Biting the Hand that Feeds You: The Reporter-Confidential Source Relationship in the Wake of Cohen v. Cowles

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Historically, journalists have respected their sources' wishes to remain anonymous.¹ In fact, some reporters have even paid fines


Commentators have classified providers of confidential information into two groups: “sources” and “sourcerers.” See Lili Levi, Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations, 43 RUTGERS L. REV. 609, 709-10 (1991). Sources are sympathetic whistleblowers, whose main motivation is to “impart[] true and important information to oversight bodies or to the press [in an attempt] to enhance government accountability [and reveal] hidden abuse.” Id. Sourcerers are “strategically manipulative leaker[s].” Id. at 711. They consist of politically motivated members of government or of a political campaign whose information tends to be self serving. See id. The sourcerer is generally perceived in an unsympathetic light:

Unlike the pure whistleblower, these anonymous sources are thought to be politically savvy. They act with selfish motives in order to promote their own agendas rather than the public interest. Even if they believe they are acting to promote public aims, their purpose in talking to the press is not so much to pass information along to the public . . . [but rather] to use the press, and ultimately the public, as a means to an end.’

Id. at 711-12.

Information gathered from sources and sourcerers has been used to test the waters for potentially controversial government policies and has even been used by dissatisfied participants within an administration to torpedo planned actions the source opposes. See id. at 687. The motives of those who leak information has been classified by one commentator as follows: the “ego leak,” where the leaker leaks to satisfy a sense of self importance; the “goodwill leak,” where data is released with the goal of developing a good relationship with the reporters involved; the “policy leak,” which represents an attempt to influence government policy and may be used to oppose or support a policy; the “animus leak,” where the leaker exacts revenge upon another person; and the “trial balloon leak,” which exposes a proposal in order to gauge public or media reactions. Stephen Hess, The Government/Press Connection 77 (1984).

Another classification of confidential sources divides sources into two groups: “visible” and “invisible” sources. See Alex S. Jones, Anonymity: A Tool Used and Abused, N.Y. TIMES, June 25, 1991, at A20. A “visible” source is one who is identified in an article as speaking on the condition of anonymity. Id. Usually, this type of source is a government official speaking “off the record.” Id. “Invisible” sources are not mentioned at all in the published story. Id. They provide information that is used by the journalist to write the
and faced incarceration rather than expose their sources’ identities.\(^2\) A number of motives have been attributed to journalists’ respect for the confidentiality agreements.\(^3\) A primary concern, however, is that information of public interest would cease to flow if sources feared exposure.\(^4\) This concern is very real,\(^5\) since confidential sources provide the media with many of their news stories.\(^6\)

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\(^2\) See In re Farber, 394 A.2d 330, 332 (N.J.), cert. denied, 439 U.S. 997 (1978) (reporter spent time in jail and paid $100,000 fine for failing to produce documents for a murder trial). There are also some early cases illustrating a journalist’s willingness to accept punishment, rather than breach confidentiality. See, e.g., Joslyn v. People, 184 P. 375, 376 (Colo. 1919) (reporter imprisoned for failing to testify concerning alleged irregularities of sheriff’s impaneling of grand jury); In re Grunow, 85 A. 1011, 1012 (N.J. 1913) (reporter fined $25 for refusing to disclose sources of information for libelous article); Ex parte Lawrence, 48 P. 124, 125 (Cal. 1897) (reporter imprisoned for failure to disclose source of information concerning bribery allegations against state senators); Ex parte Nugent, 18 F. Cas. 471, 471-72 (D.C. Cir. 1848) (earliest reported case where reporter was imprisoned for failing to reveal source to government body).

In 1734, John Peter Zenger, a German immigrant, spent nine months in jail for refusing to reveal a source. Frank B. Latham, The Trial of John Peter Zenger 3 (1970). Zenger printed a weekly pamphlet called the New-York Weekly Journal. Id. at 34. His newspaper became the organ for a group opposed to the governor of New York colony, William Cosby. See id. at 27. The governor had Zenger imprisoned for failing to identify the authors who regularly lambasted him in Zenger’s paper. See id. at 42.

\(^3\) See Levi, supra note 1, at 633-35 (examining traditional bases for ethic of non-disclosure concerning confidential sources).

\(^4\) See Michael Dicke, Note, Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidential Agreement, 73 Minn. L. Rev. 1553, 1564 (1989) (“[Reporters] fear that if they become known for breaching confidentiality agreements, existing and potential sources will ‘dry up.’”). Another motive seems to be that by keeping sources confidential, a journalist prevents other journalists from gaining access to them. Levi, supra note 1, at 633 n.90.

Without confidentiality agreements, reporters would not be able to obtain information from organized crime figures, for obvious reasons. See David Shaw, Press Watch 62 (1984).

\(^5\) See Dicke, supra note 4, at 1564 (noting reporters fear sources will dry up if confidentiality agreements are not honored); Levi, supra note 1, at 633 (same).

Particularly in recent years, reliance on confidential sources for the gathering of news has greatly increased, due in part to the rise in investigative journalism.\(^7\)

Recently in *Cohen v. Cowles Media Co.*,\(^8\) the Supreme Court ruled that when a reporter promises confidentiality and that promise is broken, then the exposed source may recover damages.\(^9\) This Note examines the issues before the *Cohen* court and suggests that the case was properly decided. Part I will discuss the reporter-source relationship. Part II examines the unique facts of *Cohen* and its procedural setting, Parts III and IV analyze the reasoning behind the Court’s decision, and finally, Part V explores the effect of the decision upon news gathering in the future.

