

NOTE

***Cohen v. Cowles Media Co.:* Bad News for Newsgatherers; Worse News for the Public**

INTRODUCTION

Reporters¹ rely heavily on confidential sources² to gather the news. Because reporters need to maintain their sources' trust³ and because their journalistic ethics⁴ require them to do so,⁵

¹ This Note generally uses the term "reporter" to refer both to individual newsgatherers and to organizations that publish news, such as newspapers, magazines, and broadcasters. In some instances this Note refers specifically to individual reporters (newsgatherers), editors, or news publishers. This Note also occasionally uses the terms "news media" and "press" to refer collectively to reporters, editors, and news publishers.

² The *Wall Street Journal* distinguishes anonymous sources from confidential sources. Monica Langley & Lee Levine, *Broken Promises*, COLUM. JOURNALISM REV., July-Aug. 1988, at 23. Anonymous sources are those that reporters promise not to name in stories. *Id.* The reporters may, however, need to reveal these sources later—for example, to defend libel suits. See *infra* note 144 (citing cases where reporters exposed publications to default judgments in libel actions rather than reveal sources). Confidential sources are those that reporters will not name under any circumstances, even if it means reporters must lose lawsuits or go to jail. Langley & Levine, *supra*; see *infra* note 142 (listing instances in which reporters went to jail rather than reveal sources). This Note will use the term "confidential" to refer to both types of sources.

³ See *infra* notes 132-40 and accompanying text (discussing extent to which reporters rely on confidential sources to gather news).

⁴ The term "journalistic ethics" in this Note refers to standards of conduct that the news media and individual news organizations promulgate. See Lynn W. Hartman, Contemporary Studies Project, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV.

reporters have traditionally gone to great lengths to keep confidentiality promises to sources.⁶ Thus, the U.S. Supreme Court confronted a novel issue⁷ in *Cohen v. Cowles Media Co.*:⁸ whether the First Amendment⁹ protects reporters who break confidentiality promises from civil liability.¹⁰ In an opinion that threatens to hamper newsgathering¹¹ and limit the public's access to important information on political and governmental affairs,¹² the *Cohen* Court held that the First Amendment does not prevent news sources from recovering damages from reporters who break promises to them.¹³

At first glance, the *Cohen* decision seems both eminently fair and potentially helpful to newsgathering. As a general rule, fairness requires that people who break their promises must either pay for the harm they cause or make good on their promises.¹⁴

637, 638 (1987) (discussing ethical standards news media have developed). Some news organizations embody their standards in written codes. *Id.* Others rely on industry custom. *See id.* Among other topics, these standards generally address relations with confidential sources. *Id.* at 638-39; *see also* Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971) (discussing news editors' views regarding confidential sources).

⁵ *See infra* notes 141-45 and accompanying text (discussing ethical requirement that reporters keep confidentiality promises to sources).

⁶ *See infra* notes 142-44 and accompanying text (discussing burdens reporters have borne to avoid naming confidential sources).

⁷ *See* Linda Greenhouse, *Supreme Court Roundup: Justices to Hear Case on Naming a News Source*, N.Y. TIMES, Dec. 11, 1990, at A24 ("The Supreme Court has dealt before with the relationship between journalists and news sources, but never in this setting."); Dan Oberdorfer, *Is 'Burning a Source' A Breach of Contract?*, NAT'L L.J., Aug. 1, 1988, at 8 (characterizing *Cohen* as "something of a journalistic curiosity").

⁸ 111 S. Ct. 2513 (1991).

⁹ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

¹⁰ *Cohen*, 111 S. Ct. at 2516.

¹¹ *See infra* notes 211-13 and accompanying text (discussing possibility that enforcing reporters' confidentiality promises will restrain reporters' ability to gather news).

¹² *See infra* notes 204-06 and accompanying text (discussing likelihood that *Cohen's* broad holding will lead to increased litigation by disgruntled news sources and thus increase self-censorship by news media); notes 214-16 and accompanying text (discussing information public might never obtain if confidentiality promises are legally enforceable).

¹³ *Cohen*, 111 S. Ct. at 2516.

¹⁴ *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 1-4(f), at 9-11 (3d ed. 1987) (indicating that fairness to persons to whom promises are made is one social value underlying contract law); *id.* § 6-1, at

Moreover, some commentators have suggested that the *Cohen* decision will benefit reporters and the public as well as the news media. First, these commentators have argued that the *Cohen* decision will enhance reporters' ability to gather the news by increasing sources' faith in confidentiality promises.¹⁵ Others have argued that had the Supreme Court held that the First Amendment did *not* allow sources to enforce confidentiality promises, it would have made it more difficult for reporters to assert their right to keep confidentiality promises in other situations.¹⁶

However, a closer examination of the decision itself,¹⁷ the relevant legal precedents,¹⁸ and the unique factual context of reporter-source relations¹⁹ reveals serious flaws in the *Cohen* opinion.²⁰ Part I of this Note examines the facts of *Cohen* and sets forth the majority's rationale for its decision. Part II first discusses the legal precedents on which the majority and dissenting opinions in *Cohen* are based. Part II then provides background information on the relationship between reporters and confidential sources. Finally, Part II briefly considers a few of the very rare situations in which reporters have broken confidentiality promises to sources and the reasons reporters have given for doing so. Part III of this Note analyzes *Cohen* in light of the legal precedents and other information set out in Part II. Part III argues that *Cohen* runs contrary not only to these precedents, but also to a basic First Amendment value: the public's interest in political discourse based on the widest possible range of information and opinion.

273 (stating that courts enforce gratuitous promises under promissory estoppel doctrine only if injustice cannot otherwise be avoided); *see also id.* § 1-1, at 1 (stating that normal legal consequence of contract is that courts may enforce contract's promises either by awarding money judgment to compensate innocent party for harm resulting from breach or by ordering breaching party to perform promises). For a definition of "promissory estoppel," *see infra* note 53.

¹⁵ *See infra* note 207 and accompanying text.

¹⁶ *See infra* notes 133-51 and accompanying text (discussing reasons reporters have fought hard for the right to keep confidentiality promises); *infra* notes 208-10 and accompanying text (explaining argument that if reporters simultaneously insist on the right to keep confidentiality promises and the right to break confidentiality promises, reporters will lose credibility with courts that enforce their right to keep confidentiality promises).

¹⁷ *See infra* notes 22-131 and accompanying text.

¹⁸ *See infra* notes 91-129 and accompanying text.

¹⁹ *See infra* notes 132-80 and accompanying text.

²⁰ *See infra* notes 181-216 and accompanying text.

I. THE COHEN DECISION

A. Factual and Procedural Background²¹

Cohen v. Cowles Media Co. arose from events near the end of the 1982 Minnesota gubernatorial election campaign.²² The plaintiff, Dan Cohen, was a political activist who worked for a public relations firm that the Wheelock Whitney campaign was using.²³ Whitney's opponent led the race by a wide margin.²⁴

Shortly before the election, Cohen called several reporters and told them he had some documents relating to a candidate in the election.²⁵ Cohen said he would give the reporters the information only if they promised him confidentiality.²⁶ Because they expected Cohen to provide them with important derogatory information about one of the candidates opposing Whitney,²⁷ the

²¹ The discussion in this section is drawn primarily from three published opinions on *Cohen v. Cowles Media Co.*: *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991); *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990); and *Cohen v. Cowles Media Co.* 445 N.W.2d 248 (Minn. Ct. App. 1989). The statements of facts in these opinions do not contradict one another, but each court emphasized different details.

To alleviate any confusion that might result from the similar citations to the opinions of the Minnesota Court of Appeals (445 N.W.2d 248) and the Minnesota Supreme Court (457 N.W.2d 199), the footnotes in this Part refer to the former as *Cohen I* and to the latter as *Cohen II*. These footnotes refer to the United States Supreme Court's opinion simply as *Cohen*.

²² *Cohen*, 111 S. Ct. at 2516.

²³ *Cohen II*, 457 N.W.2d at 201 n.3.

²⁴ See Oberdorfer, *supra* note 7.

²⁵ *Cohen*, 111 S. Ct. at 2516.

²⁶ *Id.*

²⁷ See *Cohen II*, 457 N.W.2d at 200; *Cohen I*, 445 N.W.2d at 252. Cohen told the reporters, "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 . . . then I'll furnish you with the documents." *Cohen II*, 457 N.W.2d at 200. None of the *Cohen* opinions expressly say that the reporters expected Cohen to provide derogatory information on Whitney's opponent. See *Cohen*, 111 S. Ct. at 2516; *Cohen II*, 457 N.W.2d at 200; *Cohen I*, 445 N.W.2d at 252. The reporters, however, knew that Cohen was a "long-time and well-known" supporter of Whitney's political party, *Cohen I*, 445 N.W.2d at 252, and that Cohen was associated with the Whitney campaign, *Cohen II*, 457 N.W.2d at 200. Under the circumstances, the reporters probably did not anticipate that Cohen would provide them with favorable information about Whitney's opponent or with negative information about Whitney. Furthermore, Cohen probably would not have asked for the confidentiality promise if he were planning to provide positive information about Whitney, his employer's client. See *Cohen II*, 457 N.W.2d at 200

reporters gave the requested promises.²⁸ Subsequently, Cohen produced court records indicating that Marlene Johnson, the candidate for Vice Governor on the ticket opposing Whitney, had a criminal record: she had been charged with three counts of unlawful assembly and convicted of one count of petit theft.²⁹

The reporters investigated further and learned that the unlawful assembly charges had resulted from Johnson's participation in a civil rights protest in 1969.³⁰ The charges had been dismissed.³¹ The reporters also learned that the petit theft conviction had occurred in 1970 when Johnson, distraught over her father's recent death, left a store without paying for six dollars worth of sewing notions.³² The conviction had been vacated in 1971.³³ In short, the "dirt" Cohen attempted to spread about Johnson was old and trivial.³⁴

Reporters for the defendant newspapers, the *Minneapolis Star and Tribune* and the *St. Paul Pioneer Press Dispatch*, met with their editors to decide what to do with the story.³⁵ The editors decided to publish the information about Johnson.³⁶ Over their reporters' objections, the editors also decided to name Cohen as the source of the information.³⁷ The editors felt that Cohen was attempting a "dirty trick" as a desperate campaign tactic³⁸ and that the public's interest in knowing about Cohen's conduct justi-

(stating that Cohen testified that he sought the confidentiality promise because he "feared retaliation from the news media and politicians"). Cohen likely would not have been subject to retaliation from anybody had he provided reporters with positive information about the candidate for whom his employer worked. Providing such information would merely have been consistent with his role as a supporter of Whitney's campaign.

²⁸ *Cohen*, 111 S. Ct. at 2516.

²⁹ *Id.*

³⁰ *See id.*

³¹ *Id.*

³² *Cohen II*, 457 N.W.2d at 201 n.2.

³³ *Cohen I*, 445 N.W.2d at 252.

³⁴ Larry Bodine, *The Cost of Burning a Source*, COMM. L., Winter 1991, at 12.

³⁵ *See Cohen I*, 445 N.W.2d at 253.

³⁶ *Id.*

³⁷ *Cohen II*, 457 N.W.2d at 201.

³⁸ *See id.* at 201-02. At trial, Cohen's supervisor at the public relations firm characterized Cohen's behavior as "unscrupulous." *Cohen I*, 445 N.W.2d at 252.

fied breaking the confidentiality promises.³⁹ In addition, the editors felt that failure to identify Cohen as the source would mislead the public by casting suspicion on others.⁴⁰ The editors did not, however, mention in their stories that they had broken the confidentiality promises to Cohen.⁴¹ Cohen's public relations firm employer, which had not authorized his effort to "help" the Whitney campaign with the information about Johnson,⁴² fired him the day the story came out.⁴³

A Minnesota jury found the newspapers liable for both fraud and breach of contract.⁴⁴ The jury awarded Cohen \$500,000 in punitive damages on the fraud claim and \$200,000 in compensatory damages on the breach of contract claim.⁴⁵ The Minnesota Court of Appeals overturned the punitive damages award because the facts did not support a finding of fraud,⁴⁶ but upheld the compensatory damages award.⁴⁷ Cohen and the newspapers both

³⁹ See *Cohen II*, 457 N.W.2d at 201; see also *Cohen*, 111 S. Ct. at 2523 (Souter, J., dissenting). Justice Souter noted:

There can be no doubt that the fact of Cohen's identity expanded the universe of information relevant to the choice faced by Minnesota voters in that State's 1982 gubernatorial election The propriety of his leak to respondents could be taken to reflect on his character, which in turn could be taken to reflect the character of the candidate who had retained him as an adviser. An election could turn on just such a factor; if it should, I am ready to assume that it would be to the greater public good, at least over the long run.

