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According to an Unnamed Official: Reconsidering the Consequences of Confidential Source Agreements When Promises Are Broken by the Press

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"According to an Unnamed Official": Reconsidering the Consequences of Confidential Source Agreements When Promises Are Broken by the Press

I. INTRODUCTION

> Don't you wish you had a nickel for every time you have seen or heard a news report that attributes the juiciest information to an "informed source" or a "senior official"? Don't you think it would make you a wealthy person? It might. At least that's what a reliable highly placed source who asked not to be identified tells me.[1]

Leaking information to the press is an unpreventable function of our modern, news-saturated society. The American political, business, and social arenas thrive on "inside news," and in a country where information can function as power, supply will always strive to meet the demands of the news-hungry public.[2] Even the most vocal critics of modern journalism standards would likely agree that not all leaks[3] are bad. As one commentator has aptly noted, "[Leaks] may even be an essential safety valve for the democratic processes to work."[4] However, leaks have their un-

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1. Clarence Page, *Leaks: Democracy's Safety Valve*, CHIC. TRIB., Oct. 27, 1991, at 3C.

2. This trend has proven to be particularly problematic in the political arena. In 1971, a judge dismissed the indictment of Daniel Ellsberg for supplying the Pentagon Papers to the *New York Times* and *Washington Post*. Howard Kurtz, *Calls for Probe of Leak Echo History of Failure*, WASH. POST, Oct. 15, 1991, at A4. Since that time, "successive [presidential] administrations and Congress have sought to plug leaks of classified, sensitive or embarrassing information." *Id.*

3. This Comment uses the term "leak" in reference to persons who supply inside information in exchange for a promise of confidentiality. For a typology of confidential sources, see Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609, 623-32 (1991).

4. Page, *supra* note 1, at 3C. Page classifies leaks into two principal categories. First, there are those leaks that are voluntarily offered to the press. Second are leaks elicited from a source, usually someone with a strong desire to report some sort of scandal but who lacks the means to report their story. *Id.*

Scott Armstrong, former *Washington Post* reporter and co-author of *The Brethren*, offers his own dual categorization of leaks: those that leak in and those that leak out. *Id.* "Leaks out" are intended to send a strong public message and are best

seemly side as well. They can be vehicles for bitter character assassinations and political smear campaigns.[5] As the Senate confirmation hearings of two recent Supreme Court nominees indicate, no one is immune from the power of a confidential source.[6] In the words of one media critic, "No one ever apologizes when the leaked information turns out to be wrong."[7]

When journalists turn to insiders for information, they frequently promise their sources confidentiality in exchange for valuable information.[8] Recently, however, members of the press have shown a tendency to breach confidentiality agreements.[9] These journalists frequently justify

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illustrated by the classic whistle-blowing scenario. *Id.* "Leaks in" are disclosures that an inside source believes will impact the upper levels of his or her own organization. *Id.* President Lyndon Johnson is thought to have escalated the use of "leaks in" because of his profound sensitivity to criticism. DAVID SHAW, PRESS WATCH 66 (1984). Administration officials were forced to leak their stories to journalists in order to make their dissenting opinions known. *Id.*

During the 1970s, Secretary of State Henry Kissinger functioned as an often-quoted "high-ranking source" from the State Department. Page, *supra* note 1, at 3C. He frequently staged "deep background" press conferences during which he offered choice tidbits of information regarding matters of foreign diplomacy. *Id.* Former *Washington Post* editor Ben Bradlee decided to boycott the conferences for a while, but he eventually gave in when other major media groups refused to join in his protest. *Id.*

5. In a fiery commentary appearing in *The Washington Times*, media watchdogs Reed Irvine and Joe Goulden of Accuracy in Media (AIM) suggest that a request for anonymity demonstrates that a source knows he is doing "dirty work." Reed Irvine & Joe Goulden, *Should NPR Unmask the Leaker?*, WASH. TIMES, Oct. 23, 1991, at F4.

6. While "sources" may include books, periodicals, and other forms of documentary evidence, this Comment uses the term to refer to persons who supply information.

Larry Sabato, a professor at the University of Virginia, has revealed that it was an embittered former girlfriend who made the initial allegations that President Reagan's nominee to the Supreme Court, Judge Ginsburg, used marijuana years before his nomination. Irvine & Goulden, *supra* note 5, at F4. More recently, a source leaked allegations of sexual harassment to Nina Tottenberg of National Public Radio (NPR) made by Professor Anita Hill against Justice Clarence Thomas. *Id.* The source originally provided Tottenberg with Hill's affidavit to the FBI under a cloak of confidentiality and later became the focal point of televised hearings which gripped the nation. *Id.* The latter incident so enraged Senator John Danforth that he threatened any senator involved in the leak to NPR with expulsion. *Id.*

7. Page, *supra* note 1, at 3C (quoting Norman Ornstein of the American Enterprise Institute).

8. The seventh article of the Declaration of Rights and Obligations of Journalists, adopted by the International Federation of Journalists in 1972, imposes a duty on the media to "observe professional secrecy and not to divulge the source of information obtained in confidence." Patricia Wilhelm, *The Protection of Sources; The Media: Ways to Freedom*, UNESCO COURIER, Sept. 1990, at 16. For a more complete discussion of the actual restraints imposed by journalists' codes of ethics, see *infra* text accompanying notes 133-38 and 433-36.

9. This trend caused some commentators to speculate as to whether NPR's Nina

their disregard for promises made to confidential sources by pointing to the newsworthiness of the source and the public interest served in revealing the source's identity.[10] This was the very argument recently heard by the United States Supreme Court in the case of *Cohen v. Cowles Media Co.* [hereinafter *Cohen V*].[11] In *Cohen*, many of the nation's most prominent news organizations filed briefs supporting the contention that the press has a First Amendment right to break promises to sources in the interest of disseminating newsworthy information.[12] A sharply divided Court rejected this argument, holding that a news organization can be sued and held liable for damages for breaking its promise to keep a news source's identity secret.[13] During oral arguments, media

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Tottenberg would choose to reveal the identity of the source of the Hill affidavit. Irvine & Goulden, *supra* note 5, at F4. They wondered if Tottenberg would take advantage of the powerful opportunity to sabotage the career of a United States Senator in light of the threat that he or she might be expelled from office. *Id.*

10. During a speech at Brown University, Michael Gartner, president of NBC News, addressed the issue of the disclosure of "public interest" news that sources have leaked to the press. *Id.* Gartner was asked what he would do if the Federal Bureau of Investigations (FBI) were to offer him videotapes revealing extramarrital activities of the Reverend Martin Luther King. *Id.* Gartner responded that the key issue would not be King's marital infidelity. *Id.* Rather, the proper focus of a news story would be the FBI's peddling of the videos. *Id.*

11. 14 Media L. Rep. (BNA) 1460 (Minn. Dist. Ct. 1987) [hereinafter *Cohen I*] (denying defendant's motion for summary judgment) , 15 Media L. Rep. (BNA) 2288 (Minn. Dist. Ct. 1988) [hereinafter *Cohen II*] (denying motion for judgment notwithstanding the verdict and, alternatively, motion for new trial), *aff'd in part and rev'd in part*, 445 N.W.2d 248 (Minn. Ct. App. 1989) [hereinafter *Cohen III*], *aff'd in part and rev'd in part*, 457 N.W.2d 199 (Minn. 1990) [hereinafter *Cohen IV*], *cert. granted*, 111 S. Ct. 578 (1990), *rev'd*, 111 S. Ct. 2513 (1991) [hereinafter *Cohen V*]. The case was brought by Dan Cohen, a political campaign consultant who sued the *Minneapolis Star-Tribune* and the *St. Paul Pioneer Press* after the two newspapers identified him in articles appearing in 1982. *See infra* text accompanying notes 213-80.

12. Amicus briefs were filed by the Associated Press, the American Newspaper Publishers Association, the American Society of Newspaper Editors, the Gannett Company, the New York Times Company, and the Times Mirror Company. Irvine & Goulden, *supra* note 5, at F4. While conceding that the newspapers involved in *Cohen* were "far from orthodox" in their approach to the confidential source dilemma, amici asserted that editors have the right to determine whether a source's identity is more newsworthy than the information provided. *Id.*

13. *Cohen V*, 111 S. Ct. at 2519. The decision elicited a flurry of criticism from media commentators. A spokesperson for the Reporters Committee for Freedom of the Press predicted a flood of similar lawsuits and voiced her concern about judicial intrusion in the newsroom. James Vicini, *Supreme Court Says News Media Can Be Sued for Revealing Source*, REUTERS, June 24, 1991, *available in* LEXIS, Nexis Library, REUTERS File. However, Accuracy in Media (AIM), a conservative media

attorney John French argued that publishing the name of a newsworthy source brings out "the whole truth" surrounding an important news story.[14] In a fiery response, Justice Marshall asked whether in publishing "the whole truth" the newspapers had also printed their "broken promises" to their source. When French conceded that they had not, Justice Marshall retorted, "You didn't publish *all* the truth."[15]

This Comment focuses upon the present contours of First Amendment protections for the press and applies these constitutional guarantees to the reporter-source relationship. Part I examines the historic role of the press and traces the growing popularity of confidential sources in all realms of the media. In addition, Part I addresses the delicate and often uncertain relationship that arises between a reporter and her source, and concludes that this relationship might be inherently flawed.

Part II addresses the important consequences that arise when a source seeks legal redress for the breach of a confidentiality agreement. Courts have employed several models in order to frame the First Amendment issues and contract issues raised, each having a significant impact on the decision to grant or deny relief to an exposed source. The first model relies upon the operation of traditional contract law, as opposed to tort law, and presumptively enforces reporter-source agreements as voluntary promises. The second model, the promissory estoppel model, appears to modify a strict contractual analysis of source disclosure through a selective examination of the context in which the agreement arose and a determination of whether a refusal to enforce the promise would result in injustice. However, this Comment suggests that the promissory estoppel model focuses too narrowly on the intent of the parties, consequently failing to reach a true balance-of-interests approach. The third model, based upon the historic notion of a free press, looks to the First Amendment for absolute immunity for reporters who disclose their source's identity. While the argument that imposing contract damages violates the media's First Amendment freedoms is persuasive, it does not appear to be a viable alternative in the wake of recent Supreme Court opinion.[16] Part II concludes by focusing on the various methodologies applied in three recent source disclosure cases.

Part III focuses on the shortcomings of the three predominant approaches to source claims and identifies considerations relevant to the development of a new standard that would provide a better balance between the conflicting interests at stake. This section also examines the

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watchdog group, praised the Court's ruling based upon its belief that it will help to ensure that reporters honor confidentiality agreements. *Id.*

14. Irvine & Goulden, *supra* note 5, at F4.

15. *Id.* (emphasis added).

16. *See infra* notes 259-64 and accompanying text.

emergence of the independent common law tort of breach of confidence as an alternative to current models and proposes that its adoption may be warranted in light of the growing number of source claims. This tort would extend breach of confidence protection beyond the limitations of existing case law, yet it is compatible with the principles underlying the First Amendment and traditional contract law. Finally, the Comment identifies privileges and limitations that, regardless of the standard adopted, must apply in response to countervailing public interests and First Amendment considerations.

II. THE MEDIA, COURTS AND FIRST AMENDMENT PROTECTION: AN OVERVIEW

A. *Constitutional Shelter for the Press*

1. *New York Times Co. v. Sullivan*[17]

It is well established that any abridgement of speech or of the press triggers certain protections granted to all Americans by the First Amendment.[18] Indeed, the right to freedom of opinion and expression, as well as to the free flow of information, is commensurate with the most fundamental civil rights.[19] In *New York Times Co. v. Sullivan*,[20] the Supreme Court declared that the principle of "freedom of expression upon public questions" lies at the heart of the First Amendment, and thereby established a constitutional basis for limiting the liability of the press in defamation actions involving public officials.[21] The case involved a libel action brought by the police commissioner of Montgomery, Alabama during the civil rights movement of the 1960s.[22] The Respondent alleged that an advertisement describing violent acts against Dr. Martin Luther King Jr.

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17. 376 U.S. 254 (1964).

18. *See generally* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

19. *See* Stromberg v. California, 283 U.S. 359, 369 (1931) (declaring that the First Amendment was designed to maintain "free political discussion to the end that government may be responsive to the will of the people").

20. 376 U.S. 254 (1964).

21. *Id.* at 269. *See* Whitney v. California, 274 U.S. 357, 375 (1927) ("Public discussion is a political duty; and . . . a fundamental principle of American government."). Alexander Meiklejohn characterized the *Sullivan* decision as "an occasion for dancing in the streets." Kalven, *supra* note 18, at 221 n.125.

22. *Sullivan*, 376 U.S. at 256.

and other African-American protesters implicated him in civil rights abuses.[23] The Court found in favor of the newspaper, holding that in order to preserve an environment where truth could be vigorously pursued, a public official must show "actual malice" before he can recover from the defendant.[24] Writing for the majority, Justice Brennan defined actual malice as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not."[25] The Court justified the heightened standard of proof by pointing to the nation's historical "commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may . . . include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[26] From this principle, the Court concluded that the necessary protection of public debate should afford the press substantial "breathing space."[27] Hence, some margin of error must be allowed in order to ensure that the fear of error does not discourage the press from actively pursuing truth.[28]

Sullivan represents a highwater mark in the Court's recognition of the media's fundamental role in American democracy. Several subsequent Supreme Court opinions during the 1960s and '70s bolstered *Sullivan*'s constitutional protections. In *Rosenbloom v. Metromedia, Inc.*,[29] the Court broadened *Sullivan*'s rule on "public officials"[30] by extending it to "matters of public or general concern."[31] The effect was to shift the focus of the First Amendment debate from the status of the plaintiff to the nature of the issue at hand. The Court rationalized the extension of *Sullivan* on the principle that "the commitment to robust debate on pub-

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23. *Id.* at 256-57.

24. *Id.* at 279-80.

25. *Id.* at 280.

26. *Id.* at 270.

27. *Id.* at 272 (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).

28. In the words of Justice Brennan, the press "may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.* at 279. Justice Brennan based much of his analysis on the history flowing from the Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798) (expired by its own terms in 1801), which made it a crime to defame Congress or the President. *Id.* Although the Act was never challenged in the Supreme Court, as far as Justice Brennan was concerned, it established that "[t]he right of free public discussion of the stewardship of public officials was . . . a fundamental principle of the American form of government." *Sullivan*, 376 U.S. at 275.

29. 403 U.S. 29 (1971).

30. *Sullivan*'s rule on "public officials" was extended to "public figures" in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), where the Court determined that Butts, the athletic director of the University of Georgia, was a "public figure" for purposes of applying the actual malice standard. *Id.* at 154-55.

31. *Rosenbloom*, 403 U.S. at 44.

lic issues, which is embodied in the First Amendment" must be recognized "by extending constitutional protection for all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[32]

In *Gertz v. Robert Welch, Inc.*,[33] the Court recognized the difficulties inherent in administering *Rosenbloom*'s public issue test,[34] and once again shifted the focus of press protections back to the plaintiff's status.[35] While *Gertz* distinguished private individuals from "public officials" and "public figures" for the purpose of finding the press liable in defamation actions,[36] the Court also recognized that private persons may become public figures for the limited purpose of a particular controversy involving important matters of public concern.[37] Such a broad definition of a "public figure" ensures that members of the press will remain free to pursue important public issues without the fear that private individuals who are in the public eye will successfully litigate a claim. This would effectively undermine the heightened protection afforded by *Sullivan*.[38]

2. Constitutional Protections and the Role of the Press

While the press has fared reasonably well under the constitutional shelter afforded by *New York Times, Co. v. Sullivan*[39] and its proge-

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32. *Id.* at 43-44.

33. 418 U.S. 323 (1974).

34. *See Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting) (identifying Justice Brennan's analysis as a "newsworthiness" standard with dangerous implications for the freedoms afforded the press).

35. *Gertz*, 418 U.S. at 345.

36. The Court defined the latter as individuals who have "achieve[d] such pervasive fame or notoriety that [they become] . . . public figure[s] for all purposes and in all contexts." *Id.* at 357. On the other hand, one can "voluntarily [inject] himself or [be] drawn into a particular public controversy and thereby [become] a public figure for a limited range of issues." *Id.* The Court reasoned that public officials and public figures are better able to defend their positions because they have greater access to the press. *Id.* at 344-45. Consequently, they assume a greater risk of injury by their willing participation in public issues and controversies; in contrast, private plaintiffs neither have the same degree of access to the press nor voluntarily seek publicity. *Id.* at 344-46. However, the Court did acknowledge that the public/private figure distinction is not always an easy one and may rest upon an analysis of "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 357.

37. *Id.* at 352.

38. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

39. 376 U.S. 254 (1964).

ny,[40] the Court has established that neither the media nor the ordinary citizen enjoys an absolute right to free speech. On the contrary, the extent of the shelter guaranteed by the Constitution depends upon the value of the particular First Amendment interest at issue and the strength of the competing interest involved.[41] Consequently, throughout its history, the Supreme Court has devoted much of its attention to identifying and shaping the constitutionally protected role of the press.[42]

The Court has focused upon three primary functions served by the press which form its fundamental role in society. First, the press serves as a conduit and springboard for the expression of individual opinions and ideas.[43] This function preserves the individual's autonomy by assuring a forum for the expression and dissemination of her thoughts.[44] Second, the press acts as an educator and informant for the public's benefit.[45] This concept embodies the theory of self-government when the

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40. *See* Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) (finding corportation to be "public figure" and therefore required to prove "actual malice" in product disparagement case).Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55 (1967) (broadening the "public official" definition to include "public figures").

41. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (determining the extent of constitutional protection by weighing First Amendment concerns against state interest in protecting reputation).

42. *See, e.g.*, Florida Star, Inc. v. B.J.F., 491 U.S. 524, 526 (1989) (holding statute that prevents publication of truthful, lawfully obtained information about a victim of sexual assault unconstitutional); Gannett v. Depasquale, 443 U.S. 368, 381-83 (1979) (holding that the right to a fair trial belongs to the accused, not the media); Branzburg v. Hayes, 408 U.S. 665, 709 (1972) (holding that First Amendment does not relieve newspaper reporter of obligation to respond to grand jury subpoena); Near v. Minnesota, 283 U.S. 697, 716 (1931) (recognizing right to ban publication of obscene material and material which incites a community to overthrow its government).

43. *See* Note, *The Right of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1507-16 (1974).

44. The "personal right theory," the dominant doctrine for many years, regards freedom of the press as an individual right. *See, e.g.*, Lovell v. Griffin, 303 U.S. 444, 450 (1938) (declaring freedom of the press as a personal right); *see also* Anthony Lewis, *A Preferred Position for Journalism*, 7 HOFSTRA L. REV. 595, 626 (1979). This theory views the First Amendment's speech and press clauses as virtually synonymous. *Lovell*, 303 U.S. at 451-52. *See* U.S. CONST. amend. I. In time, the Supreme Court began to focus on the societal interests served by the press, aside from journalists' individual interest in publishing. *See, e.g.*, Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (stating that "an untrammeled press [is] a vital source of public information"). However, the Court has not completely abandoned the "personal right theory." *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (quoting *Lovell*, 303 U.S. at 450, 452) (declaring that "freedom of the press is a fundamental personal right not limited to newspapers and periodicals").

45. *See* Pennekamp v. Florida, 328 U.S. 331, 354-55 (1946) (Frankfurter, J., concurring). Justice Frankfurter's summation of this view demonstrates the tension between this theory and the "personal right" approach: "Freedom of the press . . . is not an end in itself but a means to the end of a free society." *Id.* However, it appears that

press offers its own criticism and fosters open debate among the citizenry.[46] The press is protected in this capacity in order to deliver to the public information necessary for the exercise of democratic rights.[47] Third, the media serve a unique role in the constitutional system of checks and balances. This concept holds the government accountable to the people through the uninhibited reporting of political activities.[48]

In addition, the constitutional protections for these primary functions of the press ensure that journalists may carry out their work through both newsgathering[49] and publication activities.[50] Consequently, the Supreme Court has increasingly focused on newsgathering and publication

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even Justice Frankfurter was unwilling to abandon the personal right theory, noting that freedom of the press "is no greater than the liberty of every citizen of the Republic." *Id.* at 364.

46. Media scholars Langley and Levine contend that "[t]here are very few 'givens' in First Amendment jurisprudence, but among them is the proposition that the dissemination of information about government is the core value to be protected under the rubric of 'freedom of speech, or of the press.'" Monica Langley & Lee Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 34 (1988). *See also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) (stating that "[w]ithout the information provided by the press most of us . . . would be unable to vote intelligently or to register opinions on the administration of government generally").

47. *See* David M. O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579, 590 n.52 (1980) (stating that Alexis de Tocqueville long ago recognized the vital role of the press in a democracy).

48. In Mills v. Alabama, 384 U.S. 214 (1966), the Court declared: "The press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people . . . ." *Id.* at 219.

49. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 681, 707 (1972) (recognizing that newsgathering is constitutionally protected). The Court stated that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. However, the *Branzburg* Court found that the newsgathering privilege does not allow reporters to withhold the identity of a confidential source from a grand jury. *Id.* at 697. *See generally*, Note, *supra* note 43.