I. COMMON LAW AND STATUTORY BACKGROUND

While journalists have, for the most part, kept the identities of their sources confidential, there existed no right at common law to withhold a source’s identity in a judicial proceeding.\(^10\) In

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\(^7\) See Carl Bernstein & Bob Woodward, *All the President’s Men* 7 (1974). Bob Woodward and Carl Bernstein, the journalists who exposed the Watergate scandal, claim that without reliance upon confidential sources, there would have been no Washington Post story. Their confidential source, nicknamed “Deep Throat,” remains unidentified to this day. See Jones, supra note 1, at A20 (“[Promises] of confidentiality to news sources are the grease that helps make the wheels of journalism turn, especially in investigative reporting.”).


Branzburg v. Hayes,\textsuperscript{11} the Supreme Court held that the First Amendment does not provide reporters with an absolute privilege to refuse to reveal a confidential source before a grand jury.\textsuperscript{12} Lower federal courts have interpreted \textit{Branzburg} as permitting a qualified privilege\textsuperscript{13} and have utilized the balancing test set forth in the \textit{Branzburg} dissent.\textsuperscript{14} In attempting to provide statutory protection to reporters, and indirectly to confidential sources, many states have enacted shield laws that create a special privilege for reporters.\textsuperscript{15}

In recent years, however, an increasing number of reporters have begun to voluntarily expose the names of their sources.\textsuperscript{16} Ex-

\textsuperscript{11} 408 U.S. 665 (1972).
\textsuperscript{12} See id. at 700.
\textsuperscript{13} See, e.g., In re Petroleum Prod. Antitrust Litig., 680 F.2d 5, 8 (2d Cir.) (noting that because Justice Powell was deciding vote in \textit{Branzburg}, his concurrence authorizing limited privilege was incorporated into court's opinion), cert. denied, 459 U.S. 909 (1982); Bruno & Stillman Inc. v. Globe Newspaper Co., 633 F.2d 583, 594 (1st Cir. 1980) (reading \textit{Branzburg} as requiring disclosure only when need for source was compelling).
\textsuperscript{14} \textit{Branzburg} requires a court to look at the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsman that the public's right to know is impaired. Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir. 1974).
\textsuperscript{15} \textit{Branzburg}, 408 U.S. at 743 (Stewart, J., dissenting); see, e.g., Miller v. Transamerica Press, Inc., 621 F.2d 721 (5th Cir. 1980) (citing \textit{Branzburg}'s three part test), cert. denied, 450 U.S. 1041 (1981); Riley v. Chester, 612 F.2d 708, 717 (3d Cir. 1979) (emphasizing factors of three part test). The \textit{Branzburg} dissent's three part test requires that the information sought be relevant, that it cannot be obtained by alternative means, and that there is a compelling interest which overrides all other interests in that information. 408 U.S. at 743 (Stewart, J., dissenting); see Monica Langley & Lee Levine, \textit{Branzburg} Revisited: Confidential Sources and First Amendment Values, 57 Geo. Wash. L. Rev. 13, 24 (1988).
\textsuperscript{16} See Monica Langley & Lee Levine, \textit{Broken Promises}, Colum. Journalism Rev. July—Aug. 1988, at 21. Langley and Levine point out a number of recent instances in which the names of confidential sources have been exposed by the press. Id. Bob Woodward identifies the late CIA director William Casey as a former confidential source. Bob Woodward, \textit{Veil: THE SECRET WARS OF THE CIA} 14 (1987). Another recent example involved the decision of \textit{Newsweek} to reveal Oliver North as a source. Langley & Levine, supra, at 21. Colonel North had testified at the Iran Contra hearings that Congressional leaks had under-
posed sources who had been promised anonymity have brought
suit under various theories of recovery with varying degrees of suc-
cess. The Supreme Court's ruling in Cohen, which held that the
news media can be held accountable for breach of a confidentiality
agreement on promissory estoppel grounds, may radically
reshape the relationship between reporters and sources.

II. THE COHEN CASE

Dan Cohen was director of public relations for Minnesota In-
dependent-Republican gubernatorial candidate Wheelock Whitney
during the 1982 election. In the closing days of the campaign, Co-
hen offered several journalists some “dirt” on Marlene Johnson,
the Democratic candidate for Lieutenant Governor. In particular,
Cohen revealed that twelve years earlier Johnson was arrested for
the shoplifting of six dollars worth of sewing supplies. Reporters
from the Minneapolis Star & Tribune (now the Star Tribune) and
the St. Paul Pioneer Press Dispatch, among others, expressly
agreed that, in exchange for the information, they would not name

mined national security by causing the release of details of the capture of the Achille Lauro
hijackers to the press. Id. Newsweek reported that North himself was the source of this
information. Id.

Another way in which sources may be revealed is by the elimination of alternative
sources. Id. at 22. This occurred, for example, during the 1988 campaign for the Democratic
Presidential nomination when the New York Times reported that the Gephardt campaign
was not the source of the video that exposed Senator Joseph Biden as a plagiarist. Id. This
revelation made it obvious that the video was supplied by the Dukakis camp. Id.

See, e.g., Commonwealth v. Wiseman, 249 N.E.2d 610, 617 (Mass. 1969) (upholding
injunction based on filmmaker Wiseman’s breach of contract due to failure to obtain signed
releases from all inmates he intended to use in film based on prison life), cert. denied, 398
1978) (holding that newspaper was privileged to report name of 14-year-old victim of sexual
abuse, despite promise that victim’s name would not be reported); Doe v. American Broad-
casting Co., 543 N.Y.S.2d 455, 455 (1st Dep’t 1989) (rape victims, whose faces were made
recognizable during television appearance despite promise to keep them hidden, brought
breach of contract and tort claims; defendant’s motion for summary judgement was denied
and case settled before trial).