Id.

⁴⁰ *Cohen II*, 457 N.W.2d at 201. The Whitney campaign denied involvement in the leak, although Cohen was working for the Whitney campaign and planned to bill his time. Oberdorfer, *supra* note 7.

⁴¹ One newspaper did not mention confidentiality at all. *Cohen I*, 445 N.W.2d at 253. The other newspaper mentioned that Cohen had asked that his name not be published, but the newspaper did not say that its reporter had in fact promised Cohen confidentiality. *Id.* The newspapers did publish letters to the editors from a Cohen associate who criticized the reporters for breaking their confidentiality promises. *Id.* at 254. These letters, however, did not appear until after the election. *Id.*

⁴² See *id.* at 252 (stating that Cohen told his supervisor at public relations firm about his actions *after* delivering court documents to reporters).

⁴³ *Cohen*, 111 S. Ct. at 2516.

⁴⁴ See *id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

appealed.⁴⁸

The Minnesota Supreme Court affirmed the appellate court's judgment on the fraud claim,⁴⁹ but reversed on the breach of contract claim.⁵⁰ The Minnesota Supreme Court did not wish to impose the "rigidity" of contract law in the unique context of reporter-source relations.⁵¹ In addition, although the parties did not raise or brief the issue,⁵² the Minnesota Supreme Court said that the newspapers' First Amendment rights would bar Cohen from recovering compensatory damages for the loss of his job under state promissory estoppel doctrine.⁵³

Cohen appealed to the United States Supreme Court. The Court granted certiorari on a single issue: whether the First Amendment gives reporters immunity from liability for damages that result from breaking a confidentiality promise given to a news source in exchange for information on a political candidate.⁵⁴

B. *The Supreme Court's Holding and Rationale*

In an opinion authored by Justice White, the Court held that the First Amendment did not bar Cohen from asserting a state law promissory estoppel claim against the reporters who published his name in violation of their confidentiality promises.⁵⁵

⁴⁸ See *Cohen II*, 457 N.W.2d at 200 ("We granted petitions for further review from all parties.").

⁴⁹ See *Cohen*, 111 S. Ct. at 2516.

⁵⁰ *Id.*

⁵¹ See *Cohen II*, 457 N.W.2d at 203 ("To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship.").

⁵² *Cohen*, 111 S. Ct. at 2517.

⁵³ *Id.* A party may seek to use the doctrine of promissory estoppel to enforce a promise when a contract does not exist but injustice will result if the promise is not enforced. See RESTATEMENT (SECOND) OF CONTRACTS § 90, at 242 (1981). For the wronged party to enforce the promise, the person making the promise must reasonably expect that the person to whom the promise is made will act in reliance on the promise. See *id.* Also, the person to whom the promise is made must, in fact, act in reliance on the promise. See *id.* The party failing to keep the promise will be liable for damages if the court can avoid injustice only by enforcing the promise. See *id.*

⁵⁴ See 111 S. Ct. 578 (1990); 59 U.S.L.W. 3416 (U.S. Dec. 10, 1990) (No. 90-634) (discussing issue on appeal).

⁵⁵ *Cohen*, 111 S. Ct. 2513, 2518-19.

The Court based its holding on one main rule of law, but also suggested four other reasons for its decision.

The rule of law that the First Amendment does not exempt reporters from state laws of general applicability provided the *Cohen* Court with the main basis for its holding.⁵⁶ The Court characterized as “unexceptionable”⁵⁷ the proposition that “‘if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.’”⁵⁸ Nevertheless, the Court went on to say that this proposition did not control in *Cohen*.⁵⁹ Rather, the Court said that when enforcing a general law “has incidental effects” on newsgathering, it does not offend the First Amendment.⁶⁰ Because Minnesota’s promissory estoppel law applies to all citizens and does not “single out the press,” the Court held that the law could be applied to reporters without violating the First Amendment.⁶¹

The Court also set out four other arguments in support of its holding. First, the Court suggested that applying promissory estoppel law to claims by exposed sources against reporters does not “punish” reporters for publishing truthful information.⁶² The damages are compensatory, like those provided for in liquidated damages provisions in contracts,⁶³ rather than punitive.⁶⁴ The Court indicated that requiring a reporter to pay such damages is “constitutionally indistinguishable” from enforcing an agreement that a reporter pay a source an exceptionally large sum for information: in both cases, the reporter voluntarily assumes

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 2518 (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 99, 103 (1979)).

⁵⁹ *Id.*

⁶⁰ *Id.*; see *infra* notes 91-97 (discussing cases *Cohen* majority cited for this assertion).

⁶¹ *Cohen*, 111 S. Ct. at 2518-19.

⁶² *Id.* at 2519.

⁶³ *Id.* Liquidated damages are an amount that the parties to a contract agree will be paid in the event one of the parties breaches the contract. See BLACK’S LAW DICTIONARY 391 (6th ed. 1990). The amount must be the result of the parties’ good faith effort to estimate the actual damages that would result if a breach occurred. See *id.*

⁶⁴ *Cohen*, 111 S. Ct. at 2519.

the liability.⁶⁵

Second, the Court suggested that in making confidentiality promises they did not keep, the reporters in *Cohen* did not obtain Cohen's name "lawfully, at least for purposes of publishing it."⁶⁶

⁶⁵ *Id.* The *Cohen* court distinguished unconstitutional "punishment" and constitutional "compensation." In unconstitutional "punishment" cases, state law determines what truthful information reporters may not legally publish. *See id.* (citing *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979)). In constitutional "compensation" cases, reporters themselves make agreements with their sources about what truthful information they may not legally publish. *See id.*

⁶⁶ *Id.* The *Cohen* majority suggested that the reporters had not obtained Cohen's name "lawfully, at least for purposes of publishing it," insofar as they obtained it by making promises they did not keep. *Id.* at 2519. The majority did not cite any direct authority for their suggestion, although they did distinguish *Cohen* from cases like *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). In *Florida Star* and *Smith*, reporters obtained names lawfully from public records, but published the names in violation of state statutes. *Cohen*, 111 S. Ct. at 2519; *see also Florida Star*, 491 U.S. at 536; *Smith*, 443 U.S. at 103-04.

Neither of the two dissenting opinions directly addressed this point. *See Cohen*, 111 S. Ct. at 2520-23. The suggestion that the reporters obtained Cohen's name illegally, however, is weak at best. In Minnesota, both the appellate and supreme courts held that the reporters did not violate state fraud law in obtaining Cohen's name. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 259-60 (Minn. Ct. App. 1989); *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 202 (Minn. 1990). Moreover, Cohen did not even appeal this issue to the United States Supreme Court. *See* Petition for Writ of Certiorari at 4, *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990) (No. 90-634), *available in* LEXIS, Genfed Library, Briefs File.

Thus, the main difference between cases like *Florida Star* and *Smith* and the *Cohen* case is not whether the reporters lawfully obtained information. Rather, the difference lies in the constitutionality of the laws that the reporters violated when they *published* information. In *Florida Star* and *Smith*, the Supreme Court held that state laws that prohibited reporters from *publishing* the names of rape victims and juvenile offenders unconstitutionally limited First Amendment rights. *See Florida Star*, 491 U.S. at 541; *Smith*, 443 U.S. at 105-06. In *Cohen*, the Supreme Court held that enforcing the reporters' promises not to publish Cohen's name under state promissory estoppel law would not unconstitutionally limit First Amendment rights. *Cohen*, 111 S. Ct. at 2519.

Aside from the weakness of the distinction the majority drew between cases like *Florida Star* and *Smith* and the *Cohen* case, it is not at all clear that Supreme Court precedent requires or allows the press to be punished for *publishing* unlawfully obtained information. *See infra* note 96 (suggesting that although unlawful act by which information is obtained may be punished, publication of information itself cannot be punished absent showing of "overwhelming" need for secrecy).

In support of this suggestion, the Court indicated that publishing Cohen's name in violation of a confidentiality promise was legally comparable to publishing information in violation of copyright law.⁶⁷ The First Amendment, the Court said, does not provide reporters with such broad immunity from the law.⁶⁸

Third, the Court noted that Cohen was not seeking to avoid the high standards that a defamation⁶⁹ plaintiff must meet to establish liability under the First Amendment.⁷⁰ Cohen was not seeking a remedy for an injury to his reputation or state of mind that resulted from the publication of a false statement.⁷¹ Rather, the Court said, Cohen was seeking a remedy for the loss of his job and earning capacity that resulted from the publication of a true statement.⁷² For this reason, the Court distinguished *Cohen* from *Hustler Magazine, Inc. v. Falwell*, a case in which the First Amendment prevented a plaintiff from using state intentional infliction of emotional distress law to circumvent the stringent requirements for a defamation cause of action.⁷³

Finally, the Court considered the argument that allowing Cohen to recover damages under state promissory estoppel law might inhibit truthful news reporting. The Court dismissed any such inhibitions as merely an "incidental, and constitutionally insignificant," result of enforcing promises that state law requires

⁶⁷ See *Cohen*, 111 S. Ct. at 2519; see also *supra* note 66 (distinguishing unlawful acquisition of information from unlawful publication of information).

⁶⁸ See *Cohen*, 111 S. Ct. at 2519.

⁶⁹ Defamation is a communication that tends to harm one's reputation in one's community. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 111, at 774 (5th ed. 1984). The statement must be defamatory, it must be communicated to a party other than the person defamed, and it must concern the plaintiff. *Id.* § 111, at 771. In addition, the statement must be false. *Id.* § 116, at 839. Public figures seeking to recover damages for defamation normally must show that the entity publishing the statement did so with knowledge of or reckless disregard for the statement's truth or falsity. See *id.* § 113, at 806.

⁷⁰ *Cohen*, 111 S. Ct. at 2519.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* (distinguishing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)). In *Hustler*, the Court held that the First Amendment prohibited a prominent evangelist from recovering under Virginia's law of intentional infliction of emotional distress against a magazine that published an offensive cartoon parody. 485 U.S. at 50. For further discussion of *Hustler* and its application in *Cohen*, see *infra* notes 106-15 and accompanying text.

people to keep.⁷⁴

The Court, however, limited its holding to whether the First Amendment to the United States Constitution would prevent states from enforcing promises "otherwise . . . enforce[able] under state law."⁷⁵ The Court refused to reinstate the compensatory damage award to Cohen, instead remanding the case to the Minnesota Supreme Court for further consideration.⁷⁶ The Court said that the Minnesota Supreme Court's mistaken interpretation of First Amendment law might have prevented it from applying promissory estoppel law in *Cohen*.⁷⁷ The Court went on to suggest, however, that the Minnesota Supreme Court might find something in Minnesota's state constitution that would prevent enforcement of the promise under state promissory estoppel law.⁷⁸

On remand, however, the Minnesota Supreme Court found that nothing in the Minnesota State Constitution's free press guarantee would prevent Cohen from recovering from the newspapers.⁷⁹ For this and other reasons,⁸⁰ the Minnesota Supreme Court upheld the appellate court's award to Cohen of \$200,000 in compensatory damages, but on promissory estoppel grounds rather than breach of contract grounds.⁸¹

II. THE CONTEXT OF *COHEN*: LEGAL PRECEDENTS AND THE MILIEU OF POLITICAL JOURNALISM

The *Cohen* holding essentially relied on two related contentions. First, the Court said that allowing states to enforce reporters' confidentiality promises merely requires reporters to obey general laws that apply to all persons.⁸² This result, the Court

⁷⁴ *Cohen*, 111 S. Ct. at 2519.

⁷⁵ *Id.*

⁷⁶ *Id.* at 2519-20.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 390-91 (Minn. 1992). The Minnesota court "declined" to interpret Minnesota's free press guarantee more broadly than that in the United States Constitution. *Id.*

⁸⁰ See *infra* note 207 (discussing Minnesota Supreme Court's analysis of the *Cohen* case under promissory estoppel doctrine); *infra* note 214 (discussing Minnesota court's consideration of public policy in its decision in *Cohen*).

⁸¹ *Cohen*, 479 N.W.2d at 392.

