering—is an activity protected by the First Amendment. Thus, in *Branzburg v. Hayes*,²² the Court declared that "without some protection for seeking out the news, freedom of the press could be eviscerated."²³ Similarly, in *Houchins v. KQED*,²⁴ the Court announced that "there is an undoubted right to gather news 'from any source by means within the law.'"²⁵

The fact that money changes hands in the process of assembling information may raise issues of

journalistic ethics, but it does not in and of itself place the activity outside of First Amendment protection.²⁶ Indeed, the AMI Motion noted that paying for stories is a longstanding journalistic practice that has sometimes been engaged in and defended by the mainstream media.²⁷ The AMI Motion pointed out, for example, that the *New York Times* paid Charles Lindbergh \$5,000 for the story of his trans-Atlantic flight and that *Esquire* paid Lt. William Calley for a "confessional interview" about the My Lai massacre.²⁸

With all of this said, it can be argued that catch and kill does not fit very well with these newsgathering cases, the principle animating them, or the historic examples of media entities paying for stories. After all, *Branzburg* and *Houchins* unambiguously involved the collecting of information for the purpose of considering it for publication—not to keep it out of circulation. Furthermore, a principle designed to protect newsgathering cannot extend so far as to embrace the assembling of every conceivable piece of information for all imaginable purposes. For example, the First Amendment might not protect the collecting of information by someone who has the specific intent of using it to commit blackmail or extortion; in those instances, gathering information may constitute a concrete act in furtherance of an attempt to engage in a crime. Finally, the examples cited in the AMI Motion seem only to underscore the point: The *New York Times* bought Lindbergh's story in order to publish it; *Esquire* purchased Calley's confessional in order to share it.

But we should not too hastily conclude that the newsgathering doctrine affords no protection to catch and kill. After all, *Branzburg* actually consisted of several cases that the Court consolidated for decision, and in one of them (*Pappas*) the journalist ultimately wrote *no story* at all. More to the point, in *all* of these cases, the journalist appears to have entered into the newsgathering process with the specific intent of *not publishing* at least *some* information—in particular, the identity of the source. The *Branzburg* Court nowhere implied—let alone expressly held—that the

collection of information loses its constitutional protection simply because a media entity decides not to publish or enters into the process with the specific intent to withhold at least some of what it learns.

Indeed, a principle that extended protection for newsgathering only to information that a media entity had the specific intent of publishing would be deeply problematic in both application and theory. At the newsgathering stage, media entities often do not know what they plan to do with information once they get it; they withhold judgment on that matter—precisely what we want responsible publishers to do. “Do you plan to publish that information?” we ask. “How should I know?” the journalist responds. “I’m still gathering information. That’s the point.”

Trying to fashion newsgathering protection around the specific intent to publish therefore seems fraught with difficulties. Such a doctrine would afford no immunity to media entities and journalists who do not decide this question until all the facts have come in and been considered. And it would leave no room for journalists to gather information that is critical to their reporting but that they never intend to publish, such as the identities of confidential sources or—more mundanely—information that is provided on the condition that it will be used for background only and without attribution.

Granted, the fit between the newsgathering doctrine and catch and kill is less than perfect. But trying to carve out an exception for catch and kill that does not put at risk other newsgathering practices that we want to protect presents serious—perhaps insurmountable—challenges. Newsgathering, like other activities protected by the First Amendment, needs breathing room, and it seems unlikely that we can provide it apart from a principle of sufficient scope that it will afford presumptive protection to the information-collection part of catch and kill.

Withholding Publication

Two distinct (but related) legal doctrines might support the conclusion that the First Amendment protects the second activity encompassed by

catch and kill—the decision to withhold publication. First, at a general level, the Supreme Court has recognized that the First Amendment provides not only a positive right to speak (free from prohibitions and limitations imposed by state actors) but also a negative right to *refrain* from speaking (free from demands and compulsions imposed by state actors). I will refer to this as the “compelled speech doctrine.” Second, at a more specific level, the First Amendment provides “the press” with expansive editorial control over what it publishes—and chooses *not* to publish. I will call this the “editorial discretion doctrine.”