50. The Court has granted substantially more protection to publication activities because it directly involves journalists in the constitutional structure of our democratic system. For example, the press receives almost absolute protection against prior restraint on what it may publish. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (denying government's request to enjoin publication of the Pentagon Papers). Furthermore, The Supreme Court has extended protection of the media to include cases involving punishment after publication of a story. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) (ruling against conviction under statute prohibiting publication of names of judges who were subjects of confidential investigation by state commission).

freedoms in determining the scope of constitutional restrictions on efforts to inhibit public access to newsworthy information. In *Branzburg v. Hayes*,[51] the Court recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated."[52] According to Justice Powell's dissenting opinion in *Saxbe v. Washington Post Co.*,[53] *Branzburg* stands for two propositions. First, it holds that government has no constitutional obligation to "justify under the stringent standard of First Amendment review every regulation that might affect in some tangential way the availability of information to the news media."[54] Second, the holding recognizes that "news gathering is not without its First Amendment protections."[55] "An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for intelligent discharge of his political responsibilities . . . . [The press] is the means by which the people receive the free flow of information and ideas essential to intelligent self-government."[56]

B. The Growing Dependence on Confidential Sources

Overwhelming evidence indicates that the press cannot fulfill its newsgathering and publication activities without the help of confidential sources.[57] Every day the average newspaper and wire service relies upon such familiar sources as the immortal "senior staff official," the loyal "friend close to the victim," and the all-knowing "witness at the scene."[58] Reporter Bob Woodward's relationship with "Deep Throat" during the Watergate years[59] led to the once-popular belief that media reliance on

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51. 408 U.S. 665 (1972).

52. *Id.* at 681. However, the Court declined to extend constitutional protections to newsgathering from private persons and groups allegedly engaged in illegal activity. *Id.* at 703-09.

53. 417 U.S. 843 (1974).

54. *Id.* at 860 (Powell, J., dissenting).

55. *Branzburg*, 408 U.S. at 707.

56. *Saxbe*, 417 U.S. at 863 (Powell, J., dissenting).

57. *See* JAMES H. DYGERT, THE INVESTIGATIVE JOURNALIST: FOLK HEROES OF A NEW ERA, 150-51 (1976). Investigative journalist Dygert characterizes the cultivation of sources as an art which requires "a delicate touch and constant attention." *Id.* at 150. He cautions journalists not to reject information offered off the record because the information could lead to an identifiable source. *Id.* at 151. Alternatively, the journalist might persuade the original source to go on the record. *Id.*

58. *See, e.g.*, NAT HENTOFF, THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA 227 (1980) (quoting editor who claims that overwhelming number of stories derive from confidential sources); SHAW, *supra* note 4, at 56-57 (major American newspapers publish large percentage of stories quoting anonymous sources).

59. *See generally* CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1974).

unnamed sources is a relatively new phenomenon.[60] However, history reveals that the use of confidential sources dates as far back as 1812. In that year, Nathanial Rounsevell, an editor for the *Alexandria Herald*, received a contempt citation from Congress for his refusal to identify the sources of a news story.[61] President Franklin Delano Roosevelt appears to have ushered in the modern era of confidential sources by insisting that the press not use direct quotes from White House news conferences.[62] Media scholars and other commentators tend to agree that since the 1940s, the use of confidential sources has reached astronomical proportions.[63] The rapid increase over the past half-century is largely attributed to secretive politicians and a journalistic standard that now accepts stories founded upon the comments of a "source close to the President."[64] Ironically, publishers and editors who make the rare decision to forbid the use of an unnamed source are often perceived as the victims of political pressure, rather than persons making an effort to improve the quality of their profession.

While the use of confidential sources is quite popular among today's journalists, readers and viewing audiences do not share the media's enthusiasm.[65] Recent revelations of bogus sources and suspicious relation-

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60. *See* SHAW, *supra* note 4, at 66.

61. *See* Linda Himelstein, *A Dirty Job, and Many Don't Want to Do It*, THE RECORDER, Nov. 8, 1991, at 2; *see also* Ex Parte Nugent, 18 F. Cas. 471, 471-72 (C.C.D.C. 1848) (No. 10,375) (holding journalist in contempt for refusing to reveal source of information regarding Mexican treaty discussed in secret Senate meetings).

62. His successor, President Harry Truman, chose to invoke Roosevelt's edict when he assumed office. *See* SHAW, *supra* note 4, at 65.

63. The use of unnamed sources is especially popular in the nation's capital. Former *Los Angeles Times* reporter David Shaw points to presidents as the worst offenders. *Id.* He contends that the Kennedy Administration was well known for its practice of leaking stories attributed to anonymous sources close to the President. *Id.* The author further claims that Lyndon Johnson's presidency ushered in a novel use of unnamed sources. *Id.* It seems that Johnson's extreme sensitivity to criticism struck fear in the hearts of administration officials. Therefore, Johnson's aides were forced to leak news to the media for the simple purpose of making their dissenting opinions known to the White House. *Id.* at 66. The Watergate era exacerbated the problems associated with anonymous sources in two respects. First, sources came to recognize the legal risks of being identified by the press. *Id.* Further, Shaw asserts that Watergate ushered in the "scoop" mentality, which pressures journalists to outperform their competitors. *Id.*

64. *See id.* at 66.

65. *See, e.g.*, Henry Rosin, *WAMU Talks Mostly Out of the Left Side of Its Mouth*, WASH. TIMES, Nov. 9, 1991, at D2 (declaring that reporter Nina Tottenberg should reveal identity of source who leaked Professor Anita Hill's affidavit claiming Justice

ships with anonymous insiders have left the readers and viewers skeptical, if not angry, at the media's abuse of public trust.[66] In 1981, the public was confronted with the ugly confession of a Pulitizer Prize-winning author who admitted that she had fabricated the child heroin addict portrayed in her story, "Jimmy's World."[67] Since that time, opinions of reporters and editors suggest that the public lacks faith in the existence of most anonymous sources cited by journalists.[68] Public opinion took another downturn when the Iran-Contra affair revealed that journalists often develop cozy relationships with their confidential informants.[69] This situation presents its own significant problems when an intimate relationship causes a reporter to compromise professional integrity in order to retain the services of an informative source.[70] Thus, the journalist does not fulfill his duty to gather the complete facts, and neglects his responsibility to verify the truth.[71] Finally, overreliance on confidential sources discourages journalists from actively pursuing credible sourc-

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Clarence Thomas sexually harassed her); Irvine & Goulden, *supra* note 5, at F4 (characterizing reporter who habitually relies upon anonymous sources for controversial stories about public officials as a "scalp hunter"); *cf.* Branzburg v. Hayes, 408 U.S. 665, 692-93 (1972) (agreement of confidentiality should not make parties immune from consequences of violating established law).

66. *See* LARRY J. SABATO, FEEDING FRENZY: HOW ATTACK JOURNALISM HAS TRANFORMED AMERICAN POLITICS 200-03, 278 (1991). A random-sample telephone survey conducted by Cable News Network (CNN) in 1989 revealed that Americans, when asked to choose the professional group with the lowest ethical standard, placed journalists second on their list following lawyers by a mere percentage point. *Id.* at 202, 278.

67. *See* Ira R. Allen, UPI, April 16, 1981, *available in* LEXIS, NEXIS LIBRARY, UPI File. Reflecting on the discovery of Cooke's fabrication, Washington columnist Sandy Grady called it "a black day" in the history of journalism. *Id.* Grady suggests that the competitive profession of journalism should share in the discomfort of the revelation and perhaps engage in some soul-searching of its own. *Id.*

68. *See* SHAW, *supra* note 4, at 60-61 (anonymous sources suspected to be bogus).

69. *See* Jonathan Alter, *When Sources Get Immunity: Was North Pampered?*, NEWSWEEK, Jan. 19, 1987, at 54. In spite of their suspicions that Lieutenant Colonel Oliver North was a key player in the diversion of funds to the Nicaraguan Contras, journalists refrained from agressively pursuing the story because North had proven to be a reliable confidential source of inside information. *Id.* The first news stories detailing one of the most complicated and scandal-ridden events of the 1980's first appeared in November 1986 and were followed by three investigations headed by the Tower Commission, Congress, and a special federal prosecutor. North was convicted of helping to provide covert assistance to Nicaraguan forces by means of profits from arms sales to Iran. However, the multicount conviction was eventually overturned on appeal. *See* SABATO, *supra* note 66, at 19-20.

70. *See* Alter, *supra* note 69, at 54 (confidentiality agreement arising out of Iran-Contra scandal prevented reporters from scrutinizing role of North). *See also* SABATO, *supra* note 66, at 102 (local editors refrained from being first to break story of mayor's extramarital affair, which he admitted in confidence to journalists).

71. *See* Alter, *supra* note 69, at 54.

es willing to reveal their identity.[72] Absent strict demands from publishers and editors for disclosure of confidential sources, reporters lack incentive to aggressively seek identifiable informants when a citation to "a senior staff official" will suffice.[73]

Not surprisingly, confidentiality has become a valuable commodity in our news-saturated society.[74] As reporters habitually turn to anonymous informants, some sources have begun to demand that their identities remain secret, occasionally even before they begin to reveal information.[75] Here, while the source has the ability to withhold information and thus establish his power over the reporter, the reporter may also exercise his power over the source. Journalists frequently offer anonymity as a means of eliciting information.[76] This is a particularly useful resource

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72. One former reporter points out that it is much quicker to obtain a story from a confidential source. SHAW, *supra* note 4, at 68. Further, a journalist takes his chances by failing to ascertain the credibility of an anonymous source because the source might have fabricated or distorted the truth. Alfred Knoll, *Don't Quote Me, But . . .*, THE PROGRESSIVE, Sept. 1988, at 4. *But see* DYGERT, *supra* note 57, at 151 (information from confidential source may eventually lead to another source who is willing to speak on the record).

73. Some commentators believe that reporters rely heavily upon confidential sources under the mistaken belief that such sources add prestige and glamour to their stories. *See, e.g.*, Knoll, *supra* note 72, at 4; SHAW, *supra* note 4, at 69. Norman Isaacs, former journalist and past chairperson of the National News Council, refers to this practice as "cloaking of sources for effect." NORMAN E. ISAACS, UNTENDED GATES 27, 52 (1986). This practice was decried by veteran Washington reporter James McCarthy, who suggested that the most salutory thing that could happen in his profession "would be if every reporter were required to take an oath that he would walk out of the office of any official who insisted on talking 'off the record.'" Furthermore, McCarthy contends that journalists should refrain from accepting "background" information not attributable to anyone by name. Lastly, he boldly suggests that the practice of "deep background" briefings should be abolished by constitutional amendment. *Id.*

74. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 693 (1972) (journalists frequently offer anonymity in order to gain access to news of illegal conduct). *See also* SHAW, *supra* note 4, at 62, 66 (political tenor of Watergate crisis enabled investigative reporters to pursue stories without worrying about attribution); ISAACS, *supra* note 73, at 49-50. Referring to pressure imposed by the "scoop virus," one reporter claims, "[I]f you're second often enough, they just get someone else to do your job." *Id.*

75. *See, e.g.*, Garland v. Torre, 259 F.2d 545, 547 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958) (actress sought to discover identity of confidential source of allegedly defamatory news report provided by show business insider).

76. *See* SHAW, *supra* note 4, at 69. However, media critics and editors complain that the popular use of confidential sources leads some reporters to grant confidentiality for almost any story. *See id.* Bill Kovach, the former Washington editor of the *New York Times*, recalls one reporter who told a source over the telephone, "I

when the informant is hesitant to comment or if the journalist has reason to believe that the story will be politically sensitive.[77] With these issues in mind, a journalist is forced to confront three important issues prior to reporting her story. First, she must decide whether a confidential source serves a valid purpose in a particular story.[78] Next, the journalist should determine if the use of an anonymous source is in the best interest of the public and her profession.[79] Finally, the reporter must confront her source's willingness to divulge information. A lack of cooperation on the part of the source increases the chance that a journalist will offer some form of an agreement or compromise to elicit valuable information.[80]

C. *When the Judge Demands to Know "Who's Who?": Constitutional Refuge in the Wake of* Branzburg v. Hayes[81]

American reporters generally resist attempts to force the disclosure of an anonymous source.[82] A journalist will normally reveal the identity of a source only when compelled by a court action.[83] In a civil proceeding, such as a libel suit, a court may force a reporter to reveal her source if she is named party to the litigation.[84] However, courts have also ordered

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assume that's on background," implying that the person's identity would not be revealed in print. *Id.* As a result, Kovach issued a stern warning to his staff that confidentiality should not be volunteered, but rather granted reluctantly and only under special circumstances. *Id.*

77. *See, e.g., Branzburg*, 408 U.S. at 693 (journalist agreed not to reveal names of Black Panther party members in order to secure entry into headquarters); Alter, *supra* note 69 (Lieutenant Colonel Oliver North's briefings for reporters were usually confidential).

78. Several Washington journalists confided in former reporter David Shaw that unnamed sources are not always of critical importance and are, therefore, used too frequently. However, these same persons asked that their identities not be revealed in connection with those remarks. SHAW, *supra* note 4, at 67.

79. *See generally id.* at 59-60 (decreased use of anonymous sources may be means of regaining public's trust in media).

80. In *All The President's Men*, their best selling book about Watergate, the famous investigative duo of Carl Bernstein and Bob Woodward noted that "without [confidential sources] there would have been no Watergate story told by the *Washington Post*." BERNSTEIN & WOODWARD, *supra* note 59, at 7.

81. 408 U.S. 665 (1972).

82. *See, e.g., id.* at 675-76 (reporter fought subpoena compelling him to appear before grand jury to discuss confidential source); Maine v. Hohler, 543 A.2d 364, 364 (Me. 1988) (journalist refused to divulge source when called to testify at murder trial).

83. *See, e.g., Branzburg*, 408 U.S. at 668-76 (consolidation of four cases involving journalists subpoenaed to testify about confidential sources); Tribune Co. v. Huffstetler, 489 So. 2d 722, 723 (Fla. 1986) (reporter subpoenaed by government official investigating alleged violations of ethics by county commissioners).

84. *See, e.g.*, Rancho La Costa v. Penthouse, 165 Cal. Rptr. 347, 358-59 (Cal. Ct.

journalists to comply with court orders when they are not named parties. Perhaps the most common instance of forced disclosure takes place in the criminal courts when a journalist has information regarding criminal activity.[85] In this context, the Supreme Court concluded that "[t]he preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution,"[86] and that such a "preference . . . is hardly deserving of constitutional protection."[87] In both civil and criminal matters, journalists generally claim that if courts force them to reveal the source of their information, it will impair their newsgathering abilities because of a source's reluctance to further cooperate.[88] Yet, threatened with potential fines, unemployment, and imprisonment, even the most ardent journalists are likely to comply with court orders.[89]

During an era in which even "routine" news reports are increasingly dependent upon information provided to journalists by confidential

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App. 1980) (court ordered journalist to disclose confidential source of allegedly defamatory article); Downing v. Monitor Publishing Co., 415 A.2d 683, 685 (N.H. 1980) (plaintiff in libel suit sought to compel identification of sources who made allegedly defamatory statements).

85. *See, e.g.*, *Branzburg*, 408 U.S. at 668-76 (reporters subpoenaed by grand juries for information regarding confidential sources suspected of criminal activity); *Hendricks*, 14 Media L. Rep. at 2372 (after obtaining information from confidential sources about defendant's alleged criminal activity, journalists subpoenaed to testify). *But see Huffstetler*, 489 So. 2d at 723 (reversing newsman's subpoena during investigation by authorities for information about confidential sources).

86. *Branzburg*, 408 U.S. at 691.

87. *Id.* The Court refused to "seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it." *Id.* at 692.

88. *See, e.g.*, *Branzburg*, 408 U.S. at 679, 682 (forced disclosure of source's identity would breed distrust between informants and the press and would hinder journalist's newsgathering abilities); Plunkett v. Hamilton, 70 S.E. 781, 785 (Ga. 1911) (compelling disclosure of newsman's sources would substantially impair ability to report the news).

89. One of the most publicized cases involved *New York Times* reporter Myron Farber. *See In re* Farber, 394 A.2d 330, 332 (N.J. 1978), *cert. denied*, 439 U.S. 997 (1978). Farber was sentenced to six months in jail after being held in contempt of court. As an added penalty, his employer, the *New York Times*, was fined $100,000 for the reporter's refusal to cooperate with the court. The trial, in which Farber refused to testify, ended less than three months after he was sentenced. Thus, the reporter actually served only 82 days in jail. *Id. See also* Farr v. Pitchess, 522 F.2d 464, 466 (9th Cir. 1975) (court ordered reporter jailed for refusing to reveal source of information regarding murder), *cert. denied*, 427 U.S. 912 (1976).

sources, the law has remained relatively static regarding the constitutional protections afforded reporters in court proceedings. The first noteworthy development in this area comes from *Garland v. Torre*,[90] a 1958 case involving the late actress Judy Garland. The plaintiff sought to uncover the identity of the source of allegedly defamatory statements.[91] Although the court ultimately held that the defendant journalist was required to reveal the identity of his source, the Second Circuit suggested for the first time that the First Amendment might provide a journalist with a privilege to withhold a source's identity under certain circumstances.[92] However, in the decade following *Garland*, the judicial concept of First Amendment protection for journalists concealing the identity of their sources remained almost dormant. It was not until the late 1960s, when America witnessed the rise of politically dissident groups, that courts addressed the concerns of sources and reporters alike. Organizations such as the Black Panthers began to condition the sharing of information with the press upon the promise that their identities would remain confidential.[93] Apparently, they feared that once their names were known to the public, government forces could identify them and subject them to prosecution for their political activities.[94] In response, the government sought assistance from the courts to compel disclosure of sources possibly connected to allegedly violent and illegal activity.[95]

The confrontations between the media and government climaxed in the 1972 case of *Branzburg v. Hayes*,[96] in which the Supreme Court held that no First Amendment privilege protects the press from revealing its confidential sources in the context of grand jury investigations undertaken in good faith.[97] While *Branzburg* clearly stands for the proposition

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90. 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

91. *Id.* at 547.

92. *Id.* at 548 (declaring that "compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news"). *See also In re* Grand Jury Witnesses, 322 F. Supp. 573, 574, 577-78 (N.D. Cal. 1970) (denying newsmen privilege to refuse to testify before grand jury about confidential sources).

93. *See Branzburg*, 408 U.S. 665, 679 (1972).

94. J. Edgar Hoover, then Director of the FBI, once characterized the Black Panther Party as "the greatest threat to the internal security of the country . . . its members have perpetrated numerous assaults on police officers and have engaged in violent confrontations with police throughout the country." S. REP. NO. 755, 94th Cong., 2d Sess. 187-88 (1976). At one time, the Panthers were the focus of a covert action program designed to disband organizations which the FBI characterized as "Black Nationalist Hate Groups." *Id.* at 187.

95. *See, e.g., In re* Grand Jury Witnesses, 322 F. Supp. at 577 (involving two reporters subpoenaed to testify before grand jury investigating Black Panther Party for acts allegedly "directed against the security of the government").

96. 408 U.S. 665 (1972).

97. *Id.* at 690 (footnote omitted) ("We are asked to create another [testimonial

that First Amendment protections are not absolute, the Court did recognize, for the first time, that the First Amendment theoretically protects newsgathering.[98] However, the Court did not address the propriety of a reporter's claiming a privilege of confidentiality when under subpoena in a criminal proceeding.[99]

In spite of the indefiniteness of the majority opinion in *Branzburg*, lower courts have used the case to formulate a balancing test regarding matters not before a grand jury. In these instances courts rely on Justice Stewart's dissent[100] in which he suggests the parameters for compelling a reporter to reveal the identity of her source.[101] With these parameters in mind, courts weigh the importance of a confidentiality agreement against the need for the court to ascertain the truth.[102] To determine whether a qualified privilege should protect the journalist in criminal proceedings, a court will weigh three factors. First, the court will consid-

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privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.").

98. *Id.* at 681. The Court found that any privilege claimed by journalists must give way to the government's fundamental interests in the administration of justice and in solving crimes. *Id.* at 700-02. Modernly, federal common law provides a qualified privilege for journalists as first recognized in Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979). In *Riley*, the Third Circuit held that journalists were privileged not to reveal the identity of confidential sources in federal question cases due to the strong First Amendment interest in encouraging the free flow of information. *See also* United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) (holding qualified privilege applies to criminal cases), *cert. denied*, 449 U.S. 1126 (1981).

99. The Court's opinion in *Branzburg* focuses upon both the confidential sources (dissident political groups) and the crimes they allegedly committed (violent protests, drug use). *See, e.g., Branzburg*, 408 U.S. at 691-92. Therefore, the Court paid much attention to the government's perceived interest in preventing harm to the community instead of focusing on the nature of the relationships between the press and confidential sources.

100. *Id.* at 725-52 (Stewart, Brennan, and Marshall, J.J., dissenting).

101. *See, e.g.*, Zerilli v. Smith, 656 F.2d 705, 711-12 (D.C. Cir. 1981) (finding that the powerful dissenting opinion in *Branzburg* established the standards for a qualified privilege for journalists who refuse to disclose the identities of confidential sources).