⁸² See *supra* notes 56-61 and accompanying text.

asserted, was consistent with legal precedents.⁸³ The First Amendment, they said, does not give reporters immunity from obeying the law.⁸⁴ Second, the Court said that to the extent its holding might inhibit reporting of truthful information, this result was only an incidental, constitutionally insignificant, result of requiring reporters to obey general laws.⁸⁵

In his dissent, Justice Blackmun, joined by Justices Marshall and Souter, contradicted the first assertion. Justice Blackmun pointed out that the First Amendment does not allow states to enforce general laws in ways that inhibit the publication of lawfully obtained,⁸⁶ truthful information, absent a showing of a state interest of the highest order.⁸⁷ Justice Blackmun indicated that this rule does not grant to reporters any special immunity from general laws, because the First Amendment protects all who publish information.⁸⁸

⁸³ See *Cohen*, 111 S. Ct. at 2518 (stating that “well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news” controlled *Cohen*).

⁸⁴ See *supra* notes 56-61 and accompanying text.

⁸⁵ See *supra* note 74 and accompanying text.

⁸⁶ For a discussion of whether the reporters obtained Cohen’s name unlawfully and the Supreme Court’s previous statements as to whether reporters can constitutionally be punished for publishing information obtained unlawfully, see *supra* note 66 and accompanying text and *infra* note 96.

⁸⁷ *Cohen*, 111 S. Ct. at 2520 (Blackmun, J., dissenting) (citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)).

⁸⁸ *Id.* (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (“The liberty of the press is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion[.]”). “Publish” means “to make public; to circulate; to make known to people in general.” BLACK’S LAW DICTIONARY 1233 (6th ed. 1990). As Justice Marshall suggested in *Florida Star v. B.J.F.*, backyard gossip can serve as well as the news media as a vehicle of information and opinion. 491 U.S. 524, 540 (1989). Thus, reporters are not the exclusive beneficiaries of First Amendment protections.

Commentators have suggested that *Cohen* singles the press out for particular burdens. See Karl Olson & Benjamin A. Holden, *An Oath of Silence: Contract Damages Come to the Information Industry When a Reporter Breaches a Deal With a Source*, RECORDER, Oct. 14, 1991, at 8. This is because only news organizations are in the newsgathering business and therefore likely to rely on making confidentiality promises to do their jobs. *Id.*; see *infra* notes 132-40 (discussing extent to which reporters rely on confidential sources).

In a separate dissent, Justice Souter, joined by Justices Marshall, Blackmun, and O'Connor, pointed out a further inconsistency between the majority opinion and the Court's previous First Amendment jurisprudence. Justice Souter noted the political context of *Cohen*.⁸⁹ He argued that the majority's holding silenced speech deserving of the highest degree of constitutional protection: information involving a public figure in a political campaign.⁹⁰

To facilitate Part III's evaluation of whether *Cohen* was correctly decided, this Part will set forth the legal precedents on which both the majority and the dissents relied and will discuss other relevant legal precedents as well. This Part will also provide background information on a subject neither the majority nor the dissents addressed: the symbiotic relationship between reporters and confidential sources, which leads reporters to keep confidentiality promises in the vast majority of cases. Finally, this Part will discuss a few of the rare situations in which reporters have broken confidentiality promises to sources.

A. Legal Precedents

As the *Cohen* majority pointed out, reporters must obey generally applicable laws. For example, the First Amendment does not allow reporters to disregard grand jury subpoenas,⁹¹ nor does it

⁸⁹ See *Cohen*, 111 S. Ct. at 2523 (Souter, J., dissenting).

⁹⁰ See *id.*

⁹¹ *Cohen*, 111 S. Ct. at 2518 (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)). Ironically, the *Cohen* Court did not say whether a source who a reporter exposes in a grand jury investigation would have a civil cause of action against the reporter for breach of a confidentiality promise. See *Editorial: Justices Adopt Role of Ethics Police in Confidential Source, Libel Cases*, NEWS MEDIA & L., Summer 1991, at inside front cover; *infra* notes 204-06 and accompanying text (discussing *Cohen* Court's failure to limit in any way circumstances under which exposed source might recover for breach of confidentiality promise).

In *Branzburg*, the Court held that requiring reporters to testify before grand juries does not abridge First Amendment guarantees of freedom of speech and freedom of the press. 408 U.S. at 667. The reporters in *Branzburg* argued that forcing them to reveal sources' confidences before grand juries would deter sources from furnishing reporters with publishable information. *Id.* at 679-80. This would, in turn, the reporters argued, inhibit the free flow of information that the First Amendment protects. *Id.*

The *Branzburg* Court did not "question the significance of free speech, press, or assembly to the country's welfare," nor did the Court suggest "that news gathering does not qualify for First Amendment protection; without

permit reporters to violate copyright laws,⁹² labor laws,⁹³ anti-trust laws,⁹⁴ or nondiscriminatory tax laws.⁹⁵ Similarly, reporters

some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. But the Court said that requiring reporters to testify before grand juries neither restricts what the press can publish nor "command[s] that the press publish what it prefers to withhold." *Id.* The requirement does not punish the content of published material by imposing a tax or criminal or civil penalty. *Id.* Moreover, the requirement neither forbids nor restricts reporters' use of confidential sources, nor does it require them to publish confidential sources' names. *Id.* at 681-82.

The Court went on to say that the First Amendment did not exempt reporters from the general rule that requires everyone to disclose to grand juries information received in confidence, even though the rule might deter sources from furnishing reporters with newsworthy information. *See id.* at 682. The Court said that the First Amendment does not "invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." *Id.* The press must obey labor laws, antitrust laws, and non-discriminatory tax laws. *Id.* at 682-83. And although the law of defamation and contempt restricts the content of publications, reporters may be penalized for publishing defamatory statements, *id.* at 683 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)), and for contempt of court, *id.* at 684 (citing *Craig v. Harney*, 331 U.S. 367, 377-78 (1947)). The First Amendment also does not give reporters a constitutional right to special access to information not generally available to the public. *Id.* (citing *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (holding that First Amendment did not require government to issue reporters passports to Cuba, even though travel restriction limited flow of information about Cuba)).

⁹² *See Cohen*, 111 S. Ct. at 2518 (citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576-79 (1977)); *see also infra* note 98 (discussing *Zacchini* in detail).

⁹³ *See Cohen*, 111 S. Ct. at 2518 (citing *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-93 (1946); *Associated Press v. NLRB*, 301 U.S. 103, 131-33 (1937)). In *Oklahoma Press*, the Court held that the First Amendment did not excuse a newspaper from complying with federal wage and hour laws. 327 U.S. at 192-93. In *Associated Press*, the Court held that the First Amendment did not allow a news organization to violate labor laws by firing an editor for engaging in union activities. 301 U.S. at 131-33.

⁹⁴ *See Cohen*, 111 S. Ct. at 2518 (citing *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969); *Associated Press v. United States*, 326 U.S. 1 (1945)). In *Citizen Publishing*, the Court held that the First Amendment did not save a merger of newspapers that violated antitrust laws. 394 U.S. at 135-36, 139. In *Associated Press*, the Court held that requiring a news organization to comply with federal fair trade practices did not violate its freedom to speak. 326 U.S. at 7.

⁹⁵ *See Cohen*, 111 S. Ct. at 2518 (citing *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581-83 (1983); *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943)). In *Minneapolis Star*, the Court held

may not unlawfully break into homes or offices to gather news.⁹⁶ These general laws apply to reporters even though they may affect the content of what reporters can publish.⁹⁷

But as Justice Souter noted in his dissent, these laws do not, with the arguable exception of copyright law,⁹⁸ *determine* the con-

that a state tax on paper and ink singled out the press for unique burdens and thus violated the First Amendment. 460 U.S. at 592-93. In *Murdock*, the Court held that a license tax imposed on peddlers could not be imposed on persons selling religious tracts door to door without violating the First Amendment. 319 U.S. at 115-17. The “non-discriminatory” character of the peddler’s tax was irrelevant because “[f]reedom of press, freedom of speech, [and] freedom of religion are in a preferred position.” *Id.* at 115.

⁹⁶ *Cohen*, 111 S. Ct. at 2518. The *Cohen* majority does not cite authority for this proposition. *See id.* Justice Stewart’s concurring opinion in *Landmark Communications, Inc. v. Virginia* provides some support for this common-sense assertion, but not for the *Cohen* Court’s suggestion that because the press *obtains* information illegally the press can be punished for *publishing* the information. *See* 435 U.S. 829, 849 (1978) (Stewart, J., concurring). Justice Stewart wrote:

If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish. Though government may *deny access* to information and *punish its theft*, government may *not prohibit or punish the publication* of that information once it falls into the hands of the press, unless the need for secrecy is *manifestly overwhelming*.

Id. (emphasis added); *see also* Potter Stewart, “*Or of the Press*”, 26 HASTINGS L.J. 631, 635-36 (1975) (noting that in *Pentagon Papers case*, *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Court could find no constitutional basis for prohibiting *publication* of allegedly stolen government documents).

⁹⁷ For example, if reporters must identify confidential sources in grand jury proceedings, this may decrease the willingness of confidential sources to talk with reporters. *See* *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972). This in turn may affect the type and amount of information that reporters have available to publish. *See id.*

⁹⁸ The majority cited *Zacchini v. Scripps-Howard Broadcasting Co.* for the proposition that reporters must not publish materials that violate the copyright laws. *Cohen*, 111 S. Ct. at 2518 (citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576-79 (1977)). *Zacchini* involved the doctrine of “right of publicity,” i.e., the right of performers to profit from their performances. *See* 433 U.S. at 565. *Zacchini* starred in a human cannonball act at a fair. *Id.* at 563. Contrary to *Zacchini*’s express request, a local television station filmed his 15-second act and broadcast the act in its entirety on the evening news. *Id.* at 563-64.

The television station claimed that under the First Amendment they could broadcast *Zacchini*’s performance because it was a news story of public interest. *Id.* at 569. *Zacchini*, however, was not complaining because the

tent of publications.⁹⁹ Although some exceptions exist, including

station broadcast the news of his performance. *See id.* Rather, he was complaining because the television station broadcast his entire performance. *Id.* If people could see his act for free on television, he argued, they were unlikely to come to the fair and pay him to see it. *See id.* Thus, the television station interfered with his common law right of publicity. *Id.*

The Supreme Court granted certiorari to consider whether the First Amendment allowed the television station to violate Zacchini's right of publicity. *Id.* at 565. The Court held that the First Amendment did not give the television station such a privilege. *Id.* at 577. The Court reasoned that state right of publicity law served a purpose similar to federal copyright law: to promote the arts and with them the public good by giving artists the right to profit from their works. *Id.* at 576-77; *see also* U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power to establish copyright protections). Although the television station could broadcast the news of his performance, the station could not interfere with Zacchini's right of publicity by showing his entire act to the public free of charge on the evening news. *See Zacchini*, 433 U.S. at 575-79.

Although *Zacchini* is a state law right of publicity case rather than a copyright case *per se*, *see id.* at 574-75 (comparing protections provided by state law right of publicity and federal copyright law), it helps to illustrate the extent to which copyright law determines the content of publications. Copyright protects particular expressions of facts and ideas, but it does not protect the facts or ideas themselves. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[D] (1991). Thus, copyright law limits the content of publications only to the extent that it prohibits taking other people's ways of expressing facts or ideas without permission. *See id.*; *see also* *International News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918) (holding that Associated Press could copyright news articles because they are their authors' expressions of information, but that news itself, which is just information and not expression, is not copyrightable).

⁹⁹ *See Cohen*, 111 S. Ct. at 2522 (Souter, J., dissenting); *see also* *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) (noting that requiring reporters to testify before grand juries does not restrain what newspapers may publish); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969) (noting that enforcement of antitrust laws did not regulate news gathering or news dissemination, but only commercial activities); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 193 (1946) (noting that requiring news organization to comply with federal wage and hour laws did not restrain freedom of expression); *Associated Press v. United States*, 326 U.S. 1, 7 (1945) (noting that enforcing fair trade laws against news organization did not restrict "utterances themselves"); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (noting that enforcing labor law did not limit Associated Press's full freedom to publish news as it desired or its right to discharge employees for failing to follow its editorial policies).

defamatory speech,¹⁰⁰ obscene speech,¹⁰¹ speech that invades privacy,¹⁰² and speech aimed at inciting immediate violence,¹⁰³ First Amendment law has strongly opposed the application of general laws in ways that limit the content of speech.¹⁰⁴ To silence speech

¹⁰⁰ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

¹⁰¹ See *id.* at 56 (citing *FCC v. Pacifica Foundation*, 438 U.S. 726, 747 (1978)).

