

Summer 1992

## Promises of Confidentiality: Do Reporters Really Have to Keep Their Word

Harold B. Oakley

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Harold B. Oakley, *Promises of Confidentiality: Do Reporters Really Have to Keep Their Word*, 57 Mo. L. REV. (1992)

Available at: <https://scholarship.law.missouri.edu/mlr/vol57/iss3/7>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# Promises of Confidentiality: Do Reporters Really Have to Keep Their Word?

*Cohen v. Cowles Media Co.*<sup>1</sup>

## I. INTRODUCTION

In an industry in which information is the ultimate commodity, a new dilemma that confronts the media world is whether the First Amendment protects news gatherers from sources who try to enforce promises of confidentiality. The debate raised in *Cohen v. Cowles Media Co.*<sup>2</sup> pits the First Amendment freedoms of the press and speech against concepts of contracts and torts that are deeply rooted in our legal heritage. By upholding the media's liability to its sources, the United States Supreme Court's opinion in *Cohen* could have a great impact upon the way reporters gather news and methods of news publication.<sup>3</sup> The decision will propel contract issues such as offer, acceptance and consideration into the ivory tower of editorial journalism. Consequently, the authority of a reporter to make promises of confidentiality will surely be reviewed and curtailed.

The controversy surrounding the *Cohen* case centers on the importance society attaches to the press. The Supreme Court of the United States has identified three principal roles played by the press in the American "constitu-

---

1. 111 S. Ct. 2513 (1991).

2. The *Minnesota Law Review* first broached the issues discussed here. See Michael Dicke, Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553 (1989) (analyzing *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990), *rev'd*, 111 S. Ct. 2513 (1991)).

3. See Linda P. Campbell, *Papers Lose Appeal on Source Confidentiality*, CHI. TRIB., June 25, 1991, §1, at 2; Bernard James, *Justices Still Seeking a Consistent Voice on First Amendment*, NAT'L L. J., Aug. 19, 1991, at S4; Karl Olson & Benjamin A. Holden, *An Oath of Silence*, THE RECORDER, Oct. 14, 1991, at 8; Albert Scardino, *Newspaper in New Case Over Naming Source*, N.Y. TIMES, July 23, 1988, §1, at 6.

For other cases involving breaches of confidentiality agreements since the *Cohen* cases, see *Ruzicka v. Conde Nast Publications, Inc.*, 939 F.2d 578 (8th Cir. 1991); *Morgan v. Celender*, 780 F. Supp. 307 (W.D. Pa. 1992); *O'Connell v. Housatonic Valley Publishing Co.*, No. 0055284, 1991 Conn. LEXIS 2749 (Super. Ct. Nov. 27, 1991) (court rejects *Cohen* analysis and embraces that in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)); *Strong Memorial Hosp. v. Gannett Co. Inc.*, 573 N.Y.S.2d 828 (1991) (newspaper breaks confidentiality promise to AIDS patient whom it photographed); *Doe v. ABC*, 543 N.Y.S.2d 455 (App. Div. 1989).

tional scheme."<sup>4</sup> First, the press serves as a vehicle for individual expression, one of the personal rights protected by the First Amendment.<sup>5</sup> Second, the media plays a role in "informing and educating the public, offering criticism, and providing a forum for discussion and debate."<sup>6</sup> Each form of expression is guaranteed under the First Amendment. According to the theory of self-government, the press provides the members of the public with information they need to exercise democratic rights.<sup>7</sup> Therefore, the press is protected as an integral institution of democracy. Third, the press performs a watchdog role by assuring that the government is accountable to the people.<sup>8</sup> The role of the press as a check on government is also an outgrowth of the self-government theory; however, it focuses on the press as a guarantor of people's rights and not on the content of the information conveyed.<sup>9</sup>

When reporters exercise their roles as members of the press, they often make promises of confidentiality to sources to secure information for publication that might otherwise be unattainable.<sup>10</sup> The reliability of these promises rests in the professional ethics expected of reporters, editors, and the media in general.<sup>11</sup> Most journalists consider promises of confidentiality sacred and will risk going to jail to protect a source; however, there may be circumstances that warrant revealing a source.<sup>12</sup>

4. Dicke, *supra* note 2, at 1558.

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

6. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (citing *Mills v. Alabama*, 384 U.S. 214, 219 (1966)).