102. *See, e.g.*, United States v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976) (in deciding whether source must be disclosed, courts must strike balance between interest in upholding reporter-source agreements and interests of criminal justice system); United States v. Liddy, 478 F.2d 586, 587 (D.C. Cir. 1972) (reporter's privilege must be balanced against society's interest in compelling all citizens to give relevant testimony); United States v. Orsini, 424 F. Supp. 229, 232 (E.D.N.Y. 1976), *aff'd*, 559 F.2d 1206 (2d Cir. 1977) (decision whether to reveal identity of confidential source requires courts to balance reporter's interests against defendant's sixth amendment right to a fair trial).

er whether the journalist actually possesses information vital to the resolution of the ultimate issue.[103] Second, the court must examine whether other reasonable means of gathering the information exist.[104] Last, and perhaps most important, the court must consider whether a failure to obtain the information would cause a miscarriage of justice.[105] Thus, under the three *Branzburg* factors, a qualified privilege protects journalists when the interests of confidentiality outweigh the need to obtain information from a confidential source.

D. Journalists Search for Broader Protection: the Shield Laws

Branzburg's failure to establish a strict testimonial privilege spurred the press to seek a more protective form of refuge from court orders.[106] As a result of intense lobbying efforts on behalf of journalists, many state legislatures have enacted "shield laws" that provide a qualified privilege to protect confidential communications between journalists and their unidentified sources.[107] The shield laws are analogous to the rules of evidence, which seek to protect confidential relationships such as those between an attorney and client or a doctor and patient.[108] Today, a slight majority of states provide varying degrees of protection for journalists.[109] Almost half the states in this group grant an unqualified privilege for the media, thereby enabling them to avoid revealing a source's identity in any criminal or civil proceeding.[110] The remaining states have cho-

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103. *See, e.g.*, Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir. 1974) (compelled testimony requires court to balance journalist's interests against need for testimony), *cert. denied*, 417 U.S. 938 (1974).

104. *See, e.g.*, Baker v. F & F Investment, 470 F.2d 778, 783 (2d Cir. 1972) (upholding qualified privilege when First Amendment interest in free press outweighs interest in forced testimony), *cert. denied*, 411 U.S. 966 (1973).

105. *See id.*

106. The Supreme Court itself has stated that it is in effect "powerless to bar state courts from responding in their own way and construing their own constitution so as to recognize a newsman's privilege, either qualified or absolute." Branzburg v. Hayes, 408 U.S. 665, 706 (1972). Thus, it appears that the Court has paved the way for journalists to strengthen shield laws.

107. *See generally* Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815 (1983) (surveying various state approaches to shield laws). One of the most well-known cases cited in the historical development of shield laws is that of journalist John Peter Zenger who, in 1734, chose to remain in jail rather than reveal his sources. Zenger withstood nine months of imprisonment before he was finally tried and acquitted. *Id.* at 817.

108. *See* Phillip R. Roach, Jr., *The Newsman's Confidential Source Privilege in Virginia*, 22 U. RICH. L. REV. 377, 379 (1988) (describing similarities between media shield laws and attorney-client privilege).

109. *Id.* at 387-88 n.70 (listing statutes of 26 states that have enacted shield laws).

110. *Id.*

sen to apply the *Branzburg* factors,[111] thereby compelling a reporter to identify the source if the court finds that the information sought is relevant, important and not reasonably obtainable from any other source.[112] Thus, the media enjoys only a qualified privilege in these states.[113] The impact of shield laws on the reporter's source most effectively illustrates the limitations of these laws.[114] Courts have left no doubt that the intent of shield laws is to protect the "free flow" of information, rather than to protect persons who provide the information.[115] Furthermore, in spite of numerous proposed statutes, Congress has failed to enact a federal shield law.[116] Thus, until *Cohen v. Cowles Media Co.*,[117] state shield laws forced the press to focus on *how* to protect the identity of sources from court disclosure orders rather than on whether the press had the right to not reveal a confidential source at all.[118]

E. "Methinks the Source Doth Protest Too Much": Journalists Fight to Reveal the Identity of Newsworthy Sources

Today the media has discovered that its right to shield the identity of confidential sources can be a double-edged sword. While much of the press enjoys the protection of shield laws,[119] many of today's journalists are seeking the right to expose the identity of a source when the source itself is considered newsworthy.[120] On the one hand, these journalists argue that involuntary exposure is in the public interest.[121] Yet they

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111. *See supra* text accompanying notes 103-05.

112. *See* Malcom St. Dizier, *Reporters' Use of Confidential Sources, 1974 and 1984: A Comparative Study*, 6 NEWSPAPER RES. J. 44, 45 (1985).

113. *See* St. Dizier, *supra* note 112, at 45.

114. *See* New Jersey v. Boiardo, 416 A.2d 793, 795 (N.J. 1980) (acknowledging the chilling effect compulsory disclosure has on confidential sources).

115. *See id.* (declaring that a reporter's privilege belongs exclusively to the reporter, not her source).

116. *See* TOM GOLDSTEIN, THE NEWS AT ANY COST: HOW JOURNALISTS COMPROMISE THEIR ETHICS TO SHAPE THE NEWS 157-58 (1985).

117. 111 S. Ct. 2513 (1991). The defendants in *Cohen* voluntarily revealed the identity of their source. Thus, the case does not squarely address the extent of protection under shield laws. However, the Court's holding on the ability of a source to recover for breach of a confidentiality agreement is certain to have an impact on all types of reporter-source relationships.

118. *See* Monica Langley & Lee Levine, *Broken Promises*, COLUM. JOURNALISM REV., July-Aug. 1988, at 24.

119. *See supra* notes 109-13 and accompanying text.

120. *See* Langley & Levine, *supra* note 118.

121. *See, e.g., Cohen V*, 111 S. Ct. at 2518. *But see* EDMUND B. LAMBETH, COMMITTED

fight the same notion when faced with a court order compelling disclosure, arguing that forcing disclosure of the source of their information impairs their newsgathering abilities.[122]

Revealing the identity of a confidential source is not a totally new practice and actually occurs with greater frequency than one might suspect.[123] Several prominent news stories arising during the 1970s and '80s demonstrate that such exposure is not uncommon, nor does it necessarily lead to a court battle. Journalist Sidney Zion revealed to the public that Daniel Ellsberg supplied the "Pentagon Papers" to the *New York Times*.[124] Bob Woodward informed the press that Justice Potter Stewart agreed to supply information for Woodward's book, *The Brethren*, only on condition of anonymity.[125] And after the United States government took steps to retaliate against the highjackers of the Achille Lauro cruise ship, the public learned that none other than Lieutenant Colonel Oliver North acted as the media's confidential source.[126]

A related issue arises when a journalist seeks to gain a source's confidence through private discussions. In these instances, the journalist may imply or promise that he will neither use the content of the meeting nor reveal the source of his information.[127] Such conversations may be necessary to cultivate the trust of an informant or to gain an understanding of information previously obtained.[128] However, a problem arises when the meeting itself produces a newsworthy story. For example, *Washing-*

JOURNALISM: AN ETHIC FOR THE PROFESSION 143 (1986). According to one author, the reason for intentional exposure is commonly one of self-interest. Litigation presents one context in which the media may reveal a source for its own benefit. This has led some news organizations to enter into explicit contracts with sources which provide that in the event of litigation, a source's identity may be revealed. *Id.* at 142-43. *See also*, Richard Harwood, *Defending the Indefensible*, WASH. POST, June 30, 1991, at C6 (journalist decries "rhetorical whining" of editors who complain that courts are infringing upon the right of the press to present the news).

122. *See* Branzburg v. Hayes, 408 U.S. 665, 677 (1972); HENTOFF, *supra* note 58, at 229-30.

123. Floyd Abrams, a well-known First Amendment attorney, has remarked that voluntary exposure of confidential sources is especially common in defamation litigation. While journalists may give little thought to breaking a promise of confidentiality, they may choose to "fib" about their broken promises to their peers. *See* Langley & Levine, *supra* note 118, at 21.

124. *See* GOLDSTEIN, *supra* note 116, at 156-57. Some journalists question Zion's duty to protect Ellsburg's identity because he no longer worked for the *New York Times* when he identified Ellsburg as the leak. *Id.*

125. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHEREN (1979).

126. *See Two Leaks, But By Whom?*, NEWSWEEK, July 27, 1987, at 16. *Newsweek*'s decision to identify North drew criticism from the magazine's own staff as well as from the press in general. *Id.*

127. *See* GOLDSTEIN, *supra* note 116, at 188.

128. *Id.*

ton Post reporter Milton Coleman disclosed that the Reverend Jesse Jackson referred to Jews as "Hymies" in private conversations with journalists during the 1984 presidential campaign.[129] A similar incident arose when Henry Cisneros, then mayor of San Antonio, Texas, confessed to a local reporter that he had engaged in an extramarrital affair with a campaign aide.[130] Shortly thereafter, the *San Antonio Express-News* published the story.[131] While both of these incidents took place under a cloak of confidentiality, the respective newspapers rationalized the decision to publish the information by claiming that the stories were a matter of public importance.[132] This defense exposes the vulnerability of a source who trusts the express or implied promise of a reporter. If the journalist is given the freedom to determine when public interest concerns justify publication, it appears that the journalist may disclose almost anything that the media deems newsworthy.

F. Ethical Guidelines for the Confidential Source Dilemma

Since 1923, codes of ethics addressing a wide variety of issues have provided guidelines for American journalists in their newsgathering tasks.[133] Two primary problems remain regarding confidential sources. First, the media industry has generally avoided implementing strict standards with the "teeth" necessary to effectively restrain reporters in certain situations. Most newspapers consider it sufficient to abide by the policies of national professional organizations such as the American Society of Newspaper Editors (ASNE).[134] News outlets that choose to adopt their own ethical codes compound this problem.[135] Quite often,

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129. *See id.* at 187-88 (illustrating need for media and its sources to clarify the terms of their conversations).

130. *See* David Maraniss, *The Tumult of Mayor Cisneros*, WASH. POST., Oct. 24, 1988, at C1.

131. *See* SABATO, *supra* note 66, at 17-18.

132. Editors believed that as a candidate for the nation's highest office, Jackson could not hide behind a guise of confidentiality. GOLDSTEIN, *supra* note 116, at 187. Likewise, those involved in the decision to publish news of Cisneros' affair determined that the citizens of San Antonio needed a complete and honest account of their leader's marital problems. *See* Maraniss, *supra* note 130, at C1.

133. The American Society of Newspaper Editors (ASNE) set forth their Ethical Code in 1923. Some 50 years later, the Society of Professional Journalists (SPJ) implemented their own code. *See* GOLDSTEIN, *supra* note 116, at 166.

134. *See id.* at 167.

135. *Id.* Goldstein's research revealed that 27 of 37 newspapers had their own written codes. *Id.*

their written standards are no more strict or precise than those of the national organizations.[136] Second, whether applying a national or local code, journalists have little guidance regarding the issue of confidential sources.[137] However, in the aftermath of Janet Cooke's revelation of her fabricated story of the child heroin addict, some newspapers began to reexamine their policies during the 1980s.[138]

The common thread among most of these new policies is the greater role played by editors in the decision-making process. Prior to granting confidentiality to a source, journalists generally must obtain permission from their editor.[139] This includes revealing the source's identity so that the editor may evaluate that source's credibility.[140] Editors justify this expanded influence by citing the legal ramifications for the newspaper should a source seek redress.[141] They argue that if the newspaper must face liability for its stories, the paper deserves some measure of control over the actions of its reporters.[142] As one might expect, media commentators have not greeted this policy with enthusiasm, nor allowed it to escape criticism. Both journalists and media commentators complain that by leaving the ultimate decision of disclosure to an editor, the system strips the journalist of his independence.[143] Furthermore, they contend that this system presents logistical problems for the reporter, who is out in the field covering a story while his editor remains in the newsroom.[144] In addition, many editors fear that increased regulatory procedures will provide fuel for a plaintiff's claim in court.[145] Others argue, however, that a plaintiff may use a failure to legislate media ethics against a journalist in the courtroom.[146] Common logic dictates that it is

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136. *Id.*

137. Industry-wide codes are generally grouped under broad categories, none of which includes reference to confidential sources. *See infra* notes 434-36 and accompanying text.

138. *See generally*, GOLDSTEIN, *supra* note 116, at 217 (urging stricter and more definitive guidelines for the reporter-source relationship).

139. Langley & Levine, *supra* note 118, at 22 (referring to several news outlets where editors are required to examine and approve of reporter-source agreements of confidentiality).

140. *See, e.g., Cohen V*, 111 S. Ct. 2513, 2515 (1991).

141. *See, e.g.*, Langley & Levine, *supra* note 118, at 22 (some insurers offering coverage in the event of a libel suit demand to know the identity of sources).

142. *Id.*

143. *See* Richard P. Cunningham, *Should Reporters Reveal Sources to Editors?*, THE QUILL, Oct. 1988, at 7-8 (emphasizing that the independent nature of journalists tends to breed resentment toward policies designed to curb their freedom).

144. *Id.*

145. *See* GOLDSTEIN, *supra* note 116, at 166-67 (citing belief that a paper trail of ethical codes may substantially influence juries in libel litigation). *But see id.* at 167 (declaring that the threat that a newsroom's ethical guidelines will have adverse impact in litigation is exaggerated).

146. *See, e.g.*, Seegmiller v. KSL Inc., 626 P.2d 968, 976 (Utah 1981) (finding the

more prudent to avoid liability by implementing practical guidelines *before* a disgruntled source decides to file a claim.[147]

III. CURRENT APPROACHES AND RECENT CASE LAW DEVELOPMENTS IN SOURCE RECOVERY

The issue of whether a court should enforce a reporter's promise of confidentiality to a news source sparks a classic conflict between two important freedoms. On the one hand, the First Amendment affords the press broad liberties in the gathering and publication of newsworthy information. On the other hand, the freedom to contract, while not a constitutionally protected right,[148] is one in which the state also has an important interest. Perhaps the most obvious method of resolving this dilemma would be to recognize that interests of a constitutional dimension clearly outweigh those founded in the common law of contracts. This approach, however, ignores the principle that even constitutional rights must be reconciled with other rights, not simply through their inherent power as tenets of the Constitution, but in a manner which recognizes the broad interests of society as a whole.[149]

Courts continue to search for the means by which to resolve the conflicting interests of First Amendment and contract freedoms. Indeed, as contract actions by sources are finding their way into courtrooms, this issue has become the subject of heated judicial debate and scholarly criticism.[150] Part A of this section describes three popular approaches to this issue: the traditional contract model; the promissory estoppel model; and the First Amendment model. Part B illustrates how various state and federal courts have treated each approach, as well as the United States Supreme Court, which squarely addressed the issue of source recovery for breach of a confidentiality agreement in the 1991 case, *Cohen v.*

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customs and practices of media defendants relevant in determining negligence).

147. In fact, many news outlets update their written standards of conduct in an attempt to curb abuses by reporters. ISAACS, *supra* note 73, at 53.

148. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (declaring that not all impairments of private contracts are deemend unconstitutional in spite of protections afforded by Contracts Clause). *See also* U.S. CONST. art. I, § 10.

149. *See* Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 39 (1943).

150. *See, e.g., Cohen V*, 111 S. Ct. 2513 (1991) (finding that law of promissory estoppel governs source's claim against media defendant); Ruzicka v. Condé Nast Publications, Inc., 939 F.2d 578 (8th Cir. 1991) (finding state law does not enforce promises of confidentiality).

Cowles Media Co.[151]

A. Legal Models for Treatment of the Reporter-Source Relationship

1. Strict Liability Under Contract Law: Is a Promise Always a Promise?

While some would argue that reporter-source agreements are promises which merely create ethical obligations as opposed to contracts,[152] courts decline to make such a distinction.[153] Under this approach, the principle of strict liability demands that, absent a valid defense, such as misrepresentation, mistake, incapacity, or duress, the agreement should be considered an enforceable contract.[154] Accordingly, parties entering into an agreement do so with a reasonable expectation of full, or at least substantial, performance. Thus, under the "sanctity of contracts" approach, it follows that a source who enters into a confidentiality agreement would likely recover damages for losses flowing from a journalist's breach of contract by revealing the source's identity.[155] Proponents of this theory point to several policies which justify an important state interest in upholding traditional notions of contract law, most importantly reliance,[156] efficiency,[157] fairness,[158] and primacy of will.[159] With these policies in mind, some would argue that enforcement of reporter-source relationships is necessary regardless of the actual substance of a confidentiality agreement.[160]

The neutral application of contract law to agreements between private parties might suggest an absence of state action for purposes of First Amendment scrutiny.[161] As one commentator aptly noted, "This ap-

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151. *Cohen V*, 111 S. Ct. 2513 (1991) (emphasizing that First Amendment does not protect press from suit arising from breach of reporter-source agreement).

152. *See supra* notes 133-47 and accompanying text.

153. *See, e.g., Cohen III*, 445 N.W.2d 248 (Minn. Ct. App. 1989). The Minnesota Court of Appeals clearly found the existence of an offer, acceptance, and consideration in the agreement between Cohen and the newspapers. *Id.* at 258-59.

154. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 9-1 (3d ed. 1987).

155. *See id.* at § 1-4. For centuries, legal philosophers have focused on the following five factors to explain why the legal system recognizes and enforces private agreements: "(a) [T]he human will either as a source of sovereignty or (b) as a source of moral compulsion, (c) private autonomy, (d) reliance, and (e) the needs of trade." *Id.*

156. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

157. R. POSNER, ECONOMIC ANALYSIS OF LAW § 4.3 (4th ed. 1992).

158. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

159. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 575 (1933).

160. *See* GRANT GILMORE, THE DEATH OF CONTRACT 40 (1974) (stating that freedom of contract is a fundamental tenet of contract law).

161. *See Cohen V*, 111 S. Ct. 2513, 2517-18 (1991) (finding that the First Amendment

proach is neither adequate in its denial of state action nor faithful to the body of contract law which it purports to apply."[162] Since its historic ruling in *New York Times Co. v. Sullivan*,[163] the Supreme Court has found that the test of state action is "not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[164] Therefore, a finding of state action in the context of a dispute involving a reporter-source confidentiality agreement is merely an extension of the "unambiguous assumption of state action in the context of tort claims, in which courts enforcing the common law would be adjudicating state-created rights and duties."[165]

Aside from issues arising out of the state action dispute, there are other reasons why the contract model represents an overly simplistic approach to reporter-source agreements. Even if journalists should be bound by their promises of confidentiality just like other parties to private agreements, even classic contract doctrine recognizes that in some instances, public policy interests may override those of the contracting parties. For example, the doctrines of unconscionability, mistake, frustra-

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does not require that courts more strictly scrutinize enforcement of the theory of promissory estoppel against the press than enforcement against others).

162. *See* Levi, *supra* note 3, at 645-46.

163. 376 U.S. 254 (1964).

164. *Id.* at 265.

165. Levi, *supra* note 3, at 647. Professor Levi suggests that those who would assign contract law to the realm of purely private interests might also contend that the fundamental principles of tort and contract do not demand equal scrutiny by the state. However, over time, rigid distinctions between contract and tort have begun to give way to a partial merger of these two areas of the law. As Professor Tribe has remarked, "In an era in which contract and tort merge . . . [a] distinction is hardly satisfactory." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1714 (2d ed. 1988). For example, the premise that parties are free to contract as they desire founds the traditional tenets of contract law. RESTATEMENT (SECOND) OF CONTRACTS, ch. 8, introductory note (1979). Accordingly, parties to a voluntary agreement are generally responsible for the consequences of their acts. *See id.* However, there are recognized exceptions to this doctrine which suggest that social values play a substantive role in the enforcement of contracts, just as they do in tort law. According to the Restatement (Second) of Contracts, under some circumstances "the interest in freedom of contract is outweighed by some overriding interest of society." *Id.* For example, the doctrines of unconscionability, undue influence, mistake, frustration, and incapacity limit the enforcement of a private voluntary contract. *Id.* at §§ 152-53, 177, 262, 265. *See also id.* at § 161(b) (stating that parties are obligated to act with one another in good faith and with proper deference to reasonable standards of conduct); *id.* at § 164 (noting that misrepresentations render a contract voidable); *id.* at § 178 (stating that courts many deny enforcement of illegal agreements and others contracts determined to be contrary to public policy).

tion, duress, and undue influence may limit the enforcement of private contracts.[166] In the words of one commentator, these limitations serve as "self-consciously public supplements to a dominantly private contract doctrine, by policing the limits of acceptable bargain in the name of social norms of fairness."[167] Thus, it follows that prior to the strict enforcement of any private agreement, courts must examine the overall social worth of the contract as well as any special interests of the contracting parties.[168]

Granted, courts generally enforce agreements of confidentiality arising in the context of traditional business relationships on the grounds that they involve certain fiduciary duties or that enforcement will promote classic commercial interests such as investment and business morality.[169] However meritorious the automatic enforcement of contracts may be in the workplace, extending this principle to press confidentiality agreements is short-sighted and certainly dangerous to reporter-source relationships. Breaching a promise of confidentiality should not go unpunished. However, at a minimum, courts should consider imposing a higher burden of proof in this context, requiring a plaintiff suing under a strict contract theory to show, with clear and convincing evidence, that the reporter either promised confidentiality with the knowledge that she would later breach the promise, or with serious doubts as to whether she would honor the promise.[170] Any lesser protection afforded the press fails to recognize the historic importance of the media's newsgathering and publication functions.