¹⁰² See, e.g., 3 RESTATEMENT (SECOND) OF TORTS § 652D, at 383-94 (1977). Many states allow invasion of privacy lawsuits when an individual or news organization unreasonably publicizes private facts. *Id.* For the lawsuit to succeed, a reasonable person must find the publicity of the facts offensive. *Id.* In addition, the public must not have a legitimate interest in knowing the facts. *Id.*

Lawsuits for unreasonable publicity to private facts often fail. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 470 (1975) (holding television station not liable to rape victim for publishing victim's name in contravention of state statute; victim's name available in public court records); *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1229 (6th Cir. 1981) (holding that alleged rape victim in famous Scottsboro case could not recover for invasion of privacy from broadcasters of television movie dramatizing case); *Montesano v. Donrey Media Group*, 668 P.2d 1081, 1082, 1088 (Nev. 1983) (holding newspaper not liable for invasion of privacy for publishing name of person convicted of crime as juvenile 20 years earlier, despite state law forbidding disclosure of minors' criminal convictions). But see *Horne v. Patton*, 287 So. 2d 824 (Ala. 1973) (holding that doctor could be liable for revealing patient information to plaintiff's employer under breach of confidential relationship theory, invasion of privacy theory, and breach of implied contract of confidentiality theory); *Copley v. Northwestern Mut. Life Ins. Co.*, 295 F. Supp. 93, 97 (S.D. W. Va. 1968) (holding that plaintiff stated cause of action against insurance company for disclosing trade secrets confidentially obtained during insurance application process). See generally WILLIAM L. PROSSER ET AL., *CASES & MATERIALS ON TORTS* 963-70 (8th ed. 1988) (discussing outcomes of over 35 cases involving claims for unreasonable publicity to private facts).

When plaintiffs do succeed in suits for disclosure of private facts, they often do so on alternate theories, such as breach of a confidential relationship. See, e.g., *Humphers v. First Interstate Bank of Oregon*, 696 P.2d 527, 533, 536 (Or. 1985) (holding that natural mother, whose identity doctor disclosed to child born out of wedlock, had no cause of action for invasion of privacy, but could have cause of action for disclosure of confidential information); *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 288, 290 (Idaho 1961) (holding bank's disclosure of plaintiff's finances not an invasion of privacy, but finding tort action for breach of confidential relation available to plaintiff).

¹⁰³ *Hustler*, 485 U.S. at 56 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

¹⁰⁴ See *supra* note 99 (listing cases in which courts suggested that they

because of its content, a state must demonstrate an “ ‘interest of

were willing to enforce general laws against reporters because relevant laws did not dictate content of publications). A recent case, *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), illustrates the extent to which a compelling state interest must be present for the Court to uphold a law that inhibits the content of speech. The *Simon & Schuster* case also illustrates how carefully tailored to serve that interest a law must be. *See id.* at 510-11.

Simon & Schuster arose out of the collaboration of Henry Hill, a former gangster now in the Federal Witness Protection Program, and author Nicholas Pileggi on the book *Wiseguy: Life in a Mafia Family*. *See id.* at 506. *Wiseguy* detailed Hill's 25-year criminal career, including his participation in the theft of over \$6 million from Lufthansa Airlines, the largest successful cash robbery in United States history. *Id.* (citing NICHOLAS PILEGGI, *WISEGUY: LIFE IN A MAFIA FAMILY* 9 (1985)). The book was a critical and commercial success. *Id.* at 507. Over a million copies were printed, and the book was made into the acclaimed 1990 film *Goodfellas*. *Id.*

Hill earned over \$100,000 in royalties from the book. *See id.* The New York State Crime Victims Board sought to obtain Hill's royalty earnings to hold in escrow for the victims of his crimes pursuant to New York's "Son of Sam" law. *Id.* The Son of Sam law limited the extent to which criminals could profit from their crimes by writing about them, at least until those criminals had fully compensated the victims for their loss and suffering. *Id.* at 504-06.

The Supreme Court held that the Son of Sam law violated the First Amendment. *Id.* at 512. The Court acknowledged that the state had a "compelling interest" in seeing that crime victims were compensated before criminals could profit from their crimes, *see id.* at 509-10, but the Court found that the Son of Sam law was not carefully tailored to serve that interest, *id.* at 511-12. The law deterred criminals from speaking about their crimes by limiting the money they could earn by doing so, *id.* at 508, but the law did nothing to deter criminals from other activities that might enable them to profit from their crimes, *id.* at 510. In addition, the majority opinion suggested that the Son of Sam law could have the effect of suppressing works of great literary value in which "criminals" describe their "crimes," including such works as Thoreau's *Civil Disobedience* and St. Augustine's *Confessions*. *See id.* at 511-12.

Other cases also illustrate the extent to which a statute that limits the content of publication must be carefully tailored to serve a compelling state interest. *E.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-06 (1979). In *Florida Star*, the Court held that Florida's statute prohibiting the publication of rape victims' names violated the First Amendment. 491 U.S. at 537. The Court acknowledged that Florida's highly significant state interests included protecting victims' privacy, protecting victims from retaliation, and encouraging crime reporting. *See id.* But because the statute restricted only the news media and not other speakers, the Court found that the statute was not carefully tailored to meet its objectives. *See id.* at 540. In *Smith*, the Court held that West Virginia's asserted state interest in protecting juvenile offenders'

the highest order.’ ”¹⁰⁵ In his dissent in *Cohen*, Justice Blackmun cited *Hustler Magazine, Inc. v. Falwell*¹⁰⁶ to illustrate this principle.¹⁰⁷

In *Hustler*, the Supreme Court held that the First Amendment prohibited noted evangelist Jerry Falwell from recovering damages from *Hustler* magazine under Virginia’s general law of intentional infliction of emotional distress.¹⁰⁸ *Hustler* had published a cartoon parody suggesting that Falwell had engaged in a “drunken incestuous rendezvous” in an outhouse with his mother.¹⁰⁹ A federal court of appeals affirmed that Falwell had proven all of the elements of a cause of action for intentional infliction of emotional distress and upheld a jury verdict for Falwell.¹¹⁰ The Supreme Court did not contradict the finding that Falwell had proven all the elements of a state law cause of action, but the Court, nonetheless, overturned the jury’s verdict.¹¹¹

The Court noted that the cartoon was part of public debate

anonymity to enhance chances of reform did not justify the imposition of criminal penalties for publishing offenders’ names. 443 U.S. at 104-06. Because the statute punished newspapers only and not other publishers, it was not carefully tailored to meet its objectives. *Id.*

¹⁰⁵ See, e.g., *Florida Star*, 491 U.S. at 533 (“ ‘[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.’ ” (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)); see also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 840-42, 845 (1978) (holding that state interest in preserving public respect for judiciary was insufficient to justify punishing dissemination of information about confidential judicial review proceedings); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 471, 495 (1975) (holding that state interest in protecting rape victim’s privacy does not justify punishing reporters for publishing her name when state makes information publicly available in court records).

¹⁰⁶ 485 U.S. 46 (1988).

¹⁰⁷ See *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2521 (1991) (Blackmun, J., dissenting) (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

¹⁰⁸ *Hustler*, 485 U.S. at 57.

¹⁰⁹ *Id.* at 48.

¹¹⁰ See *id.* at 49-50. Virginia law requires a plaintiff in an intentional infliction of emotional distress action to “show that the defendant’s conduct (1) is intentional or reckless; (2) offends generally accepted standards of decency or morality; (3) is causally connected with the plaintiff’s emotional distress; and (4) caused emotional distress that was severe.” *Id.* at 50 n.3.

¹¹¹ See *id.* at 50-57.

about a public figure.¹¹² The Court said that in this context of public debate, the First Amendment prohibited Falwell from recovering damages.¹¹³ Allowing Falwell to recover damages, the Court said, would chill political commentary, a result the Court found unacceptable.¹¹⁴ Virginia's state interest in protecting its citizens from intentional infliction of emotional distress was not sufficient to overcome the First Amendment interest in protecting a "patently offensive" expression of opinion.¹¹⁵

Furthermore, as Justice Souter pointed out in his dissent in *Cohen*, a core reason that the First Amendment protects freedom of speech and freedom of the press is to promote informed public

¹¹² *See id.* at 53.

¹¹³ *Id.* at 53, 57.

¹¹⁴ *See id.* at 53-57. "Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject." *Id.* at 53.

In *Cohen*, the majority suggested that requiring the reporters to pay damages to Cohen would not "punish" them for publishing truthful information. *Cohen*, 111 S. Ct. at 2519. Rather, the majority said, it would, strictly speaking, merely require them to compensate Cohen for the harm they caused him by breaking their promises in disregard of a generally applicable law. *Id.* In any event, the Court suggested, it did not matter whether the damages the reporters paid to Cohen were compensatory or punitive, because whatever damages the reporters had to pay were merely the result of requiring reporters to obey general laws requiring them to keep their promises. *See id.*

This contention does not square with the result in *Hustler*. The *Hustler* Court held that *any* award of damages would inhibit speech about public figures in a manner inconsistent with the First Amendment. *See Hustler*, 485 U.S. at 53-57. As in *Cohen*, in *Hustler* the Court did not base its holding on whether damages were punitive or compensatory. *See id.* at 57 (stating that Falwell's intentional infliction of emotional distress claim could not, consistent with the First Amendment, provide basis for an award of *damages*). The jury had awarded Falwell both compensatory and punitive damages. *Id.* at 49. But unlike the *Cohen* court, the *Hustler* Court did not focus on whether *Hustler* had violated general state laws. *See id.* at 51-57. The Supreme Court did not deny that Falwell had established the elements of an intentional infliction of emotional distress cause of action. *See id.* at 50-57. Nor did the Court suggest that Falwell had not suffered emotional distress. *See id.* But instead of focusing on this violation of general law like the *Cohen* Court, the *Hustler* Court focused on the chilling effect that punishing *Hustler* would have on the expression of opinion about a public figure. *See id.* at 50-57. Thus, the *Hustler* Court overturned the jury's award of damages to Falwell. *See id.* at 57.

¹¹⁵ *Id.* at 50.

discussion of public affairs.¹¹⁶ The First Amendment does not

¹¹⁶ See *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2523 (1991) (Souter, J., dissenting); see also *Hustler*, 485 U.S. at 50-51 (“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. ‘[T]he freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.’”) (quoting *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 503-04 (1984)); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1977) (stating that First Amendment exists not only to foster self-expression, but to afford “the public access to discussion, debate, and the dissemination of information and ideas.”) (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90 (1969)); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (describing “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (describing founding fathers’ belief that “public discussion is a political duty; and that this should be a fundamental principle of the American government”).

The press’s role in fostering this public discussion has been acknowledged often. See, e.g., *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 492 (1975) (“Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.”); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 537 (1983) (“The sense one gets from that history is that most of the Framers perceived, however dimly, naively, or incompletely, that freedom of the press was inextricably related to the new republican form of government and would have to be protected if their vision of government by the people was to succeed.”); Stewart, *supra* note 96, at 637 (stating that “our liberties might survive without an independent established press. But the Founders doubted it, and, in the year 1974 [the year President Nixon resigned as a result of the Watergate scandal], I think we can all be thankful for their doubts.”).

Prior to the Supreme Court’s decision in *Cohen*, the “public’s right to know” played an important role in suggested standards under which exposed sources might recover for confidentiality promise breaches. See Michael Dicke, Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553, 1581 (1989) (proposing newsworthiness of information as factor in determining reporter liability); Jens B. Koepke, Comment, *Reporter Privilege: Shield or Sword? Applying a Modified Breach of Contract Standard When a Newsperson “Burns” a Confidential Source*, 42 FED. COMM. L.J. 277, 317 (1990) (proposing public interest in disclosure of source’s identity as defense to action for breach of confidentiality promise).

The right to know has affected proposals for standards of recovery in other areas of law as well. See Bruce J. Borrus, Comment, *Defamation and the First Amendment: Protecting Speech on Public Issues*, 56 WASH. L. REV. 75 (1980) (arguing that when speech concerns public issues, plaintiff should never

allow all speech to be published with impunity,¹¹⁷ but it has traditionally afforded political speech a very high degree of protection.¹¹⁸ To the extent that the *Cohen* majority's rule limits the content of political speech of all speakers, it has great constitutional significance.¹¹⁹

recover for defamation; no societal values other than interest in public debate about public issues should enter decision); Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1462 (1982) (suggesting public right to know exception to availability of cause of action for breach of confidence, particularly in context of reporter-source relations).

¹¹⁷ See *supra* notes 100-03 and accompanying text.

¹¹⁸ See *supra* note 116 and accompanying text.