7. See Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy? What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 653 (1975).

8. See *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

9. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1443-44 (1991); *Mills*, 384 U.S. at 219; Justice William J. Brennan, Address at S.I. Newhouse Center for Law & Justice (Oct. 17, 1979), in 32 RUTGERS L. REV. 173, 176-77 (1979).

10. See *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990), *rev'd*, 111 S. Ct. 578 (1991).

11. *Id.* at 202.

12. *Id.* Circumstances that may warrant revealing a source include:

(1) where disclosure is required to correct misstatements made by the source and (2) where failure to reveal the source may subject the newspaper to substantial libel damages. As an example of the first instance, the authors cite Oliver North's public hearing testimony that the leaking of information about the *Achille Lauro* hijacking seriously compromised intelligence activities, whereupon Newsweek disclosed that North himself was the anonymous source of the leak. In some civil libel actions, says the article, where the reporter refuses to reveal his or her confidential source of allegedly defamatory information, the court has threatened to enter a default

At least two reasons make promises of confidentiality important to the newsgathering profession.<sup>13</sup> First, breaking a promise of confidentiality that has induced a source to provide information is dishonorable.<sup>14</sup> Second, sources may disappear if it becomes known that the promises will not be kept.<sup>15</sup> The media's professional ethics have generally protected sources,<sup>16</sup> however, journalists have recently begun to disregard these promises when they believe the public has a right to know the confidential information.<sup>17</sup>

## II. THE FACTS

Petitioner Dan Cohen sought a ruling from the Supreme Court that the First Amendment does not prohibit a plaintiff from recovering damages, under a state law theory of promissory estoppel, for breach of a promise of confidentiality.<sup>18</sup> The case arose after reporters of the *St. Paul Pioneer Press Dispatch* and the *Minneapolis Star and Tribune*<sup>19</sup> had given Cohen a promise of confidentiality and had subsequently breached it.<sup>20</sup>

During the closing days of the 1982 Minnesota gubernatorial race, Cohen<sup>21</sup> approached reporters from the *St. Paul Pioneer Press Dispatch* and the *Minneapolis Star and Tribune* and offered to provide documents relating to a candidate in the upcoming election.<sup>22</sup> Cohen insisted on a promise of confidentiality before he would provide the information.<sup>23</sup> After both reporters promised to keep Cohen's identity anonymous,<sup>24</sup> Cohen turned over

---

judgment against the defendant newspaper, thereby exposing the newspaper to heavy damages.

*Id.* at 202 n.4 (citing Monica Langley & Lee Levine, *Broken Promises*, COLUM. JOURNALISM REV. July/Aug. 1988, at 21) (citations omitted).

13. *Id.* at 202.

14. *Id.*

15. *Id.* at 202-03.

16. *Id.*

17. Langley & Levine, *supra* note 12, at 21.

18. *Cohen*, 111 S.Ct. at 2515.

19. The *St. Paul Pioneer Press Dispatch* is published by respondent Northwest Publications, Inc., and the *Minneapolis Star* is published by respondent Cowles Media Co.

20. *Cohen*, 111 S. Ct. at 2516.

21. Cohen was an active Republican associated with Wheelock Whitney's Independent Republican gubernatorial campaign. *Id.*

22. *Id.*

23. *Id.* Cohen testified at trial that "he insisted on anonymity because he feared retaliation from the news media and politicians." *Cohen*, 457 N.W.2d at 200.

24. *Cohen*, 111 S. Ct. at 2516. Neither reporter told Cohen that their promises of confidentiality were subject to their editors' approval. Both intended to keep

copies of two public court records concerning Marline Johnson, the Democratic-Farmer-Labor candidate for Lieutenant Governor.<sup>25</sup> The records concerned charges of unlawful assembly, which were later dismissed, and a conviction for petit theft, which was later vacated.<sup>26</sup>

The two newspapers independently decided to publish Cohen's name as part of their stories concerning Johnson.<sup>27</sup> The decision to identify Cohen was based on three reasons common to both newspapers.<sup>28</sup> Editors argued that (1) Cohen's identification as the source of the Johnson story was newsworthy;<sup>29</sup> (2) to attribute the information to an anonymous source would be "misleading and cast doubt on others;"<sup>30</sup> and (3) the Johnson story was becoming known among the news media and was discoverable from sources not bound by confidentiality.<sup>31</sup>

Cohen's identity anonymous as promised. *Cohen*, 457 N.W.2d at 200.