2. Promissory Estoppel: Public Policy Offers Sources a Second Chance for Recovery Under Contract Law

Even if the typical reporter-source agreement fails to meet the requirements of a valid contract,[171] a source may have an alternate means of recovery under the doctrine of promissory estoppel. Promissory estoppel is viewed as both a method of protecting the promisee's reliance interest

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166. RESTATEMENT (SECOND) OF CONTRACTS §§ 152-53, 177, 265 (1979).

167. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1001 (1985).

168. *Id.*

169. *See generally* Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 350, 363-70 (1989) (noting that courts presume various societal interests in the promotion of confidential relationships).

170. *See* Michael Dicke, Comment, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553, 1579-81 (1989) (proposing clear and convincing standard for proof that "a confidentiality agreement existed and that a media entity breached the agreement by publishing information in violation of its terms").

171. *See infra* note 312 and accompanying text.

and as a means of giving effect to the parties' real intentions upon entering into a legally binding agreement.[172] While generally considered an extension of the law of contracts, promissory estoppel departs from the fundamentals of contracts in two important respects. First, the doctrine rejects the notion that all voluntary agreements (subject to narrow exceptions) should be enforced, because promissory estoppel represents what the parties necessarily intended.[173] Second, the doctrine applies a contextual approach to contracts, paying particular attention to the public policy implications of contract enforcement.[174] With these principles in mind, the factfinder must ultimately determine whether "injustice" would result if the agreement at issue were not enforced.[175]

While reporter-source agreements are generally presumed to impose an ethical duty to keep the identity of a source secret, the legal ramifications of a reporter's promise are subject to various interpretations.[176] Therefore, under the doctrine of promissory estoppel, the court first examines whether the parties intended legal consequences to flow from their agreement. While some would argue that an exchange of promises necessarily implies a legal contract,[177] there may be instances in which

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172. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979). *See generally* Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443 (1987).

173. *See, e.g., Cohen IV*, 457 N.W.2d 199, 203 (Minn. 1990) (finding that the parties to a reporter-source agreement of confidentiality did not intend legal consequences to flow from their promises).

174. *See id.* (declaring contract law "ill fit" in the context of press-source relationships).

175. *See Cohen IV*, 457 N.W.2d at 204-05.

176. *See* LOU CANNON, REPORTING: AN INSIDE VIEW, 247-53 (1977). Recognizing the confusion that sometimes results when insiders are consulted for background information, one journalist has suggested seven different options designed to alleviate the uncertain consequences of background briefings:

1. Completely on the record, everything fully quotable.
2. On the record, but check quotes with interviewee before using.
3. On the record, but paraphrase or indirect discourse only.
4. Background with direct quotes attributable to a source such as a White House official.
5. Background with indirect quotes attributable to a source such as a White House official.
6. Deep background, no quotes, use with attribution such as it is understood or without attribution and "on your own."
7. Off the record, information not publishable.

Id. at 247-48.

177. *See* Kurt Hirsch, Note, *Throwing the Book at Revelations: First Amendment*

the ground rules established by the reporter or source are so vague or ambiguous that one or both parties presume the other to lack serious intentions.[178] Thus, under the doctrine of promissory estoppel, courts will refuse to create a contract in situations in which, given the social and professional context, the parties were not likely to expect legal consequences to flow from their agreement.[179]

The second step of a promissory estoppel analysis requires the court to determine whether, given the "special relationship" of the a reporter and his source,[180] non-enforcement of an agreement would result in injustice. Thus, the court must weigh the First Amendment concerns of a free press against the state's interest in upholding the terms of a valid contract.[181] While classic constitutional balancing tests[182] generally tip the scale in favor of the freedom afforded the press under the First Amendment, this is not necessarily the case when it comes to an agreement of confidentiality.[183] In contrast to law of defamation, the doctrine of promissory estoppel involves a less mechanical approach[184] in which

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Implications of Enforcing Reporters' Promises, 18 N.Y.U. REV. L. & SOC. CHANGE 161, 178 (1990-91) (declaring that the parties in *Cohen* certainly intended to create a contract). *But see* Levi *supra* note 3, at 667 (hypothesizing that the parties in *Cohen* might have misunderstood one another's expectations).

178. *See* GOLDSTEIN, *supra* note 116, at 187-88 (context of reporter's conversation with a politician illustrates need for parties to clarify terms of their conversations).

179. *See, e.g., Cohen IV*, 457 N.W.2d 199, 203 (1990).

180. The Minnesota Supreme Court analogized the reporter-source relationship to other "special relationship" settings in which non-enforcement of a contract is found not to upset fundamental considerations of public policy. *Id.* Indeed, not all confidential relationships warrant protection under the law. Courts recognize that relationships necessarily involve an element of risk. As one court has commented, "A cause of action cannot lie each time someone succumbs to the temptation to break a confidence and whisper a juicy rumor." Blair v. Union Free Sch. Dist. No. 6 Hauppauge, 324 N.Y.S.2d 222, 228 (Dist. Ct. 1971). For example, in the case of a broken engagement, the law defers to society's interest in enforcing traditional notions of morality and personal honor. *See* RESTATEMENT (SECOND) OF CONTRACTS § 21(c), illus. 5 (1981). This standard is appropriate in the area of social relations where an individual should be to free to conduct himself as he sees fit, subject to reasonable limits. Furthermore, personal taste and instinct typically play a large role in the area of personal relations. Therefore, it follows that individuals are better able to make well-reasoned decisions than courts of law.

181. *Cohen IV*, 457 N.W.2d 199, 205 (Minn. 1990).

182. For example, a decision to impose limits on the press requires a court to first consider whether the state has a compelling state interest in regulating the activity. Second, the court must determine whether the proposed limitations substantially relate to that interest. *See, e.g.*, Allen v. Combined Communications, 7 Media L. Rep. (BNA) 2417, 2420 (Colo. Dist. Ct. 1981) (describing terms of appropriate balancing test). *See also* Lewis v. Baxley, 368 F. Supp. 768, 778 (N.D. Ala. 1973).

183. *See, e.g., Cohen V*, 111 S.Ct. 2513, 2518-19 (holding that First Amendment interests do not shelter the press from uniform application of promissory estoppel doctrine).

184. Although subsequent cases have established that the press is not completely

the potentially high costs of non-enforcement command heightened protection of the interests of both media defendants and sources.[185] Since policy considerations involve difficult value choices, courts may be reluctant to explicitly set forth the reasons for their decision under the second step of the promissory estoppel model, choosing instead to focus on the first issue—the intent of the parties.[186] But regardless of whether courts base their opinions on the first or second step of a promissory estoppel model, promises made by the press "in the classic First Amendment context of . . . a political campaign"[187] do not always enjoy the same protection as other forms of free speech. While promissory estoppel permits some degree of flexibility in an otherwise rigid contractual analysis of reporter-source agreements, all critics of the contract model do not welcome these accommodations.[188]

3. First Amendment Protection: Heightened Scrutiny Shelters the Press

> You can't tell a carpenter he is free to practice his trade as long as he uses no tools. You can't tell a newspaperman that he has a free press as long as he does not use his tools . . . .[189]

Some would suggest that traditional notions of a free press impose an

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shielded from liability under defamation law, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and its progeny imposed heightened protection for the press against suits for libel and slander by requiring that public officials and public figure plaintiffs prove that defamatory statements were made with "actual malice" (i.e., with knowledge that the statements were false or in reckless disregard of their truth or falsity). *See id.*, 376 U.S. at 279-80. *See also supra* notes 18-21 and accompanying text.

185. In *Cohen IV*, 457 N.W.2d 199 (1990), the Minnesota Supreme Court found in favor of the *Star Tribune* and *Pioneer Press*. *Id.* at 205. However, the court conceded that "[t]here may be instances where a confidential source would be entitled to a remedy such as promissory estoppel, when the state's interest in enforcing the promise to the source outweighs First Amendment considerations . . . ." *Id.* Here, the court recognized that the Constitution does not protect the press from considerations of public policy. Indeed, the majority's use of terms such as "inappropriate" and "ill fit" in reference to contract law to some degree demonstrates its own policy concerns. *See id.* at 203.

186. As Professor Levi astutely commented, the Minnesota Supreme Court "attempted to disguise its policy determination by shoehorning it into the apparently doctrinal rubric of the parties' intent . . . ." Levi, *supra* note 3, at 614.

187. *Id.* at 205.

188. *See infra* notes 166-67 and accompanying text.

189. CANNON, *supra* note 176, at 284 (quoting A.M. Rosenthal, former managing editor of the *New York Times*).

impenetrable barrier between the press and a source whose identity has been unwillingly revealed.[190] However, the First Amendment freedoms to gather and print the news do not exempt the press from tort claims.[191] As one commentator has aptly noted, courts do not tolerate illegal conduct merely because it expresses a constitutionally protected idea.[192]

While journalists have sought to expand their general First Amendment privileges, they have failed to convince the Supreme Court that sources are prevented from pursuing damages for a breach of a confidentiality agreement.[193] In *Smith v. Daily Mail Publishing Co.*,[194] the Supreme Court afforded broad protection to the press in instances where publication involved lawfully obtained, truthful information.[195] In the words of the Court, "absent a need to further a state interest of the highest order," the press remains immune from a claim of civil damages.[196] While some may view *Smith* as a general expansion of the First Amendment's protection, an equally well-established line of cases demonstrates that even if generally applicable laws, such as the doctrine of promissory estoppel, affect the ability of the press to gather and report the news, these laws do not offend constitutional principles.[197]

When determining whether government regulations impose upon the media's First Amendment rights, courts employ a two-step "ends/means" analysis.[198] First, the court must decide whether a compelling state interest justifies limiting the media's access to the news.[199] Second, the

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190. *See, e.g., Cohen V*, 111 S. Ct., 2513, 2519-21 (1991) (Blackmun, J., dissenting) (finding that use of promissory estoppel claim in context of political campaign violates First Amendment). *But see* GOLDSTEIN, *supra* note 116, at 193 (characterizing fears about court-imposed threats to the First Amendment cited by Court in *Sullivan* as exaggerated).

191. Since the Supreme Court's decision in *Branzburg*, the press has not enjoyed absolute protection from either criminal or civil claims. *See* Branzburg v. Hayes, 408 U.S. 665 (1972). *See, e.g.*, Galella v. Onassiss, 487 F.2d 986, 995 (2d Cir. 1973) (newsgathering privilege does not provide immunity from laws broken while covering a story); Prahle v. Brosamle, 295 N.W.2d 768, 781 (Wis. Ct. App. 1980) (Constitution does not confer right for reporter to trespass); Belluomo v. KAKE, 596 P.2d 832, 835-36 (Kan. Ct. App. 1979) (television station not protected from claim of trespass in pursuit of news story).

192. BERNARD KAUFMAN, THE MESSAGE, THE MEDIUM AND THE FIRST AMENDMENT 19 (1970).

193. *See, e.g., Cohen V*, 111 S. Ct. at 2519 ("The First Amendment does not grant the press such limitless protection.").

194. 443 U.S. 97 (1979).

195. *Id.* at 105-06.

196. *Id.* at 103.

197. *See Cohen V*, 111 S. Ct. at 2518.

198. *See, e.g., Cohen III*, 445 N.W.2d 248, 256 (Minn. Ct. App. 1989).

199. *See id.*

court examines whether the regulation of the particular news activity substantially relates to that interest.[200] Although this test serves a useful purpose in the area of government regulation, civil enforcement of a confidentiality agreement cannot be properly termed a "government act" that impermissibly limits newsgathering. Moreover, application of the test by analogy fails because it does not take into account public policy concerns stemming from the failure to enforce a valid agreement between two consenting parties.[201] Granted, the absence of a First Amendment privilege from contract claims may impose additional restraints on press freedom, but these limitations are indeed justified. While journalists play an undeniably critical role in the dissemination of vital public information, their status does not exempt them from fundamental responsibilities mandated by an orderly society.[202]

At least one court has suggested a First Amendment approach to confidentiality agreements modeled after the "actual malice" standard established in *New York Times Co. v. Sullivan*.[203] By implementing the *Sullivan* standard, courts would focus almost exclusively on the media defendant's state of mind.[204] In contrast to the strict contract approach, one might assume that the application of the *Sullivan* standard to reporter-source agreements would not only offer increased protection of the state's interests in the reporting of newsworthy information, but would spur robust political debate. However, it does not fortify the barrier between the media and civil claimants, nor does it provide a workable alternative to the contract or promissory estoppel models.[205] It is important to note that courts would apply the reckless disregard standard to

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200. *See id.* at 257.

201. *See infra* text accompanying notes 319-21.

202. The First Amendment itself sets forth certain responsibilities along with the rights afforded the press. *See* Time, Inc. v. Hill, 385 U.S. 374, 389-90 (1967) (First Amendment does not absolve press from liability for publication of calculated falsehoods); Bavarian Motor Works Ltd. v. Manchester, 305 N.Y.S.2d 593, 596 (N.Y. 1969) (inseparable from privilege of free speech is responsibility not to abuse this freedom).

203. *See* Fries v. National Broadcasting Co., No. 456687 (Super. Ct. Cal. 1982) (suggesting that communication privilege afforded by state tort law would serve as a check on claim of damages in source's contract claim).

204. According to *Sullivan* and its progeny, the "actual malice" standard requires a showing that the media defendant made defamatory statements with the knowledge that they were false, or with "reckless disregard" of their falsity, in cases in which the plaintiff is a public official or public figure. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). *See also* St. Amant v. Thompson, 390 U.S. 727 (1968).

205. For a full discussion of the flaws of the defamation privilege when applied to confidentiality cases, see Levi, *supra* note 3, at 658-65.

situations where the publication at issue is truthful.[206] As the source need not prove the falsity of the information disclosed, a claim of reckless disregard must focus on the media defendant's decision to publish the source's name. When the source agrees to furnish information based on a promise of confidentiality, it follows that any willful decision to reveal a source's identity involves reckless disregard for the source's expectation of privacy.[207] Therefore, the transfer of the *Sullivan* standard to confidentiality cases affords the plaintiff a tremendous windfall and thereby weakens the media's protection from civil suits.

Moreover, the defamation standard, expressly formulated to minimize the potential chilling effects of restraints on the press,[208] could conceivably instigate a new chill on reporter-source agreements in one of two ways. First, if courts were to construe the reckless disregard standard as affording heightened protection for a media defendant, it would likely lead to self-censorship on the part of reluctant sources.[209] Second, fearing the possibility that increased protection might lead reporters to breach confidentiality agreements more frequently, sources would be reluctant to share their news, thereby decreasing the amount of information available to the press and the public.[210] On the other hand, if the court found the reckless disregard standard to increase the chances of recovery for a source, reporters might hesitate to extend offers of confidentiality.[211] While the chilling effects of a defamation standard are speculative at best, they nevertheless cast further doubt on the applica-

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206. Unlike defamation cases, in which the plaintiff seeks damages for the publication of false information, a claim for the breach of a confidentiality agreement requires publication of the source's name or perhaps facts sufficient to establish his identity. While courts have yet to find a breach of contract under the latter scenario, with the Supreme Court's recent decision in *Cohen*, source recovery remains a distinct possibility. *See Cohen V*, 111 S. Ct. 2513 (1991); Ruzicka v. Condé Nast Publications, Inc., 939 F.2d 578 (8th Cir. 1991) (although backgroud information made source identifiable to several persons, state law barred cause of action for breach of contract).

207. In the words of one commentator:

> [W]hat does it mean to ask whether the press showed reckless disregard of the consequences of disclosure? Given that confidentiality is always requested self-protectively and that reporters inevitably know of some potentially harmful effect to the source of being identified, it is difficult to discern how voluntary disclosure by the press would not virtually always rise to the level of reckless disregard.

Levi, *supra* note 3, at 660.

208. Any substantial chilling effect on the freedoms secured by the First Amendment triggers constitutional protection. *See* Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 441 (1980).

209. *See* Levi, *supra* note 3, at 662.

210. *See id.*

211. *Id.*

tion of First Amendment tort law to the subject of confidentiality agreements.

The First Amendment is not wholly irrelevant to an analysis of reporter-source agreements. Indeed, the risk to First Amendment freedoms created by a strict contract approach demonstrates the need to consider the costs to the press if such agreements are strictly enforced. However, any model which attempts to increase protection for the press cannot ignore other relevant social policies. Otherwise, First Amendment freedoms might preclude recovery for a source who justifiably relied on an unqualified and unambiguous promise of confidentiality.

B. Recent Cases Illustrating the Tensions Between the First Amendment and Contract Law

While source confidentiality agreements have remained a topic of heated debate among journalists and media watchdog groups alike, sources whose identities journalists have revealed are moving beyond the realm of philosophical discussion by seeking legal redress. This Section will address three cases,[212] each arising from an attempt to enforce a confidentiality agreement, which raise the issue of how courts should treat the disclosure of a source's identity. Two of the cases squarely address the subject of news leaks and offer very distinct analyses of the ramifications of the reporter-source relationship. The facts of the third case provide a variation of the classic news leak scenario and illustrate one of the different approaches a court could take when addressing a breach of a reporter-source agreement. This section will discuss the various fact patterns presented in each case with an emphasis on the distinct types of agreements formed by the sources and their media counterparts.

1. *Cohen v. Cowles Media Co.*

a. Introduction

In *Cohen v. Cowles Media Co.*,[213] a sharply divided Supreme Court squarely addressed the issue of a journalist's obligation to honor his promise of confidentiality to a source. Daniel Cohen sued Minnesota's

212. *Cohen V*, 111 S. Ct. 2513 (1991); Ruzicka v. Condé Nast Publications, Inc., 939 F.2d 578 (8th Cir. 1991); Fries v. National Broadcasting Co., No. 456687 (Super. Ct. Cal. 1982).

213. *Cohen V*, 111 S. Ct. 2513.

two largest newspapers, the *St. Paul Pioneer Press Dispatch* (*Pioneer Press*) and the *Minneapolis Star and Tribune* (*Star Tribune*), alleging fraudulent misrepresentation and breach of contract after the two newspapers published stories identifying Cohen as the source of information about a candidate for lieutenant governor.[214] Several days before the 1982 election, Cohen contacted Lori Sturdevant from the *Star Tribune* and Bill Salisbury from the *Pioneer Press* and offered to provide embarassing information from court records concerning Democrat-Farm-Labor (Democratic)[215] candidate Marlene Johnson.[216] At the time, Cohen was an active participant in the campaign of the Independent-Republican (Republican) party's gubernatorial nominee, Wheelock Whitney.[217] The records revealed that in 1969 Johnson had been charged with three counts of unlawful assembly and was convicted of petty theft in the following year.[218] The charges for unlawful assembly were later dropped, and Johnson's conviction was vacated in 1971.[219]

On October 27, 1982, less than a week before Minnesota voters would head to the polls, Cohen separately approached the reporters, and in so many words, made the following offer:

> I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and you will also agree that you're not going to pursue with me a question of who my source is, then I'll furnish you with the documents.[220]

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214. *Id.*

215. *Cohen IV*, 457 N.W.2d 199, 201 (Minn. 1990). The Democratic-Farm-Labor Party of Minnesota is affiliated with the national Democratic party. Likewise, the state's Independent-Republican party is a subdivision of the national Republican party.

216. It was Gary Flanke, a former Independent-Republican legislator and county attorney, and not Cohen, who originally uncoverered the information about the Democratic-Farm-Labor candidate for lieutenant governor. *Cohen III*, 445 N.W.2d 248, 252 (Minn. Ct. App. 1989).

217. *Cohen V*, 111 S. Ct. at 2516.

218. *Id.*

219. *Id.* Both newspapers offered Johnson the opportunity to explain the court records. She contended that the unlawful assembly charges stemmed from her participation in a protest against allegedly discriminatory hiring practices on municipal construction projects. The petty theft conviction arose out of Johnson's departure from a store after failing to pay for six dollars' worth of sewing materials. Apparently the incident occurred during a period when Johnson suffered from emotional distress. *Id.*

220. *Cohen IV*, 457 N.W.2d at 200. *See also* Maureen Rubin, *Rethinking the Anonymous Source Dilemma*, PUB. REL. J., Nov. 30, 1988, at 12. Immediately after the court records were obtained, several supporters of the Independent-Republican party met and determined that Cohen should be the one to release the documents to the local media while retaining his anonymity. *Cohen III*, 445 N.W.2d at 252.