17 See Oberdorfer, supra note 9, at 8. Before the incident, Cohen had been involved in
public relations and politics and had served, at one time, as the President of the Minneapo-
lis City Council. Id. A graduate of Harvard Law School, he had written a well-received biog-
raphy of Hubert Humphrey. Id.

20 Id. at 2516.

22 See Cohen v. Cowles Media Co., 457 N.W.2d 199, 201 n.2 (Minn. 1990). Prior to the
sewing supply incident, Johnson had also been arrested for unlawful assembly at a protest
rally, but the charge was later dropped. Id.
Cohen as the source. Despite these promises of confidentiality, the editors of the two newspapers, over the objections of their reporters, decided that the newsworthiness of the source’s identity was reason enough to disclose the source. Such disclosure was unprecedented at either newspaper. As a consequence of his exposure, Cohen was immediately fired.

Cohen filed suit against the two newspapers in Minnesota District Court alleging breach of the contract of confidentiality. Cohen also sued the two reporters for misrepresentation. The judge rejected the First Amendment free speech claims of the media defendants and charged the jury under the common law of contracts and misrepresentation. The jury awarded Cohen $200,000 in compensatory damages and $500,000 in punitive damages.

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23 See id. at 200. Cohen spoke with Lori Sturdevant of the Tribune, Bill Salisbury of the Dispatch, Gerry Nelson of the Associated Press, and David Nimmer of television station WCCO and made the following offer:

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

Id. All four agreed, but only Nelson and Nimmer kept their promises. See id. at 201 n.1.

24 See Cohen v. Cowles Media Co., 479 N.W.2d 387, 391 (Minn. 1992). “The editors who countermanded the promises [made by the reporters to Cohen] conceded that never before or since have they reneged on a promise of confidentiality.”

Id. Tribune reporter Sturdevant was so upset the editors decided to reveal Cohen’s name that she withheld her byline from the article. See Cohen, 457 N.W.2d at 201.

25 See id. at 202.


27 See id. at 1463.

28 See id. at 1464. The judge summarized defendants’ First Amendment arguments as follows:

Defendants are arguing that parties who enter into otherwise valid contractual relationships with newspaper organizations . . . may not rely on the newspaper's promise to perform, even though that party may have performed fully his or her part of the bargain . . . because to require the newspaper to perform its agreement would somehow operate to censor the news.

Id.

29 See id. at 1464 (“This is not a case about free speech, rather it is one about contracts and misrepresentation.”).

30 See Cohen v. Cowles Media Co., 15 Media L. Rep. (BNA) 2288, 2291 (Minn. Dist. Ct. 1988) (denying motion for judgment n.o.v.). The judge passed judgment based upon the jury verdict by reasoning that denying relief to an injured plaintiff “would be to deprive that citizen of the protection of law without any countervailing benefit to the legitimate interest of the public being informed. Rather than chill freedom of expression, such a result would 'encourage conduct by news media that grossly offends ordinary men.'” Id. (citation omitted).
A divided panel of the Minnesota Court of Appeals affirmed the breach of contract award, but dismissed the award for misrepresentation. On appeal, the Minnesota Supreme Court dismissed the contract cause of action on state law grounds, stating that the source and reporter do not intend to enter into a formal contract. Instead, the court opined that reporter-source confidentiality agreements are based on relationships of trust and ethics and are not intended by the parties to be legally enforceable. This conclusion seems incorrect in light of the fact that all contractual elements were present. In addition, the court, sua sponte, consid-

Defendants had moved for judgment n.o.v., arguing that allowing the verdict to stand invited
[t]he potential for inventive plaintiffs' attorneys to play havoc with the news process in ways which have nothing to do with the falsity of defamatory content of the information published . . . . [S]uch situations may cause journalists to 'steer wide of the unlawful zone,' cautiously restricting the flow of information to the public.

Koepke, supra note 9, at 284 (quoting defendant's motion for judgment n.o.v.); see also Oberdorfer, supra note 9, at 8 (newspapers contending that expert testimony presented by Cohen's attorney with respect to salary projections was unrealistic). See generally Jury Awards $700,000 For Breach of Confidentiality, 15 MEDIA L. REP. (BNA) 1593, 1593 (1988) (discussion of damage award).

Id. at 259-60. The Court ruled that the misrepresentation award could not stand because the simple failure to perform in the future did not amount to misrepresentation at the time of the original contract. Id. Additionally, the reporters were unaware that they lacked the authority to bind their newspapers. Id. at 260. Thus, their failure to tell Cohen of this lack of capacity did not constitute fraud. Id.

Regarding the contract claim, the Court upheld the constitutionality of the claim by finding: 1) there was no state action, id. at 254-55; 2) and even if there were a state action, "the government . . . interest in protecting the expectation of a person who freely enters into a contract" outweighs the press's First Amendment rights to gather the news since the "[press] cannot rely on the first amendment to shield themselves from criminal or civil liability simply because the acts giving rise to such liability were taken while in pursuit of newsworthy information," id. at 256-57; and 3) the news media defendants waived whatever First Amendment rights they did have to publish the information by entering into an express contract of confidentiality. Id. at 258. "[The reporters] understood that they were waiving the right to publish a potentially newsworthy item in return for obtaining another potentially newsworthy item from Cohen." Id.

ered promissory estoppel as a ground for recovery, and indicated that this theory may better fit the facts of this case. The court, however, refused to allow recovery on these grounds, reasoning that public debate would be chilled. The court held that this would be an impermissible infringement on the First Amendment because it would hinder the exercise of ‘editorial control and judgment,’ a process critical to the First Amendment guarantees of the free press. The United States Supreme Court disagreed with this rationale.

As a general norm of contract law, parties need not in fact consider or intend the legal consequences of the actions by which they manifest their assent in order to be bound. In any event, the objective theory of contract interpretation has dominated contract rhetoric since the mid-19th century. See Restatement (Second) of Contracts § 178 (1981) (discussing public policy/enforcement balancing).