25. *Cohen*, 457 N.W.2d at 200.

26. *Cohen*, 111 S. Ct. at 2516. The first court record indicated that Johnson had been charged in 1969 with three counts of unlawful assembly, and the second that she had been convicted in 1970 of petit theft. *Cohen*, 457 N.W.2d at 200. Both newspapers interviewed Johnson for her explanation, and one reporter tracked down the person who had found the records for Cohen. *Id.* at 201. As it turned out, the unlawful assembly charges arose out of Johnson's participation in a protest of an alleged failure to hire minority workers on municipal construction projects, and the charges were eventually dismissed. *Id.* at 201 n.2. The petit theft conviction was for leaving a store without paying for \$6.00 worth of sewing materials. *Id.* The incident apparently occurred at a time during which Johnson was emotionally distraught, and the conviction was later vacated. *Id.*

27. *Cohen*, 111 S. Ct. at 2516 ("In their stories, both papers identified Cohen as the source of the court records, indicated his connection to the Whitney campaign, and included denials by Whitney campaign officials of any role in the matter.").

Cohen had also contacted the Associated Press and WCCO-TV. The Associated Press reported the story without divulging the source. WCCO-TV decided not to broadcast the news because the last-minute leak seemed unfair to Johnson. David G. Savage, *Media Must Keep Promise to Sources, Justices Rule; Press: Court Says News Organizations Can Be Forced To Pay Damages If It Violates Pledge of Confidentiality*, L.A. TIMES, June 25, 1991, at A1.

28. *Cohen*, 457 N.W.2d at 201.

29. *Id.* Cohen was a newsworthy and public figure. He had been active in politics for years as a campaign worker, candidate, and elected public official. He was a Whitney supporter in 1982 and was employed by an advertising firm which handled some work for the Whitney campaign. He had also worked as a lawyer, stock broker, public relations official, author, and freelance newspaper columnist. *Id.* at 201 n.3.

30. *Id.* at 201.

31. *Id.*

Cohen was fired by his employer the day the stories appeared.<sup>32</sup> Thereafter, he sued the publishers in Minnesota state court, alleging fraudulent misrepresentation and breach of contract.<sup>33</sup> The trial court rejected the publishers' argument that the First Amendment barred Cohen's lawsuit.<sup>34</sup> A jury returned a verdict in Cohen's favor, awarding him \$200,000 in compensatory damages and \$500,000 in punitive damages.<sup>35</sup>

The Minnesota Court of Appeals concluded that Cohen did not establish a fraud claim,<sup>36</sup> the only claim that could support an award of punitive damages.<sup>37</sup> The court of appeals, therefore, reversed the award of punitive damages.<sup>38</sup> The court affirmed the trial court's \$200,000 compensatory damage award for breach of contract.<sup>39</sup>

The Minnesota Supreme Court reversed the compensatory damages award.<sup>40</sup> The court considered Cohen's breach of contract claim and concluded that "a contract cause of action is inappropriate for these circumstances"<sup>41</sup> despite the apparent existence of an offer, acceptance and consideration.<sup>42</sup> The court concluded that the special relationship shared by reporters and their news sources does not normally involve an intent to make

32. *Id.* at 202.

33. *Id.* Cohen could not sue for defamation because the information published was true. *Id.*

34. *Cohen*, 111 S. Ct. at 2516.