¹¹⁹ See *supra* note 116 (citing cases emphasizing importance of freedom of speech in fostering public debate about public affairs); see also *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989) (citing numerous cases supporting assertion that speech concerning political campaigns deserves high degree of First Amendment protection).

The *Cohen* majority said that *Cohen* was different from *Hustler* and thereby implied that the restrictions that the *Cohen* holding placed on the content of speech were less constitutionally significant. See *Cohen*, 111 S. Ct. at 2519. The *Cohen* majority said that in *Hustler*, Falwell was attempting to use state emotional distress law to recover for injury to his state of mind to circumvent the rigid "constitutional" standards for recovery in a defamation claim. See *id.* *Cohen*, on the other hand, was seeking recovery under state promissory estoppel law for the loss of his job and earning power that reporters caused by breaking their confidentiality promises to him. *Id.* Thus, the Court suggested that *Cohen*, unlike Falwell, was not seeking to circumvent the constitutional standards of defamation law. See *id.*

In fact, neither *Cohen* nor Falwell were pursuing defamation claims at the appellate level. In the *Hustler* case, the magazine had put a notice on the cartoon that the cartoon was a parody and should not be taken seriously. *Hustler*, 485 U.S. at 48. Since nobody would reasonably believe that the cartoon asserted a fact about Falwell, he could not recover for defamation. *Hustler*, 485 U.S. at 57; see KEETON ET AL., *supra* note 69, § 111, at 111 (Supp. 1988) (indicating that defamatory statement must cause recipients to reasonably believe that speech refers to plaintiff). *Cohen* could not assert a defamation claim either, although the reason was different. The statement about *Cohen* was true—he had provided the information about Johnson to the reporters—and thus he could not meet the defamation requirement that the statement about him was false. *Cohen*, 111 S. Ct. at 2519; see KEETON ET AL., *supra* note 69, § 116, at 839 (indicating that defamatory statement must be false).

Rather, both Falwell and *Cohen* sought to recover under generally applicable state laws for injuries from statements published about them in political contexts. Falwell sought to recover under a state law prohibiting citizens from intentionally inflicting emotional distress on others. *Hustler*, 485 U.S. at 48. *Cohen* sought to recover under a state law requiring people

Further, the limits that the *Cohen* decision places on the content of speech do not affect only reporters. As Justice Blackmun points out in his dissent, the First Amendment does not single out the news media for special privileges.¹²⁰ Rather, it provides the same protection to all speakers.¹²¹ Thus, logic dictates that the *Cohen* decision's limits on First Amendment protections will apply to nonmedia speakers as well as media speakers.¹²²

Interestingly, the *Cohen* majority did not cite *Snepp v. United States*¹²³ as authority for its holding. In *Snepp*, the Supreme Court enforced, over an author's First Amendment objections, an agreement not to publish certain information.¹²⁴ *Snepp*, a former CIA agent, had signed a CIA employment agreement promising to seek CIA approval before publishing any material he wrote about CIA activities.¹²⁵ In enforcing the agreement, the Supreme Court emphasized that the agreement served vital national security interests in protecting intelligence-gathering activities.¹²⁶ These national security interests were state interests of such a high order, the Court suggested, that they justified the limits the

to keep their promises. *Cohen*, 111 S. Ct. at 2516. Any suggestion that the *Cohen* case places constitutionally insignificant restrictions on speech simply because Cohen, unlike Falwell, was not trying to avoid the constitutional standards for recovery in defamation law, ignores the facts of the two cases.

¹²⁰ See *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2520 (1991) (Blackmun, J., dissenting) (citing *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)); see also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). In *Bellotti*, the Court stated, "[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten." *Id.* at 782 (footnote and citations omitted). The *Bellotti* Court went on to suggest that if the institutional press received greater constitutional protection than other speakers, "the result would not be responsive to the informational purpose of the First Amendment." See *id.* at 782 n.18. "Even decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification." *Id.* at 783 (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)). But see *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (stating that freedom of speech and of the press enjoy "preferred positions"). See generally Stewart, *supra* note 96 (discussing unique role of institutional media in protecting democratic ideals).

¹²¹ See *supra* note 88.

¹²² See *Cohen*, 111 S. Ct. at 2519 (indicating that state law requires "those who make certain kinds of promises to keep them").

¹²³ 444 U.S. 507 (1980).

¹²⁴ *Id.* at 510.

¹²⁵ *Id.* at 507-08.

¹²⁶ See *id.* at 512-13 & n.8.

agreement put on the content of speech.¹²⁷ The Court also said that enforcing the agreement, strictly speaking, did not punish *Snepp* for publishing any particular information; it just punished his failure to obtain CIA approval before publishing.¹²⁸ Perhaps the *Cohen* majority did not cite *Snepp* because they could not reasonably contend that enforcing reporters' confidentiality promises to sources was as compelling a state interest as the national security interest present in *Snepp*.¹²⁹

B. *Relations Between Reporters and Confidential Sources*

The *Cohen* majority paid lip service to the First Amendment requirement that states not punish the publication of truthful information lawfully acquired.¹³⁰ However, they all but ignored the implications of this requirement in reaching their decision.¹³¹ Similarly, both the majority and the dissenting opinions in *Cohen* ignored another issue they might well have considered: the nature of the relationship between reporters and confidential sources.

1. Practical and Ethical Considerations Facing Journalists and Confidential Sources

Reporters and confidential sources depend on each other.¹³² Reporters need to gather news,¹³³ and confidential sources want to publicize information.¹³⁴ Reporters promise confidentiality to

¹²⁷ See *id.*

¹²⁸ See *id.* at n.8.

¹²⁹ As Justice Blackmun's dissent in *Cohen* points out, Minnesota did not find that the state's interest in enforcing its promissory estoppel law in the context of reporter-source relations was sufficiently compelling to override the First Amendment consequences of enforcing the promise. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2522 (1991) (Blackmun, J., dissenting) (citing *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 204-05 (Minn. 1990)).

¹³⁰ See *supra* notes 57-58 and accompanying text.

¹³¹ See *supra* notes 59-74 and accompanying text.

¹³² See Monica Langley & Lee Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 14 (1988) (characterizing confidential relationships between reporters and sources as "a product of the almost symbiotic relationship that has developed over the last quarter century between public officials and journalists seeking to inform the public about its government"); Dicke, *supra* note 116, at 1563 (indicating that 80% of national newsmagazine articles and 50% of wire service stories rely on confidential sources).

¹³³ See Dicke, *supra* note 116, at 1563.

¹³⁴ See Blasi, *supra* note 4, at 239 ("Most people find exciting the prospect of press coverage of their activities, their information, or their ideas, and

induce sources to provide information.¹³⁵ In some situations, sources seek out reporters and offer information in exchange for confidentiality promises.¹³⁶ In other situations, reporters seek out sources and offer confidentiality promises in exchange for information.¹³⁷

Because reporters depend so heavily on confidential sources,¹³⁸

they cooperate with reporters as completely as they can. . . . In fact, a great deal of information comes to newsmen unsolicited. Some top-flight investigative reporters . . . say that they get as many important leads from unsolicited letters and phone calls as they do from their own digging after information.”); Richard D. Smyser, *There Are Sources and Then There Are ‘Sourcerers’*, 5 SOC. RESP.: JOURNALISM, L., MED. 13 (1979) (discussing sources who leak information to reporters to try to manipulate media coverage to their own ends); Maureen Rubin, *Rethinking the Anonymous Source Dilemma*, PUB. REL. J., Nov. 30, 1988, at 14 (“[T]here are times when an organization can be well served by acting as an anonymous source. Trial balloons and ‘leaked’ stories can help companies to gauge the reaction of columnists, editorial writers, and the general public prior to official announcements.”); Ann Louise Bardach, *Nina Totenberg: Queen of the Leaks*, VANITY FAIR, Jan. 1992, at 46, 57 (noting that National Public Radio correspondent Nina Totenberg answered question, “Just how leaky is Washington [D.C.]?” with “‘It’s a sieve.’”).

The Minnesota Supreme Court said that Dan Cohen “willingly entered” the debate surrounding the Minnesota gubernatorial election, “albeit hoping to do so on his own terms.” *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 205 (Minn. 1990).

¹³⁵ Blasi, *supra* note 4, at 240; see Paul Marcus, *The Reporter’s Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 815 (1983). Reporters make other commitments to sources as well. For example, they may assure “fair” coverage, or agree that some comments will be off the record, or promise to veil a source’s identity. See Stuart Taylor, Jr., *First Amendment Peril: Bad Issues Making Worse Law*, N.J. L.J., Aug. 29, 1991, at 75 (discussing fair coverage and off-the-record commitments); *infra* note 153 (discussing *Ruzicka v. Conde Nast*, in which source was promised that her identity would be veiled). These commitments are vague. Misunderstandings can easily arise about what “fair” coverage is, which remarks were on or off the record, or what must be done to veil a source’s identity. See Taylor, *supra*; *infra* note 153 (discussing *Ruzicka* case, which arose from failure to adequately veil source’s identity).

¹³⁶ See *supra* note 134.

¹³⁷ See, e.g., *Anonymity Breach Not Privacy Invasion*, NEWS MEDIA & L., Spring 1989, at 19 (discussing case in which newspaper contacted parents of drug-using teenager and promised confidentiality in exchange for interview).

¹³⁸ See Langley & Levine, *supra* note 132, at 25-32 (discussing extent to which reporters rely on confidential sources); Dicke, *supra* note 116, at 1563 (discussing same point).

they have strong practical reasons to keep their confidentiality promises. If reporters routinely broke their confidentiality promises, sources would stop trusting reporters and would stop providing them with information.¹³⁹ This would make it considerably more difficult for reporters to do their jobs.¹⁴⁰

In addition to practical considerations, ethical considerations demand that reporters keep their confidentiality promises.¹⁴¹ Reporters have accepted jail sentences¹⁴² and exposed their publications to default judgments in libel¹⁴³ suits rather than reveal confidential sources.¹⁴⁴ Reporters have also fought hard for state "shield laws" that allow them to keep their confidential sources

¹³⁹ Marcus, *supra* note 135, at 815-16.

¹⁴⁰ *See id.*

¹⁴¹ *See, e.g.,* Cohen v. Cowles Media Co., 457 N.W.2d 199, 202 (Minn. 1990). Discussing Cohen's breach of contract claim, the Minnesota Supreme Court noted, "The record is replete with the unanimous testimony of reporters, editors, and journalism experts that protecting a confidential source of a news story is a sacred trust, a matter of 'honor,' of 'morality,' and required by professional ethics." *Id.*; *see also* Marcus, *supra* note 135, at 815-16 (quoting from American Newspaper Guild's Code of Ethics regarding reporter's duty not to reveal confidential sources); *Protecting Sources' Identities Every Reporter's Duty, Believed Bill Farr, Steering Committee Member Who Died in March*, NEWS MEDIA & L., Spring 1987, at 3 [hereafter *Protecting Sources' Identities*] (obituary for reporter who spent 46 days in jail rather than reveal confidential source).

¹⁴² *See Protecting Sources' Identities, supra* note 141, at 3 (reporter served 46 days in jail rather than reveal confidential source); *3 Reporters in Contempt, 2 Ordered Jailed*, NEWS MEDIA & L., Spring 1986, at 33 (two reporters accepted jail sentences rather than reveal confidential sources); *Source Saves Reporter from Jail Term*, NEWS MEDIA & L., Summer 1985, at 26-27 (source, believed to be only witness to robbery, came forward after reporter jailed for refusing to reveal source's identity); *Reporter Who Refused to Testify Freed as Sentence is Commuted*, N.Y. TIMES, Sept. 8, 1982, at A14 (discussing reporter who spent eight days in jail rather than reveal confidential source).

¹⁴³ Libel is a false written statement communicated to a party other than the plaintiff that invades the plaintiff's interest in good name or reputation. KEETON ET AL., *supra* note 69, § 111, at 771.