The Compelled Speech Doctrine. At a high level of abstraction, the compelled speech doctrine stands for the principle that the state cannot force someone to say things that he or she does not want to say. For example, in the seminal case of *West Virginia State Board of Education v. Barnette*,²⁹ the Supreme Court upheld the right of objecting public school students to refuse to salute the flag.³⁰ The Court noted that a right to speak entails a corresponding right not to speak: “To sustain the compulsory flag salute we [would be] required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.”³¹

Indeed, compelled speech cuts at the heart of First Amendment protections. It reflects a government effort to impose an orthodoxy on its citizens—a constitutional anathema. Justice Jackson famously summarized the principle this way: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”³²

In subsequent cases, the Supreme Court continued to endorse the compelled speech doctrine, while moderating the absolutist language of *Barnette*. For example, in *Wooley v. Maynard*,³³ the Court struck down a New Hampshire law that rendered it

a misdemeanor for objecting individuals to cover the state motto (“Live Free or Die”) on their license plates because they found it morally and religiously repugnant. Citing *Barnette*, the Court acknowledged that “the right to freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”³⁴ And, again citing *Barnette*, the Court stressed that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”³⁵

The *Wooley* Court observed, however, that this did not end the inquiry: It needed also to consider whether the state had any “sufficiently compelling” countervailing interests that justified the law. The state offered two. First, the state argued that display of the motto made it easier for police officers to tell whether vehicles bore New Hampshire plates. The Court dismissed this argument, pointing out that a plate’s configuration of letters and numbers readily conveyed its New Hampshire identity. Second, the state argued that the motto communicated a message of history, pride, and individualism. The Court made swift work of this argument as well, observing that this was not an ideologically neutral justification and that the state had no authority to turn the private property of the Maynard family into a “mobile billboard” to promote New Hampshire’s favored messages.

Along the way, the *Wooley* Court pointed to the editorial discretion doctrine, which the Court plainly viewed as reflecting a sensibility closely related to the compelled speech doctrine. I will turn to that doctrine shortly. Before doing so, however, I want to note some of the ways in which the compelled speech doctrine does not fit particularly well with catch and kill.

The compelled speech doctrine gets at a deep moral and psychological truth: There is something profoundly, personally, and perhaps even uniquely offensive about being forced by the state to express support for an ideological message with which one has grave objections of conscience.

Prohibitions *against* speech undermine a number of values that we deem personally important, including self-realization and self-expression.³⁶ But the wrong imposed by *forced* speech goes even further: It requires hypocrisy and a breach of personal sincerity.³⁷ In a compelled speech case, the government isn't just keeping me from saying something I want to say; it's making me say something I don't believe.

Catch and kill seems disconnected from these concerns in a number of respects. The nonspeakers in the typical compelled speech case—a student who does not want to salute the flag, a citizen who objects to displaying on his personal property a slogan that he finds offensive—seem much more vulnerable to the coercive power of the state than does a media corporation engaged in a commercial transaction. Furthermore, the compelled speech cases implicate matters deeply personal to the nonspeaker—specifically, his or her *own* speech and a government command to use that speech in a way that he or she finds grossly offensive. In contrast, catch and kill involves *someone else's* speech—the speech that the media entity purchased—and does not in any obvious way involve the sanctity of the individual conscience.

We can, of course, imagine hypothetical circumstances in which the fit between catch and kill and the compelled speech doctrine might seem tighter. Imagine, for example, a publisher who learns that a public figure whom he or she believes to be a person of great character is about to become the target of a false smear campaign. The public figure does not personally have the resources to fend off the attack. Outraged and morally indignant, the publisher agrees to buy the slanderer's story in order to keep it out of circulation—but the miscreant later runs to court to get the contract nullified because he thinks he can make more money telling his tale on the talk-show circuit.

We have some elements here that resonate with the compelled speech doctrine: an act of conscience, a righteous silence, and even some state coercive power (in the form of a judge's order, if the court grants the request for relief). Still, the fit remains

rough at best. And it seems unlikely that these hypothetical facts align very closely with the average use of catch and kill.³⁸

The Editorial Discretion Doctrine.