35. *Id.*

36. The claim of fraudulent misrepresentation failed because "[t]o be actionable, a misrepresentation must misrepresent a present or past fact." *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 259 (Minn. Ct. App. 1989), *aff'd in part*, 457 N.W.2d 199 (Minn. 1990), *rev'd*, 111 S. Ct. 2513 (1991). Future nonperformance does not mean there was misrepresentation at the inception of the contract, unless when entering into the contract the party never intended to perform the contract. *Id.* Cohen concedes that the reporters intended to keep the promises. *Id.* The record also shows that the editors intended to keep the promises until more information was obtained and the matter was discussed with the other editors. *Id.* at 260. The court of appeals also found that the reporters did not mislead Cohen by concealing the fact that only editors had the authority to promise confidentiality. *Id.* The reporters did not know of the policy and thought they as reporters had the necessary authority to make promises of confidentiality. *Id.* at 259-60.

37. *Cohen*, 111 S. Ct. at 2516.

38. *Cohen*, 445 N.W.2d at 260.

39. *Cohen*, 111 S. Ct. at 2516.

40. *Id.* (citing *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990), *rev'd*, 111 S. Ct. 2513 (1991)).

41. *Id.* at 2516-17 (quoting *Cohen*, 457 N.W.2d at 203).

42. *Cohen*, 457 N.W.2d at 202.

a legally binding contract.<sup>43</sup> The parties expect that promises of confidentiality impose a moral and ethical obligation, which is not necessarily coextensive with legally binding obligations.<sup>44</sup> The court also found the application of contract theory to promises of confidentiality impractical in daily newsgathering.<sup>45</sup>

The court then addressed the question of whether Cohen could establish a cause of action under Minnesota law on a promissory estoppel theory.<sup>46</sup> Apparently, a promissory estoppel theory was never tried to the jury, nor briefed or argued to the lower courts by the parties. The theory first arose during oral arguments in the Minnesota Supreme Court when one of the justices asked a question about equitable estoppel.<sup>47</sup>

The court decided that the most problematic element in establishing a promissory estoppel cause of action here was whether injuries could be avoided only by enforcing the promise of confidentiality made to Cohen.<sup>48</sup> The court stated that

[u]nder a promissory estoppel analysis there can be no neutrality towards the First Amendment. In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated. The court must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity.<sup>49</sup>

---

43. *Id.* at 203.

44. *Id.*

45. *Id.* The court stated:

The source, for whatever reasons, wants certain information published. The reporter can only evaluate the information after receiving it, which is after the promise is given; and the editor can only make a reasonable, informed judgment after the information received is put in the larger context of the news. The durability and duration of the confidence is usually left unsaid, dependent on unfolding developments; and none of the parties can safely predict the consequences of publication . . . Each party, we think, assumes the risks of what might happen, protected only by the good faith of the other party.

*Id.*

46. *Cohen*, 111 S. Ct. at 2517. Under promissory estoppel a contract in law is implied where one does not exist in fact. "[A] promise expected or reasonably expected to induce definite action by the promisee that does induce action is binding if injustice can be avoided only by enforcing the promise." *Cohen*, 457 N.W.2d at 203-04.

47. *Cohen*, 111 S. Ct. at 2517.

48. *Id.*

49. *Cohen*, 457 N.W.2d at 205.

The court reasoned that applying promissory estoppel to *Cohen* would mean "second-guessing the newspaper editors."<sup>50</sup> The court recognized that the choice of editorial material is at the heart of First Amendment rights of a free press.<sup>51</sup> Enforcing civil judgments against the press for breaching promises of confidentiality could chill public debate about politics, which is crucial to a democratic society.<sup>52</sup> The court concluded that "in this case enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights."<sup>53</sup>

In granting certiorari upon Cohen's petition, the Supreme Court of the United States considered only the First Amendment implications of enforcing a promise of confidentiality against the press.<sup>54</sup> In an opinion delivered by Justice White,<sup>55</sup> the Court held that the First Amendment does not bar a promissory estoppel cause of action against the press.<sup>56</sup>

### III. LEGAL BACKGROUND

In the *Cohen* case, the Supreme Court sought to provide redress for the plaintiff's injury caused by the breach of the promise of confidentiality while protecting the First Amendment's guarantee of freedom of the press. The tension between these conflicting goals is especially sharp because the First Amendment freedoms and the freedom to contract are both cornerstones of the political, socio-economic, and legal heritage of the United States.