¹⁴⁴ *See, e.g.,* Langley & Levine, *supra* note 2, at 22 (discussing Georgia case in which court entered default judgment against libel defendant who refused to reveal confidential sources); Douglas Dowie, untitled article, UPI, Jan. 10, 1983, available in LEXIS, Nexis Library, UPI File (discussing court's entry of default judgment against reporters who refused to name confidential sources; libel plaintiff sought \$60 million in damages); *see also* Robert G. Berger, *The "No-Source" Presumption: The Harshes Remedy*, 36 AM. U. L. REV. 603, 615-19 (1987) (discussing cases in which courts have instructed juries in libel cases to assume that reporters who publish allegedly libelous statements have no sources for their stories).

confidential.¹⁴⁵

Reporters are not the only people who have a significant interest in protecting confidential sources. The public also has a substantial interest in protecting the trust between reporters and confidential sources. This is because confidential sources, particularly over the last twenty-five years,¹⁴⁶ have provided much important information about politics and government that the public might not otherwise have obtained. A confidential source gave the Pentagon Papers to the *New York Times*.¹⁴⁷ A confidential source enabled *Washington Post* investigative reporters to uncover the Watergate scandal.¹⁴⁸ More recently, a confidential source provided National Public Radio correspondent Nina Totenberg with the affidavit in which Anita Hill first made her sexual harassment charges against Supreme Court nominee Clarence Thomas.¹⁴⁹ Having this sort of information helps the public make intelligent judgments about its governmental officials.¹⁵⁰ Thus, the relationship of trust between confidential sources and reporters serves the fundamental values of a democratic society.¹⁵¹

¹⁴⁵ See *Case Law Protecting Sources, Information*, NEWS MEDIA & L., Fall 1990, pullout section, at 4 (discussing state common law protection of reporters' right not to reveal sources); *Cites to State Shield Laws*, NEWS MEDIA & L., Fall 1990, pullout section, at 9 (discussing state statutes that protect reporters' right not to reveal sources).

¹⁴⁶ Langley & Levine, *supra* note 132, at 14 (indicating that relationship between reporters and confidential sources has developed over last 25 years).

¹⁴⁷ Alex S. Jones, *Anonymity: A Tool Used, and Abused*, N.Y. TIMES, June 25, 1991, at A20. The Pentagon Papers were a classified study of the United States' involvement in the Vietnam War. *Id.*

¹⁴⁸ See Marcus, *supra* note 135, at 815 (indicating that public learned of Watergate scandal that led to President Nixon's resignation because confidential sources provided information to *Washington Post*). For an account of the Watergate scandal, see CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974).

¹⁴⁹ Bardach, *supra* note 134, at 57.

¹⁵⁰ See *supra* note 116 (citing cases on importance of flow of information on public affairs to the public).

¹⁵¹ See *supra* note 116 (citing sources on importance of public debate on political affairs). Some would contend that this view of the press is overly romantic. See, e.g., Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609, 671-89 (1991). Professor Levi discusses in detail the view that the news media is more lapdog than watchdog, eagerly gobbling up information provided by high government officials who use the news media to manipulate public opinion.

2. Broken Confidentiality Promises

Given how important it is to maintain trust between reporters and confidential sources, it seems odd that reporters would ever break promises to sources absent court decisions requiring them to do so.¹⁵² Nonetheless, reporters have on rare occasions intentionally broken promises that they made to sources not to publish certain information, such as the source's identity.¹⁵³ In these exceptional situations, reporters have asserted that their ethical duty to inform the public about what the sources asked them not

Professor Levi concludes that, in reality, the news media functions in both the watchdog and lapdog roles. *Id.* at 689.

¹⁵² See Langley & Levine, *supra* note 2, at 21.

¹⁵³ See *infra* notes 155-76 and accompanying text. Aside from situations in which reporters directly name sources, reporters can reveal sources in other ways. Levi, *supra* note 151, at 636-39. For example, a reporter may reveal a source by saying who is not the source. *Id.* at 638 n.103; see also *infra* notes 162-64 and accompanying text. A reporter may also use terminology that reveals the source's identity to careful readers, or use a consistent term to refer to a source that will evolve into a commonly recognized "code," or give other clues to a source's identity. See Levi, *supra* note 151, at 638 n.103.

Reporters have also unintentionally broken confidentiality promises to sources. See, e.g., *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289 (D. Minn. 1990). In *Ruzicka*, a reporter for *Glamour* magazine promised to conceal the identity of a source, Jill Ruzicka, in a story about improper sexual relations between psychotherapists and their patients. *Id.* at 1290-92. Prior to speaking to the *Glamour* reporter, Ruzicka had spoken often in public about her experiences as a victim of a therapist's sexual misconduct. See *id.* at 1291.

In the story she wrote, the reporter gave Ruzicka a pseudonym and did not mention specific information about a job Ruzicka had held, because Ruzicka had told the reporter that this information might allow people to identify her. *Id.* at 1291-92. Nonetheless, two of Ruzicka's former therapists, who were intimately familiar with Ruzicka's background as a victim of a psychotherapist's misconduct, guessed her identity from the *Glamour* story. *Id.* at 1292. Elliot Rothenberg, the attorney who represented Dan Cohen in *Cohen v. Cowles Media Co.* before the Supreme Court, *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2516 (1991), brought suit on Ruzicka's behalf against *Glamour* magazine for breaching a promise to veil Ruzicka's identity. *Ruzicka*, 733 F. Supp. at 1290.

The federal district court, sitting in diversity in Minnesota, held that the *Glamour* reporter had kept all of her specific promises to Ruzicka and therefore Ruzicka could not recover from *Glamour* under a breach of contract theory. *Id.* at 1301. Ruzicka appealed. *Ruzicka v. Conde Nast Publications, Inc.*, 939 F.2d 578 (8th Cir. 1991). Based on the decision in *Cohen*, the Eighth Circuit remanded the *Ruzicka* case to the district court for consideration of whether Ruzicka could recover under Minnesota promissory estoppel law. *Id.* at 582-84.

to report was greater than their ethical duty to keep confidentiality promises.¹⁵⁴

For example, during his testimony before Congress on the Iran-Contra affair,¹⁵⁵ Lieutenant Colonel Oliver North accused Congress of leaking information about covert operations to the press.¹⁵⁶ Although it appears *Newsweek* had earlier promised North anonymity, following North's testimony the magazine decided to reveal that North himself, not Congress, had leaked the information in question.¹⁵⁷ Although *Newsweek's* story did not expressly mention it, the public's interest in knowing that North was lying to Congress is apparent.¹⁵⁸

Other examples also illustrate the balance reporters have struck between keeping their promises to sources and providing the public with important information. As commentators have noted, confidential sources who attempt to hide their efforts to manipulate the media behind confidentiality promises present reporters with different ethical considerations than other confidential sources.¹⁵⁹ Normally, reporters go to great lengths to keep their confidentiality promises.¹⁶⁰ But when sources try to use confidentiality promises to manipulate the media and possibly deceive the public, reporters must consider both the public's interest in knowing about attempts to manipulate press coverage and the reporters' obligations to keep their promises.¹⁶¹

In one such instance, the *New York Times* revealed a confidential

¹⁵⁴ See *infra* notes 155-72 and accompanying text.

¹⁵⁵ For a brief overview of the Iran-Contra affair, see J. Graham Noyes, Comment, *Cutting the President Off From Tin Cup Diplomacy*, 24 U.C. DAVIS L. REV. 841, 841-47 (1991).

¹⁵⁶ *Two Leaks, But by Whom?*, NEWSWEEK, July 27, 1987, at 16.

¹⁵⁷ See *id.*

¹⁵⁸ First Amendment lawyer Stuart Taylor suggests that when a confidential source lies about the source of a leak, a reporter might be justified in breaking a confidentiality promise. See Stuart Taylor, Jr., *Bad Law in Works: Press May Provoke Supreme Court Ire by Supporting Unethical Conduct*, CONN. L. TRIB., Apr. 8, 1991, at 27.

¹⁵⁹ Smyser, *supra* note 134, at 13-14 (1979) (distinguishing between sources, who provide important information about politics and government, and "sourcerers," who use confidentiality promises to manipulate the media to serve their own ends); see also Langley & Levine, *supra* note 2, at 22 (noting that *Washington Post* investigative reporter Bob Woodward states that breaking a confidentiality promise might be justified if source of crime story is herself involved in crime, or if source provides "'bad information'").

¹⁶⁰ See *supra* notes 133-45 and accompanying text.

¹⁶¹ See *supra* note 159 and accompanying text.

source by saying who was not the source. The *Times* revealed that Richard Gephardt's presidential campaign had not provided the story that candidate Joseph Biden had plagiarized a speech.¹⁶² This revelation meant that the source of the story worked for the Dukakis campaign.¹⁶³ The *Times* felt this revelation was justified because rumors were circulating that the Gephardt campaign had leaked the information in an ethically questionable effort to discredit the Biden campaign.¹⁶⁴

In another such instance, a reporter breached a confidentiality promise and revealed that Jody Powell, President Carter's press secretary, was the source of a story that Senator Charles Percy had accepted an ethically questionable gift from the Bell and Howell Company.¹⁶⁵ Senator Percy had been vigorously investigating Burt Lance, President Carter's budget director.¹⁶⁶ The reporter learned that the story about the gift was false, and the reporter decided to reveal the "larger story" that "top White House aides were trying to smear"¹⁶⁷ the senator who was pursuing the Lance investigation.¹⁶⁸

Promises to keep a comment "off the record" may involve similar concerns. For instance, a *Washington Post* reporter broke such a commitment to presidential candidate Jesse Jackson. The reporter revealed that Jackson had referred to Jews as "Hymies" and New York as "Hymietown."¹⁶⁹ The reporter felt the public's interest in the information justified breaking his promise. Jackson should not, the reporter felt, be allowed to hide anti-Semitic sentiments behind a promise that his remarks be off the record.¹⁷⁰

Similarly, a *Philadelphia Bulletin* reporter broke a promise that a discussion with a student be "off the record" and reported that the student had said that President Reagan should be killed.¹⁷¹ The reporter felt he owed a greater allegiance to the President than to a source who attempted to hide behind a confidentiality

¹⁶² Langley & Levine, *supra* note 2, at 22.

¹⁶³ *Id.*

¹⁶⁴ *See id.*

¹⁶⁵ Smyser, *supra* note 134, at 17-18.

¹⁶⁶ *See id.* at 17.

¹⁶⁷ *Id.* at 17-18.

¹⁶⁸ *Id.*

¹⁶⁹ H. EUGENE GOODWIN, *GROPING FOR ETHICS IN JOURNALISM* 126 (2d ed. 1987).

¹⁷⁰ *Id.* at 126-27.

¹⁷¹ *Id.* at 125.

promise to express an "idea[] that threaten[s] us all."¹⁷²

On at least one occasion, a reporter has violated a confidentiality promise with less commendable motives than the examples cited above. In a California Superior Court case, *Fries v. National Broadcasting Co.*,¹⁷³ a police officer obtained a confidentiality promise and spoke with a reporter about alleged misconduct by an assistant police chief.¹⁷⁴ The reporter later revealed the officer's name in exchange for access to a private meeting.¹⁷⁵ The case ultimately settled.¹⁷⁶

As the situations above suggest, however, the *Fries* case is an anomaly rather than an example of a common practice. Reporters generally keep their confidentiality promises—first, because they should,¹⁷⁷ and second, because they must if they hope to do their jobs effectively.¹⁷⁸ On the rare occasions when reporters have broken their promises, their reasons for doing so have arguably been good ones. The editors who broke their reporters' promises in *Cohen* had a good reason, too,¹⁷⁹ although they probably should have admitted doing so and explained their actions in their stories.¹⁸⁰

¹⁷² *Id.*

¹⁷³ Santa Clara County (Calif.) Superior Court No. 456687 (cited in Mary Ann Galante, *Source Confidentiality Suit Ends in Deadlock*, NAT'L L.J., Apr. 2, 1984, at 4).

¹⁷⁴ Langley & Levine, *supra* note 2, at 24.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See *supra* note 141 and accompanying text.

¹⁷⁸ See *supra* notes 132-40 and accompanying text.

¹⁷⁹ See *supra* notes 35-40 and accompanying text.

¹⁸⁰ See Ethan Bronner, *Supreme Court Hears Case on Confidential News Sources*, BOSTON GLOBE, Mar. 28, 1991, at 3. Justice Marshall commented at oral argument that when the newspapers did not discuss their breach of their confidentiality promises in their stories, they did not "publish all of the truth." *Id.* Other commentators have said that the papers' failure to mention that they broke their promises put them in a particularly bad light. See, e.g., Marcia Coyle, *Writers Under Fire*, NAT'L L.J., Jan. 14, 1991, at 1 (indicating that prominent First Amendment attorney Floyd Abrams said it was easy to criticize the newspapers); Taylor, *supra* note 158, at 27 (characterizing newspapers' failure to mention their promises or their breach of them as "lame").

