

## Two Wrongs Mock a Right: Overcoming the *Cohen* Maledicta That Bar First Amendment Protection for Newsgathering

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*A jury's verdict of \$5.5 million in punitive damages against ABC News in a lawsuit brought by Food Lion, Inc. demonstrated the danger of a legal regime that provides no First Amendment protection for journalists who commit state-law torts during newsgathering. Insidious dicta in Cohen v. Cowles Media Co., a 1991 Supreme Court opinion, has hardened into doctrines that preclude First Amendment protection for newsgathering torts. In Cohen, Justice White said that the First Amendment offers no protection from the enforcement of "generally applicable laws" against newsgatherers and that First Amendment protection applies only to information that has been "lawfully acquired."*

*This Article shows that these doctrines are not only false, but have already done serious damage to First Amendment interests. It surveys lower court decisions from around the country to demonstrate the doctrines' pernicious influence, then it evaluates alternative solutions to the problem. The Article concludes that the most effective, if least likely, solution would be a rule that tracks the New York Times Co. v. Sullivan "actual malice" standard, redefined as "bad faith" or "outrageous behavior" when applied to newsgathering torts.*

### I. INTRODUCTION

On January 22, 1997, a federal jury in North Carolina awarded Food Lion, Inc. \$5.5 million in punitive damages to punish Capital Cities/ABC, Inc. for the way it acquired a story for the magazine program *PrimeTime Live* that exposed unsanitary practices in Food Lion grocery stores.<sup>1</sup> Earlier, the same jury had found ABC liable for fraud, trespass, and breach of loyalty during the

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<sup>1</sup> See Howard Kurtz & Sue Anne Pressley, *Jury Finds Against ABC for \$5.5 Million*, WASH. POST, Jan. 23, 1997, at A1.

newsgathering process and awarded Food Lion \$1402 in compensatory damages.<sup>2</sup>

The award may have been merely a "slap on the wrist," as one juror later characterized it,<sup>3</sup> but for most news organizations \$5.5 million is real money. And notwithstanding the self-righteous disclaimers that followed, especially from newspapers,<sup>4</sup> ABC's actions in the case were not so very different from the actions of investigative reporters dating back to 1886, when Nellie Bly feigned insanity to do an exposé on inhumane conditions in an insane asylum for Joseph Pulitzer's *New York World*.<sup>5</sup>

Following a tip, two ABC producers lied about their identities to Food Lion management and were hired as grocery store clerks.<sup>6</sup> Using hidden cameras and microphones, they obtained video evidence showing that the store sold tainted meat and later broadcast parts of that video tape on November 5, 1992.<sup>7</sup>

Plaintiff Food Lion was unwilling or unable to vindicate its reputation through a libel or false light privacy suit, so it was never required to challenge the accuracy of the broadcast in court.<sup>8</sup> Although the trial judge denied the

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<sup>2</sup> See *id.* at A6; *Food Lion Awarded Damages From ABC*, N.Y. TIMES, Dec. 31, 1996, at D4; Howard Kurtz, *Jury Finds ABC Committed Fraud in Food Lion Investigative Story*, WASH. POST, Dec. 21, 1996, at A7. The jury awarded Food Lion \$1400 in damages for fraud (representing some, but not all, of the wages paid) and \$1 each for trespassing and breach of loyalty. See Scott Andron, *Food Lion versus ABC*, QUILL, Mar. 1997, at 20.

<sup>3</sup> *Jury Awards Food Lion \$5.5 Million in ABC Case*, NEWS MEDIA & L., Winter 1997, at 4.

<sup>4</sup> See, e.g., *Food Lion Decision Leaves a Bad Taste in the Mouth*, NEWS MEDIA & L., Winter 1997, at 2 ("This self-righteousness was displayed primarily, though not exclusively, by print journalists."); Dorothy Rabinowitz, *ABC's Food Lion Mission*, WALL ST. J., Feb. 11, 1997, at A20 ("Many journalists continue to believe that they are involved in a calling so high as to entitle them to rights not given ordinary citizens.").

<sup>5</sup> See MICHAEL EMERY & EDWIN EMERY, *THE PRESS AND AMERICA* 210 (6th ed. 1988); MELVIN MENCHER, *NEWS REPORTING AND WRITING* 615 (5th ed. 1991); MITCHELL STEPHENS, *A HISTORY OF NEWS* 249 (1988).

<sup>6</sup> See Howard Kurtz, *Jury Finds ABC Committed Fraud in Food Lion Investigative Story*, WASH. POST, Dec. 21, 1996, at A7.

<sup>7</sup> See *id.*

<sup>8</sup> While Food Lion vigorously denied the allegations in the story, it initially believed it could not carry the heavy burden of proving libel. Later, after ABC turned over additional out-takes, the company asked the federal district court to extend North Carolina's one-year limitations period on libel, which had already run. Judge P. Trevor Sharp rejected the company's request, finding the claim of new evidence "unpersuasive and exaggerated." Andron, *supra* note 2, at 15, 19.

The veracity of ABC's story is expected to be litigated in a shareholder suit against Food Lion, alleging that management purposely misled shareholders about sanitary and labor practices in an effort to inflate stock prices. See *Longman v. Food Lion, Inc.*, No. 92-696

company's request for \$2.5 billion in damages tied to its loss of business and stock value,<sup>9</sup> he permitted the jury to award \$1402 in compensatory damages for fraud, trespass, and breach of loyalty.<sup>10</sup> Most importantly, he permitted the jury to consider and award punitive damages.<sup>11</sup>

*Food Lion, Inc. v. Capital Cities/ABC, Inc.* is only the latest in a long series of lawsuits that aimed to circumvent the First Amendment protections that have been accorded to libel, invasion of privacy, intentional infliction of emotional distress—all publication-dependent torts—and similar causes of action against the press by focusing not on the publication or broadcast, but on the newsgathering process itself.<sup>12</sup> Why newsgathering torts have become the focus of plaintiffs that believe they have been unfairly treated by the media presents no great mystery. While libel and related lawsuits are alive and well at the trial level,<sup>13</sup> more than half of all plaintiffs' judgments are reversed, remanded, or reduced on appeal,<sup>14</sup> where appellate judges are charged with independently applying the exacting standards compelled by the First Amendment.<sup>15</sup> Although

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(M.D.N.C. filed 1992), discussed in David E. Rovella, *Food Lion Swats ABC, but Investors Want Answers*, NAT'L L.J., Feb. 10, 1997, at A7.

<sup>9</sup> See Kurtz, *supra* note 6, at A7.

<sup>10</sup> See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 1997 U.S. Dist. LEXIS 13214, at \*3 (M.D.N.C. Aug. 29, 1997).

<sup>11</sup> On August 29, 1997, the court held that the punitive damage award was excessive and ordered a remittitur of all punitive damages above \$315,000. *See id.* at \*48–50.

<sup>12</sup> One observer lists among these so-called “trash torts:” “interference with contracts, stalking, trespass, intrusion upon seclusion, invasion of privacy, interference with law enforcement, negligence, conspiracy, and infliction of emotional distress.” Paul McMasters, *It Didn't Have to Come to This*, QUILL, Mar. 1997, at 18. For an earlier and more scholarly view of the phenomenon, see Todd F. Simon & Mary M. Cronin, *Searching for Media Liability: The Law's Response to Perceived Changes in Harms Caused by Mass Media* (presented at the annual meeting of the Association for Education in Journalism and Mass Communication, Aug. 11, 1990) [hereinafter *Media Liability*].

<sup>13</sup> Just one week before the first *Food Lion* verdict, a federal jury in Miami, Florida, ordered ABC to pay \$10 million in libel damages to financier Alan Levan for a 1991 story that appeared on the news magazine *20/20*. See Kyle Pope, *ABC Network Loses Libel Suit Over '20/20'*, WALL ST. J., Dec. 19, 1996, at B1. Pope quotes a preliminary report from the Libel Defense Resource Center showing the mean libel jury verdict in 1996, prior to the ABC judgment, was \$2.4 million, more than double the median of \$985,000 of the previous two-year period and more than ten times the \$175,000 two-year median of 1992–1993. *See id.*

<sup>14</sup> See *Reversal of Libel Verdicts Is Common, LDRC Study Finds*, [News Notes] 24 Media L. Rep. (BNA) No. 39 (Oct. 8, 1996).

<sup>15</sup> See, e.g., *Harte-Hanks Communications Inc. v. Connaughton*, 491 U.S. 657, 685–86 (1989) (holding that whether evidence is sufficient to support a finding of actual malice is a question of law and that reviewing courts must fully consider the factual record); *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 514 (1984) (holding that federal

no such records are kept of newsgathering verdicts, plaintiffs have a good reason to believe that the odds of reversal are much longer: the Supreme Court has never clearly articulated the scope of First Amendment protection for newsgathering. There are no constitutional standards against which appellate courts must measure a tort plaintiff's showing.

Moreover, those would-be plaintiffs that may be unwilling to leave questions of falsity or fault in the hands of a jury are probably justified in assuming that they may bring a newsgathering-based action without meeting the rigorous standards imposed on libel plaintiffs.<sup>16</sup> For that, plaintiffs have to thank two doctrines derived from the Supreme Court's opinion in *Cohen v. Cowles Media Co.*<sup>17</sup> that serve to deprive the news media of important First Amendment protections for both newsgathering and dissemination: the First Amendment offers no special immunity from "generally applicable laws"<sup>18</sup> and First Amendment protection applies only to information that has been "lawfully acquired."<sup>19</sup>

This Article will examine these doctrines with a view toward exposing their role in obstructing the natural evolution of a constitutional rule that ensures First Amendment values are taken into account when tort liability for reporters' conduct in gathering news is alleged. Part II will discuss what little the Supreme Court has already told us about First Amendment protection for newsgathering and place that in the context of other press clause jurisprudence, including *New York Times Co. v. Sullivan*<sup>20</sup> and *Hustler Magazine, Inc. v. Falwell*.<sup>21</sup> Part III will examine the *Cohen* case in detail, dissecting and debunking the two major doctrines that now effectively deprive newsgathering of constitutional protection. Part IV will review the damage those flawed doctrines have already done in trial and appellate courts around the country. And Part V will discuss

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courts of appeal must exercise their own judgment in determining whether actual malice was shown with convincing clarity).

<sup>16</sup> Prospective plaintiffs learned that publication-related torts would have to meet libel standards when the Reverend Jerry Falwell sued *Hustler* magazine for intentional infliction of emotional distress based on a tasteless and suggestive parody in which the televangelist was featured. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) ("We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.").

<sup>17</sup> 501 U.S. 663 (1991).

<sup>18</sup> *Id.* at 669.

<sup>19</sup> *Id.*

<sup>20</sup> 376 U.S. 254 (1964).

<sup>21</sup> 485 U.S. 46 (1988).

alternative approaches toward a new constitutional rule that might evolve, indeed that might have already evolved, in the absence of the *Cohen* "maledicta."

This Article concludes that, although the First Amendment confers no immunity upon the press to violate laws of general applicability or to commit tortious or unlawful acts in pursuit of the news, neither do such violations relieve the courts of responsibility to consider the First Amendment values at stake, weigh them against the other societal values represented by the laws in question, and, where appropriate, adjust those laws to accommodate any higher values they may find. Where this is done, case by case, unobstructed by misguided Supreme Court dicta, a theory of First Amendment protection for newsgathering will evolve naturally. Ultimately, this Article suggests that the most efficacious, although perhaps least likely, result of such unencumbered evolution is a rule that tracks the *New York Times Co. v. Sullivan* "actual malice" standard, redefined as "bad faith" or "outrageous behavior" when applied to newsgathering torts. Neither this standard nor any other, however, will emerge from the constitutional common law process until the *Cohen* doctrines are disavowed or disregarded.

## II. FIRST AMENDMENT PROTECTION FOR NEWSGATHERING

We can be reasonably sure that newsgathering,<sup>22</sup> as we know it today, was not foremost in the minds of those who drafted the Bill of Rights when they conceived the press clause of the First Amendment. Indeed, the active pursuit of information through correspondents was minimal in eighteenth-century America with most newspapers content to rely on each other, foreign newspapers, and letters for newsworthy items.<sup>23</sup> News was being covered in the early nineteenth-century, but only "in fits and starts, often hazily, often laggardly, usually in third- or fourth-hand reports, often obscured by the prejudices of partisans. And with few exceptions, news was not being uncovered. American newspapers had yet to discover the power of reporting."<sup>24</sup>

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<sup>22</sup> In this Article, the term "newsgathering" is used to describe a broad range of activities undertaken by journalists in order to collect the information they intend to disseminate (*i.e.*, publish or broadcast). In the case of "live" broadcasts, newsgathering and dissemination occur simultaneously, although the processes must be separated for purposes of legal analysis. A more precise definition might be "the pursuit of independently verifiable facts about current events through enterprise, observation and investigation." STEPHENS, *supra* note 5, at 229.

<sup>23</sup> *See id.* at 230.

<sup>24</sup> *Id.* at 225.

Not unreasonably, the degree of constitutional protection accorded to newsgathering is held to be distinct from and lower than that given dissemination, even though today we conceive of the former as a prerequisite to the latter. Whatever constitutional protection there may be for newsgathering derives not from its own place in eighteenth-century democratic ideals, but from modern notions of its indispensability to the constitutional functions of the press in society.

Among those functions are some that may seem remote from the mundane newsgathering process, such as providing a means for individual self-fulfillment through the expression of ideas and opinions, or allowing the venting of those ideas and opinions to serve as a safety valve for society as a whole, or finding some eternal political truth in the clash of those ideas and opinions<sup>25</sup> on a Miltonian battlefield<sup>26</sup> or in a Holmesian marketplace.<sup>27</sup> Other functions, however, simply cannot be fulfilled without the freedom to gather as well as disseminate news.

One cannot, for example, embrace Alexander Meiklejohn's idea of freedom of the press as ensuring that the public will have the information necessary to make informed judgments in a self-governing society without presupposing that the press would be free to gather that information.<sup>28</sup> Much of the credit for the reform agenda of the Progressive era goes to the investigative reporters of the first decade of the twentieth-century: Lincoln Steffens, Ida Tarbell, Ray Stannard Baker, Upton Sinclair, and others.<sup>29</sup> "To these writers and to the fast-growing muckraking magazines goes the credit for arousing a lethargic public to righteous indignation. They spotlighted Progressivism, and gave this political movement the impetus that aided it in the passage of social and economic legislation."<sup>30</sup>

Without First Amendment protections, the press also could not perform what Vincent Blasi and Lucas Powe see as its "watchdog" or "checking" function, exposing governmental misconduct and holding it accountable to the public.<sup>31</sup> Although the major Watergate revelations came too late to prevent

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<sup>25</sup> See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877 (1963), reprinted in part in *FIRST AMENDMENT ANTHOLOGY* 8-12 (Donald E. Lively et al. eds., 1994) (summarizing these ideas).

<sup>26</sup> See JOHN MILTON, *AREOPAGITICA* 167 (New York, Grolier 1890) (1644).

<sup>27</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>28</sup> See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 *Sup. Ct. Rev.* 245, reprinted in *FIRST AMENDMENT ANTHOLOGY* 2-3 (Donald E. Lively et al. eds., 1994).

<sup>29</sup> See ARTHUR WEINBERG & LILA WEINBERG, *THE MUCKRAKERS 1902-1912* at xvi-xviii (1961).

<sup>30</sup> *Id.* at xviii.

<sup>31</sup> See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *AM. B.*

President Nixon's re-election, the work of the *Washington Post's* Bob Woodward and Carl Bernstein, and later the *New York Times's* Seymour Hersh and the *Los Angeles Times's* Jack Nelson, eventually contributed to his resignation and the end of what President Ford called "our long national nightmare."<sup>32</sup>

Notwithstanding its importance to First Amendment values, however, newsgathering is still merely conduct, not speech. And although the Supreme Court has articulated a reasonably well-defined set of principles for dealing with other protected conduct, namely symbolic speech or expressive conduct,<sup>33</sup> the conduct we call newsgathering has only occasionally been considered by the Supreme Court, and the rules are not at all clear.

We know that the Constitution affords some degree of protection for newsgathering,<sup>34</sup> but we do not fully understand the scope of that protection or how to gauge when our freedom to gather news has been unconstitutionally abridged. We know, for example, that First Amendment protection extends to "routine newspaper reporting techniques,"<sup>35</sup> but we do not know exactly where "routine" ends and extraordinary begins<sup>36</sup> or what degree of protection must be

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FOUND. RES. J. 521, 527; see also LUCAS POWE, *THE FOURTH ESTATE AND THE CONSTITUTION* 298 (1991) (arguing that "freedom of the press is an integral part of the checks" provided for in the Constitution).

<sup>32</sup> EMERY & EMERY, *supra* note 5, at 507-15.

<sup>33</sup> See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (holding that expressive conduct may be regulated if such regulation is "within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

<sup>34</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.").

<sup>35</sup> *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103-04 (1979) ("These cases involved situations where the government itself provided or made possible press access to the information. That factor is not controlling. Here respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferance of government to supply it with information.").

<sup>36</sup> We do know that "[t]he use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law." *Branzburg*, 408 U.S. at 681-82. The *Branzburg* Court also tells us that "grand jury investigations . . . instituted or conducted other than in good faith . . . to disrupt a reporter's relationship with his news sources would have no justification" under the First Amendment. *Id.* at 707-08.

accorded routine television reporting.<sup>37</sup>

We are also told that newsgatherers have no right of access to people, places, and documents beyond that granted to the general public,<sup>38</sup> although the Court has recognized that journalists are frequently given preferential treatment as public surrogates.<sup>39</sup> Finally, we are told that the First Amendment does not immunize journalists from torts or crimes committed while gathering news,<sup>40</sup> although lower courts sometimes strain to avoid finding liability.<sup>41</sup> Before *Cohen*, the Supreme Court had never reviewed the tort-like behavior of the news media independent of publication.<sup>42</sup>

Beyond these few general principles, most people are uncertain about which newsgathering activities are, or are not, protected.<sup>43</sup> While that may be problematic for journalists and media lawyers, the absence of some overarching theory of First Amendment protection for newsgathering is not terribly surprising. First Amendment jurisprudence has largely defied attempts to construct any unified theory<sup>44</sup> and, for better or worse, our constitutional doctrines have largely evolved gradually, one case at a time. That is precisely the process that was incorrectly and unnecessarily short-circuited by the

<sup>37</sup> Even the most routine broadcast reporting techniques are often prohibited in places where print journalists may work freely. *See, e.g.*, *Estes v. Texas*, 381 U.S. 532, 539–40 (1965) (finding no First Amendment right to televise trials).

<sup>38</sup> *See Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 834 (1974).

<sup>39</sup> *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 n.2 (1980) (“As a practical matter, however, the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the ‘agent’ of interested citizens, and funnels information about trials to a large number of individuals.”).

<sup>40</sup> *See Branzburg*, 408 U.S. at 682 (“It is clear 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.”).

<sup>41</sup> *See infra* notes 430–31 and accompanying text.

<sup>42</sup> Arguably, the Court erred in considering *Cohen* without reference to publication as well. *See infra* text accompanying note 300.

<sup>43</sup> *See John W. Wade, The Tort Liability of Investigative Reporters*, 37 VAND. L. REV. 301 (1984) (attempting to define the parameters of protected newsgathering activities).

<sup>44</sup> Because of this, Rodney Smolla explains that “[t]he modern student of free speech will quickly be tempted to abandon the search for general organizing principles, instead treating each pocket of conflict as a discrete ‘law unto itself.’” RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 18 (1992). Martin Redish writes, “There seems to be general agreement that the Supreme Court has failed in its attempts to devise a coherent theory of free expression. These efforts have been characterized by ‘a pattern of aborted doctrines, shifting rationales, and frequent changes of position by individual Justices.’” MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 9 (1984), *reprinted in* *FIRST AMENDMENT ANTHOLOGY* 17 (Donald E. Lively et al. eds., 1994).



doctrines enunciated in *Cohen* and their adoption by lower court judges. The pendency of important newsgathering tort cases, including *Food Lion*, demands returning to first principles, debunking the false doctrines in *Cohen*, and allowing the normal evolutionary process to continue. That process begins with *New York Times Co. v. Sullivan*—the first time that a civil lawsuit against the news media under state tort law was held to implicate the First Amendment.<sup>45</sup> That landmark decision, which imposed a heavy constitutional burden on public officials who invoke state libel law against criticism of their official conduct,<sup>46</sup> was subsequently extended to impose the same burden in cases involving criminal libel,<sup>47</sup> false light privacy,<sup>48</sup> public figure plaintiffs,<sup>49</sup> and matters of public interest regardless of the status of the plaintiff.<sup>50</sup>

*New York Times Co. v. Sullivan* concerned alleged injury associated with publication, not newsgathering, and courts have been quite comfortable drawing a line between the two and rendering *New York Times Co. v. Sullivan* inapposite in discussing, for example, intrusion on seclusion or trespass.<sup>51</sup> But the line between newsgathering and dissemination is not nearly so clear. Indeed, the constitutional burden imposed upon libel plaintiffs—that they demonstrate actual malice (*i.e.*, knowing falsity or reckless disregard for the truth)—may require an inquiry into the newsgathering process.<sup>52</sup> While the

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<sup>45</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

<sup>46</sup> See *id.* at 279–80, 285–86. Notably, the Court required that a public official plaintiff must prove actual malice, that is, knowing falsity or reckless disregard for the truth, with convincing clarity. See *id.*

<sup>47</sup> See *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964).

<sup>48</sup> See *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967).

<sup>49</sup> See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967).

<sup>50</sup> See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 30–32 (1971). This plurality opinion was subsequently rejected in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346–47 (1974) (holding that states may define the appropriate standard of liability for libel of a private individual, so long as they do not impose liability without fault).

<sup>51</sup> See, e.g., *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (denying that the First Amendment privileges reporters to enter a plaintiff's home by misrepresenting their identity and purpose in order to surreptitiously photograph and record his unlawful activities); *Galella v. Onassis*, 353 F. Supp. 196, 223 (S.D.N.Y. 1972) (rejecting the proposition that the First Amendment privileges a photographer from engaging in trespass, intrusion, and other torts to photograph Jacqueline Kennedy Onassis and her family); *Le Mistral, Inc. v. Columbia Broad. Sys.*, 402 N.Y.S.2d 815, 817 (N.Y. App. Div. 1978) (finding that the First Amendment does not insulate the news media from trespass claims). Needless to say, all three of these warhorses might suffer under a fully developed First Amendment right to gather news.

<sup>52</sup> See, e.g., *Herbert v. Lando*, 441 U.S. 153, 158 (1979) (permitting libel plaintiffs to discover evidence of discussions between reporters and editors in the newsroom during the

Court has eschewed setting express standards for newsgathering by which to measure a libel defendant's culpability,<sup>53</sup> a journalist who entertains serious doubts about the accuracy of a story is bound to investigate further and remove those doubts before publishing.<sup>54</sup>

Thus, *New York Times Co. v. Sullivan* and its progeny arguably create constitutional limitations on the duty of care in newsgathering—at least as to accuracy—owed to certain plaintiffs. Merely negligent newsgathering regarding public plaintiffs that results in a false and defamatory story is not actionable. Admittedly, such harmful conduct would not normally be challenged without publication; but one cannot say that the conduct itself lacks constitutional significance. Indeed, one might be justified in finding that *New York Times Co. v. Sullivan* stands for the proposition that all laws governing a journalist's professional activities must be applied with due consideration to First Amendment values.<sup>55</sup>

The consensus in *New York Times Co. v. Sullivan* was always a fragile

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newsgathering and production process).

<sup>53</sup> Justice Harlan's plurality opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967), suggested that a public figure libel plaintiff should prevail on a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." That opinion was "emphatically rejected by a majority of the Court in favor of the stricter *New York Times [Co. v. Sullivan]* actual malice standard." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989).

<sup>54</sup> See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

<sup>55</sup> As Justice Brennan wrote with respect to libel,

[W]e are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

*New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1963) (citations and footnotes omitted).