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

The idea that the processes involved in coming to editorial decisions may not be scrutinized in civil actions was rejected by the United States Supreme Court in Herbert v. Lando, 441 U.S. 153, 158-77 (1979), in which the Court held that a journalist’s thoughts about the information he gathers, as well as the conversations with the editor involved, are not immune from discovery in a libel suit. See Cohen, 457 N.W.2d at 203-04.

The Court reasoned that since the actual malice standard of New York Times v. Sullivan, 376 U.S. 254 (1964), requires an aggrieved party to show the state of mind of the defendant, privilege for the editorial processes would erect an “impenetrable barrier” to plaintiff’s use of such evidence, thereby making it impossible to ever prove malice with “convincing clarity.” Id. at 170. If an examination of the editorial processes is allowed in defamation suits, it is submitted that there is no reason why Cohen should have been precluded from probing the thought processes of the editor if he were required to prove a similar mental state to recover under a promissory estoppel cause of action.

Prior to Lando, the Supreme Court, in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974), stated, “The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment.” That case involved a state “right of reply statute,” and the Court invalidated the statute. Id. at 244, 258. It is not clear whether the reasoning of Miami Herald applies to Cohen since the aspect of voluntariness present in
this interpretation and remanded to the Minnesota Supreme Court for further consideration of possible state legal or constitutional impediments to Cohen’s recovery. On remand, the Minnesota Supreme Court reinstated the jury award under the theory of promissory estoppel. The court declined to read its state constitution in a way which extends greater rights under its freedom of the press clause than the United States Supreme Court found under the Federal Constitution.

III. THE SUPREME COURT’S MAJORITY OPINION

Writing for the Court, Justice White stated that this action to enforce the confidentiality agreement did not fall under a line of Supreme Court cases, exemplified by Smith v. Daily Mail Publishing and Florida Star v. B.J.F., that held that any regulation which punished the publication of truthful, lawfully obtained material must “further a state interest of the highest order.” Rather, the Court found that this case was controlled “by the equally 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.” Thus, a reporter may not trespass to gather a story, nor may an editor print material in violation of

Cohen is absent from Miami Herald, in which the editor was required to publish a particular item. Id.

40 Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991). See infra notes 43-64 and accompanying text. The Court, however, agreed with the Minnesota high court that the Minnesota Court of Appeals had erred in finding no state action: “[The rationale of our decisions in New York Times Co. v. Sullivan and subsequent cases compels the conclusion that there is state action here.” Cohen, 111 S. Ct. at 2517-18.

41 Cohen, 111 S. Ct. at 2519-20.

42 See Cohen, 479 N.W.2d 387, 390-92 (Minn. 1992) (finding defendant’s motive was to “[hang] Mr. Cohen out to dry because they didn’t regard him very highly as a source”); see also Margaret Zack, Court Restores Cohen Award, MINNEAPOLIS STAR TRIB., January 24, 1992, at 1A (report of Minnesota Supreme Court’s decision by one of defendant newspapers).


45 Cohen, 111 S. Ct. at 2518 (quoting Smith, 443 U.S. at 103).

46 Id.

the copyright laws. The Court distinguished Cohen from the first line of cases by emphasizing three points. First, the Court stated "that it was unclear whether the information in question was 'lawfully' [obtained,] . . . at least for the purposes of publishing it [, because] . . . [defendants] obtained Cohen's [information] only by making a promise which they did not honor." Next, the Court found that the award of compensatory damages did not amount to "punishment" of the defendants, since compensating Cohen simply placed him in as good a position as he would have been in had the


Media organizations are also subject to laws which apply to them in their capacity as commercial entities. See, e.g., Associated Press v. NLRB, 301 U.S. 103, 130-31 (1937) (media organizations covered under National Labor Relations Act notwithstanding First Amendment); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-93 (1946) (media organizations subject to Fair Labor Standards Act).

49 Cohen, 111 S. Ct. at 2519. The Court stressed that the right to publish truthful information is explicitly conditioned upon the fact that it is lawfully gathered. Id.; see also Florida Star, 491 U.S. at 533 (maintaining that press is constitutionally protected when publishing lawfully obtained truthful information of public nature); Smith, 443 U.S. at 103 (noting that "once the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination"); Oklahoma Publishers Co. v. District Court, 430 U.S. 308, 311-12 (1977) (holding that First and Fourteenth Amendments protect publication of name and photo of juvenile where such information had been publicly revealed in court); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496-97 (1975) (determining that state cannot constitutionally punish publication of rape-murder victim's name obtained from public courthouse records).

Professor Laurence Tribe, critical of the Court's focus on whether the information has been legally secured, notes that "[t]he same concerns for truth and self-censorship . . . arguably apply to both lawfully and unlawfully obtained materials . . . since the question of 'what is lawful?' cannot be answered without reference to the First Amendment." Laurence H. Tribe, American Constitutional Law, § 12-21, at 966 n.6 (2d ed. 1988). See also Marc A. Franklin & David A. Anderson, Mass Media Law 481 (4th ed. 1990).

[U]nderlying cases like Cox Broadcasting is the notion that the reporter obtained the information legally. If the reporter had stolen it, it is not clear that the same result would have followed . . . . In the appropriation cases it seems likely that if the published material in question has been stolen or obtained through tortious behavior that fact would have affected the legal analysis.

Id.
breach not occurred. Finally, the Court stated that "the parties themselves . . . [must] determine the scope of their legal obligations and any restrictions which may be placed on the publication of truthful information."