With the election only days away, reporter Lori Sturdevant of the *Star Tribune* found the offer too good to refuse and accepted the documents subject to Cohen's four conditions.[221]

Neither party to the suit disputed the reporter's promise or that the condition of anonymity was essential to Cohen's decision to transfer the court records to Sturdevant.[222] However, editors at the *Star Tribune* claimed that they realized that the identity of the source was newsworthy only *after* the transaction between Cohen and the journalist took place.[223] After much internal debate, the *Star Tribune* published a story identifying Cohen as the source of the records.[224] The editorial staff reasoned that the public deserved to know that a member of the Republican campaign attempted a last-minute sabotage of the Democratic candidate.[225] Furthermore, failure to disclose Cohen's identity might lead to suspicion of innocent parties, and other news agencies would likely reveal Cohen's name anyway.[226] The editorial staff at the *Pioneer Press* reached a similar conclusion and independently decided to publish Cohen's identity.[227]

On the day that the articles naming him as the source appeared, Cohen was fired from his position with a Minneapolis advertising agency.[228] He promptly sued the newspapers, claiming breach of contract and misrepresentation. The jury ruled for Cohen on both counts and awarded him $200,000 in compensatory and $500,000 in punitive damages.[229] In an un-

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221. *See Cohen V*, 111 S. Ct. at 2515.

222. *Cohen IV*, 457 N.W.2d at 204.

223. *See id.* at 202.

224. *Cohen V*, 111 S. Ct. at 2516. In post-trial motions, the defense alleged that editors "grew concerned because . . . 'the identity of the source was as newsworthy as the underlying facts.'" Rubin, *supra* note 220, at 12. Furthermore, "the editors thought the public had a right to know that someone close to the Whitney campaign 'was attempting to carry out last-minute, political dirty tricks.'" *Id.*

225. *Cohen III*, 445 N.W.2d 248, 254 (Minn. Ct. App. 1989).

226. *Cohen IV*, 457 N.W.2d 199, 201 (Minn. 1990). For this reason, the editors refrained from describing their source as a Whitney supporter, a member of the Whitney campaign, or a prominent member of the Republican party. *Cohen III*, 445 N.W.2d at 253.

227. Rubin, *supra* note 220, at 12. The *Star Tribune* had previously endorsed the Perpich/Johnson ticket, which caused concern among editors that non-disclosure might be construed as a cover-up. *Id.*

228. *Cohen V*, 111 S. Ct. at 2516. Several more items concerning Cohen's role as a source appeared in the press shortly after he was fired, including an opinion piece criticizing him for his self-righteousness and an editorial cartoon depicting his actions as "last minute campaign smears." *Cohen III*, 445 N.W.2d at 254.

229. *Cohen V*, 111 S. Ct. at 2516. "In denying the newspapers pre-trial motions for

precedented ruling, the court of appeals upheld the contract claim after determining that Cohen and the newspapers had reached a mutual agreement by the traditional means of an offer and acceptance in exchange for valuable consideration.[230] The court found that the newspapers breached the contract when they broke their respective promises, thereby failing to perform once performance by the other party was complete.[231]

Next, the court of appeals addressed the issue of whether the First Amendment barred Cohen's breach of contract claim because the disclosure of Cohen's name was both truthful and newsworthy.[232] The court concluded that First Amendment interests did not bar a claim for breach of contract for three reasons. First, Cohen's case lacked state action in order to trigger First Amendment analysis.[233] Second, the government's interest in upholding contractual obligations sufficiently outweighed alleged First Amendment interests.[234] And finally, the newspapers

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dismissal, Minnesota District Court Judge Franklin J. Knoll wrote, 'This court can perceive no constitutional dimension in the case at bar. This is not a case about free speech, rather it is one about contracts and misrepresentations.'" Rubin, *supra* note 220, at 14.

230. *Cohen III*, 445 N.W.2d at 258-59. The terms of the contract may be interpreted as follows:

> Cohen: I'll give you my tantalizing news story if you promise not to reveal my identity.
>
> Paper: Terrific. We accept and agree not to publish your name in connection with this story if you promise to provide the details.

Thus, the parties formed an oral contract and each provided valuable consideration: Cohen provided a juicy story and the newspapers promised him confidentiality. *See Cohen V*, 111 S.Ct. at 2515-16.

The statute of frauds did not provide a defense for the press in this case because the contract was to be fully performed within one year. *Cohen III*, 445 N.W.2d at 259.

231. *Id.*

232. *Id.* at 254-58. While upholding the contract claim, the court of appeals eliminated the punitive damages award. *Id.* at 260.

233. *Id.* at 254-56. The court reasoned that since "[t]he [F]irst [A]mendment bars only government action that restricts free speech or press freedom" and "the neutral application of state laws is not state action," it follows that the First Amendment is not at issue when the court merely seeks to apply the neutral principles of contract law, irrespective of the particular context in which the claim arose. *Id.* at 254-55.

The court distinguished Cohen's contract claim from those Supreme Court cases that have found the application of defamation law to constitute state action. *Id.* at 255 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)). The court reasoned that defamation law "inherently limits the content of speech" by "sanctioning the speech itself." *Id.* Conversely, in the formation of a contract, "[t]he parties themselves [select] the speech or conduct they wish [ ] to be the subject matter of the contract." *Id.* at 255-56. Therefore, the object of the sanctions is the *breach* of contract, not the words contained therein.

234. The court of appeals applied a traditional balancing test to determine whether the source's interest in receiving civil damages for the alleged breach of confiden-

waived their First Amendment rights when they became parties to the contract.[235]

The Minnesota Supreme Court reached quite a different conclusion. In a four to two decision, the court held that a cause of action for breach of contract would not lie against the newspapers and reversed the lower court's judgment.[236] The court reasoned that absent an actual contract, Cohen was entitled to recovery only if the enforcement of the reporter's promise was necessary to avoid an injustice.[237] Although the newspapers arguably had an ethical duty to maintain the secrecy of the source's identity, this did not necessarily imply a legal duty.[238] The majority presented two theories as the means for justifying non-enforcement of the agreement. First, in situations where the parties do not intend a contract, the law will not create one.[239] Second, when other types of contracts concerning special relationships are before the courts, they will not be enforced in a manner inconsistent with public policy considerations.[240]

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tiality outweighed the interests of a free press. *Id.* at 256 (citations omitted). Holding steadfastly to the proposition that, in general, the media is obliged to follow the law, the court held that the contract interest prevailed in this case. *Id.* The court found that the protection of Cohen's contractual rights was a "compelling" state interest. *Id.* In contrast, the newspapers' interest in publishing Cohen's identity—admittedly newsworthy information—was accorded little weight. *Id.* at 256-58.

235. *Id.* at 258. In addressing this final issue, the court carefully explained that a constitutional right can only be waived in clear and compelling circumstances. *Id.* In this case, the court of appeals found that the newspapers had indeed waived their First Amendment right to publish Cohen's name under the clear and compelling standard. The reporters knowingly and voluntarily pledged confidentiality, thereby waiving any constitutional right to disclose the confidential information. *Id.*

236. *Cohen IV*, 457 N.W.2d 199, 203-05 (Minn. 1989). The court's conclusion was surprising in light of its acknowledgement that the transaction between Cohen and the reporters was indeed an exchange of promises. Further, the court recognized that that this type of behavior generally forms the basis of an enforceable contract. Finally, the court went so far as to state that the three basic elements of a contract—offer, acceptance, and consideration—were seemingly present. *Id.* at 202.

237. *Id.*

238. *Id.* at 203.

239. *Id.* This is perhaps the most unpersuasive portion of the Minnesota Supreme Court's ruling. The court would not have the law create a contract even though the parties to the agreement never denied the exchange of mutual promises. *See supra* note 230 and accompanying text. The exchange of promises is the very heart of a contractual relationship and demands full enforcement.

240. The court analogized the reporter/source agreement to a contract of marriage or one to impair family relations, in which case public policy dictates non-enforcement. *Cohen IV*, 457 N.W.2d at 203. These analogies ignore several distinct features of the reporter-source relationship. Most notably, this relationship arises in a profes-

Therefore, in the eyes of the Minnesota Supreme Court, the reporter-source agreement was not a contract at all, but rather an "I'll-scratch-your-back-if-you'll-scratch-mine" accommodation."[241] After denying the existence of a contract, the court next examined whether it should apply the doctrine of promissory estoppel[242] to enforce the newspapers' promise. In spite of the court's finding that two of the elements of promissory estoppel were present—reasonable expectation and reliance on the part of the promisee—it held that "the moral ambiguity" of the communications between the reporter and Cohen prevented a finding of the "resulting injustice" necessary for enforcement under the theory of promissory estoppel.[243]

Finally, the court addressed the First Amendment interests at stake in a reporter-source agreement.[244] Focusing on the context in which the promise arose, the court applied a balancing test between the constitutional rights afforded a free press and the common law interest in enforcing a confidentiality agreement.[245] The court stated, "[I]n the classic First Amendment context of the quintessential public debate in our democratic society, namely a political source involved in a political campaign . . . it seems to us that the law best leaves the parties here to their trust in each other."[246] Accordingly, the court found that the balance tipped in favor of the press and thus reversed the lower court's holding.[247]

b. The Supreme Court's decision

A sharply divided United States Supreme Court reversed the state court's ruling, holding that the First Amendment does not bar a source from recovering damages for breach of a promise of confidentiality.[248]

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sional context, which lacks the trust and confidence generally associated with private familial agreements. Further, in the context of other "special relationships," such as marriage or doctor/patient, the law provides a privilege for the communication, not the communicator. However, in *Cohen*, the source did not seek to protect the communication to the reporter (i.e., the background information regarding the Democratic candidate). Rather, he expected his identity to remain secret. *See* Hirsch, *supra* note 177, at 179 n.123 (citing Rusher, *The Press Rampant*, COLUM. JOURNALISM REV., Nov./Dec., 1979, at 19).

241. *Cohen IV*, 457 N.W.2d at 203.

242. *See supra* notes 172-79 and accompanying text.

243. *Cohen IV*, 457 N.W.2d at 203-04.

244. *Id.* at 205. *See generally* Harold W. Suckenick, *Don't Rely on Reporters' Confidentiality Promises*, O'DWYER'S PR SERVICES REP., Dec. 1990, 29.

245. *Cohen IV*, 457 N.W.2d at 205.

246. *Id.*

247. *Id.*

248. *Cohen V*, 111 S. Ct. 2513 (1991). The split among the Justices resulted in a five to four decision. Justice White authored the majority opinion in which Chief

The Court quickly dismissed the media defendants' contention that the court should dispose of the case without reaching the merits because Cohen did not raise the promissory estoppel theory in the lower courts and because the state supreme court's ruling rested solely on its interpretation of state law.[249] Pointing to the Minnesota court's conclusion that the doctrine of promissory estoppel would violate the newspapers' First Amendment rights, the Court declared that the holding below clearly rested on a matter of federal law.[250]

Next, the Court summarily addressed the state action issue, rejecting the newspapers' theory that a private cause of action arising from a confidentiality agreement was insufficient for the purpose of asserting First Amendment protections.[251] Relying on the historic rulings of *New York Times Co. v. Sullivan*[252] and its progeny, the Court concluded that the application of state laws in a manner which allegedly threatens First Amendment interests is sufficient to establish state action under the Fourteenth Amendment.[253]

The Court then turned to the issue of whether state officials may enforce the doctrine of promissory estoppel when such enforcement would prevent the publication of truthful, lawfully obtained information. Relying on the Court's decision in *Smith v. Daily Mail Publishing Co.*,[254] the newspaper argued that "absent a need to further a state interest of the highest order,"[255] states may not constitutionally punish publication of matters of public concern.[256] The majority, however, maintained that *Smith* did not control, and instead looked to another line of cases to support its contention that because generally applicable laws, such as the doctrine of promissory estoppel, do not single out the press, they do not violate the First Amendment simply because they may have "incidental effects" on the media.[257] Furthermore, the Court distinguished *Smith* on

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Justice Rehnquist and Justices Stevens, Scalia, and Kennedy joined. Justice Blackmun filed a dissenting opinion, joined by Justices Marshall and Souter. Justice Souter also filed a separate dissent, in which Justices Marshall, Blackmun, and O'Connor joined. *See* Vicini, *supra* note 13, at 13.

249. *Cohen V*, 111 S. Ct. at 2517.

250. *Id.*

251. *Id.* at 2517-18.

252. 376 U.S. 254 (1964). *See supra* notes 17-42 and accompanying text.

253. *Cohen V*, 111 S. Ct. at 2517-18.

254. 443 U.S. 97 (1979).

255. *Id.* at 103.

256. *Cohen V*, 111 S. Ct. at 2517.

257. *Id.* at 2518-19 ("[I]nsofar as we are advised, the doctrine [of promissory estop-

the ground that it addressed the issue of criminal sanctions, as opposed to the compensatory damages which Cohen sought.[258] The Court reasoned that reliance on the holding in *Smith* prohibiting unfair punishment of press in terms of monetary sanctions is misplaced because courts may hold the press accountable for the cost of acquiring newsworthy material.[259] In the eyes of the majority, compensatory damages are no more violative of the First Amendment than generous bonuses paid to cooperative sources.[260] Moreover, the Court concluded that, unlike *Smith*, in which the state defined what publications would trigger liability, the law of promissory estoppel "simply requires those making promises to keep them."[261]

At this point, the Court prematurely dismissed the potential chilling effects of the promissory estoppel doctrine on primary press functions. Despite the newspapers' persuasive argument that the incentive to avoid liability would inhibit reporting of truthful information, the majority concluded that any such effect would be "constitutionally insignificant."[262] The Court's reasoning here is troubling. To say that the doctrine of promissory estoppel is a law of general applicability begs the question of whether courts should exempt the press from liability when application of the doctrine demonstrates more than an "incidental" effect on the

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pel] is generally applicable to the daily transaction of all the citizens of Minnesota."). *See* Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (stressing that press must pay non-discriminatory taxes); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (stating that media may not publish copyright materials without obeying general copyright laws); Branzburg v. Hayes, 408 U.S. 665 (1972) (finding that the First Amendment does not relieve reporter of responsibility as citizen to answer grand jury subpoena); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (noting that media not exempt from Fair Labor Standards Act); Associated Press v. NLRB, 301 U.S. 103 (1937) (finding that press must abide by National Labor Relations Act).

258. *Cohen V*, 111 S. Ct. at 2519.

259. *Id.* The *Cohen* Court analogized the compensatory damages sought by the petitioner to a liquidated damages provision which it would clearly uphold as a legitimate representation of the cost of breaching a contract for the purpose of publishing newsworthy and profitable information. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* The *Star Tribune* and *Pioneer Press* reasoned that the public would be prevented from learning the name of a confidential source in instances when that person's identity was itself newsworthy. *Id.* Justice Souter made a similar argument in his dissent where he noted the particular importance of revealing Cohen's name in the context of the 1982 gubernatorial election. *Id.* at 2523 (Souter, J., dissenting). In the Justice's words, exposing Cohen as a confidential source "expanded the universe of information relevant to the choice faced by Minnesota voters." *Id.* (Souter, J., dissenting). Furthermore, Justice Souter pointed out that publications in the arena of politics are the type "quintessentially subject to strict First Amendment protection." *Id.* (Souter, J., dissenting).

media's newsgathering and publication functions. Granted, the doctrine does not single out the press. However, the Court had previously held that application of state laws in a manner alleged to restrict First Amendment freedoms warranted heightened protection for the media.[263] Such protection is the very essence of the traditional notion of a free American press. In fact, the Court did not have to resort to this line of reasoning to hold in the petitioner's favor. Treating the newspapers as ordinary citizens of Minnesota[264] simply reduces this portion of the Court's analysis to a game of semantics, thereby clouding an otherwise insightful argument against absolute immunity for reporters who break their promises.

Finally, the Court pointed out that the publication of Cohen's name was not clearly protected as a disclosure of "lawfully" obtained information.[265] Rather, the newspapers decided to publish the information only after breaking a promise of confidentiality to their source.[266] However, the Court reserved final judgment on the legality of the newspapers' decision to publish and remanded the case to the Minnesota Supreme Court for consideration of Cohen's promissory estoppel claim.[267]

In conclusion, it is worth noting that the Court expressly rejected the argument that a promissory estoppel cause of action would allow a plaintiff to avoid the strict requirements for recovery under a claim for libel or defamation.[268] While some would argue that Cohen's claim bears more than just an incidential similarity to these torts,[269] the High Court

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263. *See* First National Bank v. Bellotti, 435 U.S. 765, 783 ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.").

264. *See Cohen V*, 111 S. Ct. at 2518-19.

265. *Id.* at 2519.

266. *Id.* The Court distinguished the facts of *Cohen* from the situation in Florida Star v. B.J.F., 491 U.S. 524 (1989), where the identity of a rape victim was revealed by a newspaper after legally obtaining it from a police report.

267. *Cohen V*, 111 S. Ct. at 2519-20. While the Court concluded that the Minnesota Supreme Court may have prematurely dismissed the Cohen's promissory estoppel claim, thereby commanding reconsideration of the case, it refused to reinstate the jury verdict awarding Cohen $200,000 in compensatory damages. *Id.* at 2519. The Court left that issue, as well as the possibility of protection afforded the press under the Minnesota State Constitution, for the state court to address on remand. *Id.* at 2520.

268. *Id.* at 2519.

269. *See, e.g.*, Hirsch, *supra* note 177, at 180. The author points to the nature of Cohen's alleged injuries which were characterized as "'[a] kick in the face,' 'embarrass[ing],' 'humiliat[ing],' '[an] assault,' and a variety of other personal harms." *Id.*

thought otherwise and echoed the Minnesota Supreme Court's conclusion that "Cohen could not sue for defamation because the information disclosed [his name] was true."[270]

In one of two separate dissenting opinions filed by the Court, Justice Blackmun contended that the Minnesota Supreme Court's decision did not carve an exception for the media to generally applicable state laws.[271] Justice Blackmun characterized the lower court's decision as one premised on free speech in the political arena, not on the identity of the speakers.[272] Therefore, he reasoned that because the court had focused on the public debate-like qualities of the publications at issue, the state supreme court would afford the same First Amendment protection to non-media defendants.[273]

Justice Souter, also dissenting, chastised the majority for abandoning the traditional balancing test applied to matters involving conflicts between governmental interests and constitutional protections.[274] Declar-

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(quoting Brief for Appellant at 10, *Cohen IV*, 457 N.W.2d 199 (Minn. 1990) (Nos. C8-88-2631, CO-88-2672). The author further contends that the plea to the trial jury to "'restore . . . [Cohen's] good name'" is further evidence of the parallels between this action and a tort claim against a media defendent. *Id.* (quoting Brief for Appellant at 10-11, *Cohen IV*, 457 N.W.2d 199 (Nos. C8-88-2631, C0-88-2672)). While not completely unpersuasive, this theory narrowly focuses on the similarities between the nature of the damages sought by Cohen and those of a traditional defamation claim, thereby failing to adequately address the existence of a voluntary agreement from which the damages allegedly flowed.

270. *Cohen V*, 111 S. Ct. at 2519 (quoting *Cohen IV*, 457 N.W.2d at 202).

271. *Id.* at 2520 (Blackmun, J., dissenting).

272. *Id.* (Blackmun, J., dissenting) (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964) for the proposition that "a state may not adopt a state rule of law to impose impermissible restrictions on the federal constitutional freedoms of speech and press").

273. *Id.* (Blackmun, J., dissenting). In support of this theory, Justice Blackmun pointed to the Court's decision in Hustler Magazine Inc. v. Falwell, 485 U.S. 46 (1988). In *Hustler*, the Court refused to impose liability against a magazine publisher for its satirical article about the Reverend Jerry Falwell, even though Virginia's tort law would have provided for damages under a theory of intentional infliction of emotional distress. *Id.* at 56. Justice Blackman noted that the Virginia law was certainly one of "general applicability," yet the Court found that imposing liability for the publication of a satirical story would unduly restrain the media's First Amendment freedoms. *Cohen V*, 111 S. Ct. at 2521 (Blackmun, J., dissenting).

Justice Blackmun's argument is quite effective, for one could reasonably interpret that the Minnesota Supreme Court merely applied the same principles articulated in *Hustler*. According to this theory, the lower court rejected Cohen's claim because the state's interest in protecting the sanctity of the confidentiality agreement was not sufficient to remove the publications from First Amendment protection. *Compare Hustler*, 485 U.S. at 50 *with Cohen IV*, 457 N.W.2d at 204-05.

274. *Cohen V*, 111 S. Ct. at 2522 (Souter, J., dissenting). Contending that the issue before the Court was not simply a matter of commercial relationships, but rather one involving a significant effect on the content of speech, Justice Souter would have ap-

ing that First Amendment interests are at stake when laws concerning commercial activities arguably affect the content of speech, Justice Souter argued that Minnesota's law of promissory estoppel should not be regarded as a law of general applicability without a determination of the actual impact on First Amendment protections.[275] He refused to accept the majority's argument that it was justified in dispensing with the traditional balancing test because any burden on publication was "self-imposed."[276]

Finally, Justice Souter sternly criticized the majority for its failure to adequately address the context in which the newspapers disclosed Cohen's identity.[277] Warning that under the majority's approach, courts could find a waiver of First Amendment rights when the necessary requirements were present,[278] Justice Souter declared that the value of protected speech cannot be measured by reference to the speaker alone without considering the "importance of the information to public discourse . . . [because] freedom of the press is ultimately founded on the value of enhancing such discourse for the sake of a citizenry better informed and thus more prudently self-governed."[279] Accordingly, Justice Souter believed that Cohen's identity provided relevant information upon which Minnesota voters could draw before casting their ballots in the 1982 election, thereby subjecting the newspapers' disclosures to strict First Amendment protection.[280]

2. *Fries v. National Broadcasting Co.*[281]

The case of Police Officer Joseph Fries illustrates another context in

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plied the test of constitutionality ariticulated that Justice Harlan articulated:

> [W]hen [such effects] have been justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved . . . . Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved.