A reporter's negligent driving and similar hypothetical conduct are sometimes cited to cast doubt on this proposition. See, e.g., *Risenhoover v. England*, 936 F. Supp. 392, 404 (W.D. Tex. 1996) ("As Plaintiffs note, it would be ludicrous to assume that the First Amendment would protect a reporter who negligently ran over a pedestrian while speeding merely because the reporter was on the way to cover a news story."). Obviously, there must be some degree of attenuation from the newsgathering function at which the conduct has no constitutional significance. Usually, common sense is sufficient to make the distinction, unless the purpose is to confuse the issue by raising a red herring.

one,<sup>56</sup> and it began to unravel in succeeding cases. By the time *Rosenbloom v. Metromedia, Inc.* was decided in 1971, a plurality barely existed to further extend its most rigorous standards to include private figure plaintiffs.<sup>57</sup> Yet not even Justice White, who would soon become the Court's most outspoken opponent of expanding the press's constitutional protection, was ready to retreat from the notion that, in protecting the press, the First Amendment might impose some burden on private citizens.<sup>58</sup> Concurring in the judgment, he asserted that the First Amendment gives the media a privilege to "report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view."<sup>59</sup>

With *Rosenbloom*, the prevailing image of the press had begun to change. Justice White, for one, began to view the press as a potential persecutor, rather than protector, of the public interest:

Some members of the Court seem haunted by fears of self-censorship by the press and of damage judgments that will threaten its financial health. But technology has immeasurably increased the power of the press to do both good and evil. Vast communication combines have been built into profitable

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<sup>56</sup> The making of that majority is discussed in ANTHONY LEWIS, *MAKE NO LAW* 170-82 (1991).

<sup>57</sup> See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 32 (1971).

<sup>58</sup> See *id.* at 61-62 (White, J., concurring).

<sup>59</sup> *Id.* at 62. Justice White's bold dictum in *Rosenbloom* has never been followed, of course, and, as will be shown, was fundamentally incompatible with his subsequent decisions. Indeed, when CBS, Inc. was recently sued for invasion of privacy by a family who was videotaped in their home by a CBS News crew accompanying federal agents executing a valid search warrant, the broadcaster did not even raise a First Amendment defense. See *Ayeni v. CBS, Inc.*, 848 F. Supp. 362, 368 (E.D.N.Y. 1994). The district court, finding CBS's purpose in taping the scene was to "titillate and entertain others" for profit, held that neither the federal agents nor CBS was entitled to dismissal on the ground of qualified immunity. See *id.* CBS settled on confidential terms and the U.S. Court of Appeals for the Second Circuit affirmed as to the federal agents. See *Ayeni v. Mottola*, 35 F.3d 680, 684 n.2, 686 (2d Cir. 1994). The court held that it was objectively unreasonable for the federal agents to believe that inviting CBS to the scene was lawful. See *id.* at 686. In a similar case, one Eighth Circuit judge questioned the *Ayeni* holding, calling it "at most only the beginnings of a trend in the law." *Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996) (Arnold, J., dictum). However, another judge expressly agreed with *Ayeni*. See *id.* at 448 (Rosenbaum, J., concurring). The district court below also agreed with *Ayeni*. See *Parker v. Clarke*, 905 F. Supp. 638, 643 (E.D. Mo. 1995). None of these jurists even considered the kind of First Amendment privilege Justice White's *Rosenbloom* dictum suggests.

ventures.<sup>60</sup>

Justice White's growing suspicion of the press was no doubt reaffirmed by *New York Times Co. v. United States*<sup>61</sup>—the Pentagon Papers controversy that reached the Court later the same month. While not technically a newsgathering case, *New York Times Co. v. United States* gave Justice White an opportunity to express the view that the *New York Times* and the *Washington Post* stood exposed to the full weight of the criminal law if the government chose to prosecute under Espionage Act provisions barring the unauthorized possession of national defense information.<sup>62</sup> The government did indict Daniel Ellsberg, who leaked the materials to the *Times* and the *Post*, as well as a colleague, Anthony Russo. Those prosecutions were dropped in the wake of revelations regarding the White House plumbers, and no charges were brought against the newspapers.<sup>63</sup>

In *Gertz v. Robert Welch, Inc.*, the Court retreated from its position in *Rosenbloom* in favor of lighter, but nonetheless substantial, constitutional burdens on private figure plaintiffs.<sup>64</sup> But Justice White's position had

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<sup>60</sup> *Rosenbloom*, 403 U.S. at 60 (White, J., concurring).

<sup>61</sup> 403 U.S. 713 (1971).

<sup>62</sup> *See id.* at 740 (White, J., concurring). Although White's concurring opinion did not explicitly discuss newsgathering, as distinguished from publication, he pointed out that newspapers were vulnerable to prosecution under the Espionage Act, *see* 18 U.S.C. § 793(e) (1994), regardless of whether they had published the material. *See id.* at 738 n.9. David Rudenstine notes that White had inquired of the Solicitor General, Erwin Griswold, about criminal prosecution during oral argument.

When Griswold answered that he could not imagine the government criminally prosecuting the newspapers for publishing material the Supreme Court refused to enjoin, White was sufficiently agitated that he complained during the [J]ustice's conference that the [S]olicitor [G]eneral had given away the threat of criminal prosecution during his oral argument.

DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED* 312 (1996).

<sup>63</sup> *See* RUDENSTINE, *supra* note 62, at 342–43. It is not clear why the newspapers were not prosecuted, since more than a majority of the Supreme Court Justices had indicated that its refusal to enjoin publication was not dispositive on that issue. Neither Attorney General John Mitchell nor Solicitor General Erwin Griswold thought a criminal case against the papers was winnable and, as Rudenstine explains, that could have been sufficient. *See id.* at 343. “But it may also be that the Nixon administration decided not to prosecute the newspapers in order to avoid a confrontation with the news media during Nixon's reelection bid.” *Id.*

<sup>64</sup> *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346–47 (1974) (precluding liability without fault and punitive damages without actual malice).

hardened. Gone was the “deference” of his *Rosenbloom* concurrence,<sup>65</sup> replaced by a tone of indignation, if not outrage, in his *Gertz* dissent.<sup>66</sup> His image of the press had crystallized:

The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home. Neither the industry as a whole nor its individual components are easily intimidated, and we are fortunate that they are not. Requiring them to pay for the occasional damage they do to private reputation will play no substantial part in their future performance or their existence.<sup>67</sup>

Writing separately in another case decided the same day, Justice White referred again to *Gertz* and the press:

To me it is a near absurdity to so deprecate individual dignity, as the Court does in *Gertz*, and to leave the people at the complete mercy of the press, at least in this stage of our history when the press, as the majority in this case so well documents, is steadily becoming more powerful and much less likely to be deterred by threats of libel suits.<sup>68</sup>

Professing to “continue to subscribe to *New York Times* [*Co. v. Sullivan*] and those decisions extending its protection to defamatory falsehoods about public persons,” Justice White said his quarrel lay with the Court’s willingness “to find in the *New York Times Co. v. Sullivan* doctrine an infinite elasticity.”<sup>69</sup> *Gertz*, he said, “is the latest manifestation of the destructive potential of any good idea carried out to its logical extreme.”<sup>70</sup>

That refusal to adopt an expansive reading of *New York Times Co. v. Sullivan* doctrine, even within the confines of libel law, carried over into the

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<sup>65</sup> See *Rosenbloom*, 403 U.S. at 60 (White, J., concurring).

<sup>66</sup> See *Gertz*, 418 U.S. at 369 (White, J., dissenting).

<sup>67</sup> *Id.* at 390–91 (footnote omitted). Justice White’s view of the press had begun to change even before *Gertz*. Vincent Blasi pointed out that earlier in *Branzburg v. Hayes*, Justice White “characterized the press as a private-interest group rather than an institution with a central function to perform in the constitutional system of checks and balances” and “labeled the source relationships that reporters sought to maintain ‘a private system of informers operated by the press to report on criminal conduct’ [cautioning] that this system would be ‘unaccountable to the public’ were a reporter’s privilege to be recognized.” Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 593, cited in LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 54 (1991).

<sup>68</sup> *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 263 (1974) (White, J., concurring).

<sup>69</sup> *Gertz*, 418 U.S. at 398–99 (White, J., dissenting).

<sup>70</sup> *Id.*

newsgathering cases that reached the Supreme Court during the next twenty-five years. The first of these cases, however, was decided almost before the ink was dry on *New York Times Co. v. Sullivan*, and it is doubtful that the Court gave the new libel doctrine any thought at all in *Zemel v. Rusk*.<sup>71</sup>

Zemel had sought to have his passport validated for travel to Cuba as a tourist.<sup>72</sup> When his request was denied, he renewed it, this time asking for permission to travel "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen."<sup>73</sup> Refused again, Zemel challenged the Secretary of State's authority to take such action.<sup>74</sup> A three-judge district court granted the Secretary's motion for summary judgment, and the United States Supreme Court affirmed.<sup>75</sup>

The Court rejected Zemel's contention that the refusal to validate his passport for Cuba infringed upon his First Amendment right to inform himself.<sup>76</sup>

For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition . . . it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. . . . The right to speak and publish does not carry with it the unrestrained right to gather information.<sup>77</sup>

Ample reasons exist for considering *Zemel* as something other than a bona fide newsgathering case. State Department policy at the time contemplated exemptions for bona fide journalists, among others,<sup>78</sup> and Zemel's desire to "inform himself" seems as disingenuous now as it obviously did to the Court then. Still, the Court has repeatedly held that the First Amendment rights of the press and public are coextensive;<sup>79</sup> Zemel did not have to attend journalism school to gather news and information.

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<sup>71</sup> 381 U.S. 1 (1965).

<sup>72</sup> *See id.* at 3.

<sup>73</sup> *Id.* at 4.

<sup>74</sup> *See id.*

<sup>75</sup> *See id.* at 3, 5.

<sup>76</sup> *See id.* at 16.

<sup>77</sup> *Id.* at 16-17.

<sup>78</sup> *See id.* at 3.

<sup>79</sup> *See infra* note 92 and accompanying text. The concept of First Amendment protection for newsgathering put forward by this Article does not rely on special institutional rights for the press, so that topic will be reserved for another day. For a discussion of the press's institutional rights, see Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975), and the response of Chief Justice Burger in *First National Bank v. Bellotti*, 435 U.S. 765, 797-802 (1978) (Burger, C.J., concurring).

More importantly, the Court recognized that the Secretary's interference with the flow of information about Cuba was "a factor to be considered in determining whether [Zemel] has been denied due process of law."<sup>80</sup> As Justice Stewart would later point out, the rule at issue in *Zemel* was justified by the "weightiest considerations of national security."<sup>81</sup> Justice Stewart also noted that the Court's use of the word "unrestrained" to characterize unprotected newsgathering necessarily implies that "some right to gather information does exist."<sup>82</sup> If *Zemel* affords any guidance on the right to gather news, it is that the government's interest in restricting travel must be balanced against the public's interest in the flow of information.

The case that sent Justice Stewart back to *Zemel*, *Branzburg v. Hayes*, reached the Court between *Rosenbloom* and *Gertz*. In each of the three cases consolidated under that caption, the Court refused to allow a reporter to protect his confidential sources by refusing to testify before a grand jury.<sup>83</sup> Although unanimous in concluding that the First Amendment afforded some protection for newsgathering, the Court was deeply divided as to the scope of that protection.

Writing for a plurality of four, Justice White penned the phrase that would ever after be quoted by those who sought an expansive reading: "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."<sup>84</sup>

In Justice White's opinion, however, that protection did not include even a qualified testimonial privilege to protect confidential sources.<sup>85</sup> Calling that a "crabbed view" of the First Amendment,<sup>86</sup> three dissenters endorsed a three-part test for determining when reporters could be compelled to disclose their confidences.<sup>87</sup> Justice Powell's concurring opinion interpreted the Court's opinion as, in fact, requiring courts to strike "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony

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<sup>80</sup> *Zemel*, 381 U.S. at 16.

<sup>81</sup> *Branzburg v. Hayes*, 408 U.S. 665, 728 n.4 (Stewart, J., dissenting) (quoting *Zemel*, 381 U.S. at 16-17).

<sup>82</sup> *Id.*

<sup>83</sup> *See id.* at 667.

<sup>84</sup> *Id.* at 681.

<sup>85</sup> *See id.* at 690.

<sup>86</sup> *Id.* at 725 (Stewart, J., dissenting, joined by Brennan, J., and Marshall, J.). Justice Douglas dissented separately.

<sup>87</sup> *See id.* at 743.

with respect to criminal conduct."<sup>88</sup>

Thus, although *Branzburg* has been cited both to affirm and deny a First Amendment right to protect confidential sources,<sup>89</sup> there were five votes for a right of some sort—four for a balancing test and one for an absolute privilege.<sup>90</sup> Like *Zemel*, *Branzburg* offers an uncertain message, but it is not that the First Amendment affords no protection for newsgathering. Most state legislatures and lower courts that have considered a testimonial privilege have opted for some form of balancing.<sup>91</sup> Perhaps some future Supreme Court will ratify that judgment; there is nothing in *Branzburg* to prevent it.

Much of the Supreme Court's newsgathering jurisprudence has resulted from efforts by the press to establish a constitutional right of access to information. While less than successful, these cases hardly sounded a death knell for a constitutional right to gather news. A trio of prison access cases, for example, held that the press has no greater First Amendment right than the general public to access information controlled by the government.<sup>92</sup> But the holding in *Houchins v. KQED, Inc.*, that the First Amendment did not afford either the press or the public a right of access to information controlled by the government,<sup>93</sup> was endorsed by only four justices.

The issue in *Houchins v. KQED, Inc.*, however, was far narrower than the plurality's sweeping dictum, and Justice Stewart, who cast the fourth vote for the judgment, would have recognized a new constitutional mandate: once the government has "opened its doors," the press and the public must have equally

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<sup>88</sup> *Id.* at 710 (Powell, J., concurring); see also *infra* text accompanying note 191.

<sup>89</sup> Compare Justice White's interpretation in *Cohen*, see *infra* text accompanying notes 191-99, with Justice Brennan's order in *In re Roche*, 448 U.S. 1312, 1315 (1980), expressing the view that *Branzburg* stands for the proposition that the First Amendment provides some degree of protection for reporter's confidences.

<sup>90</sup> See *Branzburg*, 408 U.S. at 711-12 (Douglas, J., dissenting).

<sup>91</sup> Twenty-nine states and the District of Columbia have adopted reporters' shield laws. See *Confidential Sources & Information*, NEWS MEDIA & L., Fall 1993, at 2, 3. Case law recognizing some form of the privilege is available in 18 states that do not have shield laws, two states have neither shield laws nor reported case law concerning the privilege, and one state supreme court has rejected the privilege. For a complete jurisdiction-by-jurisdiction review, see James Goodale & John S. Kiernan, *Reporter's Privilege*, 2 COMMUNICATIONS LAW 1996 at 955 (Practicing L. Inst. ed., 1996). See also *So You've Been Subpoenaed . . .*, NEWS MEDIA & L., Fall 1993, at 4.

<sup>92</sup> See *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 834 (1974). But see Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992) (arguing for a superior right of access for the press under certain circumstances).

<sup>93</sup> See *Houchins*, 438 U.S. at 15 (opinion of Burger, C.J.).



“effective access” to the information that was revealed.<sup>94</sup> To Justice Stewart, who believed that “freedom of the press” implied special institutional rights,<sup>95</sup> the First Amendment gave KQED the right to televise any areas of the Alameda County Jail that the public was allowed to visit.<sup>96</sup>

The Court quickly put to rest any notion that the Constitution required effective access for broadcast media. In *Nixon v. Warner Communications, Inc.*, the Court denied broadcasters physical access to the infamous Watergate tapes that had been played in open court.<sup>97</sup> But the larger issue of access would ultimately be decided in favor of the press. In 1980, *Richmond Newspapers, Inc. v. Virginia* held that, under certain circumstances and within certain bounds, the First Amendment may indeed require the government to afford the press and public access to information, namely the right to attend criminal trials.<sup>98</sup>

In *Gannett v. DePasquale*, the Court found no Sixth Amendment right for the public to attend criminal proceedings, but left open the question of a First Amendment right.<sup>99</sup> *Richmond Newspapers* settled the matter. It was, wrote Justice Stevens in a concurring opinion, the first time that the Court had “squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.”<sup>100</sup> Even so, the holding was carefully limited,<sup>101</sup> and it took several more cases to define the right of access with respect to criminal proceedings.<sup>102</sup> The Court has rejected a right of access to participants in a criminal trial,<sup>103</sup> and has yet to rule on access to civil trials.<sup>104</sup>

Apart from the access cases, the Supreme Court considered relatively few

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<sup>94</sup> *Id.* at 16–18 (Stewart, J., concurring).

<sup>95</sup> *See id.*; *see also* Stewart, *supra* note 79, at 631.

<sup>96</sup> *See Houchins*, 438 U.S. at 18–19 (Stewart, J., concurring).

<sup>97</sup> *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 591 (1978).

<sup>98</sup> *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

<sup>99</sup> *See Gannett v. DePasquale*, 443 U.S. 368, 379–80 (1979).

<sup>100</sup> *Richmond Newspapers*, 448 U.S. at 582 (Stevens, J., concurring).

<sup>101</sup> “[O]ur holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute . . . [A] trial judge, in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial.” *Id.* at 581 n.18.

<sup>102</sup> *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (recognizing a qualified right of access to pretrial hearings); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (recognizing a qualified right of access to voir dire); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (striking down a Massachusetts statute that required courtrooms to be closed during the testimony of minor victims of sexual offenses).

<sup>103</sup> *See KPNX Broad. Co. v. Arizona Superior Court*, 459 U.S. 1302 (1982).

<sup>104</sup> *See Richmond Newspapers*, 448 U.S. at 580 n.17 (“Whether the public has a right to attend trials of civil cases is a question not raised by this case.”).

newsgathering questions during the 1970s and 1980s. In *Zurcher v. Stanford Daily*, the Court upheld the prerogative of police to obtain a search warrant for evidence of criminal activity thought to be in the possession of journalists.<sup>105</sup> Writing for the majority, Justice White rejected the argument that the First Amendment required police to use a subpoena duces tecum except where there was reason to believe the evidence might be destroyed or removed and a restraining order would be futile.<sup>106</sup> Following the opinion, and Justice White's tacit invitation,<sup>107</sup> Congress enacted the Privacy Protection Act of 1980<sup>108</sup> requiring subpoenas in all but the most urgent circumstances.

Another case, *Seattle Times Co. v. Rhinehart*,<sup>109</sup> bears mentioning here because, although it is not strictly speaking a newsgathering case, it has been cited by lower courts to deprive journalists of access to discovery materials.<sup>110</sup> In that case, the Court upheld a protective order that prevented the *Seattle Times* from publishing information it had obtained through discovery in litigation to which it was a party, although the decision explicitly declined to preclude dissemination of the information if obtained by the press from other sources.<sup>111</sup>

Thus, the Supreme Court's jurisprudence was marked by a reluctance to extend to newsgathering the same kind of First Amendment protection afforded dissemination, but, ultimately, some kind of rough balance emerged. It came in the form of a constitutional mandate, as in *Richmond Newspapers*, or a legislative reaction, as in *Zurcher*, or both, as in *Branzburg*. In time, a broad constitutional rule might have emerged, but not until the Court chose to review a decision applying state tort law or tort-like causes of action to impose liability on newsgatherers.

One might have expected *Hustler Magazine, Inc. v. Falwell*, in which the Court applied the actual malice standard to a complaint alleging intentional infliction of emotional distress,<sup>112</sup> to serve as a model for that kind of case. The well-known and politically active Reverend Jerry Falwell had been mercilessly and tastelessly parodied in a pornographic magazine.<sup>113</sup> A jury rejected his libel

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<sup>105</sup> See *Zurcher v. Stanford Daily*, 436 U.S. 547, 567-68 (1978).

<sup>106</sup> See *id.* at 563-65.

<sup>107</sup> See *id.* at 567.

<sup>108</sup> 42 U.S.C. § 2000aa (1994 & Supp. 1997).

<sup>109</sup> 467 U.S. 20 (1984).

<sup>110</sup> See, e.g., *Procter & Gamble Co. v. Bankers Trust Co.*, 900 F. Supp. 186, 192 (S.D. Ohio 1995) (holding that a magazine could not publish confidential material from a motion to amend which it had obtained illegally); *infra* notes 353-69 and accompanying text.

<sup>111</sup> See *Seattle Times*, 467 U.S. at 37.

<sup>112</sup> See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

<sup>113</sup> See *id.* at 48.

action, on the ground that the “parody could not ‘reasonably be understood as describing . . . actual events,’” but awarded him \$200,000 in compensatory and punitive damages for intentional infliction of emotional distress.<sup>114</sup> That award was affirmed on appeal,<sup>115</sup> but a unanimous Supreme Court reversed.<sup>116</sup>

Writing for the Court, Chief Justice Rehnquist rejected Falwell’s argument that the actual malice standard of *New York Times Co. v. Sullivan* need not be applied to a tort claim that did not seek redress for reputational damage.<sup>117</sup> Citing the vulnerability such a holding would create for political cartoonists,<sup>118</sup> the Chief Justice concluded that public figures like Falwell would have to show both a false statement of fact and actual malice to recover.<sup>119</sup> Such a standard, he said, “is necessary to give adequate ‘breathing space’ to the freedoms protected by the First Amendment.”<sup>120</sup>

Although he concurred in the judgment, Justice White wrote separately to question what *New York Times Co. v. Sullivan* had to do with this case.<sup>121</sup> Justice White’s reluctance to extend *New York Times Co. v. Sullivan* in *Hustler* would presage his position in *Cohen v. Cowles Media Co.*, which cut short the natural evolution of First Amendment protection for newsgathering and set the stage for many wrongheaded opinions coming out of the lower courts today.

### III. COHEN V. COWLES MEDIA CO.

Dan Cohen was a Minneapolis public relations executive<sup>122</sup> associated with the 1982 gubernatorial campaign of Independent-Republican Wheelock Whitney.<sup>123</sup> In late October 1982, just six days before the general election, Cohen contacted a number of journalists in the St. Paul-Minneapolis area,

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<sup>114</sup> *Id.* at 49.

<sup>115</sup> *See Falwell v. Flynt*, 797 F.2d 1270, 1278 (4th Cir. 1986).

<sup>116</sup> *See Hustler*, 485 U.S. at 57. Justice Kennedy took no part in the decision.

<sup>117</sup> *See id.* at 52–53.

<sup>118</sup> *See id.* at 53.

<sup>119</sup> *See id.* at 56.

<sup>120</sup> *Id.*

<sup>121</sup> *See id.* at 57 (White, J., concurring). Throughout oral argument in *Hustler*, Justice White sought a way to avoid applying *New York Times Co. v. Sullivan* to the case. First, he urged the magazine’s counsel to concede that his case turned on the proposition that a parody of a public figure was never actionable, absent a false statement of fact, then he challenged Falwell’s counsel to explain why, if this cartoon did indeed contain a false statement of fact, his libel claim failed. *See* RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT* 270, 280, 284 (1988).

<sup>122</sup> *See* Bill Salisbury, *Burning the Source*, WASH. JOURNALISM REV., Sept. 1991, at 18.

<sup>123</sup> *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991).

offering to give them information concerning a Democratic-Farmer-Laborite ("DFL") candidate in exchange for a promise of confidentiality.<sup>124</sup> Among the journalists accepting the offer were reporters for the *St. Paul Pioneer Press* and the *Minneapolis Star Tribune*.<sup>125</sup>

Cohen provided the reporters with public court records showing that Marlene Johnson, the DFL candidate for Lieutenant Governor, had previously been arrested for unlawful assembly and petit theft.<sup>126</sup> The unlawful assembly charges, which grew out of a civil rights demonstration, were ultimately dismissed.<sup>127</sup> The candidate had been convicted on the theft charge, which involved a minor shoplifting offense while she had been emotionally distraught, but the conviction was later vacated.<sup>128</sup>

Editors at both the *St. Paul Pioneer Press* and the *Minneapolis Star Tribune* independently decided to print the story and, over their reporters' protests, to include the name of the source.<sup>129</sup> While the *Pioneer Press* editors buried Dan Cohen's name deep in the story, the *Star Tribune* editors featured it, apparently reasoning that the value of the story, if any, lay in Cohen's conduct, not Johnson's.<sup>130</sup> The *Star Tribune* also attacked Cohen in its editorial pages,<sup>131</sup> but neither paper reported that it had broken a promise of confidentiality with Cohen.<sup>132</sup>

When the story broke, Cohen lost his job<sup>133</sup> and later sued the newspapers' publishers alleging fraudulent misrepresentation and breach of contract.<sup>134</sup> Overcoming the publishers' First Amendment claims, Cohen won \$200,000 in compensatory damages and \$500,000 in punitive damages at trial.<sup>135</sup> The Minnesota Court of Appeals struck down the punitive damage award after

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<sup>124</sup> See Salisbury, *supra* note 122, at 19-20. According to Salisbury, the *Pioneer Press* reporter involved, Cohen refused even to describe the information until he received a promise of confidentiality. See *id.* at 20.