The Court further rejected the claim that Cohen was merely using promissory estoppel as a means of circumventing "the strict requirements for establishing a libel or defamation claim" in New York Times v. Sullivan. Stressing that Cohen's theory of recovery was based properly on contract, rather than defamation principles, the Court noted that Cohen was "not seeking damages for injury to his reputation or his state of mind. He sought damages in excess of $50,000 for a breach of a promise that caused him to lose his job and lowered his earning capacity."

IV. ANALYSIS OF JUSTICE WHITE'S OPINION

The Cohen Court has in effect limited the applicability of New York Times and its progeny to cases involving a limited class of

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50 See Cohen, 111 S. Ct. at 2519. The court posited that had the agreement between the parties contained a liquidated damages provision, any payment to Cohen "would represent a cost of acquiring newsworthy material to be published at a profit, rather than a punishment imposed by the State. The payment of compensatory damages in this case is constitutionally indistinguishable from a generous bonus paid to a confidential news source." Id.

51 Cohen, 111 S. Ct. at 2519. But see id. at 2522-23 (Souter, J., dissenting). Justice Souter maintained that the Court incorrectly concluded that the newspaper had established its own restrictions on publication by promising not to print Cohen's name. Id. (Souter, J., dissenting).

This suggests both the possibility of waiver, the requirements of which have not been met here . . . as well as the conception of the First Amendment rights as those of the speaker alone, with a value that may be measured without reference to the importance of the information to public discourse.

Id. at 2523 (Souter, J., dissenting).

52 Id. at 2519. New York Times and subsequent cases established standards of liability which have the effect of protecting media defendants in defamation lawsuits brought by public officials or public figures. See New York Times v. Sullivan, 376 U.S. 254, 283 (1964). The public official or public figure plaintiff must generally prove that defendant's publication was made with "actual malice," i.e., with knowledge of its falsity or with reckless disregard for its truth. See id. at 279-80; see also Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (applying actual malice standard to publication based tort of intentional infliction of emotional distress); Time Inc. v. Hill, 385 U.S. 374, 387-88 (1967) (holding that false light invasion of privacy was subject to actual malice standard). But see, Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-46 (1974) (declining to apply the actual malice standard where plaintiff is a private figure).

53 Cohen, 111 S. Ct. at 2519. But see id. at 2521 (Blackmun, J., dissenting). Justice Blackmun disagreed with the majority and found the analogy to reputation-based injury cases, such as Hustler, appropriate. Id. (Blackmun, J., dissenting).
common-law causes of action. It is submitted that only those common-law claims whose actionability rests solely on an act of expression and/or publication (e.g., defamation or false light) will, after Cohen, be subject to New York Times-type constitutional scrutiny. Conversely, causes of action based on laws of general applicability are free from First Amendment constraints. Unlike defamation, which applies specifically to publication, Cohen's assertion of a promissory estoppel claim relates to general contract law, germane to transactions between any parties concerning any subject. Although the breach in this case was manifested in a publication, that event is not itself central to Cohen's theory of recovery under promissory estoppel.

The Court's reliance upon the neutral application of generally applicable laws is not unprecedented in freedom of the press juris-

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64 See Gertz v. Robert Welch, Inc., 418 U.S. 323, 370 (1974) (White, J., dissenting). In Gertz, Justice White expressed his disdain for the broad application of constitutional standards to common-law causes of action by commenting that "the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States." Id. (White, J., dissenting). See also Levi, supra note 1, at 661 n.170 ("If, in fact, the New York Times approach is analytically flawed and often arbitrary, why should it be extended into yet another domain [such as contract law]?").

55 See Cohen, 111 S. Ct. at 2518-19.
   There can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, in so far as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.

Id.

56 Id.

57 See, e.g., Dietemann v. Time, Inc., 449 F.2d 245, 249-50 (9th Cir. 1971). In Dietemann, the Ninth Circuit refused to grant defendant Time's First Amendment protection from plaintiff's invasion of privacy action merely because it had published the information it had wrongfully gathered. Id. The court held that:
   - privilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication . . . . A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him . . . .

Id. (emphasis added).

One factor that distinguishes Cohen from publication-based torts is that in defamation cases, publication triggers the cause of action. See Mass Media Law, supra note 49, at 233-34 (discussing publication element of defamation in light of mass media defendants). However, in the context of suits arising from reporter-source agreements, publication acts not as the trigger of liability, but instead as evidence of one party's breach of the agreement. See, e.g., John D. Calamari & Joseph M. Perillo, The Law of Contracts, § 2-10 (3d ed. 1987) (bilateral contract formed and legal obligations adhere at moment of exchange of mutual promises).
prudence. Its reaffirmation in Cohen is particularly significant in light of the Supreme Court’s recent application of the doctrine to the First Amendment’s free exercise clause in Employment Division v. Smith, in which the Court upheld a Wisconsin drug statute that did not provide an exception for the ceremonial use of peyote by Native Americans. The Smith Court ruled that, since the drug law was one of general applicability, the incidental effect upon activities pursuant to the exercise of First Amendment rights was of no constitutional significance.

Although the only cause of action before the Cohen Court was based on promissory estoppel, the Court’s language strongly indi-
icates that enforcement of reporter-source confidentiality agreements on a strict contract basis would likewise pass constitutional muster. As Justice White stated, “the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law.”