Id. (Souter, J, dissenting) (quoting Konigsberg v. State Bar, 366 U.S. 36, 51 (1961)).

275. *Id.* (Souter, J., dissenting).
276. *Id.* at 2522-23 (Souter, J., dissenting).
277. *Id.* at 2523 (Souter, J., dissenting).
278. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967).
279. *Cohen V*, 111 S. Ct. at 2522-23 (Souter, J., dissenting).
280. *Id.* (Souter, J., dissenting).
281. No. 456687 (Super. Ct. Cal. 1982).

which a reporter-source relationship may arise. Angered and frustrated by what he perceived to be his department's inadequate response to the improprieties of a senior officer, Fries assumed the role of a whistleblower[282] by seeking redress through the media.[283] In particular, Fries felt the assistant chief's actions warranted a more severe penalty: permanent dismissal from the police force.[284] Furthermore, he believed that the entire matter was one of legitimate public concern, and therefore, on his own initiative, leaked details of the incident to the press.[285] The reporter in whom Fries originally confided eventually revealed his source's identity, thereby subjecting Fries to ostracism by his peers. Claiming that he was unable to work under the severe pressure inflicted by his coworkers, Fries left the police force and sought damages for breach of his contract with the reporter.[286] The parties eventually reached a settlement agreement.[287]

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282. Whistleblowers often leak information when they can no longer tolerate wasteful or corrupt internal practices. Feeling a sense of powerlessness within their organizations, they seek to vent their frustrations through channels outside of the ordinary bureaucratic process. *See, e.g.*, HENTOFF, *supra* note 58, at 227.

283. The first trial of the *Fries* case ended in a hung jury, and the parties reached a settlement prior to the commencement of the second trial. Therefore, case records do not provide a definitive statement of the facts. *See* Dicke, *supra* note 170, at 1555 n.14 (citing Fries v. National Broadcasting Co., No. 456687 (Super. Ct. Cal. 1982). However, the case garnered sufficient interest among the media to suggest the information appearing in the text accompanying notes 282-87.

284. *See* Stephen Carrizosa, *Reporter on Trial in Suit for Release of Source's Name*, L.A. DAILY J., Mar. 14, 1983, at 1; Raymond Cox, *Reporter Sued for Disclosing Source*, L.A. DAILY J., Mar. 14, 1983, at 2.

285. *See* Carrizosa, *supra* note 284, at 1.

286. *Id.* Seasoned Washington reporter Lou Cannon contends that "sources depend on confidentiality for their job, their reputation and their peace of mind." CANNON, *supra* note 176, at 283.

Mindful of the potential chilling effect which forced disclosure of confidential sources in the government would have, former managing editor of the *New York Times*, A.M. Rosenthal wrote:

> We will never know what this loss of confidentiality of sources will cost because we will never know what we might have known. It seems entirely plain that the destruction of confidentiality of news sources will have an impact on how much the public knows about every aspect of public affairs. There will simply be fewer and fewer people in government . . . willing to take the risk that the press will be able to protect them. It will not all happen tomorrow but it will happen as long as this country is ready to say that the price of dissidence is exposure.

Id. at 283-84.

287. *See supra* note 283.

3. *Ruzicka v. Condé Nast Publications, Inc.*[288]

Jill Ruzicka sued her psychiatrist for malpractice, claiming that he engaged in improper sexual conduct during therapy sessions.[289] During a flurry of media coverage, her name and place of employment were made known to the public, as were allegations about the specific conduct of the psychiatrist.[290] After settling her case, Ruzicka spoke publicly about her experiences and was eventually named to a state task force on the sexual exploitation by psychotherpists.[291] In 1987, she consented to an interview with a journalist from *Glamour* magazine. Ruzicka alleged that she agreed to the interview on the conditions that she would neither be identified nor identifiable from the contents of the article.[292] The reporter denied any such explicit conditions, contending that Ruzicka wanted only a general "masking" and that her request was very casual.[293] However, Ruzicka alleged that she resolved any ambiguities by later reaffirming her desire not to be identified in response to an inquiry by the reporter.[294]

The article, published in *Glamour*'s September 1988 issue, substituted Ruzicka's last name with the pseudonym "Lundquist" while using her real first name, Jill. The piece described "Jill Lundquist's" experiences of sexual abuse and traced her decision to file suit against her psychiatrist. The reporter altered other details about Jill's life in an effort to comply with the masking agreement.[295] In spite of the reporter's efforts, Ruzicka learned that two persons identified her from the article and sued the reporter and the magazine's publisher, Condé Nast, for breach of con-

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288. 939 F.2d 578 (8th Cir. 1991).

289. *Id.* at 579-80.

290. *Id.* at 580 n.3. In August 1981, the *Minneapolis Tribune* reported the pending litigation, naming Ruzicka as the plaintiff and including details about her personal life such as her place of employment. The following year the *Tribune* ran an article describing an agreement between the doctor and the state Board of Medical Examiners and again named Ruzicka. Subsequent articles appeared in both the *Tribune* and the *St. Paul Pioneer Press* once again identifying Ruzicka as the victim of therapist abuse. *Id.* Interestingly, these newspapers are the same two alleged to have breached the confidentiality agreement in *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991). *See supra* text accompanying note 214.

291. *Ruzicka*, 939 F.2d at 580 n.3.

292. *Id.* at 579.

293. *See id.* at 580.

294. *See id.*

295. *Id.*

tract.[296] The media defendants filed motions for summary judgment which the district court granted in 1990.[297]

The Minnesota District Court began its opinion by reviewing the development of defamation law, from its foundation in strict liability at common law to the First Amendment protections which the Supreme Court afforded the press in *New York Times Co. v. Sullivan*.[298] Recognizing the media's heightened protection under tort law, the court questioned whether similar protections should be granted in contract claims.[299] In response, the court applied the same three-prong approach used by the Minnesota Court of Appeals in *Cohen III*.[300] However, it reached a diffent conclusion on each issue. First, the court held that state action lies in a case where a private party seeks damages under a contract theory for statements made by a media defendant.[301] Next, the court refused to find a waiver of the media defendants' First Amendment rights, reasoning that even if an agreement did indeed exist between the parties, it was far too vague for the purpose of waiving constitutional rights.[302] The court concluded that "at a minimum, the Constitution requires plaintiffs in contract actions to enforce a reporter-source agreement to prove specific, unambiguous terms and to provide clear and convincing proof that the agreement was breached."[303] Thus, according to the district court, even though the issue was one of contract law and not tort, the First Amendment afforded the press some protection against claims for breach of a reporter-source agreement.[304]

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296. *Id.* Ruzicka claimed that the inclusion of facts, such as her first name, residence, occupation, and her participation on the state task force, constituted the breach. The last detail was the critical factor for purposes of identification because the task force's public report listed all members, and she was the sole female participant. *Id.* However, Ruzicka admitted that the two persons who identified her were her former therapists, persons who had extensive knowledge of her background prior to publication of the article. *Id.* The complaint contained a variety of tort claims, including fraudulent misrepresentation, invasion of privacy, false light, and intentional infliction of emotional distress. The court quickly dismissed these claims, as well as one for unjust enrichment. *Id.* at 580-81.

297. *Id.* at 581.

298. Ruzicka v. Condé Nast Publications, Inc., 733 F. Supp. 1289, 1292-93 (D. Minn. 1990).

299. *Id.* at 1293.

300. *See supra* notes 232-35.

301. *Ruzicka*, 733 F. Supp. at 1295-96.

302. *Id.* at 1296-98.

303. *Id.* at 1300.

304. *Id.* at 1298-1301. *Cf.* Virelli v. Goodson-Todman Enterprises, Ltd., 536 N.Y.S.2d 571 (N.Y. App. Div. 1989). *Virelli* illustrates how the Minnesota Court of Appeals might have treated the *Ruzicka* case had the issue been one of tort law and not contract. The plaintiffs consented to an interview regarding their daughter's drug abuse. *Id.* at 573. They contended that the reporter negligently breached an agree-

Ruzicka appealed to the Eighth Circuit Court of Appeals, which rendered its opinion less than a month after the United States Supreme Court decided the case of *Cohen v. Cowles Media Co.*[305] The court concluded that regardless of the Supreme Court's decision in *Cohen*, Minnesota law did not permit a finding of legally enforceable agreement when a reporter makes a promise of confidentiality.[306] Thus, state law barred Ruzicka's breach of contract suit.[307] Addressing the theory of promissory estoppel, the court emphasized that under most circumstances it does not consider new claims advanced on appeal.[308] However, the court determined that it would be unfair to bar Ruzicka's claim when Cohen was permitted to press his promissory estoppel action although he never formally pled it.[309] Accordingly, the court remanded the case to the district court with instructions for the lower court to allow Ruzicka to amend her complaint should it determine that Ruzicka's promissory estoppel claim was significantly different from the breach of contract claim.[310]

IV. SOURCE EXPECTATIONS VERSUS CONSTITUTIONAL SAFEGUARDS FOR THE MEDIA: THE CONFLICT CONTINUES

A. *Application of Contract Theory in the Wake of* Cohen

The majority in *Cohen* recognized that contract theory allows parties to exercise personal autonomy when formulating enforceable agreements.[311] However, even if the elements of a valid contract are present

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ment not to reveal their identities and to allow them the opportunity to review the article prior to publication. The plaintiffs brought suit for invasion of privacy, negligence and intentional inflicition of emotional distress. *Id.* at 572. The court held that the article was a matter of public interest, and therefore the plaintiff's allegations were insufficient. *Id.* at 574-76. Because the damages sought were solely attributed to injured reputation, humiliation, and emotional distress, the court found that the constitutional standards applicable to defamation and invasion of privacy actions applied. *Id.* at 575-76. Not surprisingly, the court rejected the plaintiffs' argument that because the reporter broke a promise to protect the plaintiffs' identities, the constitutional protections usually afforded the press were rendered inapplicable. *See id.* at 576.

305. Ruzicka v. Condé Nast Publications, Inc., 939 F.2d 578 (8th Cir. 1991).

306. *Id.* at 582.

307. *Id.*

308. *Id.*

309. *Id.* at 582-83.

310. *Id.* at 583-84.

311. *Cohen V*, 111 S. Ct. 2513, 2519 (1991). "Minnesota law simply requires those making promises to keep them. The parties themselves, as in this case, determine the scope of their legal obligations and any restrictions which may be placed on the

when a reporter promises a source anonymity in exchange for information,[312] holding a media defendant liable under a theory of promissory estoppel for later disclosing the source's identity penalizes the reporting of truthful information.[313] Proponents of the promissory estoppel model contend that it treats all citizens fairly by refusing to grant immunity on the basis of one's affiliation with the press.[314] However, this theory places undue emphasis on the *identity* of the publisher rather than the *information* she seeks to report. When a reporter discloses information regarding a matter of public concern which she originally obtained in confidence, courts must look beyond the reporter-source relationship and instead focus on the public interests served by the disclosure.[315] Those who argue that such an approach affords disproportionate protection to the media should take note of Justice Blackmun's articulate dissent in *Cohen*. As the Justice aptly points out, impermissible restrictions on freedoms of speech and press are equally available to non-media defendants who choose to reveal truthful, newsworthy information.[316] Accordingly, the application of a promissory estoppel theory to reporter-source agreements warrants closer examination when it is based upon the faulty assumption that without this theory, the press has special immunities.[317]

Generally, one may characterize the doctrine of promissory estoppel as a relatively benign means of upholding traditional principles of equity.[318]

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publication of truthful information are self-imposed." *Id.*

312. The three elements of a legally enforceable contract are offer, acceptance, and consideration. In addition, most courts require a fourth element for the contract to be valid: the parties must have intended legal consequences to flow from their agreement. Courts traditionally use an objective test to determine whether the manifestations of the parties demonstrate such an intent. *See* CALAMARI & PERILLO, *supra* note 154, at §§ 2-1, 2-2, 2-4, 4-1. *See also* Dicke, *supra* note 170, at 1567 n.77.

A source's request for anonymity constitutes an offer, while a reporter's agreement thereto represents both an acceptance and consideration in the form of a promise. The consideration supplied by the source is found in the information provided to the reporter. *See id.*

313. *See Cohen V*, 111 S. Ct. at 2520 (Blackmun, J., dissenting).

314. *Id.* at 2519-20 (Blackmun, J., dissenting).

315. Protected disclosure would be most appropriate when the information concerns matters of public debate, health and safety, or national security. This theory is consistent with the decision in *Cohen IV*, in which the Minnesota Supreme Court found it to be of "critical significance" that "the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign." *Cohen IV*, 457 N.W.2d 199, 205 (1990).

316. *Cohen V*, 111 S. Ct. at 2520 (Blackmun, J., dissenting) (quoting Lovell v. Griffin, 303 U.S. 444, 452 ("The liberty of the press is not confined to newspapers and periodicals . . . . The press in its historic connotiation comprehends every sort of publication which affords a vehicle of information and opinion.")).

317. *See id.*

318. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981) ("Neither real nor

However, when the doctrine discourages the disclosure of truthful information, one cannot say that it has a merely incidental burden on the vital functions of the press. To the extent that the High Court's decision in *Cohen* sanctions truthful speech, a search for a more balanced approach to the confidential source dilemma is warranted.

B. The Pitfalls of the Promissory Estoppel Model and Its Alternatives

Confidentiality agreements generally assist the media in performing their primary functions: newsgathering, analyzing and interpreting gathered information, and publishing information for the public's benefit.[319] Reporter-source agreements also benefit the anonymous source, who has the ability to convey newsworthy information in exchange for the promise that his identity will not be revealed or that information provided exclusively for background purposes will not be published.[320] Nevertheless, the supposed benefits and security of confidentiality agreements sometimes weigh heavily on the freedoms enjoyed by the media. Sources legitimately expect that journalists will honor their agreements, and this restrains the press from publishing all of the information which the reporter gathered. However, it is important to note that journalists generally impose these restraints upon themselves.[321] In the typical confidentiality agreement scenario, the reporter voluntarily promises to protect the identity of sources for the all-important purpose of obtaining valuable information.

Journalists typically do not dispute the voluntary nature of their agree-

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apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.").

319. *See generally*, William W. Van Alstyne, *The First Amendment and the Free Press: A Comment On Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1 (1980). While confidentiality agreements enhance a reporter's newsgathering abilities, the gravamen of a breach of such a contract is injury through publication, not through newsgathering. Allegations of tortious newsgathering activity are generally reserved for claims for invasion of privacy, even though publication may follow the privacy invasion. *See* Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1279 (1976). Some courts allow additional compensation for the plaintiff in a privacy action by awarding further damages flowing from subsequent publication. However, the court generally states that the intrusion tort itself is a newsgathering claim. *See, e.g.*, Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971).

320. *See supra* note 76 and accompanying text.

321. *See Cohen V*, 111 S. Ct. 2513, 2519 (1991).

ments with sources.[322] Nevertheless, many members of the media believe that breach of contract actions unfairly penalize the media for providing truthful and newsworthy information, thereby violating the First Amendment.[323] In contrast, viewed from the perspective of an anonymous source, court enforcement of a confidentiality agreement merely satisfies the fundamental elements of contract law.[324] In the eyes of a source, a breach of contract action simply asks a court to assess the injuries to the source arising from a media entity's disregard for a voluntary agreement. However, the use of secrecy and the sharing of knowledge unavailable to the general public creates a unique backdrop for reporter-source relations, thereby justifying consideration of confidentiality agreements outside the context of traditional contractual relations.

The promissory estoppel model as endorsed by the Supreme Court in *Cohen v. Cowles Media Co.*[325] fails to appreciate the important distinctions of the *modus operandi* underlying a reporter-source agreement. First, unlike formal contracts where the rights and liabilities of the parties are clearly defined, confidentiality agreements generally contain vague and imprecise terms.[326] One might attribute this indefiniteness to the foundation of trust upon which a reporter and source base their relationship.[327] Sharing private information fosters feelings of intimacy and solidarity and relieves the need to clearly establish conditions of disloyalty.[328] Moreover, journalists typically work under strict deadlines. These time constraints make the formation of an explicit contract impractical and unlikely. Hence, a contract action brought by a source potentially undermines the well-established tenet that uncertainty regarding liability should be kept to a minimum when First Amendment inter-

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322. *See, e.g., id.* at 2516 (neither the reporter nor her source disputed that the confidentiality agreement was the product of mutual consent).

323. *See* Langley & Levine, *supra* note 118, at 24. In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1974), the Supreme Court indicated that the press operates at its zenith when publishing truthful information. *Id.* at 495-96.

324. *See* Dicke, *supra* note 170, at 1569.

325. 111 S. Ct. 2513 (1991).

326. *See* Vince Blasi, *The Newsman's Privilege: An Emprirical Study*, 70 MICH. L. REV. 229, 284 (1971). Professor Blasi notes that while some contracts may be more explicit when they involve sophisticated sources, the general rule is that confidentiality agreements are indefinite. *Id.* at 243.

327. *See* John P. Borger, *Publication Torts as Contracts and Misrepresentations: Redirecting Judicial Focus*, in LIBEL LITIGATION 1990, at 35, 43 (PLI Pat., Copyrights, Trademarks and Literary Prop. Course Handbook Series No. 294, 1990).

328. *See* Levi, *supra* note 3, at 706-07. Suggesting a context-sensitive approach to the confidential source dilemma, Professor Levi offers detailed analysis of what she terms the "double-edged" character of reporter-source relations. *Id.* She contends that society feels ambivalent about secrecy because it may engender positive moral values such as solidarity and self-esteem, while simultaneously fostering disloyalty, anxiety, and the risk of manipulation. *Id.*

ests are at stake.[329] In other words, because a journalist's relationship with her source naturally rests on a vague foundation, courts should evaluate the validity of a source's claim in light of unique context of the agreement. Furthermore, the vague, imprecise and oral nature of confidentiality agreements may give rise to complicated evidentiary disputes.[330] Consequently, the judge or jury hearing such a case confronts the word of one party against the other. Such indefiniteness may potentially lead to time-consuming and expensive litigation concerning the terms of a confidentiality agreement and create the very type of self-censorship that undermines First Amendment interests.[331]

Perhaps the most obvious solution to conflicts that arise from confidentiality agreements would be for the press to permanently refrain from granting confidentiality in the first place. This would alleviate the dilemma faced by the editor, who must choose between honoring the agreement of her reporter and publishing what she considers to be newsworthy information. Arguably, this approach would dispose of the problems associated with the indefiniteness of such contracts. However, members of the press are quick to complain that this approach would unduly hinder the media's newsgathering function and would consequently inhibit the dissemination of valuable public information.[332] Modern journalists rely heavily upon confidential sources in performing their essential duties,[333] and the information obtained often leads to the development of

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329. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974).

330. The trial judge in *Cohen* was forced to confront one such problem arising out of the oral nature of the reporter-source agreement. Ruling on a motion for summary judgment, the judge found that in spite of the absence of a written agreement, the contract satisfied the statute of frauds because the parties could perform in less than a year and because the source had already performed his obligations by providing information to the reporter. *See Cohen I*, 14 Media L. Rep. 1460 (Minn. Dist. Ct. 1987) (Knoll, J., denying motion for summary judgment).

331. The area of defamation law provides a useful example of the cost to First Amendment values. The potential cost of defending a libel suit may sometimes halt the investigation of high-risk stories or ultimately prevent their publication. *See Litigation Costs and Self-Censorship*, L.A. DAILY J., June 19, 1981, at 18.

332. *See* Cox Broadcasting v. Cohn, 420 U.S. 469, 492 (1974) (stating that "[w]ithout the information provided by the press most of us . . . would be unable to vote intelligently or to register opinions on the administration of government generally"); *see also* Mills v. Alabama, 384 U.S. 214, 219 (1966) (stating that "[t]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people . . . .").

333. Professor Vincent Blasi authored the seminal study on the relationship between reporters and confidential informants. His 1971 report showed that the average

critical news stories.[334]

At the opposite end of the spectrum, an alternative solution to the confidential source dilemma would be to grant the press absolute immunity under the First Amendment, thereby shielding a reporter from liability should the name of the source be revealed in the future. Under this approach, one might argue that a source should assume the risk that a journalist might disclose information that the source did not intend to reveal.[336] However, the Supreme Court has rejected the notion that the First Amendment affords the press any such absolute protection.[336] Instead, the Court has adopted a policy which balances the interests of the First Amendment against those protected by common law causes of action.[337] Furthermore, this alternative negates the important role of legally enforceable contracts in modern society. Granting the media absolute immunity from the consequences of ignoring a legitimate agreement unfairly deprives sources of the ability to rely upon voluntary promises and to pursue a claim when the press fails to fulfill a contractual obligation.[338] This approach leaves sources in an unfairly vulnerable position while giving the media excessive protection, and fails to treat the interests of both parties fairly.