<sup>125</sup> See *id.* Associated Press reporter Gerry Nelson and WCCO-TV reporter Dave Nimmer also received the information. See *id.* Nelson's stories did not name Cohen, while Nimmer decided the story was not newsworthy. See *id.* at 20-21.

<sup>126</sup> See *Cohen*, 501 U.S. at 665.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.* at 665-66.

<sup>129</sup> See Salisbury, *supra* note 122, at 21.

<sup>130</sup> See *id.* at 21-22.

<sup>131</sup> See *id.* at 22.

<sup>132</sup> See *id.*

<sup>133</sup> Cohen said he was fired, and that position is adopted by the Supreme Court. See *Cohen*, 501 U.S. at 666. His supervisor said he resigned. See Salisbury, *supra* note 122, at 22.

<sup>134</sup> See *Cohen*, 501 U.S. at 666.

<sup>135</sup> See *id.*

finding that Cohen had failed to establish a fraud claim.<sup>136</sup> The Minnesota Supreme Court struck down the compensatory damage award, holding a contract action “inappropriate” under the circumstances.<sup>137</sup>

During oral argument before the Minnesota Supreme Court, one of the justices asked a question about equitable estoppel.<sup>138</sup> In addressing that issue, the court found it necessary to “balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity.”<sup>139</sup> In this case, the court said, enforcing the promise would violate the newspapers’ First Amendment rights.<sup>140</sup> The United States Supreme Court granted certiorari “to consider the First Amendment implications of this case.”<sup>141</sup>

Writing for a five to four majority,<sup>142</sup> Justice White rejected the newspapers’ argument that this case was controlled by the line of cases holding 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.”<sup>143</sup> Instead, Justice White said, the 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.”<sup>144</sup>

Justice White proceeded to list a number of cases, each of which will be discussed below, purporting to demonstrate that enforcement of general laws against the press is not subject to any “stricter scrutiny than would be applied to enforcement against other persons or organizations.”<sup>145</sup> Finding Minnesota’s

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<sup>136</sup> See *id.* (citing *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 260 (Minn. Ct. App. 1989)).

<sup>137</sup> See *id.* (citing *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990)).

<sup>138</sup> See *id.* at 666–67. “Apparently,” Justice White said, “a promissory estoppel theory was never tried to the jury . . . nor argued by the parties.” *Id.* White went on to deny that it made any difference to the Supreme Court’s jurisdiction, as the newspapers claimed, since the state supreme court had decided the issue as a matter of federal constitutional law. See *id.* at 667–68.

<sup>139</sup> *Cohen*, 457 N.W.2d at 205.

<sup>140</sup> See *id.*

<sup>141</sup> *Cohen*, 501 U.S. at 667.

<sup>142</sup> Dissenting opinions were written by Justice Blackmun, with whom Justices Marshall and Souter joined, and Justice Souter, with whom Justices Marshall, Blackmun, and O’Connor joined. See *id.* at 672, 676.

<sup>143</sup> *Id.* at 668–69 (quoting *Smith v. Daily Mail Publ’g*, 443 U.S. 97, 103 (1979)).

<sup>144</sup> *Id.* at 669.

<sup>145</sup> *Id.* at 669–70. If this quotation is read as merely refusing to recognize a distinction between the institutional press and the general public, it says nothing about the level of scrutiny required when a tort is committed in the *act* of gathering news.

doctrine of promissory estoppel just such a “law of general applicability,” Justice White had no problem applying it to the press.<sup>146</sup> He even suggested that the newspapers’ breaking their promises might serve as a predicate for finding their conduct unlawful, thus arguably negating First Amendment protection for the information itself.<sup>147</sup>

Justice White further distinguished Cohen’s situation from that of a plaintiff seeking to avoid the “strict requirements” for establishing a libel claim by stating an alternative cause of action.<sup>148</sup> Specifically citing *Hustler Magazine, Inc. v. Falwell*, where the Court denied a claim for intentional infliction of emotional distress without a showing of actual malice, Justice White pointed out that Cohen had not sought damages for injury to his reputation or state of mind, but rather for the loss of his job and his lowered earning capacity.<sup>149</sup>

Finally, Justice White tackled the argument that allowing the promissory estoppel claim would inhibit the press from disclosing the identity of a confidential source when, as in *Cohen*, that information is newsworthy.<sup>150</sup> If true, he said, the “chilling effect” would be “no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them.”<sup>151</sup> This analysis begins with the core concept of that masterpiece of circular reasoning: the supremacy of generally applicable law.

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<sup>146</sup> *Id.* at 670.

<sup>147</sup> *See id.* at 671. Justice White did not say that a finding of unlawful newsgathering, without more, would justify a prior restraint on publication. Indeed, his opinion in the Pentagon Papers case suggests he would not go quite that far. But other courts have certainly adopted that interpretation, and Justice White’s language certainly leaves the possibility open. For a full discussion of the notion that illegal conduct in newsgathering removes First Amendment protection from publication of the truthful information thereby obtained, see *infra* Part III.B.

<sup>148</sup> *See Cohen*, 501 U.S. at 671.

<sup>149</sup> *See id.* Nowhere does Justice White explain how these injuries differ. Cohen lost his job because he tried to “sandbag” an opponent, or because he got caught trying. Either way, his injury was reputational. Nor does Justice White explain why the difference, if any, justifies the distinction. One commentator has speculated that Justice White may have believed the distinction to lie in the different degrees of the “chilling effect” resulting from the relatively contained contract damages Cohen was awarded and the virtually unlimited tort damages that Falwell was denied. *See* Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 *BUFF. L. REV.* 1, 83 (1995).

<sup>150</sup> *See Cohen*, 501 U.S. at 671–72.

<sup>151</sup> *Id.* The Court remanded *Cohen* to the Minnesota Supreme Court which ultimately affirmed a \$200,000 judgment for compensatory damages. *See Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 392 (Minn. 1992).

### A. *Laws of General Applicability*

The chief doctrine upon which Justice White relies in *Cohen*, the doctrine of general applicability, may be articulated as follows: as long as a law of general applicability—*e.g.*, tax, antitrust, or fair employment law—was not designed to infringe on a fundamental right—*e.g.*, single out the press for special treatment—then any burden the law might impose on that fundamental right is merely incidental and of no constitutional significance.<sup>152</sup>

In reciting the cases that support his theory, Justice White included several that involve laws that can be fairly categorized as general economic regulations, with no direct bearing on journalistic activities.<sup>153</sup> As a group, these appear to pose only the most attenuated threat to established First Amendment rights and, therefore, show the doctrine in its most innocuous and apparently acceptable form.

#### 1. *General Economic Regulations*

In *Associated Press v. NLRB*,<sup>154</sup> the wire service had discharged an editorial employee, in violation of the National Labor Relations Act, for union organizing and agitating for collective bargaining.<sup>155</sup> The National Labor Relations Board ordered it to cease its anti-union practices and reinstate the fired employee, and, when the Associated Press (“AP”) refused to comply, the court of appeals issued a decree enforcing the order.<sup>156</sup>

In its brief to the United States Supreme Court, the Associated Press argued, *inter alia*, that ordering the employee’s reinstatement was tantamount to giving the NLRB editorial control of the newspaper.<sup>157</sup> The Court rejected that contention out of hand, noting that the NLRB’s order in no way circumscribed the service’s freedom to publish the news as it saw fit and that the service was

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<sup>152</sup> At one point, Justice White states the principle this way: “[G]enerally 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.” *Cohen*, 501 U.S. at 669. At another point, he finds any inhibition on truthful reporting resulting from this decision “no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law.” *Id.* at 672. There is no inquiry, in Justice White’s view, into how burdensome the effects of the law on newsgathering might be.

<sup>153</sup> *See id.* at 669.

<sup>154</sup> 301 U.S. 103 (1937).

<sup>155</sup> *See id.* at 123–25.

<sup>156</sup> *See id.* at 124.

<sup>157</sup> *See* Brief for Petitioner, 1937 U.S. LEXIS 1192, at \*21–24, *Associated Press v. NLRB*, 301 U.S. 103 (1937).

free to discharge any editorial employee who failed to comply with its editorial policies.<sup>158</sup> In reaching that conclusion, the Court pointed out that

[t]he business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the antitrust laws. Like others he must pay equitable and nondiscriminatory taxes on his business.<sup>159</sup>

The Court seemed to justify its application of this general law against the wire service by insisting that the AP retained the ability to “publish the news as it desires it published.”<sup>160</sup> This at least suggests that the Court might have found otherwise if the freedom to publish were in fact curtailed to some unspecified degree by applying the law. It is also instructive that the Court looked upon state libel laws as similar laws of general applicability, especially in view of Justice White’s attempt in *Cohen* to distinguish them.<sup>161</sup>

The connection between the valid application of a general law and the continued right to publish freely, which the Court seemed to find in *Associated Press v. NLRB*, is clarified and emphasized in *Oklahoma Press Publishing Co. v. Walling*.<sup>162</sup> In affirming the right of the Department of Labor to subpoena the records of a newspaper publisher in a Fair Labor Standards Act investigation,<sup>163</sup> the Court held that “[t]he [First] Amendment does not forbid this or other regulation which ends in no restraint upon expression or in any other evil outlawed by its terms and purposes.”<sup>164</sup> There is no suggestion that such a restraint would be merely an “incidental” and “constitutionally insignificant” burden.<sup>165</sup> Indeed, the Court views such a restraint as an “evil” that is “outlawed” by the First Amendment’s “terms and purposes.”<sup>166</sup>

In the antitrust area, Justice White first cites *Associated Press v. United*

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<sup>158</sup> See *Associated Press*, 301 U.S. at 133.

<sup>159</sup> *Id.* at 132–33 (footnotes omitted).

<sup>160</sup> *Id.* at 133.

<sup>161</sup> See *Cohen*, 501 U.S. at 671. The inclusion of libel as a law of general applicability in *Associated Press* reinforces Justice O’Connor’s assertion that “[t]here is nothing talismanic about neutral laws of general applicability.” *Employment Div., Dep’t of Human Resources of Or. v. Smith*, 494 U.S. 872, 901 (1990) (O’Connor, J., concurring) (quoted in *Cohen*, 501 U.S. at 677 (Souter, J., dissenting)).

<sup>162</sup> 327 U.S. 186 (1946).

<sup>163</sup> See *id.* at 188–89, 218.

<sup>164</sup> *Id.* at 193.

<sup>165</sup> *Cohen*, 501 U.S. at 672.

<sup>166</sup> *Walling*, 327 U.S. at 193.



*States*,<sup>167</sup> in which the Supreme Court struck down AP's by-laws as a restraint of trade in violation of the Sherman Antitrust Act.<sup>168</sup> Justice Black, perhaps the Court's most steadfast defender of the First Amendment, declared that "[t]he fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices."<sup>169</sup>

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<sup>167</sup> 326 U.S. 1 (1945).

<sup>168</sup> *See id.* at 12–13. Justice Black deftly turned the Associated Press's own First Amendment argument against it:

Finally, the argument is made that to apply the Sherman Act to this association of publishers constitutes an abridgment of the freedom of the press guaranteed by the First Amendment. Perhaps it would be a sufficient answer to this contention to refer to the decisions of this Court in *Associated Press v. Labor Board* and *Indiana Farmer's Guide Co. v. Prairie Farmer Co.* It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.

*Id.* at 19–20 (citations omitted). In a footnote, Black added:

It is argued that the decree interferes with freedom "to print as and how one's reason or one's interest dictates." The decree does not compel AP or its members to permit publication of anything which their "reason" tells them should not be published. It only provides that after their "reason" has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication. The only compulsion to print which appears in the record is found in the By-Laws, previously set out, which compel members of the Association to print some AP news or subject themselves to fine or expulsion from membership in the Association.

*Id.* at 20 n.18.

<sup>169</sup> *Id.* at 7.

This reference to “business practices” became even more clearly a limitation in Justice White’s second-referenced antitrust case, *Citizen Publishing Co. v. United States*.<sup>170</sup> In striking down a joint operating agreement between Tucson, Arizona’s only two daily newspapers as violating both the Sherman Act and the Clayton Antitrust Act,<sup>171</sup> Justice Douglas—the Court’s other First Amendment “absolutist”—wrote that the restraints imposed by joint operating agreements cannot be justified by the First Amendment.<sup>172</sup> Additionally, Justice Douglas stated that “[n]either news gathering nor news dissemination is being regulated by the present decree. It deals only with restraints on certain business or commercial practices.”<sup>173</sup> Not only did Justice Douglas confine the valid application of this general law to “business or commercial practices,” but he explicitly referred to “news gathering” as a presumably protected activity that was not threatened by enforcing the law.<sup>174</sup>

Finally, turning to the tax code, Justice White cites *Murdock v. Pennsylvania*<sup>175</sup> and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*<sup>176</sup> to support his contention that laws of general applicability do not implicate the First Amendment.<sup>177</sup> It is difficult to see why he thought these cases supported his position. Both struck down ostensibly neutral taxes and, as will be shown, provide even stronger evidence than the others that the doctrine of general applicability is misconceived.

In *Murdock*, the Court barred the application to Jehovah’s Witnesses of an ordinance imposing a flat tax on “all persons canvassing for or soliciting . . . orders for goods, paintings, pictures, wares, or merchandise of any kind.”<sup>178</sup> As applied, Justice Douglas characterized the tax as a “license tax . . . imposed on the exercise of a privilege granted by the Bill of Rights.”<sup>179</sup> Justice Douglas made it quite clear that his holding applied equally under the press and free exercise clauses: “The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of the press and religion as the ‘taxes on knowledge’ at which the First Amendment was partly aimed.”<sup>180</sup>

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<sup>170</sup> 394 U.S. 131 (1969).

<sup>171</sup> *See id.* at 133–35.

<sup>172</sup> *See id.* at 139.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> 319 U.S. 105 (1943).

<sup>176</sup> 460 U.S. 575 (1983).

<sup>177</sup> *See* *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

<sup>178</sup> *Murdock*, 319 U.S. at 106–07, 114–17.

<sup>179</sup> *Id.* at 113.

<sup>180</sup> *Id.* at 114–15.

Moreover, it made no difference to Justice Douglas that the ordinance applied to peddlers as well as preachers:

The fact that the ordinance is “nondiscriminatory” is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.<sup>181</sup>

Justice Douglas does say in passing that neither religious groups nor the press “are free from all financial burdens of government,”<sup>182</sup> but the case hardly supports Justice White’s proposition that the “media . . . must pay nondiscriminatory taxes.”<sup>183</sup>

In *Minneapolis Star*, the Court struck down a use tax imposed on the cost of paper and ink consumed in the newspaper production process.<sup>184</sup> Although the tax had no more sinister purpose than to serve as a surrogate for the state’s general sales tax, an exemption for smaller newspapers resulted in the *Star Tribune*’s bearing a disproportionate burden.<sup>185</sup>

Writing for the majority, Justice O’Connor paid lip service to the limited expression of the doctrine of general applicability found in the labor and antitrust cases: “Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems.”<sup>186</sup> However, *Minnesota Star* really stands for the proposition that even such neutral economic regulations as sales and use taxes may be found constitutionally infirm where First Amendment values may be jeopardized.<sup>187</sup>

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<sup>181</sup> *Id.* at 115.

<sup>182</sup> *Id.* at 112.

<sup>183</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (citing *Murdock*, 319 U.S. at 112, and *Minneapolis Star*, 460 U.S. at 581–83).

<sup>184</sup> See *Minneapolis Star*, 460 U.S. at 592–93.

<sup>185</sup> See *id.* at 578–79.

<sup>186</sup> *Id.* at 581.

<sup>187</sup> Of course, it may be difficult to say just when those values are jeopardized. See, e.g., *Leathers v. Medlock*, 499 U.S. 439, 453 (1991) (exempting certain media from a generally applicable, content-neutral sales tax does not violate the First Amendment where there is no likelihood that the tax will stifle the free exchange of ideas); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 24–25 (1989) (extending state general sales tax to religious publications does not restrain the free exercise of religion where it is not a flat license or

Thus, the cases Justice White cites in *Cohen* support a far less imposing doctrine than the outcome would suggest. Those discussed so far concede only that economic regulations of general applicability may be imposed on businesses engaged in First Amendment activities, including newsgathering and dissemination, provided the integrity of those activities is never threatened. These cases have nothing to say about laws that do not constitute economic regulation, but which still may be applied to obstruct newsgathering or stifle publication of truthful information, such as Minnesota's law of promissory estoppel.

## 2. Nonregulatory Laws

In his litany of cases supporting the doctrine of generally applicable laws,<sup>188</sup> Justice White cites only two cases involving state law unrelated to business regulation: *Branzburg v. Hayes*<sup>189</sup> and *Zacchini v. Scripps-Howard Broadcasting Co.*<sup>190</sup> Apart from their link to *Cohen*, these opinions have two other elements in common: both opinions were written by Justice White and both have been largely confined to their own facts.

Justice White wrote a plurality opinion in *Branzburg* expressing the view that the First Amendment afforded journalists no special privilege to protect the identity of confidential sources or information received in confidence by refusing to testify before a grand jury.<sup>191</sup> His argument began with an articulation of the general applicability doctrine: "It is clear 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."<sup>192</sup> In support, Justice White cited several of the same cases he would later cite in *Cohen*,<sup>193</sup> as well as others involving economic regulation of media businesses.<sup>194</sup>

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occupation tax and poses little threat to religious activity).

<sup>188</sup> See *Cohen*, 501 U.S. at 669.

<sup>189</sup> 408 U.S. 665 (1972).

<sup>190</sup> 433 U.S. 562 (1977).

<sup>191</sup> See *Branzburg*, 408 U.S. at 690-92.

<sup>192</sup> *Id.* at 682.

<sup>193</sup> See *id.* at 683 (citing *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139 (1969); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 192-93 (1946); *Associated Press v. United States*, 326 U.S. 1 (1945); *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)).

<sup>194</sup> See *id.* (citing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (antitrust law); *Mabee v. White Plains Publ'g Co.*, 327 U.S. 178 (1946) (labor and employment law); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (tax law); *Indiana Farmer's Guide Publ'g Co. v. Prairie Farmer Publ'g Co.*, 293 U.S. 268 (1934) (antitrust law)).

Justice White went on to point out that the press is also subject to limitations imposed by state libel laws, may be punished for contempt, and has no constitutional right to information not available to the public generally.<sup>195</sup> In none of these areas, however, could he say, as he would hold in *Cohen*, that First Amendment considerations played no role in how these constraints were applied. For example, *New York Times Co. v. Sullivan*,<sup>196</sup> which Justice White cited first in a list of libel cases,<sup>197</sup> put such an array of First Amendment qualifiers on state libel law that Justice White himself would later question its wisdom.<sup>198</sup> Moreover, at least some form of First Amendment balancing will often take place before a contempt citation or access restriction is imposed on the press.<sup>199</sup>

However, there is no need to challenge Justice White's examples to negate *Branzburg* as authority for *Cohen*'s expression of the general applicability doctrine. Justice White himself undermined that authority by imposing a constitutional caveat in *Branzburg*:

[N]ewsgathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.<sup>200</sup>

That caveat was broadened by Justice Powell's influential (some would say controlling) concurring opinion.<sup>201</sup> Justice Powell reiterated White's

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<sup>195</sup> See *id.* at 683–85.

<sup>196</sup> 376 U.S. 254 (1964).

<sup>197</sup> See *Branzburg*, 408 U.S. at 683–84.

<sup>198</sup> See *supra* notes 65–71 and accompanying text.

<sup>199</sup> With respect to contempt, see, e.g., *In re Providence Journal Co.*, 820 F.2d 1342, 1353 (1st Cir. 1986) (reversing a contempt conviction because the underlying court order was an unconstitutional prior restraint). As for access, see, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580–81 (1980) (holding the right to attend criminal trials is implicit in the guarantees of the First Amendment).

<sup>200</sup> *Branzburg*, 408 U.S. at 707–08 (footnote omitted).

<sup>201</sup> See *id.* at 709–10 (Powell, J., concurring). Lucas Powe says *Branzburg* “was the case that began the press's transformation of Justice Powell into the Sainted Lewis (only a slight exaggeration) by the time he was to be replaced by the mephistophelean Robert Bork.” POWE, *supra* note 31, at 182. In fact, Professor Powe finds “nothing inconsistent” between the opinions of Justices White and Powell in *Branzburg*: “[H]ard and fast rules could be avoided, but in individual cases, when a source deserved protection, a judge might grant it.”

admonition, then moved beyond the “good faith” test Justice White suggested to endorse a protective order where the information sought bears “only a remote and tenuous relationship to the subject of the investigation, or if [the journalist] has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement.”<sup>202</sup> In addition, Justice Powell stated:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.<sup>203</sup>

Precisely what factors go into that balancing varies from circuit to circuit and from state to state, but some balancing requirement can be found in nearly every jurisdiction.<sup>204</sup>

Thus, *Branzburg* stands, not for the implication in *Cohen* that requiring the press to comply with generally applicable laws of evidence has no First Amendment significance, but for the proposition that imposing these generally applicable laws on the press must be carefully balanced against its First Amendment rights.

Finally, in *Cohen*, Justice White cites *Zacchini v. Scripps-Howard Broadcasting Co.* to support the undeniable proposition that “[t]he press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws.”<sup>205</sup> In *Zacchini*, the Court reversed the Ohio Supreme Court’s holding that a First Amendment privilege prevented a circus performer from recovering damages from a television station that taped and aired his entire fifteen-second “human cannonball” performance without his consent.<sup>206</sup> Since *Zacchini* had little to do with copyright infringement,<sup>207</sup> but

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*Id.* at 183. Perhaps, but the vast majority of courts that have considered the issue appear to recognize in Justice Powell’s opinion something much closer to Justice Stewart’s constitutional balancing test than to Justice White’s endorsement of a court’s inherent authority to prevent prosecutorial abuse.

<sup>202</sup> *Branzburg*, 408 U.S. at 710.

<sup>203</sup> *Id.*

<sup>204</sup> See *supra* note 91.

<sup>205</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576–79 (1977)).

<sup>206</sup> See *Zacchini*, 433 U.S. at 563–66.

<sup>207</sup> The Court of Appeals of Ohio found infringement of a common law copyright, but the Ohio Supreme Court and the United States Supreme Court based their decisions squarely on the “right of publicity” claim. See *id.* at 564–65.

rather involved a state tort law claim for appropriating the “right of publicity,”<sup>208</sup> both causes of action should be examined. As has been true in all previous cases, one finds that, in applying either of these laws of general applicability to the press, courts are constrained by First Amendment considerations.

In *Zacchini*, Justice White cited three federal district court decisions that “rejected First Amendment challenges to the federal copyright law on the ground that ‘no restraint [has been] placed on the use of an idea or concept.’”<sup>209</sup> Then, oddly, he reminded the reader that “[*Zacchini*] does not involve a claim that respondent would be prevented by petitioner’s ‘right of publicity’ from staging or filming its own ‘human cannonball’ act.”<sup>210</sup> Justice White dropped this line of reasoning, presumably believing his point was made, namely, that federal copyright law withstands First Amendment scrutiny. But his examples beg the real question here: Is there a First Amendment privilege to take someone else’s performance (or words) without consent?