V. POST-COHEN NEWS-GATHERING

The effects of Cohen have been significant. In Ruzicka v. Conde Nast, also decided under Minnesota law, Jill Ruzicka, a victim of sexual abuse at the hands of a psychiatrist, was approached for an interview by a reporter for Glamour magazine. As a precondition to consenting to the interview, Ms. Ruzicka insisted that she remain unidentifiable. Before publication, however, the article had undergone a number of revisions that made Ms. Ruzicka’s identity obvious to anyone familiar with her. Ruzicka brought suit, and the federal district court granted the defendant magazine’s motion for summary judgment and declined to follow the then-recent Minnesota Court of Appeals decision in Cohen II, which upheld a contract recovery. The Court of Appeals for the Eighth Circuit, basing its decision on the Supreme Court decision in Cohen, remanded the case for consideration of a newly-pleaded promissory estoppel cause of action. There have

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63 See Cohen, 111 S. Ct. at 2519.
64 Id.
65 939 F.2d 578 (8th Cir. 1991).
66 Id. at 579.
67 Id.
68 See id. at 580. Prior to publication, Glamour’s reporter read to Ruzicka a preliminary draft of the article which did not mention her by name and did not discuss her service on a Minnesota task force on therapist-patient sexual abuse. Id. When the article was published, it did state that the names had been changed, but the story was attributed to a “Jill Lundquist,” using Ruzicka’s real first name, and it mentioned her service on the task force, of which she was the only female member. Id. The article also noted that Ruzicka was an attorney and referred to her lawsuit against her psychiatrist. Id.
70 See id. at 1294. The district court concluded that it was not bound by the state court’s decision in Cohen II on questions concerning the First Amendment. See id. The court held that the First Amendment bars enforcement of breach of contract suits arising from the promise of confidentiality unless: 1) plaintiff can prove the existence of specific and unambiguous terms of agreement; and 2) plaintiff can prove the breach of those terms by clear and convincing evidence. See id. at 1300.
71 Ruzicka v. Conde Nast Pub., Inc., 939 F.2d 578, 583 (8th Cir. 1991). It is suggested that plaintiff Ruzicka was a much more sympathetic character than Dan Cohen, an active political supporter in an election campaign. Ruzicka’s name itself was not newsworthy, thus neutralizing in Ruzicka one of the key arguments available to the defense in Cohen. More-
been similar cases in the lower courts.\textsuperscript{72}

The reaction of the press and First Amendment commentators to the \textit{Cohen} holding has been negative.\textsuperscript{73} The criticism has pointed to the "chilling effect" the enforcement of reporter-source agreements will have upon the news-gathering and editorial

over, contrary to \textit{Cohen}, the media defendant in \textit{Ruzicka} approached Ms. Ruzicka. \textit{Id.} at 579. Consequently, it cannot be argued that Ruzicka placed herself into the stream of journalistic commerce. Although dissenting in \textit{Cohen}, Justice Souter nevertheless allowed for the possibility that a non-public figure could constitutionally maintain an action against a media defendant for the breach of a promise of confidentiality. \textit{See Cohen}, 111 S. Ct. at 2523 (Souter, J., dissenting). \textit{Ruzicka} may be such a case.

\textsuperscript{72} \textit{See}, e.g., Morgan v. Celender, 780 F. Supp. 307, 311 (W.D. Pa. 1992) (declining to apply \textit{Cohen} where newspaper promised to use silhouette of victim of sexual abuse and instead printed photo with features recognizable); O'Connell v. Housatonic Valley Publishing Co., No. 005289, 1991 WL 258157, at *5 (Conn. Super. Ct. 1991) (holding that \textit{Cohen} did not apply where plaintiff requested anonymity, reporter gave no assurances, and plaintiff failed to seek recovery in contract); Anderson v. Gannett, Inc., 573 N.Y.S.2d 828, 831-32 (N.Y. Sup. Ct. Monroe Cty. 1991) (denying media defendant's request for summary judgment based on court's application of "unlawfully obtained" reasoning of \textit{Cohen}). In \textit{Anderson}, a newspaper had failed to comply with its promise that an HIV positive patient's photo would not make him recognizable. \textit{Id.} at 829-30. Plaintiff's estate had successfully sued defendant's doctor for breach of patient-physician confidentiality and the doctors sought indemnity from the newspaper. \textit{Id.} at 829. The court held that this was a proper case in which to apply the doctrine of promissory estoppel. \textit{Id.} at 832. \textit{See also} Linda Greenhouse, \textit{Justices Rule Press Can Be Sued For Divulging a Source's Identity}, N.Y. Times, June 25, 1991, at A21 (quoting Jane Kirtley, executive director of Reporters Committee for Freedom of Press saying that "similar cases had been filed around the country and that the [Supreme Court's] ruling [in \textit{Cohen}] today would encourage more").

\textsuperscript{73} \textit{See}, e.g., Aaron Epstein, \textit{Decision on First Amendment Media Can Be Sued if Secret Information Revealed, High Court Rules}, SACRAMENTO BEE, June 25, 1991, at A1 ("It's a terrible decision . . . It opens the door to a flood of lawsuits by people who will say they were identified after they were promised anonymity") (quoting Jane Kirtley); Martin Garbus, \textit{The Big Chill on Free Speech}, NEWSDAY, July 4, 1991, at 63 ("The Supreme Court concluded, in effect, that the right to publish information that could affect the outcome of an election is less important than the right of a confidential source to punish the media for revealing his identity."); Greenhouse, supra note 72, at A21 ("[Supreme Court's decision in \textit{Cohen} contained] a lot of dangerously broad language.") (quoting First Amendment lawyer Lee Levine); David O. Savage, \textit{Media Must Keep Promises to Sources, Justices Rule}, L.A. TIMES, June 25, 1991, at A1 ("Media lawyers feared that the ruling could inspire a new round of lawsuits against the press."). \textit{But see} Bodine, supra note 35, at 12 ("The facts, logic, and emotion of this case go against the paper."); William P. Cheshire, \textit{James Madison Did Not Contemplate Giving a License to Lie}, ARIZ. REPUBLIC, June 30, 1991, at E4 (arguing Court decided \textit{Cohen} correctly); Stuart Taylor, Jr., \textit{Gambling With Free Speech; News Organizations Risk Damaging the First Amendment by Claiming That It Licenses Journalists to Engage in Unethical Conduct}, THE RECORDER, Apr. 3, 1991, at 4 (expressing support for \textit{Cohen}, but fearing that claims of media in \textit{Cohen} will convince Court to devalue reporter-source relationship in future); \textit{The Press and Its Promises}, PHOENIX GAZETTE, June 26, 1991, at A12 ("The First Amendment is a wondrous vaccine. But even it cannot—should not—be used to protect against a broken promise.").
processes. It is proposed, however, that this argument is misplaced. Without assurances that a journalist will honor promises of confidentiality, sources will dry up. Moreover, some reporters have even expressed satisfaction with the Cohen decision. These