Before evaluating the media's constitutional rights, one must determine whether a private cause of action for promissory estoppel involves state action within the meaning of the Fourteenth Amendment. If not, the issue of whether the First Amendment protects the speech in *Cohen* is never reached because constitutional rights would not attach.

In *New York Times Co. v. Sullivan*,<sup>57</sup> the Court held that "the application of state rules of law in state courts [between private parties] in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under

---

50. *Id.*

51. *Id.* (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

52. *Id.*

53. *Id.*

54. *Cohen*, 111 S. Ct. at 2517.

55. Chief Justice Rehnquist, Justices Stevens, Scalia and Kennedy joined. Justice Blackmun filed a dissenting opinion, in which Justices Marshall and Souter joined. Justice Souter filed a dissenting opinion, in which Justices Marshall, Blackmun and O'Connor joined.

56. *Id.* at 2519.

57. 376 U.S. 254, 265 (1964).



the Fourteenth Amendment.<sup>58</sup> That rule of law was reiterated in *Philadelphia Newspapers, Inc. v. Hepps*<sup>59</sup> when a newspaper was sued for defamation for articles it published linking a beer producer to organized crime.<sup>60</sup> Therefore, state efforts to handicap newsgathering and publishing constitute state action.

The second, more complex issue is the extent to which the First Amendment provides the defendant publishers any protection. The complexity of this issue is demonstrated by the widely divergent case law cited by the parties in *Cohen*. The defendants relied on a string of Supreme Court cases subordinating the state's interests to the press' need to publish truthful information.<sup>61</sup> In contrast, the plaintiff and the majority focused on case law subjecting the press to generally applicable laws despite incidental effects on the ability to gather and report the news.<sup>62</sup> An analysis of both approaches shows that the result is dependent on the balance of the First Amendment with the state's interests.

### A. First Amendment Protection of the Press

In *Smith v. Daily Mail Publishing Co.*,<sup>63</sup> the United States Supreme Court held that "[i]f a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."<sup>64</sup> In *Smith*, the Court would not subject a newspaper to criminal sanctions for publishing a juvenile offender's name the paper had lawfully obtained, although publication violated a state statute.<sup>65</sup> The state interest of protecting the juvenile did not outweigh First and Fourteenth Amendment freedoms.<sup>66</sup>

---

58. *Cohen*, 111 S. Ct. at 2517 (citing *New York Times*, 376 U.S. at 265).

59. 475 U.S. 767 (1986).

60. *Id.* at 776-77.

61. The Court noted, "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." *Cohen*, 111 S. Ct. at 2518 (citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)). See also *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

62. *Cohen*, 111 S. Ct. at 2518.

63. 443 U.S. 97 (1979).

64. *Id.* at 103.

65. *Id.*

66. *Id.* at 105-06.

The ruling in *Smith* followed a similar conclusion in *Landmark Communications, Inc. v. Virginia*,<sup>67</sup> in which a newspaper violated a state statute by publishing an article divulging information about a state inquiry into the misconduct of a judge.<sup>68</sup> The Court refused to encroach upon First Amendment rights to enforce the statute.<sup>69</sup>

In *Florida Star v. B.J.F.*,<sup>70</sup> the Court held that the state could not impose criminal liability on a newspaper for publishing the name of a victim of a sex offense in violation of a state statute.<sup>71</sup> Imposition of liability would violate the First Amendment and would not further a "state interest of the highest order."<sup>72</sup>

All three cases involved a state imposing criminal liability on a newspaper for publishing lawfully obtained information in violation of a state statute which specifically forbade publication.<sup>73</sup> Cohen sought to impose civil liability because the published information was not obtained lawfully.<sup>74</sup> He argued that the defendants' acts were illegal because they breached their promise of confidentiality given in exchange for the information.<sup>75</sup> The Court agreed with Cohen, holding that the breach of promise propels the analysis into another line of cases subjecting the press to generally applicable laws.<sup>76</sup>

### B. Laws of General Applicability

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>77</sup> Cases decided under this doctrine reflect a desire to subject the press to laws as applied to any other person or organization.<sup>78</sup> By definition, laws of general applicability do not single out the press.<sup>79</sup> Therefore, the laws do not relate to the publication of informa-

---

67. 435 U.S. 829 (1978).