While courts should not abrogate the requirement to uphold contractual obligations when the enforcement of a contract threatens the fundamental activities of the media, the judicial system must impose constitutional limitations.[339] In order to develop a fair and practical standard,

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newsperson surveyed relied on confidential sources for 22.2% to 34.4% of his stories. *See* Blasi, *supra* note 326, at 247. A 1985 survey demonstrates an average reliance on confidential sources of 31.25%. John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After A Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 73 (1985).

334. *See* Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981).

335. *See* Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L. REV. 317, 342 (1970).

336. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("[A]bsolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation."); *see also* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.01, at 2-3 (1984).

337. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 126 (1959) ("Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.").

338. The Supreme Court has found that "tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury." *Gertz*, 418 U.S. at 342. This tension must be resolved by reconciling the interests of both parties. *See id.*

339. *Cf.* William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution,"* 25 WM. & MARY L. REV. 793, 817-19. Van Alstyne argues that especially when addressing new causes of

courts must weigh society's interest in upholding contractual undertakings against the threat to core First Amendment protections, an admittedly difficult task given the conflicting values at stake.

C. *Is a Balancing Approach Possible, or Must the Scales Necessarily Tip in Favor of a Reporter or Her Source?*

Having described the various approaches to the legal and philosophical dilemmas arising from reporter-source agreements, and having concluded that the Supreme Court's most recent treatment of this issue does not adequately address the First Amendment implications of enforcement, this Comment now explores the possibility of a more balanced approach to the contract-First Amendment conflict.

Some courts have modified or have refused to enforce contracts which would interfere with First Amendment rights.[340] For example, in *Fuentes v. Shevin*,[341] the Supreme Court applied the strict test of voluntary, knowing, and intelligent waiver, and concluded that persons who signed conditional sales contracts did not waive constitutional rights to a due process hearing prior to the repossession of their property.[342] As one commentator notes, if traditional notions of the "sanctity of contracts" were truly strong enough to override relevant constitutional interests, the Court need not have addressed a waiver analysis.[343] Thus, the Court appears to have allowed the media sufficient room to argue that courts cannot justify overriding governmental interest which would allow a burden on First Amendment rights by merely pointing to the general societal interests in upholding voluntary agreements.[344]

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action, courts must steadfastly apply constitutional standards when the action threatens First Amendment values. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (finding that new restraints on publishing are subject to traditional constitutional standards).

340. This approach is demonstrated in several decisions which involve written secrecy agreements signed by CIA agents as a condition of their employment. Although the agreements allegedly required that agents never divulge any nonpublic information concerning the CIA, the agents retained their First Amendment rights to publish unclassified information, as well as classified information already in the hands of the public. *See* Snepp v. United States, 444 U.S. 507, 510, 511 (1980); United States v. Snepp, 595 F.2d 926, 931, 932 (4th Cir. 1979); United States v. Marchetti, 466 F.2d 1309, 1313, 1317 (4th Cir. 1972).

341. 407 U.S. 67 (1972).

342. *Id.* at 94-96.

343. *See* Borger, *supra* note 327, at 51.

344. *Id.*

Application of contract principles to confidentiality agreements also raises the issue of fraud. While contract law provides a remedy for the source whose identity is eventually revealed, the reporter who pledges confidentiality might lack the capacity to protect himself from the receipt of false information.[345] Thus, reporters justifiably fear potential abuse of the shield of anonymity by a source who intentionally acts as a conduit for false information.[346] Although journalists may indeed be vulnerable to such abuse, the law affords them certain protections from fraudulent sources.[347] The contract theory of fraudulent misrepresentation[348] provides relief for a reporter when a source provides false information in return for anonymity.[349] Should the journalist discover that a confidential source has lied, or if the journalist enters into an agreement with the belief that he obtained sensitive information which later proves to be false, the source has defrauded him.[350] The theory of fraudulent misrepresentation provides relief by enabling the reporter to either avoid the contract or sue in tort.[351] The former remedy would allow the obligor to act as if he had never made the agreement, thereby enabling the reporter to reveal the identity of an unscrupulous source without the fear of liability.[352]

As with any issue concerning liability under contract law, courts must consider relevant issues of public policy in determining whether to enforce a confidentiality agreement.[353] When public policy outweighs the interest of protecting the sancity of contracts, a contract becomes unenforceable.[354] Respect for public policy demands that courts examine many issues, including: the expectations of the contracting parties, losses flowing from the abandonment of the original agreement, and the strength and relative merits of the public policy.[355] Ultimately, courts will not enforce a contract when public policy "clearly outweighs" the

345. *See* Kathryn M. Kase, Note, *When a Promise Is Not a Promise: The Legal Consequences For Journalists Who Break Promises of Confidentiality To Sources*, 12 HASTINGS COMM. & ENT. L.J. 565, 582-83 (1990) (describing theory of fraudulent misrepresentation as a means of combatting the fraudulent source).

346. *See* Langley & Levine, *supra* note 118, at 22.

347. *Id.* at 24.

348. *See* CALAMARI & PERILLO, *supra* note 154, at § 9-13.

349. For a general discussion on the theory of fraudulent misrepresentation as it applies to the reporter-source relationship, see Kase, *supra* note 345, at 582-83.

350. CALAMARI & PERILLO, *supra* note 154, at § 9-13.

351. *Id.*

352. *Id.*

353. *Id.*

354. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

355. Other important factors include the public interest protected by enforcement of the contract, future development of the relevant public policy, and consideration of legislation or judicial decree. *Id.* at §§ 178(2), (3)(a)-(b), cmt. b, 179 (b).

need for enforcement of the contract, irrespective of the origin of the policy.[356]

Those who question the contract model also rely upon the well-established theory that contract law exists for the purpose of furthering commercial relationships,[357] thereby implying that reporter-source relationships do not fall under this rubric. While one approach to the law of contracts promotes contract enforcement as a means of ensuring economic efficiency,[358] another school of thought focuses on the ethical concerns of keeping promises.[359] The latter approach appears to be the dominant one among media commentators who fail to characterize the reporter-source relationship in terms of its commercial implications, pointing instead to the divergent attitudes of the media and commercial enterprises.[360] They contend that the media has a well known distaste for government intervention, especially the type which seeks to regulate its newsgathering and publication functions. In contrast, commercial enterprises seek governmental involvement, especially when it aids commerce in the court system.[361] Yet others would argue that the commercial aspects of a reporter-source agreement are undeniable when the contract results in increased circulation, sales, or advertising.[362] While not wholly unpersuasive, the latter argument does not sufficiently support a finding that the rights and liabilities of reporters and sources are equivalent to the rights of parties to a traditional contract. It merely suggests that the question of the validity of legal claims by sources demands further consideration.

The recent willingness of the Supreme Court to apply the principles of contract to a publication-based claim against the press[363] has stirred heated debate among media watchdog organizations, legal commentators, and defense counsel.[364] While the Court's opinion was much anticipated

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356. *Id.* at § 178, cmt. b.

357. *See* Langley & Levine, *supra* note 118, at 24.

358. *See* CALAMARI & PERILLO, *supra* note 154, at § 1-4 (e) (stating that some commentators characterize contract law as a market mechanism).

359. *See id.* § 1-4 (b) (upholding the principles of contract law enforces the morality of keeping promises).

360. *See, e.g.*, Langley & Levine, *supra* note 118, at 24.

361. *See id.*

362. *See Cohen II*, 15 Media L. Rep. (BNA) 2288, 2290 (Minn. Dist. Ct. 1988).

363. *See Cohen V*, 111 S.Ct. 2513, 2518 (1991).

364. In the wake of *Cohen*, one commentator notes that Supreme Court Justices, who lack a working knowledge of the media, set forth increasingly restrictive standards for journalists. Harwood, *supra* note 121, at C6. However, a spokesperson for

by both sides to the issue and certainly welcomed by those who favor heightened protection for the "sanctity of contracts," it is doubtful that the *Cohen* decision will prove to be the final word on this constitutionally sensitive topic. Prior to a clear ruling by the High Court, interested parties scrambled for their own appropriate standard. As a result, two dominant themes emerged which incorporate both First Amendment concerns and the realities of modern journalism practices.[365] Therefore, they are still worthy of consideration even in light of *Cohen*.

The first theory, propounded by media advocates, concerns self-autonomy. They argue that, at least when dealing with truthful, lawfully obtained information of newsworthy value, courts should refrain from interfering with decisions in the newsroom.[366] Editorial decisions concerning what should and should not be published are best left to experienced journalists.[367] Under this approach, the fundamental rules of contract law do nothing to bolster a source's chances of recovery. The most obvious concern arising from the self-autonomy approach is that absent court-imposed sanctions, members of the press are free to break promises whenever it is necessary "in the interest of news."[368] While critics argue that the resulting uncertainty would cause confidential sources to cease providing information, the Supreme Court has noted that no conclusive evidence shows proof of this effect on sources.[369]

The persuasiveness of this approach is further evidenced in the brief submitted by the Cowles Media Company to the Minnesota Supreme Court. Cowles Media argued that contract law is unnecessary to protect a source who wishes to keep his identity a secret.[370] Under this theory, court-imposed penalties are considered far less effective than professional pressures such as those experienced by journalists who choose jail or

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the right-wing media watchdog group Accuracy in Media, praised the Court's decision, remarking that contract liability will help to insure a reporter's promise to a source. *See* Vicini, *supra* note 13.

365. For a summary of recent briefs and law review articles regarding the appropriate standard to apply to the contract law versus First Amendment debate, *see* Borger, *supra* note 327, at 37-64.

366. *See id.* at 56.

367. *See* Harwood, *supra* note 121.

368. *See Cohen III*, 445 N.W.2d 248, 258 (Minn. Ct. App. 1989) ("We do not think it an undue burden to require the press to keep its promises.").

369. *See* Branzburg v. Hayes, 408 U.S. 665, 693-95 (1972) (finding insufficient evidence to determine whether sources dry up due to possibility that a reporter may be forced to reveal the identity of sources before a grand jury). *See also* Blasi, *supra* note 318, at 265-67. Professor Blasi reports that the threat that reporters might be forced to respond to grand jury questioning resulted in "poisoning the atmosphere" of reporter/source relations as opposed to an absolute depletion of sources. *Id.*

370. *See* Borger, *supra* note 327, at 60 (quoting Brief for Appellant at 37-43, *Cohen IV*, 457 N.W.2d 199 (Minn. 1990)).

the payment of fines over forced disclosure of a source's identity.[371] Furthermore, some view contract law as merely a "crude tool" when applied to the arena of professional journalism.[372] In other words, if a court must narrowly focus on whether a contract was formed and subsequently breached, "contract law engenders 'the perverse result that truthful publication . . . [is] less protected by the First Amendment than even the least protected defamatory falsehoods.'"[373] Second, news organizations argue that even if courts find themselves bound by the principles of contract law, they must modify traditional theories of contract in order to accomodate First Amendment values.[374] This approach suggests that courts apply a subjective standard, taking into consideration actual conduct of the reporter as well as what he intended by his promise.[375] This would avoid arbitrarily imposed liability on the news organization on the basis of "apparent authority" or "imparted conduct or knowledge."[376] In addition, media defense counsel suggest that in order for courts to reach a fair determination of the damages flowing from a breach of the a confidentiality agreement, the parties must have clearly contemplated the possible economic consequences of their contract at the time of its formation.[377] In the words of one news organization:

> Only the source can know what he or she is trying to protect by remaining anonymous. If the source wishes to convert the reporter's pledge of confidentiality into a legally binding contract, it seems only fair that the source be required to disclose the feared consequences of breach, so that the press can intelligently evaluate its legal risks, if any.[378]

These constitutional and ethical concerns warrant further consideration by lower courts when they apply the standard set forth by the Supreme Court in the *Cohen* decision. Just as strict adherence to the terms of traditional contracts must sometimes yield to public policy concerns,[379] courts must evaluate reporter-source agreements in terms of their potential cost to First Amendment interests. At a minimum, courts

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371. *Id.* at 60-61.
372. *Id.* at 61.
373. *Id.* (quoting Florida Star v. B.J.F., 491 U.S. 524, 539 (1989)).
374. *See* Borger, *supra* note 327, at 47.
375. *Id.* at 49 (quoting Brief for Appellant at 26-36, *Cohen III*, 445 N.W.2d 248 (Minn. Ct. App. 1989)).
376. *Id.*
377. *See* Borger, *supra* note 327, at 63 (quoting Brief for Appellant at 26-36, *Cohen III*, 445 N.W.2d 248 (Minn. Ct. App. 1989)).
378. *Id.*
379. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1), (2), (3) (a) (b) (1981).

should enforce confidentiality agreements only to the extent that they can be viewed objectively and do not infringe upon the editorial process. This requires that the terms of a contract be narrowly construed and enforced only to the extent that the agreement is mutual and clearly expressed by both parties.

Of course, one can make credible policy arguments in favor of enforcing a reporter's silence even when the newsworthiness of a source's identity would make disclosure a matter of public interest. However, questions of policy are always intertwined with factual issues and, consequently, must be addressed on a case-by-case basis. Inevitably, reporters will probably continue to claim the right to reveal a source's identity in certain circumstances regardless of the *Cohen* decision. Assuming that the reporter asserts a First Amendment interest, there are several reasons judges would examine a constitutional challenge with a sympathetic eye. First, a court could narrowly tailor a decision in the reporter's favor to fit the specific facts of the case at bar. A court need not necessarily ignore the principle of stare decisis nor strike down the alleged benefits of a contract/promissory estoppel approach in exceptional cases in which disclosure would not undermine society's interest in upholding the sanctity of contracts.[380] Second, judges might be convinced that invalidating the rigid rules of contract would benefit society in limited circumstances. For example, loosening strict standards of confidentiality would not necessarily undermine the role sources play in providing important information in the political arena. Rather it would open questionable source conduct to the type of public discussion envisioned by framers of the Constitution.[381] More importantly, recognizing that First Amendment concerns may compel a reporter to breach a confidentiality agreement, sources would think twice before using a reporter as the means to air politically sensitive information.[382] While these theories are only speculative, they prompt further consideration of the appropriate standard of press liability. Against this background, courts may feel compelled to examine a less doctrinal approach when the press breaks its promises.

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380. *See, e.g.*, Borger, *supra* note 327, at 63. In its brief to the Minnesota Court of Appeals, the Cowles Media Company argued that strict adherence to contract principles is not warranted in situations in which the parties to a reporter-source agreement do not clearly express the terms of the agreement in writing or these terms are the subject of dispute. *Id.* (quoting Brief for Appellant, at 26-36, *Cohen III*, 445 N.W. 2d 248 (Minn. Ct. App. 1989)).

381. *See* U.S. CONST. amend. I.

382. *See supra* notes 5-7 and accompanying text.

D. Breach of Confidence: Looking Toward a British Model to Resolve the Tension Between Contract Principles and the First Amendment

The issue of whether or not a court should enforce a reporter-source agreement of confidentiality poses significant risks to First Amendment freedoms as well as to the freedom to contract. Enforcement of the contract or an award of damages under a tort theory would ignore well-established constitutional restrictions on suits against the press.[383] On the other hand, causes of action under a contract theory should not be used to circumvent the traditionally high barrier that protects the press from civil suits.[384] Resolving this conflict between tort and contract theory requires a balancing of interests.[385] Previously proposed standards that incorporate a balancing approach have also considered the interests served by traditional causes of action such as breach of contract, defamation, false light, and invasion of privacy.[386] However, proposals that attempt to address the complex issues of confidentiality agreements by analogy fail to adequately address concerns about the unique circumstances of a reporter-source relationship. News tips and leaks have been characterized as a reporter's lifeblood.[387] The sources chosen by a reporter may have a profound impact on matters of public interest, thereby affecting a reporter's professional reputation and self-esteem.[388] More importantly, cooperative sources "[enable] the press the function as an independent watchdog of government and other powerful groups."[389]

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383. *See generally* RODNEY SMOLLA, LAW OF DEFAMATION §§ 1.02[3]-3.36[5], 8.01[2]-8.10[5][6], at 1-6 to 3-86, 8-3 to 8-37 (1986) (surveying development of heightened protection for the press under constitutional standards).

384. *See id.*

385. When a complex fact situation involving traditional causes of action threatens to chill the exercise of First Amendment rights, the law must respond with a standard that balances the competing interests. *Cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (suggesting that nontraditional threats to the media's publication function can be subject to constitutional standards).

386. *See* Borger, *supra* note 327, at 44.

387. *See, e.g.*, SABATO, *supra* note 65, at 94-95. Sabato characterizes leads provided by sources as "the chief currency of investigative journalism." *Id.* Without tips and leaks, Sabato believes that "it would be impossible for journalism to function well." *Id.* Even when a source is unable to provide the necessary details for a fullblown news exposé, her tip offers the hope that a reporter will be able to unearth more information about a hidden scandal. *Id.*

388. *See id.* at 94.

389. *See* Levi, *supra* note 3, at 711.

Conversely, sources seek to employ journalists as a means of tapping valuable resources of power and influence just as often as they themselves are used by the press.[390] Sources such as the political player or malicious gossip, who use the media for purely selfish motives, are unlikely to elicit much sympathy. However, this is not the case when the source takes both personal and professional risks in an effort to bring newsworthy information to the public's attention. In this context, the source seeks anonymity purely as a defense against later reprisals by friends or coworkers.[391] Each of these factors demands consideration in any attempt to develop an effective analysis of source confidentiality claims. This Comment suggests that existing contract and tort prototypes fail to adequately consider the varied and unusual contexts of confidentiality agreements. Therefore, courts should look to the British legal system to develop a new tort, breach of confidence.[392] In considering breach of confidence, it is not the goal of this Comment to suggest a complete shift away from either First Amendment theory or a contract analysis. Rather, the primary focus is to emphasize the importance of a contextual approach—both in determining issues of free speech and in assessing liability under traditional principles of contract.

If Watergate had taken place in Great Britain, and Woodward and Bernstein decided to reveal the identity of their famous source, "Deep Throat," they probably would have found themselves in deep legal trouble. In fact, the court might have forced them to compensate their source with enough monetary damages to allow him to live out his days in royal style. In Great Britain, the case would likely be tried as a breach of confidence which provides sources with a means of legal redress when a party breaks a promise of confidentiality by disclosing information without the permission of the source.[393] The historic roots of this cause of

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390. *See* SABATO, *supra* note 66, at 95 (suggesting that sources, both professional and novice, regularly plant "tips" which may lead to a "jackpot" story).

391. This situation was poignantly illustrated in the *Fries* case. *See supra* text accompanying notes 281-87.

392. For a complete discussion of this tort, including its historical basis, present contours, and likelihood of future development in the United States, see Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982) (proposing that nonpersonal relationships customarily thought to impose an obligation of confidence should serve as the starting point for the development of an American breach of confidence tort).

393. *See* GEOFFREY ROBERTSON & ANDREW G.L. NICOL, MEDIA LAW 112 (1984). Although the United States has yet to formally adopt the breach of confidence tort, the foundation for this proposed cause of action can be traced to two lines of cases, those involving physicians and banks. Vickery, *supra* note 392, at 1428-31 (citing Doe v. Roe, 400 N.Y.S.2d 668 (Sup. Ct. 1977) (finding doctor liable for breach of confidence for disclosing information about former patient obtained during course of medical treatment); Peterson v. Idaho First Nat'l Bank, 367 P.2d 284 (Idaho 1961)

action date back to nineteenth-century England when business-related lawsuits were designed to prevent the unauthorized disclosure of information revealed in the course of business dealings.[394] Under modern British law, breach of confidence exists as an equitable doctrine designed to protect a variety of confidential relationships, including attorney-client, banker-customer, and husband-wife.[395] Therefore, extending this tort to cover those instances in which a reporter breaks a promise of confidentiality to a source does not seem far-fetched.[396]

Although it appears that an action for breach of confidence might apply to a broad and diverse range of confidences, the theory has not been met with great enthusiasm in the United States. This might seem surprising in a country where the right of privacy enjoys such an elevated and highly protected status.[397] The problem might be attributed to the arguably difficult task of developing an appropriate test for confidentiality. How would courts distinguish a source's claim against a reporter from that of a commercial enterprise whose trade secret has been leaked to competitors? Would the same test of confidentiality apply between spouses or to those privy to grand jury testimony?[398] While the applica-

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(holding bank manager liable under breach of confidence theory after revealing information about customer's deteriorating finances to customer's employer).

394. The first English case establishing breach of confidence as a distinct theory of legal redress occurred in 1849. In Prince Albert v. Strange, 41 Eng. Rep. 1171 (Ch. 1849), Lord Cottenham declared that a breach of confidence claim would provide an alternate theory of recovery for royal etchings which had been stolen and secretly copied. *Id.* at 1178-79.

395. *See* Vickery, *supra* note 392, at 1453.

396. One plaintiff relied upon this theory in a lawsuit against a media organization that depended heavily on confidential sources. Sun Printers Ltd. v. Westminster Press Ltd., [1982] I.R.L.R. 292 (C.A. 1982), available in LEXIS, ENGEN Library, CASES File (private company seeking to protect confidential information about company's future from publication in local newspaper).