Of course, there is such a privilege; it is known as “fair use” and it dates back at least to 1841 when Justice Story recognized the doctrine in a case involving George Washington’s letters.<sup>211</sup> The fact that it was ultimately

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<sup>208</sup> Justice White made the connection by noting that the principle underlying the Ohio law protecting *Zacchini*’s right of publicity, namely, to provide him an economic incentive to entertain the public, also underlies federal patent and copyright law.

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

*Id.* at 576 (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

<sup>209</sup> *Zacchini*, 433 U.S. at 577 n.13 (quoting *United States v. Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974)). He also refers to *Walt Disney Productions v. Air Pirates*, 345 F. Supp. 108, 115–16 (N.D. Cal. 1972), and *Robert Stigwood Group Ltd. v. O’Reilly*, 346 F. Supp. 376 (D. Conn. 1972), both of which rely on Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press*, 17 U.C.L.A. L. REV. 1180 (1970).

<sup>210</sup> *Zacchini*, 433 U.S. at 578 n.13.

<sup>211</sup> See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901), discussed in *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985). According to Justice Story:

[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other

codified within the Copyright Act of 1976<sup>212</sup> does nothing to negate or alter its character as a judicially imposed limitation on copyright consistent with, if not compelled by, the First Amendment.<sup>213</sup> The contemporary case of *Harper &*

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hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.

*Folsom*, 9 F. Cas. at 344–45.

<sup>212</sup> The Copyright Act of 1976 states:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, *news reporting*, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1994) (emphasis added).

<sup>213</sup> Earlier studies tend to see “fair use” as a judicial response to the internal logic of Congress’s charge “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” U.S. CONST. art. I, § 8, cl. 8. For example, Horáče Ball wrote:

[T]he author’s consent to a reasonable use of his copyrighted works ha[d] always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained.

HORACE G. BALL, *LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944), *quoted in Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985).

More modern analyses, with a more developed sense of First Amendment values, speak of striking the “difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), *quoted in Harper & Row*, 471 U.S. at 580 (Brennan, J., dissenting). It is interesting, though not particularly relevant,



*Row, Publishers, Inc. v. Nation Enterprises* quotes with approval the Second Circuit Court's assertion that fair use "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression."<sup>214</sup>

Again, the Court recognized, not that laws of general applicability may be applied to the press without considering the First Amendment implications, but that the interests to be protected by those laws must be balanced against First Amendment values before they can be so applied. And what is true of copyright law is equally true of the "right of publicity" tort at issue in *Zacchini*.

Nearly twenty years later, *Zacchini* remains the only "right of publicity" case reviewed by the United States Supreme Court. It is widely interpreted to hold that the First Amendment does not require states to provide a "newsworthiness" defense or any other balancing requirement.<sup>215</sup> But *Zacchini* says only that the First Amendment did not compel Ohio to let the press broadcast *Zacchini*'s entire performance: "Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."<sup>216</sup> Justice White even distinguished *Zacchini* from the so-called "incidental use" cases that typically recognize a First Amendment privilege for use of a name or picture associated with a newsworthy story.<sup>217</sup>

that Justice White joined Brennan's dissent in *Harper & Row*, a dissent that relied heavily on the need to temper the "proprietary right" bestowed by the copyright law in order to "ensure the progress of arts and sciences and the integrity of First Amendment values." *Harper & Row*, 471 U.S. at 589-90.

<sup>214</sup> *Harper & Row*, 471 U.S. at 556 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)).

<sup>215</sup> See, e.g., DONALD M. GILLMOR ET AL., *MASS COMMUNICATION LAW, CASES AND COMMENT* 329 (5th ed. 1990) ("The [*Zacchini*] Court held that the state might provide a newsworthiness defense on state law grounds but was not required to by the First Amendment.").

<sup>216</sup> *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574-75 (1977).

<sup>217</sup> See *id.* at 576. Justice White quotes, with apparent approval, Dean Prosser's discussion of incidental use:

The New York courts were faced very early with the obvious fact that newspapers and magazines, to say nothing of radio, television and motion pictures, are by no means philanthropic institutions, but are operated for profit. As against the contention that everything published by these agencies must necessarily be "for purposes of trade," they were compelled to hold that there must be some closer and more direct connection, beyond the mere fact that the newspaper itself is sold; and that the presence of advertising matter in adjacent columns, or even the duplication of a news item for the

That *Zacchini* does not foreclose a First Amendment balancing requirement is reinforced by Justice White's analogy to copyright cases,<sup>218</sup> where any fair use analysis—*i.e.*, balancing test—would also be dramatically, if not dispositively, influenced by the broadcaster's use of the entire film.<sup>219</sup> Finally, Justice White himself seemed to confine his holding to *Zacchini*'s unique facts: "We conclude that although the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so."<sup>220</sup>

Thus, in all of the cases cited by Justice White in *Cohen*, some kind of balancing was required.<sup>221</sup> His list was not exhaustive, however, and the doctrine of "general applicability" has found its most persuasive contemporary advocate in Justice Scalia, albeit in cases other than press clause cases. Two cases in particular, *Employment Division, Department of Human Resources of Oregon v. Smith*<sup>222</sup> and *Barnes v. Glen Theatre, Inc.*,<sup>223</sup> bear analysis because they involve nonbusiness regulatory laws adversely affecting First Amendment rights.

### 3. *Nonbusiness Regulation*

In *Employment Division*, the Court reversed the Oregon Supreme Court's

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purpose of advertising the publication itself, does not make any difference. Any other conclusion would in all probability have been an *unconstitutional interference with the freedom of the press*. Accordingly, it has been held that the mere incidental mention of the plaintiff's name in a book or a motion picture is not an invasion of privacy; nor is the publication of a photograph or a newsreel in which he incidentally appears.

*Id.* at 574 n.11 (quoting WILLIAM L. PROSSER, *LAW OF TORTS* 806-07 (4th ed. 1971)) (emphasis added).

<sup>218</sup> See *Zacchini*, 433 U.S. at 573.

<sup>219</sup> Keep in mind that the Court found a mere 300 words taken from the 200,000-word manuscript at issue in *Harper & Row* were sufficient to tip the third fair use factor, "[a]mount and [s]ubstantiality of the [p]ortion [u]sed," in favor of the copyright holder where those 300 words formed "the most interesting and moving parts of the entire manuscript." *Harper & Row*, 471 U.S. at 564-66.

<sup>220</sup> *Zacchini*, 433 U.S. at 578-79.

<sup>221</sup> In *Cohen*, Justice White also notes, without citing authority, that "[t]he press may not with impunity break and enter an office or dwelling to gather news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). Absent any known breaking-and-entering cases in which a reporter raised a First Amendment defense, this "example" will be dealt with by analogy to trespass. See *infra* notes 428-31 and accompanying text.

<sup>222</sup> 494 U.S. 872 (1990).

<sup>223</sup> 501 U.S. 560 (1991).

holding that the free exercise clause prohibited the state from denying unemployment benefits to persons discharged for using peyote, in violation of state criminal law, even where the use was an integral part of a religious ceremony.<sup>224</sup> In his majority opinion, Justice Scalia (joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy) held that no balancing test was required to uphold generally applicable, religion-neutral criminal laws that had the effect of burdening a particular religious practice.<sup>225</sup>

To support that position, Justice Scalia found it necessary to distinguish several cases holding otherwise by referring to the speech and press values that were also at issue in those “hybrid” cases.<sup>226</sup> Absent those values or others,<sup>227</sup> in combination with the free exercise issue, no balancing test is required.<sup>228</sup> Thus, whatever else *Employment Division* means, it cannot be read to support the bald assertion that no balancing test need be applied to laws of general applicability that burden free speech or free press rights.

Justice Scalia reserved that leap of logic for *Barnes v. Glen Theatre, Inc.*, in which he wrote an opinion concurring in the judgment that Indiana’s prohibition on public nudity, as applied to nude dancing as entertainment, did not violate the First Amendment’s guarantee of free expression.<sup>229</sup> In that opinion, Justice Scalia broke with former allies Chief Justice Rehnquist and Justice Kennedy, who, with Justices O’Connor and Souter, applied the balancing test prescribed in *United States v. O’Brien*<sup>230</sup> to reach their

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<sup>224</sup> See *Employment Div.*, 494 U.S. at 890.

<sup>225</sup> See *id.* at 884–85.

<sup>226</sup> See *id.* at 881 (citing *Follett v. McCormick*, 321 U.S. 573, 576–78 (1944) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Murdock v. Pennsylvania*, 319 U.S. 105, 108–17 (1943) (same); *Cantwell v. Connecticut*, 310 U.S. 296, 304–07 (1940) (invalidating a licensing system for religious and charitable solicitations under which an administrator had discretion to deny a license to any cause he deemed nonreligious)).

<sup>227</sup> Scalia suggested that a hybrid might also be formed by combining free expression and the “right of parents . . . to direct the education of their children.” *Id.* at 882 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 234–36 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school)).

<sup>228</sup> See *id.* at 881–85.

<sup>229</sup> See *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 572–81 (Scalia, J., concurring).

<sup>230</sup> 391 U.S. 367, 377 (1968). The *O’Brien* test was stated as follows:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential

conclusions.<sup>231</sup>

Justice White, joined by Justices Marshall, Blackmun, and Stevens, dissented, finding Indiana's law not one of general applicability, but rather one directly related to free expression.<sup>232</sup> As a result, Justice Scalia stood alone among those who would uphold the law in concluding:

[T]he only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription.<sup>233</sup>

There is no way to reconcile this view with *O'Brien*, and Justice Scalia conceded that the Court's "discussions" have not always supported his position.<sup>234</sup> What mattered, he suggested, is that the Court had "never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest."<sup>235</sup>

Justice Scalia may not have had the votes in *Barnes*, but his explanation must have impressed Justice White, for when *Cohen* was decided later that same month, Justice White had no trouble buying in and bringing along Chief Justice Rehnquist and Justice Stevens. Thus, alone among speech and press clause precedents, *Cohen* makes no inquiry as to the value of revealing Dan Cohen's identity nor attempts to balance that value against Minnesota's law of promissory estoppel.<sup>236</sup>

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to the furtherance of that interest.

*Id.* at 377, quoted in *Barnes*, 501 U.S. at 567.

<sup>231</sup> Justice Souter wrote separately, identifying the state's interest as combating the secondary effects—like prostitution—of live nude dancing, rather than society's moral views. See *Barnes*, 501 U.S. at 583 (Souter, J., concurring).

<sup>232</sup> See *id.* at 590–93 (White, J., dissenting).

<sup>233</sup> *Id.* at 578 (quoting *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622–23 (D.C. Cir. 1983) (en banc) (Scalia, J., dissenting), *rev'd sub nom.* *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)).

<sup>234</sup> See *id.*

<sup>235</sup> *Id.* at 577.

<sup>236</sup> See David Bogen, *Generally Applicable Laws and the First Amendment*, 26 Sw. U. L. REV. 201, 227–32 (1997).

#### 4. Summary

Justice White's list of the so-called laws of general applicability at issue in these precedents actually includes several different species of law. As noted above, economic regulation of business activity, the paradigm on which Justice White relies most heavily, is scrutinized, not only for motive,<sup>237</sup> but also for effect,<sup>238</sup> before it may be applied to the media. Regulation of other kinds of conduct is subject to so-called "intermediate scrutiny" whenever free speech is threatened.<sup>239</sup> First Amendment values have been judicially built into common law torts<sup>240</sup> and their statutory equivalents.<sup>241</sup> And even rules affecting the courts themselves are subject to some measure of First Amendment review.<sup>242</sup>

Of all the types of law discussed above, Minnesota's law of promissory estoppel, as applied in *Cohen*, is most closely related to the common law torts. But for the contract-like limitation on damages, and correspondingly limited "chilling effect," it could have been a breach of confidence tort.<sup>243</sup> Otherwise, Justice Blackmun was no doubt correct in regarding *Hustler Magazine, Inc. v. Falwell* as controlling precedent for judicially requiring First Amendment scrutiny in *Cohen* and, actual malice being reserved for false speech, in regarding *Smith v. Daily Mail Publishing Co.* as providing the appropriate rule

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<sup>237</sup> See, e.g., *Grojean v. American Press Co.*, 297 U.S. 233, 243-51 (1936) (striking down tax imposed almost exclusively on newspapers that opposed state government policies).

<sup>238</sup> See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-93 (1983) (striking down a use tax imposed only on certain newspapers even without evidence of unconstitutional purpose).

<sup>239</sup> See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567-68 (1991) (upholding state ban on public nudity after applying the *O'Brien* test); *United States v. O'Brien*, 391 U.S. 367, 376-77, 386 (1968) (upholding conviction for burning a draft card after applying a four-part balancing test). But see *Bogen*, *supra* note 236, at 204 (proposing that *O'Brien* is "under attack").

<sup>240</sup> See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56-57 (1988) (extending the actual malice standard to intentional infliction of emotional distress); *Time, Inc. v. Hill*, 385 U.S. 374, 384-88 (1967) (extending the actual malice standard to invasion of privacy); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-83 (1964) (requiring a public official to prove actual malice before recovering for libel).

<sup>241</sup> See, e.g., *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-06 (1979) (barring statutory liability for the publication of truthful information, lawfully obtained, absent a state interest of the highest order); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 541-42 (1969) (subjecting news media use of copyrighted material to fair use analysis).

<sup>242</sup> See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972) (making courts available to quash grand jury subpoenas served on news media without good reason).

<sup>243</sup> See *Gilles*, *supra* note 149, at 79-83.

to apply:<sup>244</sup> “To the extent that truthful speech may ever be sanctioned consistent with the First Amendment, it must be in furtherance of a state interest ‘of the highest order.’”<sup>245</sup>

Justice White’s responses to Justice Blackmun included a spurious distinction between civil liability and “punishment,” the dubious notion that First Amendment rights can be waived by something concededly less than a contract, and the meaningless truism that Cohen, unlike Falwell, was not trying to avoid constitutional libel standards.<sup>246</sup> Justice White’s antipathy toward those standards is well established,<sup>247</sup> but his attempted distinction missed the essence of *Hustler* and of *New York Times Co. v. Sullivan*,<sup>248</sup> in which those standards were first enunciated.<sup>249</sup> In both cases, the Court refused to punish speech that met all of the elements of a state-law tort because those elements were not sufficient to protect First Amendment interests.<sup>250</sup>

Both the tort of libel and that of intentional infliction of emotional distress (“IIED”) could fairly be called laws of general applicability. And although libel law inherently implicates speech interests, IIED need not involve speech any more than promissory estoppel needs to involve speech.<sup>251</sup> Still, the Court imposed the full protection of *New York Times Co. v. Sullivan* libel standards

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<sup>244</sup> See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 674–76 (1991) (Blackmun, J., dissenting).

<sup>245</sup> *Id.* at 676 (Blackmun, J., dissenting) (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).

<sup>246</sup> See *id.* at 670–71. Justice White even supports the latter response with a quote from the Minnesota Supreme Court that, by any logic, should cut the other way: “Cohen could not sue for defamation because the information disclosed was true.” *Id.* at 671.

<sup>247</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369 (1974) (White, J., dissenting); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 262 (1974) (White, J., concurring).

<sup>248</sup> 376 U.S. 254 (1964).

<sup>249</sup> Indeed, Justice White finds “[t]he central meaning of *New York Times [Co. v. Sullivan]*, and for me the First Amendment as it relates to libel laws, is that seditious libel—criticism of government and public officials—falls beyond the police power of the state.” *Gertz*, 418 U.S. at 387 (White, J., dissenting).

<sup>250</sup> In *Hustler*, the Court explicitly declined to

find that a State’s interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual fact about the public figure involved.

*Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

<sup>251</sup> See Gilles, *supra* note 149, at 77.

when speech that otherwise satisfied all the elements of the tort criticized a political figure.<sup>252</sup> Nor is it sufficient to write *Hustler* off as a special case, involving a parody that no one could have taken as fact. The Court's opinion leaves no doubt that, had the cartoon incorporated believable elements, an actual malice analysis would have been required.<sup>253</sup>

The operative reason for denying some degree of constitutional scrutiny in *Cohen* is revealed in Justice White's argument that the Minnesota newspapers may not have "obtained Cohen's name 'lawfully' in this case, at least for purposes of publishing it."<sup>254</sup> Although the breach of promise technically occurred upon publication, Justice White saw the violation of law as a part of the newsgathering process.<sup>255</sup>

Exactly what consequences flow from unlawful newsgathering remain unclear. At the very least, Justice White must have meant that publication of information obtained unlawfully is not entitled to full First Amendment protection; otherwise, he would not have distinguished *Florida Star v. B.F.J.*<sup>256</sup> in the very next sentence.<sup>257</sup> Because the newsgatherer is already liable for any crime or tort committed before publication, then, to give meaning to Justice White's dictum, the violation must also render the publisher liable for criminal or tortious publication without the First Amendment scrutiny that might otherwise be required when the law is applied to the press. From there, it is but a very short step to holding that, where circumstances permit, a court may enjoin publication of illegally obtained information. Even if it was not Justice White's intention to make that leap, even if his sensitivity to prior restraint had not softened in the twenty years between the Pentagon Papers case and *Cohen*, his opinion has undeniably emboldened other courts to restrain illegally obtained information.<sup>258</sup>

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<sup>252</sup> See *id.* at 76-77.

<sup>253</sup> "This is not merely a 'blind application' of the *New York Times* [*Co. v. Sullivan*] standard," Chief Justice Rehnquist wrote for the majority in *Hustler*, "it reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler*, 485 U.S. at 56.

<sup>254</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991).

<sup>255</sup> See *id.*

<sup>256</sup> 491 U.S. 524 (1989).

<sup>257</sup> See *Cohen*, 501 U.S. at 671.

<sup>258</sup> See *infra* notes 346-68 and accompanying text.

## B. Unlawful Newsgathering

### 1. The Constitutional Privacy Cases

In deciding that *Cohen* was controlled by the line of cases enforcing “laws of general applicability” against the media, Justice White summarily dismissed the newspapers’ assertion that the case should be controlled by the line of constitutional privacy cases that culminates in 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.”<sup>259</sup> In so doing, however, he misstated the holdings of those cases and then adopted them: “As the cases relied upon by . . . [the newspapers] recognize, the truthful information sought to be published must have been lawfully acquired.”<sup>260</sup> Those cases say nothing of the sort. However, Justice White’s misstatement has been embraced by lower court judges.<sup>261</sup>

The origin of the doctrine is usually ascribed to *Cox Broadcasting Corp. v. Cohn*,<sup>262</sup> which held that a state law criminalizing the publication of a rape victim’s name could not be the basis for a civil action against a television station that obtained the name from official court records available to the public.<sup>263</sup> Writing for the majority, Justice White merely observed that Cohn “has not contended that the name was obtained in an improper fashion,”<sup>264</sup> without any discussion of how that might have altered the outcome.<sup>265</sup> In *Oklahoma Publishing Co. v. District Court*,<sup>266</sup> the Court again merely observed the

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<sup>259</sup> *Cohen*, 501 U.S. at 668–69 (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).

<sup>260</sup> *Id.* at 669.

<sup>261</sup> *See, e.g.*, *Scheetz v. Morning Call Inc.*, 946 F.2d 202, 213 (3d Cir. 1991) (Mansmann, J., dissenting). Judge Mansmann explained:

I concur with the district court’s determination that the [F]irst [A]mendment values [of information regarding spousal abuse by a police officer] outweigh the Scheetzes’ privacy interest, but I would vacate the order of the district court and remand for trial, nevertheless, because if proven, the fact that The Call knowingly acquired the information in an unlawful manner should permit the plaintiffs to recover.

*Id.* at 207 (Mansmann, J., dissenting).

<sup>262</sup> 420 U.S. 469 (1975).

<sup>263</sup> *See id.* at 496–97.

<sup>264</sup> *Id.* at 496.

<sup>265</sup> *See id.* at 496–97.

<sup>266</sup> 430 U.S. 308 (1977) (per curiam).



absence of “evidence that [the publisher] acquired the information unlawfully”<sup>267</sup> as it unanimously struck down a pretrial order enjoining the publication of the name or photograph of a juvenile defendant acquired by the news media in open court proceedings.<sup>268</sup> In *Landmark Communications, Inc. v. Virginia*,<sup>269</sup> an opinion striking down criminal sanctions against a newspaper that published an accurate report of the confidential proceedings of a state judicial inquiry commission, Chief Justice Burger refined the issue before the Court by noting, “We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it.”<sup>270</sup> Nothing more was said on the subject, but the holdings of all three of these cases were subsequently characterized in *Smith v. Daily Mail Publishing Co.* as “suggest[ing] strongly” the principle quoted above as later relied on by the newspaper in *Cohen*.<sup>271</sup> In *Smith*, the Court struck down a state law imposing criminal sanctions on a newspaper that published the name of a juvenile offender acquired by “asking various witnesses, the police, and an assistant prosecuting attorney” at the scene of the crime.<sup>272</sup> Again, Chief Justice Burger made the point that the case did not involve any unlawful conduct by the news media,<sup>273</sup> but offered no dicta on the subject.

A decade later, the Court had occasion to revisit the issue in *Florida Star v. B.J.F.*,<sup>274</sup> in which it reversed the imposition of civil damages against a newspaper for publishing the name of a rape victim that appeared in a report that police inadvertently placed in its press room.<sup>275</sup> In a footnote to the majority opinion, Justice Marshall wrote:

The *Daily Mail* principle does not settle the issue of whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source,

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<sup>267</sup> *Id.* at 311.

<sup>268</sup> *See id.* at 311–12.

<sup>269</sup> 435 U.S. 829 (1978).

<sup>270</sup> *Id.* at 837. While there was nothing in the record to indicate how *Landmark* acquired the information, it is quite clear that the information came from a participant in the proceedings. *See Landmark Communications, Inc. v. Virginia*, 233 S.E.2d 120, 123 n.4 (Va. 1977). *Landmark* specifically argued that the “information concerning the judge in question ‘lost its confidentiality’ and ‘became public upon its first disclosure’ by a participant in the proceedings, and all *Landmark* did was to publish information ‘which was voluntarily and freely given to it.’” *Id.* at 123 (emphasis omitted).

<sup>271</sup> *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979).

<sup>272</sup> *Id.* at 99. The *Smith* Court characterized as lawful the newspaper’s “routine newspaper reporting techniques.” *Id.* at 103.

<sup>273</sup> *See id.* at 103–05.

<sup>274</sup> 491 U.S. 524 (1989).

<sup>275</sup> *See id.* at 527–29.

government may ever punish not only the unlawful acquisition, but the ensuing publication as well. This issue was raised but not definitively resolved in *New York Times Co. v. United States*, and reserved in *Landmark Communications*. We have no occasion to address it here.<sup>276</sup>

Such was the true state of the law when, in *Cohen*, Justice White wrote that the issue had been settled by these very cases and that First Amendment protection extended only to information that had been lawfully obtained.<sup>277</sup>

The pre-*Cohen* Court was justifiably hesitant to settle this issue in the context of the privacy cases. First, no case worthy of review squarely presented the issue of a newsgatherer behaving unlawfully. Apart from violating the very statute or common law proscription whose constitutionality was at issue, none of the reporters in these cases committed any unlawful acts. Indeed, because so few cases involve a newsgatherer blatantly behaving unlawfully, a “good” case may never reach the Supreme Court. A more fundamental reason for treading carefully in this area is that such a rule trenches on the First Amendment rights of the general public no less than it trenches on the rights of the publisher or broadcaster.

## 2. *The Right to Receive Information*

The Supreme Court has repeatedly insisted that the First Amendment right of free speech and press includes the public’s right to receive information as well as the publisher’s or broadcaster’s right to disseminate it. Sometimes those rights have conflicted, and the question was which should triumph;<sup>278</sup> at other times, the rights have coincided and reinforced each other.<sup>279</sup> *Cohen* was a case

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<sup>276</sup> *Id.* at 535 n.8 (citations omitted).

<sup>277</sup> See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (“As the cases relied on by respondents recognize, the truthful information sought to be published must have been lawfully acquired.”).

<sup>278</sup> See, e.g., *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974) (holding the First Amendment right of editors to select what should be printed in a newspaper superior to a statutory public right of reply to what was printed); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389–90 (1969) (holding the First Amendment right of the viewers and listeners superior to the right of the broadcasters in justifying content regulation of broadcasting).