See Koepke, supra note 9, at 284 (situation in Cohen “may cause journalists to ‘steer wide of the unlawful zone,’ cautiously restricting the flow of information to the public”) (quoting defendant's motion for judgment n.o.v. after the initial jury verdict in Cohen); Richard N. Winfield, Standing a Privilege on its Head, 7 COMM. L. REV., Spring 1989, at 4. “If expression is to be protected, that protection must be sufficiently broad to cover ingenious claims and theories. To do otherwise would be to emasculate those protections and chill free expression.”

Shortly after the initial jury verdict in Cohen, one of defendant newspapers experienced a self-imposed “chill.” See Levi, supra note 1, at 663 n.176. Fearing another lawsuit, the newspaper withdrew all 640,000 copies of their Sunday magazine after a source named in an article claimed she had been promised anonymity. Id.

See Samuel Fifer, Decision Backing Press Freedom Has Ominous Undertone, CHICAGO TRIBUNE, Aug. 17, 1990, at 23 (criticizing Minnesota Supreme Court's decision in Cohen III). “[S]ources may be less willing to trust reporters, especially if they have no remedy when promises of confidentiality are repudiated. One may well wonder how willing a future “Deep Throat” would be to come forward if he has nothing, short of faith in human nature, to rely on for his continuing anonymity . . . .” Id.; see also The Supreme Court—Leading Cases, 105 HARV. L. REV. 177, 283 (1991) (arguing that opposite result in Cohen “would reduce the stock of information by dissuading potential sources from providing information”); Cheshire, supra note 73, at 4 (criticizing Justice Souter's dissenting opinion that important electoral information might be suppressed if Cohen were allowed to prevail). “Over the long run if newspapers don’t keep their word, people who have information will quit sharing it with reporters, and the net effect will be less information for the public, not more.” Id.

Some empirical studies have suggested that the threat that a journalist might be compelled to name a source before a grand jury has little effect on sources coming forward. See Levi, supra note 1, at 663 n.177. These data, however, were gathered in the subpoena context. Id. It can be argued that these studies bear little relevance to the chilling effect that voluntary disclosure may have. Id. When a source sees a reporter going to jail and facing large monetary penalties rather than revealing a source, the very act of resisting reassures potential sources of the journalist’s good faith and may make a source willing to risk the relatively rare cases in which a reporter is actually compelled to reveal his source. See id. at 663 n.177; cf. Branzburg v. Hayes, 408 U.S. 665, 693-94 (1972) (discussing empirical studies on inhibiting effects of subpoenas compelling reporters to disclose sources).

See Olson & Holden, supra note 61, at 8 (“[s]ome reporters at the Star Tribune reportedly expressed their sentiment during the trial that the newspaper should lose Cohen's suit.”).

Reporters and editors may be fundamentally at odds with respect to the confidential source situation. See Levi, supra note 1, at 693 n.294. The reporter's ability to gather information depends to some extent upon his perceived authority to offer promises of anonymity. See id. Editors, on the other hand, have to consider the interests of the newspaper as an institution, with the associated potential liabilities. Id. During the oral argument before the Supreme Court in Cohen, Justices Scalia and Souter posed a hypothetical to defendants' counsel John French: What if "the editors had decided to keep the reporter's promise but the reporter then decided to breach it and bring out the whole truth by leaking Cohen's identity to another publication. Would the newspaper have a claim against the reporter?" Taylor, supra note 73, at 4. One commentator reported French's response in the following
reporters reason that sources will feel secure knowing they can count on a reporter's promises and will be more willing to come forward with information. 77

In the post-Cohen era, the news media should consider implementing some of the following precautions in dealing with confidential sources: 1) all sources should be clearly instructed that in the event the newspaper is sued for libel, it may have to reveal the source; 78 2) publications should settle quickly with negligently identified private figure sources, such as the Jill Ruzicka’s of the world; 79 and 3) actions instituted by politically motivated sources should be defended vigorously based on defenses available in contract actions. 80 Additionally, since a reporter may be acting with

manner:

Why sure, responded French, suddenly sounding more like a management-labor lawyer than a champion of the First Amendment. Why, that would be turning over “proprietary information.” Why, that would violate the reporter’s fiduciary duties to his employer—promises that, French implied, are far more sacred than a mere reporter’s promise to a mere source.

Id.

Justice Kennedy found that this reasoning amounted to “a very odd calculus.” Id. 77 See Olson & Holden, supra note 61, at 8 (noting that some supporters of press reluctantly support result in Cohen because different result would have stripped cloak of confidentiality from sources).

78 See Langley & Levine, supra note 16, at 22. Some courts have practically stripped news media defendants of their New York Times protection when they have refused to reveal where they obtained allegedly libellous information. See, e.g., Laxalt v. McClatchy, 116 F.R.D. 438, 452 (D. Nev. 1987) (ruling that if newspaper bases its defense upon reliability of its sources, reporter’s privilege will be deemed to have been waived); DeRoburt v. Gannett Co., 507 F. Supp. 880, 886-87 (D. Haw. 1981) (defendants in libel case must disclose source of information or face presumption that they had no source for purposes of determining actual malice); Georgia Communications Corp. v. Horne, 294 S.E.2d 725, 726 (Ga. Ct. App. 1982) (upholding default judgement against radio announcer who refused to reveal source); Downing v. Monitor Publishing Co., 415 A.2d 683, 685-86 (N.H. 1980) (libel defendant required to identify source subject to presumption that no source exists).