The foundational case with respect to the editorial discretion doctrine is *Miami Herald Publishing Co. v. Tornillo*,³⁹ which the *Wooley* Court cited with approval. In *Tornillo*, the Court considered the constitutionality of a state statute that granted political candidates a right to equal space to reply to criticism and attacks on their record by a newspaper. Failure to comply with the statute (which, for example, required that the reply be published in the same size print and given a place of equal prominence with the attack) constituted a first-degree misdemeanor. The Court had little difficulty in concluding that the statute ran afoul of the First Amendment.

The Court cited a number of precedents suggesting that “a compulsion exerted by government to print that which it would otherwise not print” is unconstitutional.⁴⁰ Applying this principle, the Court ruled that the statute “intrudes into the function of editors.”⁴¹ The Court declared that “[t]he choice of material to go into a newspaper, and the decisions made as to the . . . content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.”⁴² “It has yet to be demonstrated,” the Court concluded, “how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”⁴³

Of course, this ruling found additional support in the space limitations imposed by print: The compelled inclusion of some material necessarily required the exclusion of other material. But the Court—as if anticipating the infinitely greater latitude afforded by the Internet and online publication—held that the editorial discretion doctrine applied “[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply.”⁴⁴ The

Court made clear that its decision turned on the intrusion into editorial decision making about what (and what not) to publish—not on the space limitations of particular media.

The media-focused editorial discretion doctrine, particularly as robustly described in *Tornillo*, fits much better with catch and kill than does the compelled speech doctrine.⁴⁵ The editorial discretion doctrine easily embraces judgments about when to share (or not share) information secured from other sources. The doctrine does not depend (as the compelled speech doctrine seems to) on the refusal to speak being motivated by the sorts of religious beliefs and moral commitments that we tend to associate with the conscientious objections of individuals. And the doctrine unblinkingly extends protection despite the fact that the editorial judgment in question may be “unfair” and thus might skew or distort public dialogue about an issue or individual.

This last point seems particularly important. After all, the most influential philosophic explanation for the good served by freedom of expression—the “marketplace of ideas” model offered by Justice Holmes—assumes that (a) we allow all ideas to compete for our allegiance because (b) this helps us arrive at the truth.⁴⁶ Catch and kill, in contrast, strives to keep information and ideas *out of the marketplace* and may do so precisely in order *to keep the truth from being known*. As First Amendment arguments go, this intuitively seems like a tough one.

But the *Tornillo* Court saw things differently. Perhaps it did so because it had a model in mind other than that of the marketplace of ideas. The Court may have seen self-expression as a value unto itself—regardless of its contribution to the search for truth—and viewed government efforts to dictate what must and must not be said as an inexcusable intrusion on that value. Some of the language in the Court's opinion hints at this.

The *Tornillo* Court, however, may have thought it could square its ruling with the marketplace of ideas model. To explain how, we might consider an analogy to the difference between an act-based normative model and a rule-based normative

model. By way of example, in very general terms, the philosophy of utilitarianism holds that an action is ethically right if it yields the greatest good for the greatest number of people. *Act utilitarianism* focuses on the conduct of individual persons. *Rule utilitarianism*, in contrast, focuses on the good achieved by a given principle overall, regardless of the result in any individual instance.⁴⁷ Rule utilitarianism shows up frequently in the law: The attorney-client privilege, for example, may lead to unjust results in particular cases, but we believe that it achieves the greatest good for the greatest number overall by promoting open discourse between lawyers and the people they represent (leading to better advocacy, more just results, and so on).

The *Tornillo* Court may have had a similar notion in mind. Certainly, in any individual case, the editorial discretion doctrine may result in corruption of the marketplace of ideas and in the loss of truth and information. In general, however, the doctrine fosters a better marketplace: It empowers individuals to fashion their voices and messages as they choose, which, on the whole, facilitates a livelier, better, and more rigorous testing of ideas.

Whatever *Tornillo's* underlying philosophy, its editorial discretion doctrine does seem to lend strong support to the notion that catch and kill should receive First Amendment protection. The Court appears to see it in stark terms: If I have the information, then I can do any lawful thing I want with it. And that includes giving the information an unceremonious burial.