<sup>279</sup> See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980) (finding a First Amendment right of access to criminal trials in the public’s “freedom to listen,” which is inherent in and gives meaning to freedom of speech and of the press); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 775–86 (1978) (striking down a state law limiting the political speech of corporations based on the inherent value of political speech independent of the speaker’s identity); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756–70 (1976) (striking down a restriction on price advertising as

of the latter type, although the Supreme Court failed utterly to consider that aspect of the case. Notwithstanding thoughtful academic protestations to the contrary,<sup>280</sup> the Court has embraced the notion that the public's "right to know" is a serious First Amendment interest, a bona fide nexus between newsgathering and constitutional protection. A corollary of that principle is that the Constitution protects the speech itself, no less than the speaker,<sup>281</sup> and to the extent that protection attaches to speech, that speech may not be suppressed absent an overriding governmental interest.

That the Constitution protects the right of the public to receive information is fundamental to mainstream theories of the First Amendment.<sup>282</sup> The "marketplace of ideas" contains "buyers" as well as "sellers." Ironically, one of the most articulate expressions of this aspect of the First Amendment right comes from Justice White's opinion in *Red Lion Broadcasting Co. v. FCC*.<sup>283</sup> Upholding the Federal Communications Commission's "Fairness Doctrine," which was a series of regulations that required broadcasters to carry diverse views on controversial issues, including a "right of reply" to personal attacks,

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violating the First Amendment rights of speaker and recipient alike).

<sup>280</sup> Lucas Powe writes, "[A]part from Justice Douglas, and with the exception of some overblown dicta from other justices, the Court never saw the right-to-know model as a viable First Amendment doctrine." POWE, *supra* note 31, at 259. While the importance of Powe's misgivings about the slippery slope toward government regulation of the press that the right-to-know model suggests should not be underestimated, particularly in light of outright advocacy by such influential scholars as Owen Fiss, *see, e.g.*, OWEN M. FISS, *THE IRONY OF FREE SPEECH* 17-18, 22-25, 57 (1996), Powe both overstates the danger and understates the extent to which right-to-know has been absorbed into the constitutional jurisprudence. There is a need to recognize and accept, as the Court has, a strong right-to-know thread in a tapestry of First Amendment theory that values the speaker's autonomy above all. In that regard, Bollinger's ambivalence is more appropriate than either Powe's libertarianism or Fiss's communitarianism, although the dual system he recommends (unregulated print media, regulated electronic media) is increasingly unsatisfactory as new media emerge to obscure the bright lines. *See* BOLLINGER, *supra* note 67, at 117.

<sup>281</sup> *See Virginia State Bd. of Pharmacy*, 425 U.S. at 756 (Where a willing speaker exists, "the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both.").

<sup>282</sup> *See, e.g.*, Emerson, *supra* note 25, at 882 ("Through the acquisition of new knowledge, the toleration of new ideas, the testing of opinion in open competition, the discipline of rethinking its assumptions, a society will be better able to reach common decisions that will meet the needs and aspirations of its members."); Meiklejohn, *supra* note 28, at 255 ("Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."). Excerpts from both articles appear in *FIRST AMENDMENT ANTHOLOGY* 2, 8 (Donald E. Lively et al. eds., 1994).

<sup>283</sup> 395 U.S. 367 (1969).

Justice White declared:

The people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be abridged either by Congress or by the FCC.<sup>284</sup>

That is not to say that, in any contest between the rights of the public and the rights of the speaker, the rights of the public will always prevail. When a similar "right of reply" question involving newspapers, rather than broadcast stations, arose in *Miami Herald Publishing Co. v. Tornillo*<sup>285</sup> half a decade later, Justice White joined a unanimous Court in reversing the balance.<sup>286</sup> The right of the people to a diversity of views was not denied in the *Tornillo* case, but merely subordinated to the superior First Amendment rights accorded to print, but not broadcast, media.<sup>287</sup>

In other cases, the right of the public to receive information works in concert with the right of speakers to provide it. One such case was *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>288</sup> With only the Chief Justice dissenting, the Court struck down a state law prohibiting licensed pharmacists from advertising the price of prescription drugs.<sup>289</sup> Writing for the Court, Justice Blackmun pointed out that precedent going back to the 1940s held that the freedom of speech necessarily protects the right to receive information and ideas.<sup>290</sup> "If there is a right to advertise," Justice Blackmun wrote, "there is a reciprocal right to receive the advertising."<sup>291</sup>

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<sup>284</sup> *Id.* at 390.

<sup>285</sup> 418 U.S. 241 (1974).

<sup>286</sup> *See id.* at 259-63 (White, J., concurring).

<sup>287</sup> Owen Fiss laments that *Red Lion* has become an "empty" precedent, especially in light of *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994) (remanding legislation regulating cable television's carriage of broadcast signals), which treated *Red Lion* as a "formal vestige of another era." FISS, *supra* note 280, at 69, 72. Like Powe on the opposite side of this issue, Fiss cannot seem to separate the idea of a public right to know from its dominant or subordinate position vis-a-vis the speaker's right to speak in a given case. *See id.* at 17-18, 22-25, 57; POWE, *supra* note 31, at 235-59.

<sup>288</sup> 425 U.S. 748 (1976).

<sup>289</sup> *See id.* at 773.

<sup>290</sup> *See id.* at 757 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) and other cases).

<sup>291</sup> *Id.*

Most significantly for this discussion, Justice Blackmun expressly stated the necessary corollary of the “right to receive”—namely that the First Amendment right attaches to the communication itself, no less than to the speaker or the audience.<sup>292</sup>

That notion was ratified in *First National Bank of Boston v. Bellotti*, in which the Court struck down a Massachusetts statute that limited the political speech of corporations to matters directly affecting their businesses.<sup>293</sup> Justice Powell wrote: “The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”<sup>294</sup> When that speech is constitutionally protected, he added, “the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.”<sup>295</sup>

Finally, in *Richmond Newspapers, Inc. v. Virginia*, the Court reaffirmed that “[f]ree speech carries with it some freedom to listen.”<sup>296</sup> Finding few, if any, aspects of government “of higher concern and importance to the people” than the way criminal trials are conducted, the Court declared that “the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time the First Amendment was adopted.”<sup>297</sup>

The inescapable lesson to be drawn from these holdings is that First Amendment protection attaches to the speech itself, as well as to the speaker and the audience. Thus, the speaker is irrelevant to the First Amendment value of the speech. In the context of news or information that is unlawfully acquired, these precedents would dictate that the means of acquisition is similarly irrelevant to the value of the speech.

### C. Application to *Cohen v. Cowles Media Co.*

There is no need to debunk the *Cohen* dicta regarding laws of general applicability or unlawfully acquired information in order to conclude that *Cohen* itself was wrongly decided.<sup>298</sup> Although the promise occurred during

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<sup>292</sup> See *id.* at 756.

<sup>293</sup> See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775–86 (1978).

<sup>294</sup> *Id.* at 777.

<sup>295</sup> *Id.* at 784–85.

<sup>296</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980).

<sup>297</sup> *Id.* at 575–76.

<sup>298</sup> This opinion, of course, is not universally held. Jerome Barron, for example, argues that *Cohen* could actually improve the untrammelled flow of news and perhaps provide greater protection for the press in the long run. See Jerome A. Barron, *Cohen v. Cowles Media and*

newsgathering, the breach depended upon publication. The injury arose from publication, not newsgathering, and the damages, although characterized as nonreputational, were precisely that. Dan Cohen did not lose his job because he was promised confidentiality, or even because the promise was broken, but rather because the story exposed his lack of character.<sup>299</sup> Under those circumstances, Minnesota's law of promissory estoppel was no more a law of general applicability than libel, invasion of privacy, or intentional infliction of emotional distress. *Hustler Magazine, Inc. v. Falwell* should have controlled the outcome just as Justice Blackmun insisted.<sup>300</sup>

But even if promissory estoppel could properly be characterized as a law of general applicability, the precedents discussed above show conclusively that whatever harms may occur from a violation must be balanced against any First Amendment interests at stake. On the merits, the First Amendment value of the revelation in *Cohen* was of highest order—truthful information about dirty tricks in political campaigns—and was vital to an informed electorate.<sup>301</sup> Any

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*Its Significance for First Amendment Law and Journalism*, 3 WM. & MARY BILL OF RTS. J. 419, 419 (1994). Of all of the analyses published in the years immediately following *Cohen*, the article that most closely parallels this Article is Gregory F. Monday, Note, *Cohen v. Cowles Media Is Not a Promising Decision*, 1992 WIS. L. REV. 1243.

<sup>299</sup> One might compare this with Judge Tilley's refusal to allow Food Lion to recover for loss of business or drop in stock price unless it was willing to raise a legal claim against ABC's broadcast, rather than merely its newsgathering practices. See *infra* note 415 and accompanying text.

<sup>300</sup> See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 674–75 (1991) (Blackmun, J., dissenting).

<sup>301</sup> In another case involving political campaigns, the Court pointed out that there is little doubt that “public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* [*Co. v. Sullivan*] rule” and the strongest possible case for independent review. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971). As Madison observed in 1800, just nine years after ratification of the First Amendment:

Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.

Madison's Report on the Virginia Resolutions (House of Delegates Session of 1799–1800), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 575 (Jonathon Elliot ed., 1861). The Court has also pointed out that “[t]his value must be protected with special vigilance. . . . Vigorous reportage of political campaigns is

injury on the other side of the scale was the result of Dan Cohen's decision to reveal unsavory trivia about a political opponent. Only the notion that speech loses its First Amendment value if unlawfully acquired could tip the balance the other way.

Even if that were good law, the information in *Cohen* was not unlawfully acquired. Cohen's identity as the source of the unsavory information was freely given to the reporters, who, in turn, had every intention of keeping their promise of confidentiality. There was no fraud or misrepresentation in the acquisition. If there was a breach—indeed, one might argue that Cohen misrepresented his information, which was both irrelevant to the campaign and publicly available—it occurred upon publication. Justice White's musings about unlawfully acquired information were merely dicta.

But even if the information were unlawfully acquired, the Court's own precedents hold that First Amendment protection attaches to the speech, independent of the speaker, for the benefit of the audience, and countervailing policy arguments are inadequate to overcome that protection. The public deserved to know what Dan Cohen did, and the papers should not have been held liable for publishing the information. Journalistic ethics aside,<sup>302</sup> the First

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necessary for the optimal functioning of democratic institutions and central to our history of individual liberty." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 687 (1989).

<sup>302</sup> *Cohen*, of course, has become a case study in journalistic ethics as well as First Amendment law. Much was made by the Minnesota Supreme Court of the ethical component in deciding that Cohen's case was justified on public policy grounds:

What is significant in this case is that the record shows the defendant newspapers themselves believed that they generally must keep promises of confidentiality given a news source. The reporters who actually gave the promises adamantly testified that their promises should have been honored. The editors who countermanded the promises conceded that never before or since have they reneged on a promise of confidentiality. A former Minneapolis Star managing editor testified that the newspapers had "hung Mr. Cohen out to dry because they didn't regard him very highly as a source." The Pioneer Press Dispatch editor stated nothing like this had happened in her 27 years in journalism. The Star Tribune's editor testified that protection of sources was "extremely important." Other experts, too, stressed the ethical importance, except on rare occasions, of keeping promises of confidentiality. It was this long-standing journalistic tradition that Cohen, who has worked in journalism, relied upon in asking for and receiving a promise of anonymity.

*Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391–92 (Minn. 1992). After *Cohen*, the issue was treated with more ambivalence in one leading journalism ethics text:

Amendment should have precluded any judgment for Cohen. It did not, of course, and the fallout from *Cohen* is already apparent at the trial level and even among appellate judges.

#### IV. THE *COHEN* MALEDICTA IN COURT

The mischief done by the *Cohen* "maledicta" is readily apparent in any review of the post-*Cohen* newsgathering cases that have come before state and federal courts. This survey looks first at a series of broken-promise cases that show the impact of the *Cohen* opinion on lower courts considering similar, but factually and legally distinguishable, issues. Then it will turn to some very different post-*Cohen* cases to illustrate how the *Cohen* dicta regarding unlawfully acquired information and generally applicable laws have been used (or misused) in an effort to punish newsgathering practices.

##### A. *The Broken-Promise Cases*

Among the earliest victims of the *Cohen* decision, of course, were the defendants in the *Cohen* case itself. On remand, the Supreme Court of

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The ethical conflict in this case is between two virtues: 1) the right of the source to expect a promise to be kept and 2) the feeling of the editors that the audience needed the information about the source. Audiences' need for that information should be so great that damage done by the breaking of a reporter's (and hence, the newspaper's) promise is acceptable.

The key ethical question may lie in the editors' motives. If their intent was to inform readers about a campaign tactic they considered questionable, justification comes fairly easily. If, however, editors were even subconsciously trying to embarrass a candidate by trying to expose the candidate's agent, ethical justification becomes prohibitively difficult. Generally, any good that may come from embarrassing the candidate will be more than offset by damage to the newspaper's reputation among sources, and probably among readers. Violations of promises have a heavy burden to produce some greater good. In this case, that "good" would be a fully informed readership presumably better able to make a voting decision.

As in other ethics issues, editors are obliged to search their own minds for motives. In their social role, editors can most easily defend an action that places audience interest first, and can be justified to the audience. Editors should acknowledge to their readers or listeners that publication of the source's name was not a matter taken lightly, recognizing that future coverage may be at risk because other sources will be reluctant to confide in reporters.



Minnesota accepted the proposition that “the doctrine [of promissory estoppel] is one of general application . . . and its employment to enforce confidentiality promises has only ‘incidental effects’ on news gathering and reporting, so that the First Amendment is not offended.”<sup>303</sup> The court went on to reject the defendants’ procedural and public policy arguments, and declined to read the state’s own constitutional press clause more expansively than the First Amendment.<sup>304</sup> Instead, it applied a pure promissory estoppel analysis to the facts of the case<sup>305</sup> and came to this remarkable conclusion:

Neither side in this case clearly holds the higher moral ground, but in view of the defendants’ concurrence in the importance of honoring promises of confidentiality, and absent the showing of any compelling need in this case to break that promise, we conclude that the resultant harm to Cohen requires a remedy here to avoid an injustice. In short, defendants are liable in damages to plaintiff for their broken promise.<sup>306</sup>

It may have been the first time any court has required a newspaper to show a “compelling need” to publish in order to avoid damages.

The *Cohen* defendants were not, however, the first to suffer from the decision; that honor appears to belong to Conde Nast Publications. The Eighth Circuit seized upon the *Cohen* opinion while the ink was still drying to reverse a summary judgment for Conde Nast in another Minnesota confidentiality case.

In *Ruzicka v. Conde Nast Publications, Inc.*,<sup>307</sup> the plaintiff, Jill Ruzicka, a sexual abuse victim, agreed to be interviewed for a story on sexual abuse by therapists in *Glamour Magazine*. Co-defendant Claudia Dreifus, who wrote the story, promised Ruzicka that her name would not be used and that she would not be identifiable from the article. When the article was published, Ruzicka claimed that the steps taken to mask her identity were inadequate, although she named only two former therapists as having identified her, and filed suit in federal district court for breach of contract, fraudulent misrepresentation, invasion of privacy, intentional infliction of emotional distress, and unjust enrichment.<sup>308</sup> The court granted summary judgment on all counts, finding the agreement too vague to constitute a waiver of the magazine’s First Amendment rights<sup>309</sup> and balancing the relevant interests in favor of the press.<sup>310</sup> “[A]t a

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<sup>303</sup> *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 389–90 (Minn. 1992).

<sup>304</sup> *See id.* at 390–91.

<sup>305</sup> *See id.* at 391.

<sup>306</sup> *Id.* at 392.

<sup>307</sup> 733 F. Supp. 1289 (D. Minn. 1990), *rev’d*, 939 F.2d 578 (8th Cir. 1991).

<sup>308</sup> *See Ruzicka*, 733 F. Supp. at 1292.

<sup>309</sup> *See id.* at 1298.

<sup>310</sup> *See id.* at 1300–01 (“The Court has no doubt that in balancing the rights of the free

minimum," the court said, "the Constitution requires plaintiffs in contract actions to enforce a reporter-source agreement to prove specific, unambiguous terms and to provide clear and convincing proof that the agreement was breached," neither of which was present here.<sup>311</sup>

By the time the case reached the Eighth Circuit on appeal, the United States Supreme Court had already rejected the First Amendment ground upon which the Minnesota Supreme Court had denied Cohen recovery under a promissory estoppel theory.<sup>312</sup> Accordingly, the Eighth Circuit panel summarily dismissed the district court's constitutional analysis.<sup>313</sup> It affirmed that court's dismissal of the breach of contract and state tort actions, but remanded the case to the district court to consider the promissory estoppel theory.<sup>314</sup> The district court, on remand, found neither the promise nor the breach to be clear and unambiguous, even absent the heightened burden that a First Amendment analysis would impose.<sup>315</sup> On appeal once again, the Eighth Circuit vacated the judgment and sent the case back for trial, finding the promise sufficiently definite for a jury to determine its scope and adopting the Minnesota Supreme Court's standard of a "compelling need" to break the promise.<sup>316</sup> The parties settled in early 1995.<sup>317</sup>

Perhaps no broken-promise case more clearly demonstrates the impact of *Cohen v. Cowles Media Co.* than the New York case of *Anderson v. Strong Memorial Hospital*.<sup>318</sup> In that case, plaintiff Anderson was a patient in the defendant Strong Memorial Hospital, being treated by defendant Valenti, a physician specializing in AIDS research. Seeking Anderson's consent to be photographed for a story on Valenti's work, a Gannett reporter promised that Anderson would not be recognizable. When the photograph was published, however, Anderson was recognized by friends and family.<sup>319</sup>

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press with common contractual rights, the free press rights under the [F]irst [A]mendment must be given preference.").

<sup>311</sup> *Id.* at 1300.

<sup>312</sup> The district court in *Ruzicka* was well aware of the *Cohen* case, which had just been argued in the state supreme court, but declined to adopt the federal constitutional analysis of the state's intermediate appellate court, which had found the defendants liable for breach of contract. *See Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 256-57 (Minn. Ct. App. 1989).

<sup>313</sup> *See Ruzicka*, 939 F.2d at 582 n.5.

<sup>314</sup> *See id.* at 583.

<sup>315</sup> *See Ruzicka v. Conde Nast Publications, Inc.*, 794 F. Supp. 303, 309, 311 (D. Minn. 1992).

<sup>316</sup> *See Ruzicka v. Conde Nast Publications, Inc.*, 999 F.2d 1319, 1323 (8th Cir. 1993).

<sup>317</sup> *See Barbara W. Ball & John P. Borger, Broken Promises in the Aftermath of Cohen*, COMMUNICATIONS LAWYER, Spring 1995, at 18.

<sup>318</sup> 573 N.Y.S.2d 828 (N.Y. Sup. Ct. 1991).

<sup>319</sup> *See id.* at 829-30.

Anderson's lawsuit against Gannett for libel and invasion of privacy was dismissed, but his estate was awarded damages of \$35,000 from Strong Memorial Hospital and Valenti for their breach of the confidential patient-physician privilege. They, in turn, claimed contribution from Gannett based on its alleged negligence, negligent misrepresentation, breach of contract, and causing the breach of the patient-physician privilege.<sup>320</sup>

Denying Gannett's motion to dismiss the contribution action, the court found that *Cohen* effectively disposed of any federal constitutional question and declined to read New York's more expansive constitutional protection to encompass the disclosure of the identity of HIV-AIDS patients.<sup>321</sup> Rather, the court cited *Cohen* for the proposition that "an unkept promise to a news source makes the press' conduct unlawful"<sup>322</sup> and that "[c]ompelling the press to respect a promise made and relied upon . . . does no more than compel the press to act as any other responsible citizen with respect to laws of general application."<sup>323</sup>

In embracing the entire *Cohen* rationale, the *Anderson* court declined to follow a pre-*Cohen* appellate division precedent that applied defamation-like protections to dismiss a broken-promise claim couched as negligence. In *Virelli v. Goodson-Todman Enterprises, Ltd.*,<sup>324</sup> plaintiffs had alleged that they were identifiable in an article on drug abuse published by the defendant, despite their conditioning their consent to be interviewed on the reporter's promise not to disclose their identities.<sup>325</sup> Finding the damages sought indistinguishable from injury to reputation and emotional distress, the court held that ordinary negligence was a constitutionally insufficient basis upon which to impose liability.<sup>326</sup>

Consistent with the broader applicability of the procedural protections to media defendants already discussed, but first applied in the context of defamation actions, these protections have been expressly extended by the United States Supreme Court to actions under the New York right of privacy statute, to actions for intentional infliction of emotional distress, and to both criminal prosecutions and civil damage actions arising out of media violations of state confidentiality laws. Various courts have likewise extended freedom of speech and press guarantees to media defendants in common-law invasion of privacy cases. We see no reason why these principles should not equally apply where,

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<sup>320</sup> *See id.*

<sup>321</sup> *See id.* at 832.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> 536 N.Y.S.2d 571 (N.Y. App. Div. 1989).

<sup>325</sup> *See id.* at 571.

<sup>326</sup> *See id.* at 575.

as here, the only aspect of plaintiffs' claim distinguishing it from defamation and invasion of privacy is the alleged breach of. . . [the reporter's] promise to self-censor the content of the articles so that plaintiffs' identities would remain confidential.<sup>327</sup>

The *Anderson* court was free to ignore the *Virelli* precedent because of an apparent split within the appellate division. Six months after the *Virelli* decision, another department of the appellate division affirmed the denial of summary judgment in actions for breach of contract and negligent infliction of emotional harm, where plaintiff rape victims were recognized in a broadcast interview which they agreed to on condition that their identities would be masked.<sup>328</sup> Neither that court, nor the New York Court of Appeals, which dismissed the appeal without opinion, commented on either of those counts.<sup>329</sup>

It cannot be said that *Cohen* thwarted an inexorable trend in the lower courts toward imposing defamation-like burdens on plaintiffs who sought defamation-like damages for reporters' broken promises.<sup>330</sup> Nor did *Cohen* prevent subsequent courts from finding common law reasons for dismissing broken-promise claims.<sup>331</sup> What *Cohen* did was short-circuit the logical evolution of constitutional doctrine as exemplified by the trial courts in *Ruzicka* and *Virelli*.

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<sup>327</sup> *Id.* at 576 (citations omitted).

<sup>328</sup> *Doe v. American Broad. Cos.*, 543 N.Y.S.2d 455 (N.Y. App. Div. 1989).

<sup>329</sup> *Doe v. American Broad. Cos.*, 549 N.E.2d 480 (N.Y. 1989).

<sup>330</sup> There were pre-*Cohen* cases that found no First Amendment protection for broken promises. *See, e.g.*, *Huskey v. NBC*, 632 F.2d 1282 (N.D. Ill. 1986) (holding that allegations that the network filmed the plaintiff prisoner in an "exercise cage," despite plaintiff's objections, were sufficient to withstand a motion to dismiss plaintiff's third-party beneficiary claim for the network's breach of an agreement with the warden not to violate prisoners' privacy). And there were post-*Cohen* decisions that refused to award defamation-like damages for newsgathering torts. *See, e.g.*, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 822 (M.D.N.C. 1995) (barring recovery of "publication damages for injury to its reputation," while allowing recovery of damages for newsgathering torts); *see also Media Liability*, *supra* note 12.

<sup>331</sup> *See, e.g.*, *Doe v. KTNV-Channel 13*, 863 F. Supp. 1259 (D. Nev. 1994) (holding television station that mistakenly aired a program that revealed the identities of undercover policemen was not liable for breach of contract between the policemen and producers of the program, who were not affiliated with the station); *Wildmon v. Berwick Universal Pictures*, 803 F. Supp. 1167 (N.D. Miss.) (construing an ambiguous contract, restricting use of a filmed interview, against the plaintiff who drafted the contract), *aff'd*, 979 F.2d 209 (5th Cir. 1992); *Sirany v. Cowles Media Co.*, 20 Media L. Rep. (BNA) 1759 (Minn. Dist. Ct. 1992) (holding newspaper's broken promise not to print an obituary of plaintiff's husband not actionable for lack of either consideration or detrimental reliance).