397. In the often-quoted words of Justice Brandeis, the constitutional right of privacy is "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). TRIBE, *supra* note 165, at §§ 15-1, 15-2 (surveying judicial and scholarly approaches to this "paradoxical right").

398. The Supreme Court recently addressed the constitutionality of grand jury secrecy laws in Butterworth v. Smith, 494 U.S. 624 (1990). The Court resisted the temptation to adopt a standard which would categorically exempt grand jury information from First Amendment scrutiny. Because the law at issue in *Butterworth* was broad, it is difficult to ascertain the exact legal standard applied by courts when the wording of a statute is more precise. Hence, the Court found that some governmental interests were not "substantial," while others were not directly "advanced" by the grand

tion of the breach of confidence tort is beyond the scope of this Comment, it does raise the possibility of a slippery slope when applied to matters of American jurisprudence. Recent opinions suggest ways in which courts might develop a flexible standard for issues of confidentiality.[399] For example, in *Connick v. Myers*,[400] the Supreme Court employed a sliding scale to determine the degree of protection afforded the speech of public employees:[401] "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement . . . . [T]he state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."[402]

The extension of *Connick*'s employee speech standard to the reporter-source relationship warrants consideration. Arguably, when a source uses a journalist for her own selfish motives, the journalist becomes the source's employee when she consents to a confidentiality agreement.[403] By analogy, if a court were to focus on the content, form, and context of a politically prompted disclosure of a source like the one in *Cohen*, the reporter's disclosure of the source's identity would most likely warrant protection.[404] First, a court could find that a person with ties to the political arena has no absolute expectation of confidence when she seeks to use media channels to bear upon a political issue. Alternatively, this tort allows for broad public policy exceptions such as a compelling public interest.[405] In contrast, a reporter who reveals the identity of a whistleblower creates the precise circumstances in which liability under a theory of breach of confidence would be justified, provided that the source makes an affirmative showing that the public interest in enforcing the confidentiality agreement outweighs the public interest in disclosing her identity.[406]

The courts' failure to adopt a formal cause of action for breach of

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jury law. *Id.* at 632-36.

399. For a detailed discussion of the development of confidentiality rules in the free speech arena, see Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional*, 75 IOWA L. REV. 601, 615-25 (1990).

400. 461 U.S. 138 (1983).

401. *Id.* at 147-48.

402. *Id.* at 147-48, 150.

403. *See* SABATO, *supra* note 66, at 94-95.

404. *See* Vickery, *supra* note 392, at 1458 (quoting Woodward v. Hutchins, [1977] 1 W.L.R. 760, 763-64 (C.A.) ("'The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facts of the public interest contradictory of and more compelling than that relied upon.'")).

405. *See id.* (finding that plaintiff carries the burden of proof under the public interest limitation).

406. *See* RESTATEMENT (SECOND) OF TORTS § 652B-E (1977).

confidence might stem from the development of separate body of tort law protecting privacy rights under a variety of other theories.[407] Nevertheless, this tort, while by no means novel, deserves consideration. Support for this contention dates back to 1890, when Warren and Brandeis first proposed the common law right of privacy and mentioned breach of confidence as one method of recovery.[408]

If the breach of confidence tort gained acceptance in the United States, a successful claim for breach of confidence arising from a reporter-source agreement would rest upon the plaintiff's ability to prove the existence of three key elements: (1) a showing that the information was confidential; (2) a promise from the journalist to keep the information secret; and (3) a demonstration by the source that the journalist breached the terms of the agreement by revealing the secret information.[409] The second requirement effectively places the burden upon the source to prove the existence of a contract and is likely to be the most difficult element to satisfy. This was indeed the case in *Cohen v. Cowles Media Co.*,[410] where the indefiniteness of a reporter-source agreement precluded the Minnesota Supreme Court from finding liability on the basis of a standard contractual relationship.[411] However, some courts have rejected traditional bases of liability such as breach of contract, finding that a confidential relationship may impose "an additional duty springing from but, extraneous to the contract and that the breach of such duty is actionable in tort."[412] This was the case in *MacDonald v. Clinger*,[413] in which a New York court granted recovery in tort for breach of confi-

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407. Dean Prosser distinguished four separate areas warranting protection: "Intrusion upon Seclusion," "Appropriation of Name or Likeness," "Publicity Given to Private Life," and "Publicity Placing a Person in False Light." RESTATEMENT (SECOND) OF TORTS §§ 652B-E (1977).

408. *See* Earl Warren & Lewis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 211 (1890).

409. ROBERTSON & NICOL, *supra* note 393, at 112 (enumerating elements of breach of confidence claim).

410. 111 S.Ct. 2513 (1991).

411. *Cohen IV*, 457 N.W.2d 199, 203 (Minn. 1990). After determining that "a contract cause of action is inappropriate for these particular circumstances," the court went on to address the question of whether Cohen could establish a cause of action on the theory of promissory estoppel. *Id.* The court rejected this claim, which was the only basis of recovery considered in Cohen's appeal to the United States Supreme Court. Thus, the court did not consider the existence of an actual contract between the parties. *See Cohen V*, 111 S. Ct. at 2516-18.

412. MacDonald v. Clinger, 446 N.Y.S.2d 801, 804 (N.Y. App. Div. 1982).

413. *Id.*

dence arising from a physician-patient relationship after finding the traditional causes of action insuffient for purposes of the case at bar. In *MacDonald*, the court held that the plaintiff was entitled to sue his psychiatrist for breach of confidence after the doctor revealed personal information disclosed during therapy sessions with the plaintiff's wife.[414] While the plaintiff originally alleged damages arising from breach of contract, breach of privacy, and breach of confidence, the court found that only the last cause of action adequately addressed the implied duties arising from the confidential relationship at issue, contending that it was "obvious then that this relationship gives rise to an implied covenant which, when breached, is actionable."[415] The court then proceeded to note that recovery under a contract theory would unfairly limit the plaintiff's recovery to economic losses, thereby depriving him of damages for the pain and embarrassment of the physician's disclosure.[416] What distinguishes the *MacDonald* decision from other cases which recognize the breach of confidence tort is that the *MacDonald* court recognized that recovery is not necessarily limited to instances in which the defendant has breached the express terms of a confidential relationship. Rather, the court found that the relationship in dispute was one of trust and confidence "out of which *sprang a duty* not to disclose. The defendant's breach was not merely a broken contractual promise but a violation of a fiduciary responsibility to the plaintiff *implicit* in and essential to the doctor-patient relationship."[417]

The *MacDonald* court's finding that a tort duty may arise out of, yet remain independent from, an express contract sent a strong message that public policy may protect those who would otherwise find themselves the victims of a vague or ambiguous agreement. However, the majority of courts recognizing the breach of confidence tort have refrained from adopting *MacDonald*'s bold approach.[418] Instead, these courts have relied on traditional bases of liability or applied both approaches by recognizing breach of confidence as one of several possible theories of recovery.[419] The latter approach was employed by the Alabama Supreme

414. *Id.* at 802.
415. *Id.* at 804-05.
416. *Id.* at 804.
417. *Id.* at 805 (emphasis added).
418. *Id.*
419. *See, e.g.*, Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 289-90 (Idaho 1961) (considering various public policy rationales which might impose actionable duty in tort, but basing its ultimate holding on finding of implied contract liability). *Cf.* Davies v. Krasna, 535 P.2d 1161 (Cal. 1975). Addressing a claim of breach of confidence arising out of a playright's unapproved use of a story idea, the California Supreme Court was careful to note that it "has never ruled that a cause of action for breach of confidence can rest upon a basis other than a contract that protects that confidence." *Id.* at 1163. The court chose not to upset its own precedent, defer-

Court in *Horne v. Patton*.[420] In *Horne*, the court addressed three bases of liability arising from a physician's unconsented disclosure of private medical information to a patient's employer. The plaintiff sought damages for the traditional torts of invasion of privacy and breach of implied term of contract, as well as for breach of a confidential relationship. The court treated all three counts as matters of first impression and found that each would support the plaintiff's claims of damages.[421] In an attempt to rationalize the breach of confidence tort, the *Horne* court emphasized that the confidential physician-patient relationship carries with it certain inherent benefits which would be sacrificed if doctors were permitted to "promiscuously disclose" information obtained in the course of treatment.[422] Like *MacDonald*, *Horne* recognized that certain confidential relationships necessarily impose a positive duty upon professionals to refrain from disclosing confidential information for the benefit of the immediate parties and, as a matter of public policy, to protect society's interest in the value of confidential relations.[423]

As the *MacDonald* court aptly stated, confidential relationships normally carry a legal duty.[424] However, there may be instances when a breach of confidence would not be justified. Accordingly, British law developed the public interest defense. A defendant seeking protection on the basis of public interest might claim this defense in any one of at least four instances: (1) where law compels disclosure; (2) where there is a public duty to disclose; (3) where the interests of the defendant demand disclosure; and (4) where the source expressly or implicitly consents to the disclosure.[425] Generally, the public interest defense as it would apply to

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ring to the trial court's finding that a cause of action for breach of confidence was indeed a viable theory of recovery. *Id.*

420. 287 So. 2d 824 (Ala. 1973).

421. *Id.* at 827-31.

422. *Id.* at 827.

423. 394.*Id.* at 828.

424. *See* Susan A. v. County of Sonoma, 3 Cal. Rptr. 2d 27 (Cal. Ct. App. 1991) (finding that a forensic psychologist's statement to reporter about interview with juvenille arrestee sustained breach of confidence claim); *see also* Harley v. Druzba, 565 N.Y.S.2d 278 (N.Y. App. Div. 1991) (finding social worker-client relationship sufficient to establish cause of action for breach of confidence); MacDonald v. Clinger, 446 N.Y.S.2d 801, 804 (N.Y. App. Div. 1982).

425. For a complete discussion of the possible defenses to a breach of confidence action, see Vickery, *supra* note 392, at 1462-68 (explaining limitations to claim of breach of confidence, including traditional privileges and First Amendment freedoms). *See also* Stephen L. Grant, *In the Public Interest? The Disclosure of Confidential Information*, 6 J. MEDIA L. AND PRAC. 178, 183 (1985) (suggesting when the proposed

the press requires the media defendant to show that the need for public disclosure of confidential information clearly outweighs the source's interest in keeping the information secret.[426]

Although the United States has been hesitant to follow British law, breach of confidence is a workable solution to the conflicts arising from the contract, promissory estoppel, and First Amendment models.[427] The decision in *Cohen v. Cowles Media Co.* warrants serious examination of this tort. As some media commentators warn, the courts will likely see an increase in claims for breach of reporter-source agreements.[428] If this is indeed the effect, the doctrinal limitations of a breach of confidence tort effectively correspond to the balance which courts must maintain between the need to protect an individual's right to confidentiality and the fear of setting a low threshold for recovery which would increase the likelihood of unmeritorious claims. As a result of adopting this tort, courts will no longer need to deal with breach of confidence claims in a piecemeal manner by applying other theories of liability which do not adequately address the implied duties of a confidential relationship. The breach of confidence tort reflects society's general interest in the protection of private information. However, in contrast to the rigid laws of contracts, the contours of this tort also respect the obligation of the press to provide important information about government, political figures, private persons, and private organizations by recognizing certain well-established privileges. On the other hand, breach of confidence is more restrictive than the sweeping approach of the First Amendment model which affords the press almost absolute protection in the dissemination of newsworthy information. The tort recognizes that in compelling cases of injurious disclosures, the press must be held accountable for its actions to protect the broad societal interests in the sanctity of promises and confidentiality.[429]

The rationales behind traditional theories of liability for breach of a confidential relationship only partially overlap with the interests at stake

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tort would permit the publication of confidential information).

426. *See* Tournier v. National Provincial and Union Bank [1924] 1 K.B. 461, 473 (Eng. C.A.) (Bankes, L.J.) (setting forth the standard for application of the public interest defense in the banking industry). While *Tournier* examined the public interest defense in the context of business litigation, the obligation of confidence arising from a reporter/source agreement is sufficiently analogous to warrant consideration of this defense.

427. *See* ROBERTSON & NICOL, *supra* note 393, at 117 (finding that disclosure may be warranted in the name of public interest).

428. *See, e.g.*, Vicini, *supra* note 13 (commenting on spokesperson for Reporters Committee for Freedom of the Press who predicts floodgate of lawsuits in the aftermath of *Cohen*).

429. *See generally supra* text accompanying notes 189-207.

in a reporter-source relationship. A confidential source has both an expectation of protection from unconsented disclosure and a reliance interest in remaining free from the resulting damages should a reporter reveal her identity. The first interest is all but ignored by the First Amendment model, and the second interest is not adequately protected by contract theories that limit recovery to direct economic losses. In the absence of a breach of confidence tort, most courts continue to apply a tangle of inconsistent remedies to the detriment of society's interest in protecting the sanctity of mutual agreements. Yet some courts have wisely recognized that traditional theories simply beg the question of when courts should hold the press accountable for its promises. As breach of confidence begins to emerge as a basis for liability, those courts that have yet to adopt this cause of action should take note of the societal interests served when confidential relationships are protected by the establishment of a distinct theory in tort.

V. CONCLUSION

In *Cohen*, the Supreme Court found that a reporter's promise to provide anonymity in exchange for a source's delivery of newsworthy information contained the essential elements of an offer, acceptance, and consideration for the purposes of a contract claim.[430] The decision drew immediate criticism from media groups, who complained that the majority's opinion signals the Court's readiness to legislate newsroom ethics.[431] Critics of *Cohen* fear that a focus on journalism ethics will result in a gradual retreat from the traditional freedoms guaranteed to the press under the First Amendment. However, ethical concerns are necessarily intertwined with the professional interests of journalists[432] and,

430. *See Cohen V*, 111 S. Ct. 2513, 2517-19 (1991).

431. *See* Vicini, *supra* note 13; *see generally* Richard A. Gonzales, *Pyrrhic Victories and Glorious Defeats: Why Defendants Are Winning and Plaintiffs Are Losing the Struggle Over Actual Malice and "Fictionalized" Quotations*, 22 ST. MARY'S L.J. 1037 (1991) (suggesting high costs of litigating media ethics demand a tempered approach to issues concerning press morality).

432. Industrywide standards for journalists first appeared in the early twentieth century in an effort to impose a uniform code of ethics upon the press. Robert J. Sheran & Barbara S. Isaacman, *Do We Want a Responsible Press?: A Call for the Creation of Self-Regulatory Mechanisms*, 8 WM. MITCHELL L. REV. 1, 96-97 (1982). *See also* Lynn W. Hartman, *Project Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 679-80 (1987) (in response to industry survey, 107 out of 182 editors report that their newsrooms are governed by some form of internal written standards).

therefore, constitute a legitimate subject matter for court opinion. The more critical issue arising from the reporter-source dilemma is whether, by addressing the ethical standards of the press, courts project values that are inconsistent with the First Amendment or merely seek to clarify and enforce standards previously established by the media.

The written codes of industry associations such as the American Society of Newspaper Editors (ASNE) and the Society of Professional Journalists (SPJ) recognize the need to regulate behavior when a breach of ethics may threaten another's rights or cause injury.[433] However, the standards set forth by organizations such as ASNE and SPJ are neither rigid nor detailed, but are instead general guidelines for ethical behavior. For example, the SPJ code is premised on broad categories such as "Responsibility," "Ethics," and "Freedom of the Press."[434] Such vagueness and imprecision has caused some critics to question the impact of written codes of ethics on the practical concerns of modern journalists.[435]

While critics of the *Cohen* decision contend that the Supreme Court might be attempting to fill in the gaps provided by industry codes, thereby subjecting the press to stricter scrutiny than it would apply to other persons or professions,[436] the majority opinion flatly rebuts this notion. The Court reasoned that the newspapers themselves determined the scope of their legal obligations and, therefore, the reporters imposed upon themselves any restrictions placed on the publication of Cohen's story.[437] While this justification would apply to most contractual relations, it is does not adequately respond to the unique dilemmas arising

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433. *See* Sheran & Isaacman, *supra* note 432, at 97-99; Hartman, *supra* note 432, at 638, 695-99 (reprinting codes of ASNE and SPJ).

434. *See* Hartman, *supra* note 432, at 697-98. Similarly, the ASNE Statement of Principles groups six articles under the broad titles, "Responsibility," "Freedom of the Press," "Independence," "Truth and Accuracy," "Impartiality," and "Fair Play." *Id.* at 695-96.

435. In his concurring opinion in Pennekamp v. Florida, 328 U.S. 331 (1946), Justice Frankfurter relied upon the often quoted words of H. L. Mencken to summarize his feelings about the power of media codes:

> Journalistic codes of ethics are all moonshine. Essentially, they are as absurd as would be codes of street-car conductors, barbers or public jobholders. If American journalism is to be purged of its present swinishness and brought up to a decent level of repute—and God knows that such an improvement is needed—it must be accomplished by the devices of morals, not by those of honor. That is to say, it must be accomplished by external forces, and through the medium of penalties exteriorly inflicted.

Id. at 365 n.13 (Frankfurter, J., concurring).

436. *See, e.g.*, Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2521 (1991) (Blackmun, J., dissenting) (declaring that enforcement of Minnesota's doctrine of promissory estoppel unfairly punishes the press for publication of truthful information).

437. *Id.* at 2519.

from a voluntary agreement between a reporter and her source, for the latter is unavoidably intertwined with important First Amendment concerns. Finding it necessary to subject the *Pioneer Press* and *Star Tribune* to the principles of promissory estoppel,[438] the Supreme Court appeared to equate media codes of ethics, which are rooted in the First Amendment, with a fundamental tenet of contract law. Such an equation is unsettling and will likely lead to fear among journalists that the philosophical tone of industry codes no longer protects the press from vexatious litigation.[439] In the wake of *Cohen*, it now appears that the absence of procedures for the specific enforcement of the media codes places a heightened degree of responsibility upon editors to ensure that a reporter's behavior meets the ethical standards of society at large and not just those specifically reserved for the journalism profession.[440]

Just as media industry codes are not absolute protective devices for journalists, neither should the general principles of contract law always require the press to conceal the identity of a confidential source. The potential threat to a source's privacy interests coupled with the First Amendment rights of a free press warrants legal protection of both parties. While the factual scenario of *Cohen* lends itself well to an application of the theory of promissory estoppel,[441] the growing dependence

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438. *Id.* at 2518-19. The Court stated that

> [t]here can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, in so far as we ar advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.

Id.

439. *See Cohen V*, 111 S. Ct. at 2518-19. *See also* Hartman, *supra* note 432, at 643 (some members of the press fear that specific standards imposed by newspapers would offer powerful ammunition to plaintiffs in libel actions). Several prominent cases demonstrate a trend toward finding liability on the part of a media defendant when internal communications exist. *See, e.g.*, Sharon v. Time, Inc., 599 F. Supp. 538, 570-71, 583-85 (S.D.N.Y. 1984) (editor's memorandum to reporter provided evidence of media defendant's state of mind and supported denial of motion for summary judgment); Westmoreland v. CBS, Inc., 601 F. Supp. 66, 67 (S.D.N.Y. 1984) (office communication cited as evidence supporting court's finding of actual malice).

440. *Cf.* Hartman *supra* note 432, at 640 (media codes merely set forth lofty principles without the means of self-enforcement).

441. The Court found that the reporter's promise to keep Dan Cohen's identity secret provided the offer, acceptance, and consideration necessary to establish a contract. *See Cohen V*, 111 S. Ct. at 2518-19 (applying Minnesota's law of promissory estoppel).

upon confidential sources during the past two decades[442] suggests that courts will face numerous fact patterns, some of which will warrant increased protection of the media's First Amendment right to gather and report newsworthy stories.

The issue decided by the United States Supreme Court in *Cohen* was whether the First Amendment grants immunity from liability for damages caused when the press breaks its promises.[443] This Comment has suggested that courts must look beyond the historical notions of First Amendment immunity and yet resist the temptation to analyze the reporter-source relationship as one rooted in traditional contract law. The gap between tort and contract is not so expansive that the sometimes conflicting interests of journalists and their sources cannot be fairly resolved in a court of law. On the contrary, this narrowing gap provides fertile ground for the development of a standard that incorporates the unique features of the reporter-source relationship and avoids the application of easy absolutes illustrated by the First Amendment and contract models. It is likely that courts will increasingly confront compelling cases of source disclosures. As the political arena continues to be dominated by negative campaigning, which includes the discovery of closet skeletons by tapping anonymous sources,[444] courts must reexamine the bases of liability when the press breaks promises of confidentiality. Although the tort is still in the developing stages, breach of confidence appears to be a viable alternative to traditional legal models. Further development of this tort is warranted since reporters increasingly face scenarios in which revealing the identity of a source may have a significant impact on the newsworthiness of a story, thereby affecting the press' primary functions as educators and critics of our democratic society. This Comment proposes that the vagueness, secrecy, and ambiguity typically associated with reporter-source agreements command a heightened degree of awareness of the competing values underlying the First Amendment and contract law, and that an examination of this unique relationship should serve as the starting point for any legal analysis.

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442. *See supra* notes 122-26.

443. *Cohen V*, 111 S. Ct. at 2515.

444. *See* SABATO, *supra* note 66, at 99-100 (contending that all major presidential campaign rumors in recent history can be traced to "partisan operatives").