One final note should be made regarding the apparent tension between the marketplace of ideas model and the practice of catch and kill. Entities that buy the rights to a story may suppress that one so they can tell a different one. Assume, for example, that a professional athlete learns that a media entity has an agreement with his former paramour conveying the right to tell her story about their extramarital affair. The athlete might ask the entity not to publish that story, in exchange offering the exclusive rights to the story of his recovery from drug and alcohol

addiction. This sort of informational horse trading arguably does no disservice to the marketplace of ideas; to the contrary, it gets information into it that might otherwise be excluded.

Conclusion

Supreme Court case law provides support for the conclusion that both the “catching” and the “killing” parts of catch and kill fall within the presumptive protection of the First Amendment. Still, the Court has not expressly ruled on the practice, and, as we have seen, it takes a bit of doing to make it fit with some aspects of existing doctrine. If the Court has the occasion to decide a case involving catch and kill, then we may be reminded, yet again, of the adage that hard cases make bad law. We may learn a new adage, too: that bad actors make for hard cases. And, as for bad actors, well, catch and kill has some. ■

Endnotes

1. For a recent accusation that it did so, see Todd Spangler, *Jeff Bezos v. National Enquirer: Did AMI Break Any Laws?*, VARIETY (Feb. 8, 2019), <https://variety.com/2019/biz/news/jeff-bezos-national-enquirer-did-ami-break-laws-1203133396/>.

2. See Margaret Sullivan, “Catch and Kill” at National Enquirer Gives Media One Last Black Eye before Election, WASH. POST (Nov. 5, 2016), https://www.washingtonpost.com/lifestyle/style/catch-and-kill-at-national-enquirer-gives-media-one-last-black-eye-before-election/2016/11/05/2534d43e-a36c-11e6-8832-23a007c77bb4_story.html?utm_term=.dc573eedfe02.

3. See, e.g., Peter Nicholas & Carla Hall, *Tabloid's Deal with Woman Shielded Schwarzenegger*, L.A. TIMES (Aug. 12, 2005), <https://web.archive.org/web/20180806171954/http://articles.latimes.com/2005/aug/12/local/me-arnold12>.

4. See Megan Twohey et al., *Weinstein's Complicity Machine*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html> [hereinafter *Weinstein's Complicity Machine*].

5. *Id.*

6. *Id.*

7. The #MeToo movement is generally understood to have begun in 2006 when Tarana Burke coined the phrase in an effort to help women and girls of color

who, like her, were survivors of sexual assault. Actress Alyssa Milano is credited with reigniting and amplifying the movement when she encouraged survivors of assault to tweet out the MeToo hashtag. For a list of significant moments in the history of the movement, see Christen A. Johnson & KT Hawbaker, *#MeToo: A Timeline of Events*, CHI. TRIB. (Nov. 7, 2018), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-ht-mlstory.html> [hereinafter *Timeline*].

8. See Ramin Setoodeh, *Ashley Judd Reveals Sexual Harassment by Studio Mogul*, VARIETY (Oct. 6, 2015), <https://variety.com/2015/film/news/ashley-judd-sexual-harassment-studio-mogul-shower-1201610666/>; Joyce Chen, *Rose McGowan: I Was Raped by a Top Hollywood Exec*, US WKLY. (Oct. 14, 2016), <https://www.usmagazine.com/celebrity-news/news/rose-mcgowan-i-was-raped-by-a-top-hollywood-exec-w445112/>.

9. See Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region®ion=top-news&WT.nav=top-news>.

10. See *Timeline*, *supra* note 7.

11. David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html?utm_term=.5d2a2ec272b0.

12. Matt Ford, *The 19 Women Who Accused President Trump of Sexual Misconduct*, THE ATL. (Dec. 7, 2017), <https://www.theatlantic.com/politics/archive/2017/12/what-about-the-19-women-who-accused-trump/547724/>.