Since plaintiffs may argue that the truth or falsity of an alleged libel can only be determined by revealing a source’s name, libel suits are where reporters face the greatest pressure to reveal sources. See Langley & Levine, supra note 16, at 22.

79 See Taylor, supra note 73, at 4 (suggesting that press defendants’ decision to litigate rather than settle with Dan Cohen only gave Supreme Court opportunity to diminish reporter’s privilege).

80 See Calamari & Perillo, supra note 57, § 11-16. If the reporter can prove that the source knew that the information
apparent authority\textsuperscript{81} to bind his editor to promises of confidentiality, in light of \textit{Cohen}, if he is required to obtain an editor's approval before he may make a promise of confidentiality, it is imperative that he reveal this fact to the source prior to receiving the information.\textsuperscript{82}

The original decision of the two Minnesota newspapers to reveal Dan Cohen's name was met with almost universal condemnation by the journalism community,\textsuperscript{83} and has been characterized as "reprehensible" and "contrary to the core principles of journalistic ethics."\textsuperscript{84} Enforcing agreements of confidentiality essentially asks the press to follow its own, self-imposed standards.\textsuperscript{85} Moreover, the journalists' technical First Amendment arguments in \textit{Cohen} minimized the sanctity of the reporter-source compact to such an extent that future courts in traditional "reporter's privilege" cases may be less inclined to give credence to a reporter's recitation of his obligations toward his source.\textsuperscript{86} Freedom of the press scholar Floyd Abrams has criticized the defendant press's legal arguments in \textit{Cohen} by saying that what was missing was "nothing less than a sense of values . . . . If the press has values it cares about, it should

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\textsuperscript{81}See Restatement (Second) of Agency §§ 8, 8B (1958). Apparent authority is based upon the conduct of the principal in holding the agent out as having authority which he has actually not been given. \textit{Id.} § 8. An agent may also have the power, based on estoppel, to bind a principal where a third party has relied to his detriment upon a holding out effectuated by silence or misrepresentation. \textit{Id.} § 8B.


\textsuperscript{83}See Vittor, supra note 82, at 13.

\textsuperscript{84}See id. (quoting Floyd Abrams).

\textsuperscript{85}See Dicke, supra note 4, at 1565 n.64 (citing American Newspaper Guild Code of Ethics (1934)). The American Newspaper Guild's Code of Newsman's Ethics states: "'Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigative bodies.'" \textit{Id.}

\textsuperscript{86}See Vittor, supra note 82, at 14 ("If after \textit{Cohen}, the press expects continued First Amendment and state shield law protection for confidential source agreements, greater consideration must be given by the media regarding the adverse consequences of publishers and broadcasters breaching such agreements."); Taylor, supra note 73, at 4.

The looming danger is a possible holding that the First Amendment has nothing to say about reporters and their sources—which would destroy the fragile principle that currently protects sources from court ordered disclosure. That is one reason a number of First Amendment lawyers privately express horror at the press's posture in \textit{[Cohen]}.
articulate them lest it be understood to have no values at all.\footnote{87}{See Vittor, \textit{supra} note 82, at 14 (quoting Abrams's recent speech concerning \textit{Cohen} decision).}

**CONCLUSION**

The Constitution has never been interpreted to give the press absolute immunity from the consequences of its deliberate actions when these actions harm others.\footnote{88}{See Branzburg \textit{v. Hayes}, 408 U.S. 665, 682-83 (1972) ("[A newspaper publisher] has no special privilege to invade the rights and liberties of others."); \textit{Time, Inc. v. Hill}, 385 U.S. 374, 389-90 (1967) (finding calculated falsehood not protected by First Amendment); \textit{Galella v. Onassis}, 487 F.2d 986, 995-96 (2d Cir. 1973) (holding First Amendment is no "wall of immunity" protecting newsman's conduct while gathering news); \textit{Dietemann v. Time Inc.}, 449 F.2d 245, 249-50 (9th Cir. 1971) (determining tortious acts committed while gathering news not protected by First Amendment).}

While media defendants have insisted that the punishment of an editor's decision to publish the name of a source who has been promised anonymity is a violation of their First Amendment rights, this argument stretches the First Amendment beyond its purpose. If private individuals can sue the press for defamation, a clearly publication-based tort, then there is no reason why they should be precluded from enforcing an agreement of confidentiality. The decision not to publish a source's name is made by the editors when they send their reporters into the world clothed with the actual or apparent authority to enter into binding confidentiality agreements.\footnote{89}{See supra note 81 (definition of apparent authority).}

At any time, the editor may change the policy of the newspaper—prospectively—and warn sources that they speak at their peril. But the editor should not be heard to say, after a source has relied to his detriment upon the decision to grant confidentiality, that he may renege on the agreement and publish the source's name.\footnote{90}{See Cohen \textit{v.}, 479 N.W.2d. at 392 ("It was [the] ... long-standing journalistic tradition [of keeping sources confidential] that Cohen, who ha[d] worked in journalism, relied upon in asking for and receiving a promise of anonymity."); see also Cheshire, \textit{supra} note 73, at E4. "A newspaper that pledges to protect its news sources, accepts the proffered information, publishes it and then goes back on its commitment is entitled to neither respect nor protection against a lawsuit." \textit{Id.}}

To allow such a result would "encourage conduct by news media that grossly offends ordinary men."\footnote{91}{Dietemann, 449 F.2d at 250.}