On the other hand, many considered Cohen's campaign tactics less than ethical as well. See *supra* notes 38-43 and accompanying text (indicating that Cohen's employer fired him for using unethical tactics). Further, it seems unlikely that Cohen's employer would have fired him had his tactics been consistent with proper standards of conduct in his profession. One

III. ANALYSIS OF *COHEN*

In light of the legal precedents and the realities of the relationship between reporters and confidential sources, the Supreme Court decided *Cohen* incorrectly. Experts disagree about how the *Cohen* decision will affect newsgathering,¹⁸¹ but because *Cohen* does not put any limits on the circumstances under which sources can enforce reporters' promises,¹⁸² it seems likely to significantly affect what reporters will be willing to publish.¹⁸³ Thus, it puts a damper on a basic First Amendment value: public discussion of political and governmental affairs. This Part will discuss these matters in turn.

A. *Error in the Decision*

As the *Hustler* case suggests, the *Cohen* majority misapplied the legal rule that reporters must obey the same laws as everyone else.¹⁸⁴ Case law does support the rule that reporters are subject to general laws.¹⁸⁵ These cases do not, however, uphold laws that regulate the content of speech without considering First Amend-

commentator has suggested, however, that perhaps Cohen's "sin" was not his attempt to use a dirty trick, but getting caught. See Richard J. Tofel, *Under Inspection*, NAT'L L.J., Mar. 12, 1990, at 13.

¹⁸¹ See *infra* notes 207-13 and accompanying text.

¹⁸² See *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2519-20 (1991); see also Linda Greenhouse, *Justices Rule Press Can Be Sued for Divulging a Source's Identity*, N.Y. TIMES, June 25, 1991, at A1 ("[T]he majority opinion included 'a lot of dangerously broad language.'" (quoting First Amendment attorney Lee Levine); Taylor, *supra* note 135, at 77. Taylor says that although the press "deserved to lose," the case has "worrisome overtones for freedom of the press. The Court's unqualified declaration that the press is bound by 'generally applicable laws' " might lead to suits by sources and interviewees whose grievances are "less legitimate." *Id.* Clear breaches of confidentiality promises are exceedingly rare, but confusion often arises over what can and cannot be attributed to the source, or what is "fair" coverage. *Id.* But see Greenhouse, *supra* (stating that *New York Times* senior counsel George Freeman indicated that he did not think *Cohen* decision would encourage lawsuits against journalists, except in extreme cases).

¹⁸³ See *infra* notes 205-06 (discussing possibility that *Cohen* will subject reporters to claims for all kinds of broken promises); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (libel case, stating that "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J., concurring) (containing similar statement regarding effect of punishing error).

¹⁸⁴ See *supra* notes 106-15 and accompanying text.

¹⁸⁵ See *supra* notes 91-97 and accompanying text.

ment values.¹⁸⁶ At most, the cases uphold laws that might indirectly affect the content of publication by influencing the resources available to reporters for gathering news.¹⁸⁷

The *Cohen* majority emphasized that in this case, the reporters imposed the content restriction on themselves by promising confidentiality to Cohen.¹⁸⁸ However, this should not have enabled Dan Cohen to avoid First Amendment considerations in pursuing his cause of action to punish the content of speech.¹⁸⁹ Even the *Snepp* case, in which the Supreme Court enforced a person's agreement not to publish speech without prior CIA approval, emphasized a compelling national security interest in regulating the speech.¹⁹⁰ *Snepp's* agreement itself did not eliminate First Amendment considerations.

The *Cohen* majority said that requiring reporters to pay for the harm they caused Cohen by publishing his name was a constitutionally acceptable consequence of requiring reporters to obey the law.¹⁹¹ This statement directly contradicts the Court's holding in *Hustler*, in which the First Amendment prohibited the plaintiff from receiving compensation for emotional distress from a magazine that published a highly offensive cartoon.¹⁹² The *Hustler* Court's holding did not turn on whether the defendant violated state law, nor did it turn on whether the plaintiff suffered an injury.¹⁹³ Rather, the *Hustler* Court's holding turned on the chilling effect on speech that would result from requiring the magazine to compensate the plaintiff for the injury.¹⁹⁴ Because the speech involved public debate about a public figure, the plaintiff

¹⁸⁶ See *supra* notes 98-107 and accompanying text.

¹⁸⁷ See *supra* notes 98-107 and accompanying text.

¹⁸⁸ *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2519 (1991).

¹⁸⁹ See *supra* notes 106-15 and accompanying text (discussing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)). Any difference between the facts in *Cohen* and the facts in *Hustler* seems contrived. In the *Hustler* case, *Hustler* magazine "voluntarily" violated Virginia's intentional infliction of emotional distress law when it published the offensive cartoon about Falwell. See *Hustler*, 485 U.S. at 48 (indicating that editors chose Falwell as subject for parody). Likewise, the editors in *Cohen* decided that Cohen's identity was sufficiently newsworthy to justify breaking their confidentiality promises. See *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 201 (Minn. 1990).

¹⁹⁰ See *supra* notes 123-29 and accompanying text.

¹⁹¹ *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2519 (1991).

¹⁹² See *supra* notes 112-15 and accompanying text.

¹⁹³ See *supra* note 114 and accompanying text.

¹⁹⁴ See *supra* notes 112-15 and accompanying text.

in *Hustler* could not recover damages from the magazine consistent with the First Amendment.¹⁹⁵ Likewise, *Cohen* involved speech about a public figure¹⁹⁶ in a quintessential area of public debate, a political campaign.¹⁹⁷ Just as the *Hustler* Court refused to allow state intentional infliction of emotional distress law to silence speech on important issues, the *Cohen* Court should have refused to allow state promissory estoppel law to silence this type of speech. The Supreme Court has acknowledged that in invasion of privacy and libel cases, the First Amendment might not protect reporters who publish items of no public interest whatsoever.¹⁹⁸ But *Cohen* leads to the “perverse”¹⁹⁹ result that the publication of truthful information that might affect the outcome of a political campaign is entitled to less First Amendment protection than the publication of defamatory falsehoods.²⁰⁰

Aside from disregarding or drawing weak distinctions from its own precedents emphasizing the importance of political speech, the Court ignored the extent to which reporters keep their

¹⁹⁵ See *supra* notes 112-15 and accompanying text.

¹⁹⁶ *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 201 n.3 (Minn. 1990).

¹⁹⁷ See *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989).

¹⁹⁸ See *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967) (reserving question of whether truthful publication of very private matters unrelated to public affairs could be constitutionally proscribed); *Garrison v. Louisiana*, 379 U.S. 64, 72 n.8 (1964) (reserving issue of whether purely private libels of public figures totally unrelated to public affairs would receive First Amendment protection).

¹⁹⁹ See *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989).

²⁰⁰ See *id.* The statute at issue in *Florida Star* resulted in automatic liability for anyone who published a rape victim's name, even though the victim's identity might have become widely known by other means. *Id.* The *Florida Star* Court noted that even in defamation cases in which the lowest level of First Amendment protection is required (false statements about private plaintiffs), plaintiffs must at least show negligence. See *id.* The absence of any scienter requirement in the Florida statute made it impossible to square the statute with the First Amendment. See *id.* The *Cohen* Court, like the Florida statute, set forth no scienter requirement; rather, the Court simply said that reporters could be liable for breaking “otherwise enforceable” promises to sources. The Court did not in any way limit its holding to reporters who break their promises intentionally. See *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2518-19 (1991); see also Martin Garbus, *The Big Chill on Free Speech*, *NEWSDAY*, July 4, 1991, at 63 (noting that according to *Cohen*, information on which the outcome of a political campaign might turn is less important than punishing reporters who break promises not to publish such information).

sources' confidentiality promises.²⁰¹ The Court thus ignored its precedents requiring that content-based punishment of speech must be carefully tailored to serve state interests of the highest order.²⁰² Reporters have generally kept their confidentiality promises in all but the most unusual cases and will probably continue to do so.²⁰³ Because reporters so rarely break confidentiality promises, it does not seem necessary to provide exposed sources with a remedy that will allow them to impose an unprecedented punishment based on the content of speech.

Even assuming *arguendo*, however, that enforcing reporters' promises to their sources is a sufficiently compelling state interest to justify content-based punishment of speech, the Court's vague statement of its holding hardly provides the states with a carefully crafted standard to follow in narrowly tailoring their rules to serve that compelling interest. In fact, the most dangerous aspect of *Cohen* is probably its failure to place *any* First Amendment limits on recovery by sources who claim that reporters have breached promises to them.²⁰⁴ Reporters routinely make promises to

²⁰¹ See *supra* notes 133-45 and accompanying text (discussing reporters' motives for keeping confidentiality promises); see also Kurt Hirsch, Note, *Throwing the Book at Revelations: First Amendment Implications of Enforcing Reporters' Promises*, 18 N.Y.U. REV. L. & SOC. CHANGE 161, 212 (1990-91) (noting self-regulating nature of relationship between reporters and confidential sources).

²⁰² See *supra* note 104.

²⁰³ See Rubin, *supra* note 134, at 12 (stating that of "handful" of newspapers contacted, most said that in "extremely unusual circumstances," editors might override reporters' confidentiality promises) (emphasis added). But see Levi, *supra* note 151, at 614. Professor Levi suggests that "[i]t is likely that, as politics continues to be dominated by 'negative' campaigning and new evidence surfaces about government disinformation efforts, reporters will increasingly be confronted with situations in which promises of confidentiality will test their abilities to report events fully and independently." *Id.* (footnotes omitted).

²⁰⁴ "[W]e conclude that the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2519 (1991). But cf. Levi, *supra* note 151, at 706-32 (proposing context-based approach that would consider all aspects of reporter-source relationship, including how and why source was attempting to use media and reporters' reasons for exposing source); Dicke, *supra* note 116, at 1579-84 (proposing modified "actual malice" standard for exposed source recovery); Koepke, *supra* note 116, at 310-13 (proposing "modified breach of contract" standard for exposed source recovery). All of these proposals suggest that First Amendment considerations should weigh significantly in

sources that may be subject to widely diverse interpretations.²⁰⁵ Sources have already begun filing lawsuits.²⁰⁶

balancing exposed sources' interests against free press interests. *But see The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 277 (1991) [hereafter *The Supreme Court*] (arguing that enforcing confidentiality promises is constitutionally insignificant because it will not reduce overall stock of information); Dale Parker, Case Comment, *Constitutional Law: The Impact of Freedom of the Press on Contractual Obligations*, 3 U. FLA. J. L. & PUB. POL. 155, 164 (1990) (arguing that allowing reporters to breach confidentiality promises would allow them to avoid "legal burdens borne by the rest of society").

²⁰⁵ Commentators have suggested that the Supreme Court's holding in *Cohen* could give rise to lawsuits against reporters for all manner of broken promises to sources, whether intentionally broken or not. *See, e.g.*, Ethan Bronner, *Justices Say Sources Can Sue Media: A Broken Vow of Confidentiality Ruled Actionable*, BOSTON GLOBE, June 25, 1991, at 1; Ruth Marcus, *Court Says News Media May Be Sued for Breaking Confidentiality Pledge*, WASH. POST, June 25, 1991, at A5; *see also* Olson & Holden, *supra* note 88, at 8 ("The court seemed unfazed that news organizations might be inhibited in later cases from publishing truthful, news-worthy information where the facts do not so clearly indicate an agreement between source and reporter, or where the facts do not clearly indicate a breach. *Cohen* may spawn a spate of breach cases arising out of less clear-cut fact patterns."); Tofel, *supra* note 180, at 14 (stating that vague confidentiality promises are "thicket" courts should not enter).

²⁰⁶ *See* O'Connell v. Housatonic Valley Publishing Co., No. 0055284, 1991 Conn. Super. LEXIS 2749 (Nov. 27, 1991) (suit for breach of anonymity promise; although reporter made no specific assurances of anonymity, source assumed that because she requested it, it would be given); Marcus, *supra* note 205 (indicating that disgruntled sources have already filed some claims and discussing Idaho case in which source said reporter breached promise of favorable coverage); *see also* Ruzicka v. Conde Nast Publications, Inc., 939 F.2d 578 (8th Cir. 1991). In *Ruzicka*, the district court had already found that the defendant had kept her specific confidentiality promise to the plaintiff. *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1300-01 (D. Minn. 1990). Nonetheless, the Eighth Circuit, citing the Supreme Court's opinion in *Cohen*, remanded the case to the district court to determine whether the plaintiff could recover under promissory estoppel doctrine. *Ruzicka*, 989 F.2d at 582-83 & n.6 (citing *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2717 (1991)).

These cases will probably continue to arise. *See* Levi, *supra* note 151, at 614; Jones, *supra* note 147 (noting that it is unlikely reporters and sources will work out detailed agreements); Taylor, *supra* note 135 (noting common misunderstandings about promises between source and reporter).