13. Of course, not all efforts to muzzle potential accusers have taken the form of catch and kill. See, e.g., James B. Stewart, Rachel Abrams & Ellen Gabler, “If Bobbie Talks, I’m Finished”: *How Les Moonves Tried to Silence an Accuser*, N.Y. TIMES (Nov. 28, 2018), https://www.nytimes.com/2018/11/28/business/les-moonves-bobbie-philips-marv-dauer-cbs-severance.html?emc=edit_na_20181128&nl=breaking-

news&nid=66378075ing-news&ref=cta.

14. Ronan Farrow, *Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

15. *Weinstein's Complicity Machine*, *supra* note 4.

16. Ronan Farrow, *The National Enquirer, a Trump Rumor, and Another Secret Payment to Buy Silence*, NEW YORKER (Apr. 12, 2018), <https://www.newyorker.com/news/news-desk/the-national-enquirer-a-donald-trump-rumor-and-another-secret-payment-to-buy-silence-dino-sajudin-david-pecker>.

17. See Jen Kirby, *Trump Ally David Pecker Cuts Immunity Deal with Prosecutors*, VOX (Aug. 23, 2018), <https://www.vox.com/2018/8/23/17773808/david-pecker-immunity-trump-national-inquirer-cohn> [hereinafter *Immunity Deal*].

18. *Id.* In interviews with Ronan Farrow, however, a number of AMI employees indicated that they believed that the company had purchased the stories for the specific purpose of suppressing them. *Id.*

19. Jim Rutenberg, *Ex-Playboy Model, Freed from Contract, Can Discuss Alleged Trump Affair*, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/2018/04/18/us/politics/karen-mcdougal-american-media-settlement.html>.

20. *Immunity Deal*, *supra* note 17.

21. See Defendant Am. Media Inc.'s Amended Notice of Motion & Special Motion to Strike Complaint Pursuant to C.C.P. § 425.16, *McDougal v. Am. Media, Inc.*, No. BC 698956 (L.A. Super. Ct. filed Apr. 2, 2018) [hereinafter AMI Motion].

22. 408 U.S. 665 (1972).

23. *Id.* at 681.

24. 438 U.S. 1 (1978).

25. *Id.* at 11.

26. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that speech did not lose its constitutional protection simply because it came in the form of an editorializing advertisement). It should be noted that the commercial speech doctrine does not change the analysis here. Paradigmatic commercial speech cases involve the regulation of invitations into economic transactions, such as advertisements for goods or services. Catch and kill, in contrast, involves the *purchase of information*—not the *use of speech to sell something*. It would make no more sense to apply the commercial speech doctrine to catch and kill than it would to apply it to someone buying a book or a subscription to an online magazine.

27. See AMI Motion, *supra* note 21, at 10.

28. *Id.*

29. 319 U.S. 624 (1943).

30. School policy treated a refusal to salute the flag as “insubordination” to be dealt with by expulsion. *Id.* at 629.

31. *Id.* at 634.

32. *Id.* at 642.

33. 430 U.S. 705 (1977).

34. *Id.* at 714.

35. *Id.*

36. See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

37. See Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 Nw. U. L. REV. 839 (2005); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMM. 283 (2011).

38. The AMI Motion did not make much use of the compelled speech doctrine, perhaps for these reasons.

39. 418 U.S. 241 (1974).

40. *Id.* at 256.

41. *Id.* at 258.

42. *Id.*

43. *Id.*

44. *Id.*

45. The AMI Motion relied heavily on this doctrine. See AMI Motion, *supra* note 21, at 8–9.

46. See *United States v. Abrams*, 250 U.S. 616 (1919) (Holmes, J., dissenting). For a brief discussion of the influence of Holmes's model, see Leonard M. Niehoff & Deeva Shah, *The Resilience of Noxious Doctrine: The 2016 Election, the Marketplace of Ideas, and the Obstinacy of Bias*, 22 MICH. J. RACE & L. 243, 248 (2017), and the authorities cited there.

47. For a summary, see *Act and Rule Utilitarianism*, INTERNET ENCYCLOPEDIA OF PHIL., <https://www.iep.utm.edu/util-a-r/> (last visited Dec. 6, 2018).