## B. *Unlawfully Acquired Information*

Today, *Cohen's* influence appears in a wide variety of newsgathering cases. One of the earliest attempts to apply the *Cohen* dictum regarding unlawfully acquired information appears in a dissenting opinion in *Scheetz v. Morning Call, Inc.*<sup>332</sup> In that case, the defendant newspaper published a story on spousal abuse committed by Kenneth Scheetz, a highly decorated police officer. The story was based on a confidential police report, and there were unresolved allegations that the report had been stolen.<sup>333</sup>

The Scheetzes, husband and wife, filed a civil rights action alleging that the newspaper reporter had conspired with an unknown state actor to deprive them of their constitutional right to privacy in violation of forty-two United States Code section 1983. The district court granted defendants' motion for summary judgment as to the section 1983 claim, holding that the First Amendment rights of the defendants outweighed the Scheetzes' privacy interest.<sup>334</sup> On appeal, the court of appeals concluded that the Scheetzes had no constitutionally protected privacy interest in the police report, and so it had no occasion to address the First Amendment balance struck by the district court.<sup>335</sup>

Writing in dissent, Judge Mansmann said he would have found a constitutionally protected privacy interest but, in light of *Cohen*, would have remanded to determine whether the information had been unlawfully acquired.<sup>336</sup> "[I]f proven," Mansmann said, "the fact that [*The Call*] knowingly acquired the information in an unlawful manner should permit the plaintiffs to

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<sup>332</sup> 946 F.2d 202 (3d Cir. 1991).

<sup>333</sup> The court handled the uncertainty as follows:

There is some dispute as to how [reporter] Mutchler obtained a copy of the report. Mutchler submitted an affidavit in which she stated that she spoke to various confidential sources to see if any of them had a copy of the report. Mutchler averred that she did not conspire with or encourage anyone to steal the report. A source then showed her a copy of the report, and she copied information from it. . . . The plaintiffs cannot counter this affidavit, primarily because Mutchler's source remains confidential. [Police] Chief Stephens stated at his deposition that he told Mutchler that the report was stolen, but he also stated that he did not suspect that Mutchler had stolen it. Because we decide this appeal on other grounds, we need not resolve this dispute over how the report was obtained.

*Id.* at 204 n.2.

<sup>334</sup> *See id.* at 205.

<sup>335</sup> *See id.*

<sup>336</sup> *See id.* at 213 (Mansmann, J., dissenting).

recover."<sup>337</sup>

Mansmann conceded that the public interest in the *Scheetz* case was "arguably even stronger" than found in the Supreme Court's constitutional privacy cases,<sup>338</sup> and that the Supreme Court had expressly reserved the question of First Amendment protection for the fruits of unlawful newsgathering in those cases.<sup>339</sup> Incredibly, Mansmann then cited the recently decided *Cohen* for "hinting" that, despite the express reservation in *Florida Star v. B.J.F.*,<sup>340</sup> the privacy "line of cases required that 'the truthful information sought to be published must have been lawfully acquired.'"<sup>341</sup> After quoting extensively from *Cohen*, Mansmann found the acquisition of information in *Scheetz* "at least one degree closer to being unlawful, because if proven, [*The Call*] and its reporter would have known that the confidential report had been unlawfully acquired."<sup>342</sup> Thus, "even affording great weight to First Amendment values," Mansmann would have denied *The Call* "the benefits of its, or its agents', wrongdoing."<sup>343</sup> Bolstering his argument with misguided public policy considerations,<sup>344</sup> Mansmann concluded that "where confidential information, protected by the constitutional guarantee of privacy, is unlawfully acquired, I would hold that the [F]irst [A]mendment does not afford the press a defense against civil liability."<sup>345</sup>

The *Scheetz* dissent, and the same *Cohen* dictum, found its way into the decision of a California appellate court that affirmed the right of a judge to confiscate the film of a newspaper photographer who took photographs of a criminal defendant's arraignment without the authorization required by the

<sup>337</sup> *Id.* at 207 (Mansmann, J., dissenting).

<sup>338</sup> *Id.* at 212 (Mansmann, J., dissenting).

<sup>339</sup> *See id.* at 212-13 (Mansmann, J., dissenting).

<sup>340</sup> 491 U.S. 524, 535 n.8 (1989).

<sup>341</sup> *Scheetz*, 946 F.2d at 213 (Mansmann, J., dissenting) (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991)).

<sup>342</sup> *Id.* (Mansmann, J., dissenting) (emphasis omitted).

<sup>343</sup> *Id.* (Mansmann, J., dissenting).

<sup>344</sup> Mansmann explained his public policy considerations as follows:

Drawing this bright line at unlawful acquisition eliminates the need to establish criminal liability in each case. This rule would also serve, in the absence of internal discipline by the press, to enhance the public interest in accurate, verified reporting as well as encouraging lawful acquisition of information. . . . [It] also draws a bright line eliminating the need for ad hoc editorial decision-making that triggers the specter of self-censorship antithetical to [F]irst [A]mendment values.

*Id.* at 214 (Mansmann, J., dissenting).

<sup>345</sup> *Id.* (Mansmann, J., dissenting) (emphasis omitted).

California Rules of Court.<sup>346</sup> Finding a “clear violation” of the rule, the trial judge denied the newspaper’s motion for return of the film “in the interest of preserving order and control and respect in the court proceedings.”<sup>347</sup> On petition for a writ to release the film, the court of appeals found that, since courtroom photography could be completely banned by a trial court, confiscation of photographs that were not allowed does not constitute a prior restraint.<sup>348</sup>

Had the court stopped there, it would have been on solid ground; the Supreme Court has repeatedly upheld the right of courts to bar photography and, presumably, enforce that prohibition.<sup>349</sup> But the court chose instead to assume, *arguendo*, that the seizure was a prior restraint, and then invoked *Cohen* and the *Sheetz* dissent to justify confiscation.<sup>350</sup> The court of appeals wrote:

As stated by our high court in [*Cohen v. Cowles Media Co.*], “[T]he truthful information sought to be published must have been lawfully acquired. The press may not with impunity break and enter an office or dwelling to gather news.” Based on the foregoing, we conclude that photographs or electronic recordings obtained in violation of the law pertaining to the power of the trial court to limit or prevent courtroom media coverage under rule 980, may be subject to restraint.<sup>351</sup>

The state court’s gratuitous conclusion that unlawful newsgathering can justify a prior restraint required it to reject the then-leading federal case on point, *In re King World Productions, Inc.*,<sup>352</sup> which was reaffirmed post-*Cohen* in *Procter & Gamble Co. v. Bankers Trust Co.*<sup>353</sup> In the latter case, the “unlawful newsgathering” issue was merely a digression in Procter & Gamble’s high-stakes lawsuit against Bankers Trust for alleged fraud in the sale of derivative securities. The parties had induced a dying judge to sign a broad, stipulated protective order giving themselves discretionary authority to file

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<sup>346</sup> See *Marin Indep. Journal v. Municipal Court*, 16 Cal. Rptr. 2d 550 (Cal. Ct. App. 1993).

<sup>347</sup> *Id.* at 552.

<sup>348</sup> See *id.* at 553.

<sup>349</sup> See, e.g., *Estes v. Texas*, 381 U.S. 532, 581 n.39 (1965) (Warren, C.J., concurring) (approving proscriptions against still photography, as well as broadcasting).

<sup>350</sup> See *Marin Indep. Journal*, 16 Cal. Rptr. 2d at 554–55.

<sup>351</sup> *Id.* at 555.

<sup>352</sup> 898 F.2d 56 (6th Cir. 1990) (vacating as an unconstitutional prior restraint a temporary restraining order which enjoined the television broadcast of videotape which, according to the plaintiff, was obtained in violation of federal and state law).

<sup>353</sup> 78 F.3d 219 (6th Cir. 1996).

discovery and other materials under seal.<sup>354</sup> When sealed documents supporting Procter & Gamble's RICO allegations against Bankers Trust came into the hands of McGraw-Hill Companies' *Business Week* magazine, the parties asked the new presiding judge to enjoin publication of any information contained in those documents.<sup>355</sup>

Three hours before *Business Week* was scheduled to go to press, District Judge John Feikens sent a facsimile to McGraw-Hill prohibiting publication pending further proceedings.<sup>356</sup> McGraw-Hill unsuccessfully sought relief from the district court,<sup>357</sup> the Sixth Circuit,<sup>358</sup> and the U.S. Supreme Court,<sup>359</sup> and a second deadline passed before Judge Feikens held the first of two hearings on how McGraw-Hill acquired the documents.<sup>360</sup> A third deadline passed before Judge Feikens, finding that McGraw-Hill had acquired the documents unlawfully, made the injunction permanent, even as it removed the documents from the protective order.<sup>361</sup> In March of 1996, the Sixth Circuit reversed.<sup>362</sup>

Although *Cohen* is not mentioned in any of the decisions arising from this case, its dictum is suggested in Justice Stevens's denial of McGraw-Hill's application to stay Judge Feikens's temporary restraining order,<sup>363</sup> and

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<sup>354</sup> See *id.* at 222.

<sup>355</sup> See *id.* The documents in question were provided to *Business Week* by an attorney at the firm that represented Bankers Trust. The attorney, who was not working on the case, had worked with *Business Week's* legal affairs editor on another case, and agreed to obtain a copy of the materials for her. Exactly when the attorney first learned the documents were under seal is unclear. See Keith H. Hammonds & Catherine Yang, *Business Week vs. the Judge*, BUS. WK., Oct. 16, 1995, at 114.

<sup>356</sup> See *Procter & Gamble*, 78 F.3d at 222.

<sup>357</sup> Actually, there is some dispute about whether the district court was asked to reverse its order. *Business Week* says its counsel turned to the Sixth Circuit "[a]fter failing to contact (District Judge John) Feikens," which suggests that he made the attempt. Feikens insisted that he "was always available to provide a full hearing." *Procter & Gamble Co. v. Bankers Trust Co.*, 900 F. Supp. 186, 188 (S.D. Ohio 1995).

<sup>358</sup> See *Procter & Gamble*, 78 F.3d at 229.

<sup>359</sup> See *McGraw-Hill Cos. v. Procter & Gamble Co.*, 116 S. Ct. 6 (1995) (mem.) (declining review on jurisdictional grounds).

<sup>360</sup> See *Procter & Gamble*, 900 F. Supp. at 188.

<sup>361</sup> See *id.* at 192-93.

<sup>362</sup> See *Procter & Gamble*, 78 F.3d at 227.

<sup>363</sup> See *McGraw-Hill*, 116 S. Ct. at 6. Apart from its allowing the prior restraint to stand, Justice Stevens's opinion is most notable for his gratuitous comment on the magazine's newsgathering. Suggesting that the magazine had been disingenuous in protesting that it did not know the materials were under protective order, Justice Stevens indicated that "the manner in which petitioner came into possession of the information it seeks to publish may have a bearing on its right to do so." *Id.* at 7. Judge Feikens would quote that sentence in permanently enjoining McGraw-Hill from using the materials it had "obtained unlawfully."



fundamental to Judge Feikens's own opinion making the order permanent. Judge Feikens wrote:

I conclude that *Business Week* was aware of the protective order before it obtained the sealed documents and that *Business Week* actively sought to obtain the sealed documents while it knew of the protective order. . . . Thus, I conclude that *Business Week* may not use the confidential materials that it obtained unlawfully.<sup>364</sup>

To the extent that Judge Feikens relied on any authority, it was not *Cohen*, but *Seattle Times Co. v. Rhinehart*,<sup>365</sup> which dealt specifically with a party's disclosure of sealed discovery materials, and which the Sixth Circuit found utterly inapt.<sup>366</sup> The notion that unlawfully acquired information somehow loses its First Amendment protection had become so pervasive, however, that Judge Feikens probably thought no authority was necessary.

The Sixth Circuit opinion makes clear that "how *Business Week* obtained the documents and whether or not its personnel had been aware that they were sealed" were not relevant to the magazine's right to publish the information without prior restraint.<sup>367</sup> But the censorship had continued for weeks in fact and for months as a matter of law. Moreover, even the Sixth Circuit opinion intimates that subsequent punishment may be appropriate for publishing illegally acquired information.<sup>368</sup> The issue of punishing newsgathering practices without regard to publication arises more often in cases suggesting that no First Amendment inquiry is needed where the press violates laws of general applicability.

### C. Generally Applicable Torts

*Cohen's* contribution to this area of law is not the unremarkable statement that the press, like anyone else, is subject to generally applicable criminal statutes and tort law. It is, rather, that the press, or anyone else for that matter, may be punished under such laws when engaging in protected activities like newsgathering without any First Amendment inquiry. As a consequence, the press is losing summary judgment motions that it ought to win, and common

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*Procter & Gamble*, 900 F. Supp. at 188.

<sup>364</sup> *Procter & Gamble*, 900 F. Supp. at 191, 193.

<sup>365</sup> 467 U.S. 20 (1984).

<sup>366</sup> See *Procter & Gamble*, 78 F.3d at 225.

<sup>367</sup> *Id.*

<sup>368</sup> How the documents were acquired, and whether the magazine knew that they were sealed, "might be appropriate lines of inquiry for a contempt proceeding or a criminal prosecution," the court says. *Id.*

law tort claims are being sent to juries without any constitutional consideration.

*Risenhoover v. England*<sup>369</sup> is the most striking example of this problem and also the most recent. In that case, agents of the Bureau of Alcohol, Tobacco and Firearms (“ATF”) and their relatives sued various media organizations covering the ill-fated raid of the Branch Davidian compound in Waco, Texas, on February 28, 1993, for the deaths and injuries suffered by agents conducting the raid. The single allegation that survived the media defendants’ motion for summary judgment was that, by their presence and conduct around the compound at the time of the raid, reporters and videographers may have tipped off the cult and thereby negligently interfered with the execution of the ATF arrest and search warrants.<sup>370</sup> The court’s rejection of defendants’ claim that their activities were protected by the First Amendment was based squarely on *Cohen v. Cowles Media Co.*<sup>371</sup>

Quoting extensively from *Cohen*, District Judge Walter Smith called Texas’s law of negligence a “law of general applicability,” in that “any burden placed on the press by its application ‘is no more than incidental, and constitutionally insignificant.’”<sup>372</sup>

Defendants are no more free to cause harm to others while gathering the news than any other individual. As Plaintiffs note, it would be ludicrous to assume that the First Amendment would protect a reporter who negligently ran over a pedestrian while speeding merely because the reporter was on the way to cover a news story.<sup>373</sup>

Judge Smith then proceeded to recognize a negligence cause of action, even though neither the court nor either party could identify a single case in any jurisdiction that had held a journalist liable for negligent conduct while covering a law enforcement operation.<sup>374</sup> Instead, the court relied on other cases in which police officers were injured through the negligence of non-journalists. Judge Smith found these cases to be “instructive in that the media Defendants, because they are not protected by the First Amendment, face the potential liability faced by any other individual in the same circumstances.”<sup>375</sup> The sole Texas case on point involved a police officer’s personal injury lawsuit against an abortion clinic protester whom he attempted to lift and remove from the

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<sup>369</sup> 936 F. Supp. 392 (W.D. Tex. 1996).

<sup>370</sup> *See id.* at 407.

<sup>371</sup> *See id.* at 404 (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991)).

<sup>372</sup> *Id.* (quoting *Cohen*, 501 U.S. at 672).

<sup>373</sup> *Id.*

<sup>374</sup> *See id.* at 405.

<sup>375</sup> *Id.*

scene of the protest.<sup>376</sup> Proceeding with a conventional tort law analysis, Judge Smith found both statute-based and common law duty, the latter by applying a “risk-utility balancing test.”<sup>377</sup> To be sure, the “social utility of the defendant’s conduct”<sup>378</sup> was a factor to be considered in this balance, but not the social utility of newsgathering in general. Rather, the court said, “[t]he issue is whether the actions of the Defendants in failing to exercise some degree of caution to avoid warning the Davidians of the impending raid outweighs the risk that compromising the secrecy of the operation would result in death and injury to a number of law enforcement agents.”<sup>379</sup> Despite the defendants’ entreaty that the court “refrain from creating a rule that would hold the media liable for ‘routine’ newsgathering activities,”<sup>380</sup> which the court dismissed with a perfunctory remark on the uniqueness of the event,<sup>381</sup> the case was allowed to go forward and was eventually settled.<sup>382</sup>

If the circumstances at the Branch Davidian compound were hardly routine, as the court said, the newsgathering practices in which the reporters and videographers were engaged would not normally raise an eyebrow. Similarly, when a reporter for Channel 12 in Narragansett, Rhode Island, conducted a consensual telephone interview with a man who first threatened, then committed suicide, she would not have expected to face trial for negligence in a wrongful death action. Yet that was precisely the result of a Rhode Island Supreme Court holding which reversed a trial court’s grant of summary judgment.<sup>383</sup> Although the court took its constitutional rule on laws of general applicability from *Branzburg*, not *Cohen*, the result was the same: “[W]e believe that notwithstanding First Amendment constitutional protections, everyone, including the press, should be answerable for unprivileged negligent actions that proximately result in suicide.”<sup>384</sup> In short, whatever protection routine newsgathering may have under the First Amendment, it appears to be insufficient even to protect the reporter from simple negligence, which is everywhere a law of general applicability.

Another law of general applicability, tortious interference with performance

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<sup>376</sup> See *Airington v. Juhl*, 883 S.W.2d 286 (Tex. Ct. App. 1994).

<sup>377</sup> *Risenhoover*, 936 F. Supp. at 407.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 408.

<sup>380</sup> *Id.*

<sup>381</sup> See *id.*

<sup>382</sup> See *Cases Raise Concerns About Newsgathering Protections*, [News Notes] 24 Media L. Rep. (BNA) (Dec. 17, 1996).

<sup>383</sup> See *Clift v. Narragansett Television L.P.*, 688 A.2d 805 (R.I. 1996).

<sup>384</sup> *Id.* at 811.

of contract by a third person,<sup>385</sup> was the driving force behind CBS's recent decision to spike a scheduled *60 Minutes* interview with former Brown & Williamson Tobacco Company executive Jeffrey Wigand.<sup>386</sup> In discussing his and his employer's knowledge of the addictiveness of nicotine and the dangers of smoking, Wigand would certainly have violated his own nondisclosure agreement with Brown & Williamson. Because CBS had paid Wigand some \$12,000 as a consultant and, even more damning, agreed to indemnify Wigand in any future libel action,<sup>387</sup> network attorneys believed they were vulnerable to a tortious interference claim, notwithstanding the accuracy of the reporting or the fact that the tort had never before been successfully used in such circumstances.

CBS was roundly criticized for capitulating to the inchoate threat of a lawsuit which would almost certainly fail under First Amendment scrutiny.<sup>388</sup> But, as information concerning CBS's actual relationship with Wigand came to light, news media critics began to view the network's legal and ethical position as compromised,<sup>389</sup> and at least one legal commentator attributed the network's decision directly to *Cohen v. Cowles Media Co.*<sup>390</sup> "[U]nder *Cohen's* reasoning," wrote William Bennett Turner, "subjecting the press to liability for tortiously inducing a breach of contract is not necessarily inconsistent with the First Amendment, even when the press publishes the truth."<sup>391</sup>

Turner and others have pointed out that common law elements of the tort may well have sufficed to protect CBS from liability on a tortious interference

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<sup>385</sup> See RESTATEMENT (SECOND) OF TORTS § 766 (1979). Variations of the tort appear at § 766A, intentional interference with another's performance of his own contract with a third person; § 766B, intentional interference with prospective contractual relations not yet reduced to contract; and § 766C, negligent interference with either existing or prospective contractual relations.

<sup>386</sup> See Bill Carter, '60 Minutes' Ordered to Pull Interview in Tobacco Report, N.Y. TIMES, Nov. 9, 1995, at A1.

<sup>387</sup> Martin London, a plaintiff's attorney well known for his campaigns against the media, has spelled out the logic of the indemnification this way: since Brown & Williamson is a public figure, they would have to show knowing falsity or reckless disregard for the truth in any libel suit against Wigand. Thus, CBS's offer of indemnification was tantamount to a license to lie. Audio tape of Association of American Law Schools 1996 Annual Meeting, Session on Surreptitious Newsgathering (Jan. 3-7, 1996) (on file with author).

<sup>388</sup> See, e.g., *Self-Censorship at CBS*, N.Y. TIMES, Nov. 12, 1995, at D14.

<sup>389</sup> See, e.g., Jonathan Alter, *Blowing Smoke at CBS*, NEWSWEEK, Dec. 4, 1995, at 45; Howard Kurtz, *Details of Unaired Tobacco Story Emerge*, WASH. POST, Nov. 18, 1995, at A3.

<sup>390</sup> See William Bennett Turner, *News Media Liability for "Tortious Interference" with a Source's Nondisclosure Contract*, COMMUNICATIONS LAWYER, Spring 1996, at 13-14.

<sup>391</sup> *Id.*

claim.<sup>392</sup> As articulated in the *Restatement (Second) of Torts*, the interference must be “improper,” requiring a balancing of the plaintiff’s interest in contractual rights against the defendant’s interest in freedom of action.<sup>393</sup> “The issue is whether in the given circumstances [the defendant’s] interest and *the social interest* in allowing the freedom claimed . . . are sufficient to outweigh the harm that [the defendant’s] conduct is designed to produce.”<sup>394</sup>

The factors for determining whether interference is improper would seem to favor a media defendant pursuing a legitimate news story.<sup>395</sup> The *Restatement* itself gives examples directly analogous to the CBS case:

In some cases the actor may be seeking to promote not solely an interest of his own but a public interest. The actor may believe that certain practices used in another’s business are prejudicial to the public interest, as, for example, his maintenance of a gambling den . . . or his despoiling the environment . . . or his racial or sexual discrimination in his employment policy.<sup>396</sup>

Short of immunity, it is difficult to imagine any First Amendment privilege that would be more protective in these circumstances.<sup>397</sup> Most recently, a New

<sup>392</sup> See *id.*; see also Sandra Baron et al., *Tortious Interference: A Practical Primer for Media Practitioners*, REP. LIBEL DEF. RESOURCE CENTER, January 1996.

<sup>393</sup> See RESTATEMENT (SECOND) OF TORTS § 766 cmt. c (1979).

<sup>394</sup> *Id.* (emphasis added).

<sup>395</sup> See *id.* at § 767.

<sup>396</sup> *Id.* at § 767 cmt. f. In such cases,

[i]f the actor causes a third person not to perform a contract . . . in order to protect the public interest affected by these practices, relevant questions in determining whether his interference is improper are: whether the practices are actually being used by the other, whether the actor actually believes that the practices are prejudicial to the public interest, whether his belief is reasonable, whether he is acting in good faith for the protection of the public interest, whether the contractual relation involved is incident or foreign to the continuance of the practices and whether the actor employs wrongful means to accomplish the result.

*Id.*

<sup>397</sup> Indeed, where the claim is asserted against the publisher or broadcaster, alleging that the substance of the publication or broadcast interfered with the plaintiff’s prospective business relations with customers or clients, the few cases that have been brought, both before and after *Cohen*, suggest that the protection is sufficient. See, e.g., *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273–74 (7th Cir. 1983) (holding that tortious interference based on the substance of a broadcast must be held to the standards of a defamation action); accord *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990) (finding that statements of opinion are protected from claims of defamation and tortious interference);

York court found that the tort could not be asserted against a talk show host who invited a guest onto his program knowing that she would violate a confidentiality provision in her divorce settlement. In *Huggins v. Povich*, the court held that "the broadcaster's [F]irst [A]mendment right to broadcast an issue of public importance, its lack of any motive in harming the plaintiff, and the obvious societal interest in encouraging freedom of the press, negate[d] essential elements of the tort."<sup>398</sup>

Even with such built-in protection, however, it is not certain that the journalist's conduct will always be evaluated with due regard to First Amendment considerations.<sup>399</sup> Well before *Cohen*, a federal trial judge indicated that the subject of a magazine interview would be entitled to recover for tortious interference if the magazine induced the freelance writers to violate the terms under which they were granted the interview.<sup>400</sup> Additionally, the extraordinary intervention of the California Supreme Court was once required to reverse a lower court holding that a newsletter editorial calling upon its readers not to patronize businesses that advertised in the plaintiff's newspaper amounted to an intentional interference with economic relationship.<sup>401</sup> Moreover, "the cases fail to indicate clearly whether the judge or the jury makes the decision of whether the conduct was improper,"<sup>402</sup> potentially subjecting media defendants to costly jury trials because summary judgment is not available.