The costs of litigation will probably also place increasing pressure on the news media to censor itself. *Cf.* Jana M. Brewer, Comment, "We're Mad As Hell and We Aren't Going To Take It Any More": *The Press Responds to Meritless*

B. Public Policy Implications: Information Loss and Declining Quality of Political Discourse

The *Cohen* Court's willingness to make reporters pay for breaching confidentiality promises and the consequent litigation will probably lessen information available to the public. As a result, the quality of public discourse about public affairs will decline. One reason for this result is clear; the other less so.

It is uncertain how the *Cohen* opinion will affect reporters' ability to gather news. Some believe it will actually make more news available because giving sources a legal remedy for broken confidentiality promises will increase the sources' faith in those promises.²⁰⁷ Other experts also argue that a legal requirement that reporters keep confidentiality promises in all cases will bene-

Libel Suits, 20 LOYOLA L.A. L. REV. 45 (1986) (discussing economic pressures libel suits put on editors to self-censor stories).

²⁰⁷ See, e.g., Bronner, *supra* note 205, at 1 (quoting Harvard Law School Professor Laurence Tribe as saying that "'to the extent that promises of confidentiality are taken more seriously, the press can operate more effectively.'"); Bruce Fein & William B. Reynolds, *An 'Anonymous' Source Strikes Back*, LEGAL TIMES, Dec. 24, 1990, at 18 ("Certainly, disclosure of an informant's identity by an editor exercising non-reviewable judgment about 'newsworthiness' is far more chilling to sources than the remote possibility of judicially forced disclosure in a criminal proceeding."); Samuel Fifer, *Decision Backing Press Freedom Has Ominous Undertone*, CHI. TRIB., Aug. 17, 1990, at 23 (discussing Minnesota Supreme Court's holding that confidentiality promise could not be enforced and suggesting that this might decrease sources' willingness to trust reporters); Cary P. Rich, *Decision Could Chill Newsgathering: Court Decides No Contract Exists Between Anonymous Sources and Reporters*, FOLIO, Oct. 1, 1990, at 42 (same, quoting chief counsel for *Time* magazine).

When the Minnesota Supreme Court reconsidered *Cohen* in light of the Supreme Court's holding, it did nothing to discourage litigation. Without the First Amendment interest to consider, the Minnesota court's promissory estoppel analysis favored Cohen. The court said that because reporters normally keep confidentiality promises, the promises to Cohen must be enforced to prevent an injustice. *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 392 (1992). The court also said that the reporters had not demonstrated a "compelling need" in breaking their promises to Cohen and publishing his name. *Id.* For this reason, the Minnesota court determined that the balance of fairness went toward Cohen and affirmed the lower court's award of \$200,000 in compensatory damages. *Id.* If reporters and other speakers must demonstrate a compelling interest in breaking a confidentiality promise, regardless of whether the promise is broken accidentally or intentionally, and if the publication of truthful information about a political campaign is not a compelling interest, then the *Cohen* case seems to provide an easy standard of recovery for plaintiffs that will encourage litigation.

fit the press in the long run.²⁰⁸ They contend that if reporters simultaneously insist on the right to keep confidentiality promises and the right to break confidentiality promises, they lose credibility.²⁰⁹ These experts suggest that such apparently inconsistent posturing by the media will make legislatures and courts less likely to protect reporters' rights to keep their sources confidential.²¹⁰

On the other hand, the *Cohen* decision might diminish the amount of available news. The threat of future litigation will make reporters reluctant to give confidentiality promises.²¹¹ Without confidentiality promises, it follows that sources will be less willing to talk, and the supply of information will shrink accordingly.²¹²

How *Cohen* will affect newsgathering is not yet certain,²¹³ but the *Cohen* decision will almost certainly result in reporters being less willing to break promises to sources, even if it means concealing important information from the public.²¹⁴ Under *Cohen*'s rule,

²⁰⁸ Bronner, *supra* note 205, at 1 (stating that Harvard Law School professor Laurence Tribe said decision would be good for press in long run, because "[w]hen the press gets special benefits, it suffers a backlash").

²⁰⁹ See, e.g., Fein & Reynolds, *supra* note 207, at 18; Taylor, *supra* note 158, at 27; Daniel Klaidman, *Bad Timing for The Washington Post: Protecting Sources Gets Tougher for Reporters*, LEGAL TIMES, Apr. 29, 1991, at 6.

²¹⁰ See *supra* note 209 and accompanying text.

²¹¹ See Bronner, *supra* note 205 (stating that case will chill newsgathering because of litigation threats); Alex S. Jones, *Ruling Could Alter Use of Newspapers' Sources*, N.Y. TIMES, Sept. 10, 1989, at 22 (discussing how Minnesota Court of Appeals finding in favor of Cohen on breach of contract claim limited willingness to promise confidentiality).

²¹² See *supra* note 211; see also Levi, *supra* note 151, at 662. Professor Levi states, "[T]he possibility of extensive damage awards in contract actions may lead reporters to minimize their reliance on confidential sources and to forego stories based on unattributed information. . . . This type of press self-censorship might . . . impoverish public debate." *Id.* (footnote omitted). Professor Levi also notes that one of the defendants in *Cohen* pulled 640,000 Sunday magazines from circulation because a source claimed she had received an anonymity promise and threatened to sue if her name was revealed. *Id.* at 662 n.176. The newspaper could not determine whether the promise had been given or not. *Id.*

²¹³ See *supra* notes 207-12 and accompanying text (indicating different possible effects of legally enforcing confidentiality promises); see also Levi, *supra* note 151, at 663 (explaining difficulty in predicting whether enforcing confidentiality promises will chill newsgathering).

²¹⁴ See *supra* note 206 (discussing recent cases brought by sources who claim reporters broke promises to them and resulting chilling effect on

Oliver North could recover damages for *Newsweek's* revelation to the public that he had falsely accused Congress of leaking information about covert operations.²¹⁵ Jesse Jackson could recover from the *Washington Post* for reporting anti-Semitic remarks that Jackson made off the record.²¹⁶ This type of information can lead to significant changes in how the American public thinks about its leaders. *Cohen* may well have cost the public a significant amount of this information.

reporters' willingness to publish information). *But see The Supreme Court, supra* note 204. This commentator argues that *Cohen* will not harm the public because it will not decrease the overall stock of information. *Id.* at 282-85. The commentator suggests that if information a reporter has promised not to publish is truly newsworthy, the reporter will go ahead and publish the information. *Id.* at 282. The reporter will be able to afford to pay damages to the source because the newsworthiness of the information will lead to increased sales of the news product. *Id.*

Whether this argument has any basis in the reality of the sale of news products, however, is uncertain. The combined circulation of two leading supermarket tabloids, the *National Enquirer* and the *Star*, is approximately 7,520,000. *See* STANDARD PERIODICAL DIRECTORY 619, 621 (15th ed. 1992). In contrast, the combined circulation of the two best-selling "serious" newspapers, the *Wall Street Journal* and *USA Today*, is 3,554,547. *See id.* at 1151, 1189; *see also ABC FAS-FAX Totals for Top 25 Newspapers*, EDITOR & PUBLISHER, Nov. 2, 1991, at 14 (listing top 25 newspapers for 6 months ending September 30, 1991). If the circulation of tabloids filled with stories about celebrity diets, Elvis sightings, and visitors from other planets so far exceeds the circulation of "serious" newspapers, it may be unwise to depend exclusively on sales to support the publication of important information about politics and government.

The Minnesota Supreme Court's opinion on remand in *Cohen* seems to suggest a case-by-case approach to public policy concerns in exposed source cases. *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391 (1992). The court said that Cohen's identity was not a matter of such "grave importance as to require invalidation of the anonymity promise on grounds of public policy." *Id.* A case-by-case approach, however, would put the courts in the unaccustomed and inappropriate position of deciding what should and should not appear in the newspapers. *Cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.").

²¹⁵ *See supra* notes 204-06 (discussing breadth of *Cohen's* holding); *see also supra* notes 166-68 (discussing *Newsweek's* breach of confidentiality promise to Oliver North).

²¹⁶ *See supra* notes 204-06; *see also supra* text accompanying notes 169-70 (discussing breach of Jesse Jackson's request that remarks be off the record).

CONCLUSION

Cohen demonstrates the cliché that hard cases make bad law.²¹⁷ There were no “good guys.” *Cohen* attempted to smear a political opponent with half-truths.²¹⁸ And, as Justice Marshall pointed out during oral argument, the reporters did not “publish all of the truth”²¹⁹ either: they did not tell their readers they had broken their confidentiality promises.²²⁰ Perhaps if the reporters had told the whole story, the case might have come out differently.²²¹ Meanwhile, *Cohen* provides disgruntled sources with apparently limitless opportunities to litigate over all kinds of bro-

²¹⁷ See Coyle, *supra* note 180, at 1 (mentioning prominent First Amendment attorney Floyd Abrams’ characterization of the facts as “‘unattractive’” and statement that “[a]s a legal matter, it’s important to distinguish between conduct over which people may reasonably differ and what should be actionable’ ”); W. John Moore, *Press Clipping*, 22 NAT’L J. 3086 (1990) (quoting Brookings Institution press expert as asking “‘Why should the press go to the barricades for some reporter’s right to corrupt the process?’ ”); Taylor, *supra* note 158, at 27 (“[A] bad case will make bad law by provoking a broad decision that opens the courthouse doors to disgruntled sources pressing false claims.”); Taylor, *supra* note 135, at 66 (“Nude go-go dancers. Newspapers claiming a right to betray sources. . . . With folks like these carrying the First Amendment banner into a rightward-moving Supreme Court this year, free-speech devotees had been bracing for bad news.”).

²¹⁸ See *supra* note 38 and accompanying text. The Minnesota Supreme Court indicated that *Cohen* was unaware of the background of the charges against Johnson, *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 201 n.2. (Minn. 1990), but *Cohen*’s own brief said that he provided records indicating that Johnson’s petit theft conviction had been vacated, Brief of Petitioner at 3, *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990) (No. 90-634), available in LEXIS, Genfed Library, Briefs File. *Cohen*’s brief further suggested that although he provided a record of Johnson’s unlawful assembly arrest in 1969, he provided no record of her conviction. See *id.* *Cohen*, a former attorney educated at Harvard, see Olson & Holden, *supra* note 88, at 8, may, in fact, not have known the full details of Johnson’s “criminal record.” But had he given the matter any thought, he probably could have guessed that an unlawful assembly arrest during an era when political protests were everyday events, see generally TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* (1987), and a vacated petit theft conviction indeed constituted a trivial “criminal record.”

²¹⁹ See Bronner, *supra* note 180, at 3.

²²⁰ See Coyle, *supra* note 180 (characterizing case as unappealing for reporters).

²²¹ See *supra* note 41 and accompanying text (discussing newspapers’ failure to mention reporters’ breach of confidentiality in articles); see also Lyle Denniston, *Missed Cues Invite Defeat in Newspaper Case*, AM. LAW., June

ken promises.²²² One can only hope, as the majority suggested, that states will find something in their own constitutions to prevent sources from enforcing reporters' promises about the content of publication.²²³

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1991, at 86 (suggesting that attorneys for both Cohen and the newspapers did not handle *Cohen* case well).

Ironically, the Minnesota Supreme Court's effort to protect editorial discretion may have contributed to the problem as well. One observer noted that nothing in the Minnesota Supreme Court's opinion indicated that they thought justice required enforcing the promise under state promissory estoppel doctrine. David A. Anderson, *Metaphorical Scholarship*, 79 CAL. L. REV. 1205, 1219-20 (1991) (book review). Because the Minnesota Supreme Court used the term "First Amendment" as a metaphor for free speech, however, they brought the United States Constitution into play. *See id.* Thus, the Minnesota Supreme Court forced the United States Supreme Court to put the question of whether the Constitution *permitted* the state to impose the burden on speech ahead of whether the state *wanted* to impose the burden on speech. *Id.*

²²² *See supra* notes 205-06 and accompanying text.

²²³ *See* *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2520 (1991) (stating that Minnesota court might find something in its own constitution that would prevent Cohen's recovery under promissory estoppel); *see also* Garbus, *supra* note 200, at 63. Unfortunately, the Minnesota Supreme Court did not find anything in their state's constitution that would prohibit an exposed source from recovering for a breached confidentiality promise. *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 390-91 (1992). If other states follow Minnesota's example, it seems highly possible that other disgruntled sources will be encouraged to file lawsuits.

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