Most common law torts do not have the kind of built-in protection one finds

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*Redco Corp. v. CBS, Inc.*, 758 F.2d 970 (3d Cir. 1985) (stating that matters of public concern disclosed using true facts are not defamatory or intentionally interfering with business); *Morningstar Inc. v. Los Angeles Superior Court*, 29 Cal. Rptr. 2d 547 (Cal. Ct. App. 1994) (finding no intentional interference with economic advantage since commentary had no injurious falsehood); *Dulgarian v. Stone*, 652 N.E.2d 603 (Mass. 1995) (holding that unless statements are provable as false, they are not considered defamatory or tortiously interfering). *But see Corporate Training Unlimited Inc. v. NBC, Inc.*, 868 F. Supp. 501, 512 (E.D.N.Y. 1994) (holding that tortious interference claim survives motion for summary judgment, even if merely a restatement of the defamation claim, where defamation claim is allowed to go forward).

<sup>398</sup> *Huggins v. Povich*, 24 Media L. Rep. (BNA) 2040, 2047-48 (N.Y. Sup. Ct. 1996).

<sup>399</sup> A vigorous defender of the tort has nevertheless conceded that its built-in safeguards "may cede to free speech insufficient breathing space." David F. Partlett, *From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry*, 66 TUL. L. REV. 771, 810 (1992).

<sup>400</sup> *See Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204, 1209 (W.D. Va. 1981) (dictum).

<sup>401</sup> *See Environmental Planning and Info. Council v. Detmold Publ'g Corp.*, 680 P.2d 1086, 1092-93 (Cal. 1984).

<sup>402</sup> RESTATEMENT (SECOND) OF TORTS § 767 cmt. 1 (1979).

in the tortious interference cause of action, and that was certainly true of the array of tort claims that Food Lion brought against ABC. Food Lion's many claims included "fraud, negligent supervision, trespass, respondeat superior liability, breach of fiduciary duty and constructive fraud, unfair and deceptive trade practices, and civil conspiracy"—all of which withstood ABC's motions for dismissal<sup>403</sup> and summary judgment.<sup>404</sup> In allowing those claims to go to the jury, United States District Judge N. Carlton Tilley, Jr., relied heavily on *Cohen v. Cowles Media Co.*, although he made a far more sophisticated distinction between reputational and nonreputational damages than had the United States Supreme Court in *Cohen*.<sup>405</sup>

The *Food Lion* case began in late 1991 with a tip to Lynne Neuffer Dale (then Lynne Litt), a producer for ABC's *PrimeTime Live* magazine-format news program, from someone representing the United Food & Commercial Workers International Union, that the Food Lion grocery store chain might present an appropriate subject for investigative reporting. Another ABC producer, Susan Barnett, received a similar tip from a union-affiliated organization. The union has publicly acknowledged that it aimed to unionize Food Lion or put it out of business.<sup>406</sup> In early 1992, Dale and Barnett submitted proposals for a *PrimeTime Live* story on Food Lion, which were subsequently approved by ABC management. The plan called for Dale and Barnett to obtain employment with Food Lion, then use hidden cameras to tape the alleged unsanitary food handling practices. With the union's help, the team created false identities and backgrounds for themselves. With supporting documentation, the producers applied for employment. Ultimately, Dale obtained work as a meat wrapper at two Food Lion stores in North Carolina, where she worked for eleven days; Barnett found work as a Food Lion deli clerk in South Carolina and quit eight days later.<sup>407</sup>

Together, the producers obtained more than fifty hours of hidden camera footage, and *PrimeTime Live* aired five or six minutes in its November 5, 1992,

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<sup>403</sup> *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 824 (M.D.N.C. 1995) (dismissing only civil RICO and federal wiretap claims).

<sup>404</sup> *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1224 (M.D.N.C. 1996) (denying ABC's motion for summary judgment on claims of fraud, trespass, negligent supervision, and criminal conspiracy); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1224, 1233 (M.D.N.C. 1996) (denying ABC's renewed motion to dismiss claims of breach of fiduciary duty and unfair and deceptive trade practices or, in the alternative, for summary judgment.)

<sup>405</sup> *See Food Lion*, 887 F. Supp. at 822.

<sup>406</sup> *See id.* at 814.

<sup>407</sup> *See id.* at 816.

broadcast.<sup>408</sup> The footage was used to support allegations made by several former Food Lion employees regarding unsanitary practices at Food Lion stores. More viewers watched the November 5th telecast of *PrimeTime Live* than any previous telecast, and Food Lion suffered a drop in both retail sales and the value of its stock.<sup>409</sup>

Food Lion's subsequent lawsuit against Dale, Barnett, other *PrimeTime Live* producers, ABC and its then-corporate parent, Capital Cities/ABC, Inc., contained fourteen counts alleging a combination of state and federal claims involving—and limited to—ABC's newsgathering practices, and seeking some \$2.5 billion in damages. Although Food Lion has publicly claimed the broadcast was false and defamatory, it did not claim libel, false light privacy, or any similar tort in its initial complaint.<sup>410</sup> ABC sought to have all of the claims dismissed as violating the First Amendment.<sup>411</sup> In denying that motion, the court quoted *Cohen* at length for the proposition 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.”<sup>412</sup> The court explained:

In this case, Food Lion has alleged that ABC has committed fraud, trespass, and other wrongful acts. Like promissory estoppel, the laws governing this behavior are laws of general applicability which do not “target or single out the press.” *Cohen*, 501 U.S. at 670. Therefore, ABC, as a member of the press, has no special immunity from the application of laws such as North Carolina's unfair and deceptive trade practices statute, and the First Amendment does not bar Food Lion's claims against it.<sup>413</sup>

The court did agree with ABC that Food Lion should not be entitled to any damages based on injury to its reputation as a result of the actual broadcast unless it was prepared to meet the constitutional burden imposed by the United States Supreme Court on libel plaintiffs.<sup>414</sup> Here, the court relied on *Hustler*

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<sup>408</sup> *See id.*

<sup>409</sup> *See id.*

<sup>410</sup> *See, e.g.,* Kyle Pope, *Food Lion Pressed by ABC to Release Certain Documents*, WALL ST. J., Jan. 31, 1997, at B5; *cf. Andron, supra* note 2, at 16, 19.

<sup>411</sup> *See Food Lion*, 887 F. Supp. at 820.

<sup>412</sup> *Id.* at 821 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991)). The court again quoted *Cohen* when ABC subsequently argued that allowing a news organization to be sued under the North Carolina Unfair Trade Practices Act would render the act unconstitutional. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1224, 1227 (M.D.N.C. 1996).

<sup>413</sup> *Food Lion*, 887 F. Supp. at 822.

<sup>414</sup> *See id.*



*Magazine, Inc. v. Falwell*, rather than *Cohen*, but quoted with approval Justice White's highly questionable assertion that Cohen was "not seeking damages for injury to his reputation," but rather for "breach of a promise that caused him to lose his job and lowered his earning capacity."<sup>415</sup> With the caveat that Food Lion could not be awarded reputational damages, the court denied ABC's motion to dismiss on First Amendment grounds.<sup>416</sup>

Unable to award reputational damages, or consider the finished broadcast as evidence, the jury found ABC liable for \$1400 in compensatory damages, about half the wage and employment costs Food Lion claimed, plus \$2 token damages for trespass and breach of loyalty.<sup>417</sup> However, Judge Tilley did not preclude the jury from awarding punitive damages, and within a month it returned an award of \$5.5 million against ABC.<sup>418</sup> The jury said Richard Kaplan, former executive producer of *PrimeTime Live*, would have to pay Food Lion \$35,000, and Ira Rosen, head of *PrimeTime Live*'s investigative unit, \$10,750. No punitive damages were assessed against Dale or Barnett.<sup>419</sup>

Although the court subsequently reduced the punitive damage award,<sup>420</sup> the notion that punitive damages can be awarded under *Cohen* without any First Amendment inquiry not only makes an end run around *New York Times Co. v. Sullivan*, it vitiates the constitutional protections afforded by that decision and its progeny.<sup>421</sup> Unless the issue of constitutional protection for newsgathering

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<sup>415</sup> *Id.* (quoting *Cohen*, 501 U.S. at 671).

<sup>416</sup> *See id.* at 823. In May 1997 Judge Tilley issued an opinion setting out the rationale for his ruling that Food Lion could not recover damages resulting from "lost profits, lost sales, diminished stock value or anything of that nature." *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 958 (M.D.N.C. 1997). Judge Tilley pointed out that "Food Lion did not challenge the content of the broadcast by bringing a libel suit," so he assumed the content to be true for purposes of the trial. *Id.* at 959. Because the "publication damages" sought were not the "natural and probable consequences of [ABC's] fraud, trespass, [or] breach of the duty of loyalty," Food Lion could not show proximate cause and, thus, could not recover. *Id.* at 966.

<sup>417</sup> *See Food Lion Awarded Damages from ABC, supra* note 2, at D4.

<sup>418</sup> *See Kurtz & Pressley, supra* note 1, at A1.

<sup>419</sup> *See id.*

<sup>420</sup> *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 1997 U.S. Dist. LEXIS 13214, at \*48-50 (M.D.N.C. Aug. 29, 1997). Judge Tilley denied ABC's motion for a new trial on the condition that Food Lion file a remittitur of all punitive damage amounts above \$50,000 from Capital Cities, \$250,000 from ABC, \$7500 from Richard Kaplan, and \$7500 from Ira Rosen. *See id.*

<sup>421</sup> Judge Tilley rejected ABC's constitutional argument for denying punitive damages. ABC had argued that, under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), punitive damages could not be awarded in matters of public concern without a showing of actual malice. Assuming *arguendo* that *Gertz* applied to newsgathering, Judge Tilley ruled that his

torts is revisited, the *Cohen* dicta will set the cause of press freedom back more than thirty years.

## V. TOWARD A CONSTITUTIONAL RULE

Up to this point, this Article has tried to show that the evolution of constitutional protection for newsgathering activities has been circumvented by incorrect, but seductive, dicta in *Cohen v. Cowles Media Co.* This section will suggest a more appropriate reading of *Cohen* and articulate the kinds of constitutional rules that might evolve under such a reading. First, however, it examines the possibility that no constitutional rule is required, that common law principles, properly applied, are sufficient to protect newsgathering. This analysis leads to yet another case involving *PrimeTime Live*, hidden cameras, and misrepresentation by reporters.

### A. Desnick and the Common Law Alternative

In its motion for summary judgment on Food Lion's trespass claim, ABC relied "extensively on *Desnick v. American Broadcasting Companies, Inc.*<sup>422</sup> for the proposition that misrepresentation in the inducement of consent will not negate that consent."<sup>423</sup> J.H. Desnick, M.D., Eye Services, Ltd., had also been the subject of a *PrimeTime Live* exposé, which purported to document excessive and unjustified cataract surgery being performed on elderly Medicare patients at Eye Service's twenty-five midwestern eye clinics. After promising a balanced report, without ambush interviews, ABC obtained the clinic's cooperation to photograph its facilities and interview its personnel. Meanwhile, ABC personnel, posing as prospective patients, used hidden cameras to document unnecessary surgical referrals for the story that was ultimately broadcast.<sup>424</sup> Eye Services sued ABC and *PrimeTime Live* principals for defamation and a host of newsgathering torts, all of which were dismissed at the trial level.<sup>425</sup>

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instruction to the jury—requiring a finding that ABC "acted with a consciousness of wrongdoing"—satisfies *Gertz* and protects members of the press who act "negligently or without intent to violate generally applicable laws." If ABC believed the instruction did not rise to the appropriate constitutional level, it should have objected when the instruction could have been cured. See *Food Lion*, 1997 U.S. Dist. LEXIS 13214, at \*17-23.

<sup>422</sup> 44 F.3d 1345 (7th Cir. 1995).

<sup>423</sup> *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1222 (M.D.N.C. 1996).

<sup>424</sup> See *Desnick*, 44 F.3d at 1347-48.

<sup>425</sup> See *Desnick v. Capital Cities/ABC, Inc.*, 851 F. Supp. 303, 313 (N.D. Ill. 1994).

On appeal, Chief Judge Posner reversed the district court's dismissal of the defamation count,<sup>426</sup> but affirmed on the newsgathering torts of trespass, intrusion, fraud and violation of electronic surveillance statutes.<sup>427</sup> Rather than rely on any constitutional theory, however, Judge Posner adopted a creative approach to the application of tort law to absolve ABC of actionable wrongdoing. Instead of focusing on ABC's misrepresentation, and whether it invalidated Desnick's express consent to enter the clinics, Posner looked to the values underlying the tort and found that no trespass—in other words, “no interference with the ownership or possession of land”<sup>428</sup>—occurred at all.<sup>429</sup> Nor was there any intrusion—“no invasion of a legally protected interest in . . . privacy”<sup>430</sup>—since the only conversations surreptitiously recorded were those in which ABC personnel participated. Also, without a tortious or criminal purpose, there was no violation of federal or state wiretapping laws.<sup>431</sup>

Judge Posner is by no means the first to look beyond the standard articulation of a tort and rely on underlying principles to expand or thwart its application. One need only review the classic Cardozo opinion in *MacPherson v. Buick Motor Co.*<sup>432</sup> to be reminded that this is precisely how the common

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<sup>426</sup> The defamation count later survived defendants' motion for summary judgment on the ground that the allegedly defamatory portions of the broadcast were not “of and concerning” plaintiff J.H. Desnick, M.D., Eye Services, Ltd. *See* *Desnick v. ABC, Inc.*, 24 Media L. Rep. (BNA) 2238, 2242 (1996).

<sup>427</sup> *See Desnick*, 44 F.3d at 1355.

<sup>428</sup> *Id.* at 1353.

<sup>429</sup> Judge Posner analogized ABC's fake patients to “testers” who pose as prospective home buyers in order to gather evidence of housing discrimination. *See id.*

<sup>430</sup> *Id.* Judge Posner distinguished such cases as *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), on the ground that misrepresentation was used to gain access to a place of business rather than a private home. *See Desnick*, 44 F.3d at 1352–53.

<sup>431</sup> *See Desnick*, 44 F.3d at 1353. Judge Posner stated:

The federal and state wiretapping statutes that the plaintiffs invoke allow one party to a conversation to record the conversation unless his purpose in doing so is to commit a crime or a tort or (in the case of the state, but not the federal, law) to do “other injurious acts.” 18 U.S.C. § 2511(2)(d); Wis. Stat. § 968.31(2)(c); *Thomas v. Pearl*, 998 F.2d [447,] 451 [(7th Cir. 1993)]; *State v. Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 261 N.W.2d 147, 154 (Wis. 1978).

*Desnick*, 44 F.3d at 1353.

<sup>432</sup> 111 N.E. 1050 (N.Y. 1916) (expanding the principle of tort liability without privity of contract beyond inherently dangerous products to any product for which the danger of negligent manufacture is foreseeable).

law evolves.<sup>433</sup> Perhaps the *Cohen* dicta has not curtailed the development of newsgathering protections after all. Even the actual malice standard of *New York Times Co. v. Sullivan* had its origins in the efforts of common law judges to find a rule that protected the press from the vicissitudes of state libel law at a time when the First Amendment was thought to be quite irrelevant to state-law tort claims.<sup>434</sup>

But Judge Posner himself admitted that “[t]he lines [between acceptable and actionable deceit] are not bright—they are not even inevitable. They are traces of the old forms of action, which have resulted in a multitude of artificial distinctions in modern law.”<sup>435</sup> Judge Tilley latched on to that concession to distinguish *Food Lion* from *Desnick* on the questionable ground that Litt and Barnett were not truly Food Lion employees and thus not privileged by the company’s consent to enter into areas where only employees were permitted.<sup>436</sup>

The fatal flaw in Defendants’ argument is that it rests on the contention that Litt and Barnett were Food Lion employees and that Food Lion consented to presence of employees in the areas where Litt and Barnett were allowed to go. In fact, Litt and Barnett were actually ABC employees. A reasonable jury could find their presence in Food Lion to be purely incidental to their jobs with *Prime Time Live* and that they hoped to be admitted to areas of the store not open to the general public to “steal” that which was otherwise not available to them—the images of those areas. Like the *Desnick* examples of the purported meter reader who was really a snoop and the competitor who posed as a customer in order to gain entry and steal trade secrets, the misrepresentations which allowed Litt and Barnett to enter the restricted parts of Food Lion’s

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<sup>433</sup> See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 20–25 (1937).

<sup>434</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 280–81 (citing *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908), and other cases adopting the actual malice standard).

<sup>435</sup> *Desnick*, 44 F.3d at 1352.

<sup>436</sup> See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1222–23 (M.D.N.C. 1996). The attitudes of the two judges toward *PrimeTime Live* and its ilk may be the real distinction here. Compare this description from Judge Tilley in *Food Lion*: “[*PrimeTime Live*] is not a ‘straight news’ program; instead [*PrimeTime Live*] presents ‘undercover,’ ‘investigative’ and ‘inside’ stories of a sensational nature designed to attract large audiences and Nielsen ratings, with the commensurate financial rewards and status within the television industry,” *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 813 (M.D.N.C. 1995), with Judge Posner’s characterization in *Desnick*: “[t]oday’s ‘tabloid’ style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market, constitutes—although it is often shrill, one-sided, and offensive, and sometimes defamatory—an important part of that market,” *Desnick*, 44 F.3d at 1355 (citation omitted).

stores could negate the consent which they were given.<sup>437</sup>

Technically, of course, Litt and Barnett could not be liable for breaching their fiduciary duty to the company if they were not Food Lion employees, although Judge Tilley is talking about loyal, not legal, employees. It has yet to be established whether one can “steal” video images of another’s place of business.<sup>438</sup> Be that as it may, Judge Tilley’s response to *Desnick* shows that Judge Posner’s route to First Amendment protection for newsgathering is a slow and uncertain one. Although grounded in the common law, Judge Posner’s opinion in *Desnick* makes two vital contributions to the evolutionary process: (1) it confines *Cohen* to its peculiar facts and holding, and (2) it establishes the theoretical underpinning for according First Amendment protection to newsgathering.

### B. Confining Cohen

Judge Posner does not attack *Cohen* directly in *Desnick*.<sup>439</sup> In fact, he cites *Cohen* at one point for the very narrow proposition that “the media has no general immunity from tort or contract liability.”<sup>440</sup> But he does attack, in an otherwise gratuitous reflection on Eye Services’s fraud claim against ABC.

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<sup>437</sup> *Food Lion*, 951 F. Supp. at 1222.

<sup>438</sup> See *Pearson v. Dodd*, 410 F.2d 701, 708 (D.C. Cir. 1969) (holding that no action would lie against columnist Drew Pearson for receiving information he knew to have been stolen because the information was not protected “by the law of property, enforceable by a suit for conversion”); see also *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300 (7th Cir. 1990) (finding liability for conversion limited to receipt and use of stolen documents for which the plaintiff had no copies); *Scheetz v. Morning Call, Inc.*, 747 F. Supp. 1515 (E.D. Pa. 1990) (taking notes from a stolen police report, without actually possessing it, is neither the crime of receiving stolen goods nor the tort of conversion), *aff’d on other grounds*, 946 F.2d 202 (3d Cir. 1991); *Berger v. CNN*, 24 Media L. Rep. (BNA) 1757, 1762 (D. Mont. 1966) (holding that appropriation of recorded images and sounds does not give rise to a cause of action for conversion). Dean Wade wrote, “Perhaps someday the law by analogy will develop to the point of recognizing a cause of action for obtaining the information in a fashion that would amount to conversion if it were a tangible chattel of monetary value. Of course, it has not done this yet.” Wade, *supra* note 43, at 328.

<sup>439</sup> Indeed, one analysis of *Cohen* uses a cost-benefit analysis under the Hand-Posner model in finding that permitting sources and publishers to freely contract confidentiality agreements increases the net flow of information into the marketplace. See Joseph H. Kaufman, Comment, *Beyond Cohen v. Cowles Media Co.: Confidentiality Agreements and Efficiency Within the “Marketplace of Ideas”*, 1993 U. CHI. LEGAL F. 255, 273.

<sup>440</sup> *Desnick*, 44 F.3d at 1355 (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–70 (1991)).

“Unlike most states,” he observes, “Illinois does not provide a remedy for fraudulent promises (‘promissory fraud’)—unless they are part of a ‘scheme’ to defraud.”<sup>441</sup> Before proceeding to define “scheme” in a way that excludes ABC’s actions and affirming the trial court’s grant of summary judgment, Judge Posner pauses to consider the wisdom of Illinois’s “ambivalence . . . about allowing suits to be based on nothing more than an allegation of a fraudulent promise.”<sup>442</sup>

There is a risk of turning every breach of contract suit into a fraud suit, of circumventing the limitation that the doctrine of consideration is supposed however ineptly to place on making all promises legally enforceable, and of thwarting the rule that denies the award of punitive damages for breach of contract.<sup>443</sup>

There is no textual evidence that Judge Posner had Minnesota’s law of promissory estoppel in mind when he wrote those words. Nor is there evidence that, in finding no actionable fraud in *Desnick*, he meant to criticize the application of that law to journalists. However, the comparison is inevitable and the contrast is clear:

Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promise, as any person of normal sophistication would expect. If that is “fraud,” it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods. *Desnick*, needless to say, was no tyro, or child, or otherwise a member of a vulnerable group. He is a successful professional and entrepreneur. No legal remedies to protect him from what happened are required, or by Illinois provided. It would be different if the false promises were stations on the way to taking *Desnick* to the cleaners. An elaborate artifice of fraud is the central meaning of a scheme to defraud through false promises. The only scheme here was a scheme to expose publicly any bad practices that the investigative team discovered, and that is not a fraudulent scheme.<sup>444</sup>

Notwithstanding his attitude toward ABC’s broken promise, Judge Posner held open the possibility that Eye Services might have prevailed on a contract claim that it abandoned, presumably to get an appealable final judgment.<sup>445</sup> In

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<sup>441</sup> *Id.* at 1354.

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> *Id.* at 1354–55.

<sup>445</sup> Eye Services’s subsequent motion to reinstate the contract claim was denied. *See Desnick v. ABC, Inc.*, 31 Fed. R. Serv. 3d 958 (N.D. Ill. 1995).

fact, he would have us read *Cohen* as a simple quasi-contract case,<sup>446</sup> with nothing precedential to say on the subject of newsgathering torts. If it were otherwise, Judge Posner could not say, as he does, that

[t]oday's "tabloid" style investigative television reportage. . . is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort, *see, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988), and, we add, regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast.<sup>447</sup>

Where "no established rights are invaded in the process" of creating such a broadcast, Judge Posner declared, "then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly."<sup>448</sup> Where established rights have been invaded, the press is entitled, not to immunity, but to the kind of "safeguards designed to protect a vigorous market in ideas and opinions"<sup>449</sup> that "the Supreme Court in the name of the First Amendment has hedged about defamation suits."<sup>450</sup> What follows is a search for those safeguards in the

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<sup>446</sup> The Minnesota Supreme Court had held that "a contract cause of action is inappropriate for these particular circumstances." *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990).

<sup>447</sup> *Desnick*, 44 F.3d at 1355.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> *Id.* Judge Posner's exact words are as follows:

One further point about the claims concerning the making of the program segment, as distinct from the content of the segment itself, needs to be made. The Supreme Court in the name of the First Amendment has hedged about defamation suits, even when not brought by public figures, with many safeguards designed to protect a vigorous market in ideas and opinions. Today's "tabloid" style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market (see *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309 (7th Cir. 1994)), constitutes—although it is often shrill, one-sided, and offensive, and sometimes defamatory—an important part of that market. It is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort, *see, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988), and, we add, regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast. If the broadcast itself does not contain actionable defamation, *and no established rights are invaded in the process of creating it (for the media have no general immunity from tort or contract liability, Cohen v. Cowles Media Co., 501 U.S. 663,*

newsgathering context.

### C. *The First Amendment Right to Gather News*

Long before *Cohen v. Cowles Media Co.*, it was well established that journalists had no “immunity from torts or crimes committed during the course of newsgathering.”<sup>451</sup> Today, long after *New York Times Co. v. Sullivan*, journalists have no “immunity” from actions for libel, false light privacy, or intentional infliction of emotional distress. But the absence of immunity, then or now, has never meant the absence of First Amendment protection. The task of the constitutional common law process is to define that protection in a way that affords appropriate safeguards for “uninhibited, robust, and wide-open”<sup>452</sup> debate on public issues and reliable guidance to both journalists and judges.

#### 1. *Routine Newsgathering Practices*

One possible direction for this evolution relies on the notion of “routine newsgathering practices” as the basis for constitutional protection. This

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669–70, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991); *Le Mistral, Inc. v. Columbia Broadcasting System*, [61 A.D.2d 491 (1978)], then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly. In this case, there may have been—it is too early to tell—an actionable defamation, and if so the plaintiffs have a remedy. But none of their established rights under either state law or the federal wiretapping law was infringed by the making, as opposed to the dissemination, of the broadcast segment of which they complain, with the possible and possibly abandoned exception of contract law.

*Desnick*, 44 F.3d at 1355 (emphasis added). I chose to paraphrase in the text because the italicized words are subject to being quoted out of context to justify denying constitutional protection for newsgathering torts. See, e.g., *Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, 1997 WL 405908, at \*3 (D. Ariz. Mar. 27, 1997), a case factually similar to *Desnick*, in which the court quoted Judge Posner’s citation from *Cohen* to support its denial of ABC’s motion to dismiss plaintiff’s claim that the broadcaster violated the federal eavesdropping statute by using a hidden camera to commit tortious or criminal acts. But see *Deteresa v. ABC Inc.*, 121 F.3d 460, 466 (9th Cir. 1997), in which the court affirmed a summary judgment for ABC on plaintiff’s claim that ABC’s surreptitious recording of a conversation between a producer and a source violated the federal eavesdropping statute. While the *Medical Laboratory* court refused to dismiss even though the plaintiff merely alleged tortious and criminal purposes, the *Deteresa* court required the plaintiff to “come forth with evidence” of a criminal or tortious purpose for her claim to survive summary judgment. See *id.* at 466 n.4.

<sup>451</sup> *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

<sup>452</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).



approach has the advantage of a Supreme Court pedigree in *Smith v. Daily Mail Publishing Co.*,<sup>453</sup> and the apparent flexibility to grow with the times and expand to accommodate technological developments. Unfortunately, *Risenhoover*, the Waco raid case, and *Clift*, the Rhode Island suicide case, suggest that constitutional protection for routine newsgathering practices, as applied today, does not protect newsgatherers from liability for any adverse consequences that flow from their merely asking questions. Even more problematic is the burden it places on judges to determine when new newsgathering practices have become "routine," a burden they can meet only by impermissibly insinuating themselves into the editorial process and second-guessing journalists.<sup>454</sup>

The case of *Wolfson v. Lewis*<sup>455</sup> poses the issue squarely: to what extent does the First Amendment "protect newsgathering by T.V. journalists using modern technologies?"<sup>456</sup> The Wolfsons, husband and wife, are executives of U.S. Healthcare and relatives of the corporation's chairman. In early 1996, the Wolfsons sought and won a preliminary injunction against a crew from the syndicated television program *Inside Edition*. The couple claimed that the television crew engaged in "tortious stalking, harassment, trespass, intrusions upon seclusion and invasions of privacy"<sup>457</sup> in the course of gathering video to illustrate a story on allegedly excessive compensation being paid to U.S. Healthcare executives.<sup>458</sup> The journalists claimed that their actions were

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<sup>453</sup> 443 U.S. 97, 104 (1979).

<sup>454</sup> Perhaps Justice White himself spoke most eloquently to this point:

We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring).

<sup>455</sup> 924 F. Supp. 1413 (E.D. Pa. 1996).

<sup>456</sup> *Id.* at 1417.

<sup>457</sup> *Id.* at 1415.

<sup>458</sup> *See id.* at 1416. In late January 1997 the injunction was vacated and appeal withdrawn as part of a settlement agreement. Under that agreement, the Wolfsons dropped their invasion of privacy lawsuit and the reporters agreed to stay away from the Wolfsons' home and families. *See Health Care Executives' Suit Against 'Inside Edition' Settled; Supreme Court Won't Review Dismissal of RICO Suit Against ABC, NEWS MEDIA & L.*, Spring 1997, at 7.

protected by the First Amendment.<sup>459</sup>

In considering that defense, the court acknowledged that television newsgathering enjoyed some First Amendment protection, but noted that

[w]hen the First Amendment became part of the Constitution more than two hundred years ago, its drafters could not have imagined the existence of a television in most homes and the sophisticated tools available to T.V. journalists. T.V. journalists have at their disposal cameras with powerful zoom lenses, video camcorders that simultaneously record pictures and sound, directional microphones with the capacity to pick up sound sixty yards away, and miniature cameras and recording devices easily hidden in a pocket or behind a tie.<sup>460</sup>

Relying on *Cohen* and other cases,<sup>461</sup> the court asserted that the "First Amendment does not . . . shield the press from torts and crimes committed in the pursuit of a story."<sup>462</sup> The court noted that the "use of sophisticated video and recording equipment by T.V. journalists has increased the threat that a person's right to privacy may be violated."<sup>463</sup> In this case, where the journalists followed their subjects from Pennsylvania to Florida, surveilling them, even in their home, with telephoto lenses and "shotgun" microphones, the court found that the Wolfsons "presented sufficient evidence to support a reasonable likelihood of success on the merits of their claim for invasion of privacy based on intrusion upon seclusion . . . by engaging in a course of conduct apparently designed to hound, harass, intimidate and frighten them."<sup>464</sup>

Up to this point, the court appeared to be on solid ground; no conceivable constitutional rule would immunize the reporters from liability if those findings were true. But the court then crossed the line into editorial judgment. As part of its analysis regarding the essential element of intent, the court found

that the evidence is also sufficient to support a likelihood that a jury could determine that Mr. Wilson and Mr. Lewis harassed and invaded the Wolfsons' privacy *not, as defendants claim, for the legitimate purpose of gathering and broadcasting the news, but to try to obtain entertaining background for their T.V. exposé* concerning the high salaries paid to executives at U.S. Healthcare. Mr. Wilson and Mr. Lewis characterize their activities as "routine

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<sup>459</sup> See *Wolfson*, 924 F. Supp. at 1416.

<sup>460</sup> *Id.* at 1416.

<sup>461</sup> See, e.g., *Galella v. Onassis*, 353 F. Supp. 196 (S.D.N.Y. 1972) (enjoining a freelance photographer from "harassing" Jacqueline Kennedy Onassis), *aff'd in part and rev'd in part*, 487 F.2d 986 (2d Cir. 1973).

<sup>462</sup> *Wolfson*, 924 F. Supp. at 1417.

<sup>463</sup> *Id.* at 1418.

<sup>464</sup> *Id.* at 1432.

newsgathering” which is protected by the First Amendment. As herein set forth, the right to gather the news is not absolute; the First Amendment protects routine, lawful newsgathering. A reasonable jury would likely conclude that it is difficult to understand how hounding, harassing, and ambushing the Wolfsons would advance the newsworthy goal of exposing the high salaries paid to U.S. Healthcare executives or how such conduct would advance the fundamental policies underlying the First Amendment which include providing information to “enable members of society to cope with the exigencies of their period.”<sup>465</sup>

To the extent that the court’s granting a preliminary injunction depended upon this particular finding, it demonstrates the inadequacy of a “routine newsgathering practices” standard for protecting the integrity of the editorial process.

Note as well that this court’s formulation is “routine, lawful newsgathering practices.”<sup>466</sup> As long as the *Cohen* dicta remain operative, it is unlikely that the phrase “routine newsgathering practices” will be expanded to provide any constitutional inquiry when a tort is committed during the course of newsgathering, even in the most routine circumstances.

If the *Cohen* dicta were firmly rejected, and “routine newsgathering practices” were interpreted to encompass those practices reasonably needed to obtain a story and appropriate for the medium through which that story will be transmitted, that rubric might come to provide the necessary constitutional protection.

Absent those caveats, however, one must look to a more promising, if less likely, evolutionary direction.

## 2. *Ad Hoc Balancing*

Another possible alternative for protecting newsgatherers involves providing some mechanism for balancing the social value of the information sought or acquired against the social harm of the torts committed during newsgathering. Typically, calls for this kind of ad hoc balancing propose an affirmative defense that might be asserted by the newsgatherer-defendant. In the wake of the *Food Lion* verdict, for example, noted First Amendment lawyer Floyd Abrams invoked *New York Times Co. v. Sullivan* to call for more “breathing space in the process of gathering news. Perhaps it need be no broader than the introduction of some sort of *public-interest defense* for such claims that could permit judges and juries to factor into account the public

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<sup>465</sup> *Id.* at 1432–33 (emphasis added).

<sup>466</sup> *Id.* at 1433.

benefit that might derive from this sort of conduct."<sup>467</sup>

The newsworthiness defense that attends the disclosure of private facts tort may be an appropriate analogy for the kind of defense suggested by Abrams. Generally, that defense is expressed as an element of the tort, namely, a requirement that "the matter publicized . . . is not of legitimate concern to the public."<sup>468</sup> While the private facts tort is triggered only upon publication, it is often raised in connection with allegations of intrusion or other "misbehavior" in newsgathering,<sup>469</sup> so the experience with the newsworthiness defense may be instructive here.

The chief problem with ad hoc balancing is the uncertainty that it leaves in its wake. Floyd Abrams suggests that, on one set of facts or another, judges and juries "might choose not to" consider the public benefit of the challenged newsgathering practice.<sup>470</sup> Even if he meant only that, on one set of facts or another, the harms might be found to outweigh the benefits, it is obvious that

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<sup>467</sup> Floyd Abrams, 'Food Lion' Endangers Muckrakers, NAT'L L.J., Feb. 17, 1997, at A15 (emphasis added). Similar defenses have been proposed before. See, e.g., Note, *And Forgive Them Their Trespasses: Applying the Defense of Necessity to the Criminal Conduct of the Newsgatherer*, 103 HARV. L. REV. 890 (1990); Kathryn M. Kase, Note, *When a Promise Is Not a Promise: The Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources*, 12 HASTINGS COMM. & ENT. L.J. 565 (1990).

<sup>468</sup> RESTATEMENT (SECOND) OF TORTS § 652D (1977). The *Restatement* definition in full is as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.

*Id.*

<sup>469</sup> In *Parker v. Clarke*, 905 F. Supp. 638 (E.D. Mo. 1995), for example, a mother and daughter sued the St. Louis police department and a local television station after the police invited the television station to tape the execution of a search warrant for drugs and firearms at plaintiffs' residence. See *id.* at 640. Although no charges were ultimately filed as a result of the warrant, the television station broadcast all or part of the video they shot on their local newscasts. See *id.* at 641. Plaintiffs sought to recover from the television station under 42 U.S.C. § 1983 for violating their Fourth Amendment rights and under state law for invading their privacy by intrusion upon seclusion, public disclosure of private facts, and false light publicity. See *id.* at 645. The court granted the station's motion for summary judgment on the § 1983 claim, finding it had not acted under color of state law, see *id.* at 643, and declined to exercise supplemental jurisdiction over the state law claims. See *id.* at 646. See also Dean Wade's discussion of cases concerning misconduct in both newsgathering and publishing in Wade, *supra* note 43, at 338-40.

<sup>470</sup> Abrams, *supra* note 467, at A15.

neither journalists nor jurists would derive much guidance from such a rule.

A second problem with the ad hoc balancing approach is that claims must be adjudicated with reference to the story that was planned or ultimately published. As a practical matter, that might seem to favor the media defendant. The analogous newsworthiness defense in disclosure of private facts torts cases has been interpreted so liberally that it is sometimes said to have “swallowed” the tort itself.<sup>471</sup> Still, this approach gives judges and juries, rather than editors, the responsibility for deciding what is newsworthy or in the public interest.<sup>472</sup> One may surmise that it would afford little or no protection for newsgathering torts committed in pursuit of a false lead, because it seems too much to ask of a jury to excuse damage actually inflicted for the potential value of a story that never panned out.

Thus, neither the current notion of “routine newsgathering practices” nor the technique of “ad hoc balancing” leads to a satisfactory degree of constitutional protection for newsgathering.

A third and more effective possibility is adopting some variation of the *New York Times Co. v. Sullivan* “actual malice” standard that would be appropriate for newsgathering. Although roundly criticized for its effect on libel law,<sup>473</sup>

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<sup>471</sup> See Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 350 (1966); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

<sup>472</sup> In his dissenting opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), Justice Marshall referred to the courts’ experience with the privacy tort and to Kalven’s article, see Kalven, *supra* note 471, in rejecting what amounted to a newsworthiness defense for libelling a private figure. Justice Marshall pointed out that the courts, generally, and the Supreme Court in particular, would have to decide on a case-by-case basis whether a matter was of legitimate public interest.

Courts, including this one, are not anointed with any extraordinary prescience. But, assuming . . . courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government. . . . The danger such a doctrine portends for freedom of the press seems apparent.

*Rosenbloom*, 403 U.S. at 79 (citation omitted).

<sup>473</sup> Criticism of the *New York Times Co. v. Sullivan* approach to libel generally turns on empirical studies showing that libel suits are much too difficult for injured plaintiffs to win, much too expensive for media defendants to fight, and generally result in an outcome that satisfies no one. The Uniform Correction or Clarification of Defamation Act of 1993, approved by the American Bar Association House of Delegates at its February 1994 meeting,

such an approach is at once more protective than “routine newsgathering practices” and more predictable than “ad hoc balancing.”

### 3. *Actual Malice*

In *New York Times Co. v. Sullivan* and its progeny, the Supreme Court demanded a showing of “actual malice”—knowing falsity or reckless disregard for the truth—by public officials<sup>474</sup> or public figures<sup>475</sup> who seek to prevail in a libel action, or by any libel plaintiff seeking punitive damages.<sup>476</sup> By looking beyond this particularized definition of “actual malice” to the underlying evils deemed undeserving of First Amendment protection, one can discover analogs appropriate to newsgathering torts.<sup>477</sup>

Defamatory information that the publisher knows to be false is presumed to injure the subject of the publication and that is why it exposes the publisher to common law tort liability. The information is not unprotected by the First Amendment because it is false, or because it is defamatory.<sup>478</sup> It is unprotected by the First Amendment because it represents the publisher’s intention to harm the subject, deliberate wrongdoing unrelated to news reporting, and a gross breach of faith with the public. Not only do knowingly false statements serve no salutary purpose in the proverbial marketplace of ideas, but they also actively distort that marketplace to the detriment of buyers and sellers alike.

In gathering news, deliberate wrongdoing in bad faith, for example, tortious or criminal conduct beyond anything needed to obtain the story, is directly analogous to publishing knowingly false statements. Suppose, for the sake of argument, that *PrimeTime Live* undertook to crucify Food Lion at the

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is only the latest in a series of proposals aimed at reforming libel law. Under that proposal, damages could be severely limited by timely corrections or clarifications. As of this writing in mid-1997, however, no state had adopted the proposed legislation, and no other legislative solution appeared viable. The Supreme Court seems uninterested in changing the law, as some have suggested, *see, e.g.*, David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991), and as complex as the law of libel has become, courts now have more than 30 years in applying it. Above all, no one is urging a return to pre-*New York Times Co. v. Sullivan* standards.

<sup>474</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

<sup>475</sup> See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967).

<sup>476</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

<sup>477</sup> As used here, the term “newsgathering torts” means any established tort allegedly committed by a defendant during the course of gathering information for the purpose of disseminating that information to the public, whether or not dissemination has taken place. No special rule for the institutional press is intended, although instances of unaffiliated individuals committing bona fide newsgathering torts will doubtless be rare.

<sup>478</sup> See *New York Times*, 376 U.S. at 273.

behest of the United Food & Commercial Workers International Union. Then, assume that *PrimeTime Live* had no reasonable suspicion of improper operating procedures, but they conducted the investigation anyway, and then went on to stage the unsanitary conditions that they later broadcast on television.<sup>479</sup> Any intentional torts committed by ABC personnel would have been in breach of faith with the public and undeserving of First Amendment protection. The inquiry is not whether the network deceived the target of its investigation—that would be privileged, without more—but whether the network purposefully deceived its audience.

In the *Wolfson* case, the court found evidence that the *Inside Edition* crew was applying pressure to the Wolfson family, not for the family's contribution to their story on the excessive compensation of U.S. Healthcare executives, but to coerce Leonard Abramson, the company's chairman and Mrs. Wolfson's father, into granting an interview.<sup>480</sup> If true, that, too, would constitute a breach of faith with the public undeserving of First Amendment protection. If, as alleged, the Wolfsons were never asked for an interview, were never intended to be a subject of the story, and were only exploited for coercive effect, their surveillance cannot legitimately be called newsgathering at all.<sup>481</sup>

As "deliberate wrongdoing in bad faith" in newsgathering is analogous to "knowing falsity" in publishing, "outrageous behavior" seems a good analog for "reckless disregard for the truth." In both cases, the wrongdoing toward the public is not purposeful, but so egregious that it might as well be. Again, the focus is on the public, not the subject of the newsgathering, but the public's sense of outrage has long been considered a reliable gauge of harm to the immediate victim.<sup>482</sup> Although outrageousness is ultimately a question of fact, a court could first decide as a matter of law whether the evidence was sufficient to let the question go to a jury.<sup>483</sup>

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<sup>479</sup> The hypothetical is not at all far-fetched. Food Lion has made those very allegations throughout this case. See, e.g., Sue Anne Pressley, *Food Lion Challenges ABC's Newsgathering*, WASH. POST, Dec. 12, 1996, at A1.

<sup>480</sup> See *Wolfson v. Lewis*, 924 F. Supp. 1413, 1432 (E.D. Pa. 1996).

<sup>481</sup> On the other hand, the court itself indicated that the Wolfsons were photographed so that the reporters could obtain "entertaining background for their TV exposé." *Id.* Furthermore, the defendants' expert witness testified that all activities were consistent with journalistic standards and "completely routine newsgathering." Victor A. Kovner et al., *Recent Developments in Newsgathering, Invasion of Privacy and Related Torts*, 1 COMMUNICATIONS LAW 1996 at 507, 514 (Practising L. Inst. ed. 1996).

<sup>482</sup> Under New York law, for example, the degree of "outrage" needed to sustain a claim of intentional infliction of emotional distress is "beyond the bounds of decency as to be regarded as atrocious and intolerable to a civilized society." *Levin v. McPhee*, 917 F. Supp. 230, 242 (S.D.N.Y. 1996) (citing *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143 (1985)).

<sup>483</sup> That, too, would correspond with the actual malice standard. See *Harte-Hanks*

In the *Food Lion* case, for example, the ABC producers' misrepresentations on their employment applications would seem to fall well short of "outrageous behavior" as a matter of law. As Judge Posner says in *Desnick*, "any person of normal sophistication would expect" investigative journalists to break their promises.<sup>484</sup> On the other hand, use of a shotgun microphone capable of picking up conversations inside a private home, as alleged in the *Wolfson* case,<sup>485</sup> could hardly be kept from a jury. To continue the *New York Times Co. v. Sullivan* analogy, this variation of actual malice—deliberate wrongdoing in bad faith or outrageous behavior—would be required wherever a public official or public figure sought damages for a newsgathering tort. It would also be required where the defendant is covering government operations, such as police raids, even if the plaintiff is a private figure, to avoid chilling what is arguably the media's most important newsgathering function.<sup>486</sup> Other private figure plaintiffs would be required to show at least negligence, but, as with the publication-based torts, negligence could not stand alone. Some other established tort—trespass, intrusion, conversion, etc.—must also be implicated by the newsgatherer's behavior. Obviously, neither *Risenhoover* nor *Clift* could be sustained under this rule.<sup>487</sup>

Even a private figure plaintiff would be required to show bad faith or outrageous behavior to recover punitive damages. The rationale is the same as that offered by Justice Powell in *Gertz*:

In most jurisdictions jury discretion over the amounts awarded [for punitive damages] is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. . . . They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.<sup>488</sup>

Moreover, punitive damages would not be available in any broken-promise case, even where styled as a breach of confidence tort, on the theory that these warrant contract damages only.<sup>489</sup>

These requirements are also imposed where tortious or improper conduct is

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Communications, Inc. v. Connaughton, 491 U.S. 657, 685 (1989).

<sup>484</sup> *Desnick v. American Broad. Cos., Inc.*, 44 F.3d 1345, 1354 (7th Cir. 1995).

<sup>485</sup> See *Wolfson*, 924 F. Supp. at 1434.

<sup>486</sup> See *Blasi*, *supra* note 31, at 527.

<sup>487</sup> See *supra* text accompanying notes 369–84.

<sup>488</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); accord *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 38 (1991) (Scalia, J., concurring) (stating that punitive damages can violate the First Amendment, despite their historical sanction).

<sup>489</sup> See *Gilles*, *supra* note 149, at 59.



a necessary predicate for civil or criminal sanctions. For example, the federal and most state anti-wiretapping statutes allow one party to a conversation to record it absent a criminal or tortious purpose.<sup>490</sup> Newsgathering torts could not serve as a “tortious purpose” unless the actual malice standard is met. Likewise, no newsgathering tort could provide the basis for finding “improper” interference with contractual relations without a showing of actual malice. Should the Supreme Court ever hold that “unlawfully acquired” information may be more readily suppressed than information that is lawfully acquired, no newsgathering tort could supply the necessary “unlawfulness” absent a finding of actual malice.<sup>491</sup>

In sum, the First Amendment rule proposed here would require plaintiffs claiming injury resulting from a tort committed during the course of gathering news to show actual malice—deliberate wrongdoing in bad faith or outrageous conduct—on the part of the defendant where the plaintiff is a public official or public figure, or where the defendant is covering government operations, or where the plaintiff seeks to recover punitive damages.

## VI. CONCLUSION

From Nellie Bly to the Muckrakers to Woodward and Bernstein, the importance of newsgathering to the realization of First Amendment values has been proved time and time again. This Article has tried to demonstrate that nothing in our constitutional jurisprudence precludes a court from closely examining the application of tort and criminal law to news reporters and, where First Amendment values warrant, holding the newsgatherer harmless. Eventually, a rule should evolve to safeguard the newsgathering process itself.

While the concept of “routine newsgathering practices” may provide such a safeguard if expansively interpreted, the *New York Times Co. v. Sullivan* “actual malice” standard offers the highest degree of protection. That standard has been severely criticized in the thirty-plus years since it was promulgated, however, and thus may be the least likely conclusion of an evolution toward recognizing First Amendment protection for newsgathering. To date, however, no one has suggested an alternative to the actual malice standard for libel that

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<sup>490</sup> See, e.g., 18 U.S.C. § 2511 (1994).

<sup>491</sup> Indeed, the logic of this argument suggests that “unlawfully acquired” information may never be subject to suppression on that ground alone, whether it is obtained illegally or tortiously by a journalist, or obtained knowing it was acquired illegally or tortiously, or obtained under circumstances indicating that it must have been acquired illegally or tortiously. If merely punishing the tortious acquisition of news requires a showing of actual malice, then surely no prior restraint may be imposed on the publication of such information absent independent reasons for keeping it secret, *i.e.*, certain, serious and irreparable harm.

has attracted the interest of state legislatures or the Supreme Court. Considering the alternatives for newsgathering torts, a variation on the actual malice standard offers the best combination of equity and predictability.

Precedent for imposing such a standard is readily available in *Hustler Magazine, Inc. v. Falwell*, and practical criteria for applying the standard may be found in the concepts of "deliberate wrongdoing in bad faith" and "outrageous behavior." Unless the *Cohen* dicta are disavowed, however, there will be no evolution at all, and newsgathering will continue to lack any real First Amendment protection from whatever torts may be conjured up by creative attorneys, unsympathetic courts, and antagonistic juries.