68. *Id.* at 831. The information was printed prior to the investigatory hearing. *Id.* at 831-32.

69. *Id.* at 843-44.

70. 491 U.S. 524 (1989).

71. *Id.* at 532-33.

72. *Id.*

73. See *supra* notes 63-72 and accompanying text.

74. *Cohen*, 111 S. Ct. at 2516.

75. *Id.* at 2519.

76. *Id.* at 2518.

77. *Id.*

78. *Id.*

79. *Id.* at 2518-19.

tion, in contrast to the statutes in the First Amendment line of cases that specifically forbade the publication of certain information.<sup>80</sup>

In *Associated Press v. NLRB*,<sup>81</sup> the Court held that the National Labor Relations Act could be enforced against the defendant publisher without violating its First Amendment freedoms.<sup>82</sup> The Associated Press had transferred information via telephone and telegraph; therefore, the Court found that Associated Press was engaged in interstate commerce.<sup>83</sup> As a consequence, the Court held the National Labor Relations Board could require employees of Associated Press to be returned to employment and compensated for lost wages after they had been discharged for union activities.<sup>84</sup>

Associated Press claimed unsuccessfully that the First Amendment freedoms of press and speech would be violated by enforcement of the Act because federal jurisdiction over the defendant's employees was based on Congress' authority to regulate "the gathering, production, and dissemination of news for the American press."<sup>85</sup> Associated Press argued that to treat the news as "ordinary articles of commerce, subject to federal supervision and control" amounted to a violation of the freedoms of speech and the press.<sup>86</sup> The defendant argued the enforcement of the Act eliminated the freedom of the press by allowing a federal bureau to "dictate" whom the press must employ.<sup>87</sup>

The Court in *Associated Press* rejected the defendant's claim of a First Amendment violation as irrelevant and "unsound."<sup>88</sup> The majority held that the Act does not interfere with the employment practices by the press unless employees are discharged for union activity or request collective bargaining.<sup>89</sup> These reasons are unrelated to newsgathering and dissemination. Because the effects on publication appeared incidental at best, the Court found that the act could be applied to the press.<sup>90</sup>

In *Oklahoma Press Publishing Co. v. Walling*,<sup>91</sup> the Court held that the Fair Labor Standards Act applies to the press.<sup>92</sup> The Fair Labor Relations

80. See *supra* notes 63-72 and accompanying text.

81. 301 U.S. 103 (1937).

82. *Id.* at 132-33.

83. *Id.* at 127-28.

84. *Id.*

85. *Id.* at 115-16.

86. *Id.*

87. *Id.*

88. *Id.* at 131.

89. *Id.* at 132.

90. *Id.* at 131-32.

91. 327 U.S. 186 (1946).

92. *Id.* at 192-93.

Board had requested a newspaper's employment and business records by subpoena pursuant to the Fair Labor Standards Act.<sup>93</sup> The newspaper claimed unsuccessfully that the application of the Act to newspapers would violate their First Amendment rights by regulating their press activities.<sup>94</sup> The Court held that protecting employees from unfair employment practices was not regulation of newsgathering and dissemination.<sup>95</sup>

In *Branzburg v. Hayes*,<sup>96</sup> the Court held that the First Amendment does not relieve reporters from responding to a grand jury subpoena and answering relevant questions in a criminal investigation.<sup>97</sup> The Court subordinated the concern that the reporter might reveal a confidential source to the policy concern for enforcement of subpoenas.<sup>98</sup>

In *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>99</sup> the Court held that the press may not publish copyrighted material without obeying the copyright laws.<sup>100</sup> The plaintiff, an entertainer, alleged that a broadcast company misappropriated the plaintiff's right of publicity when the company televised a videotape of the entertainer's act on a news program without his consent.<sup>101</sup> The Court held that "[t]he Constitution no more prevents a State from requiring respondent to compensate petitioner [entertainer] for broadcasting his act on television than it would privilege respondent [broadcaster] to film and broadcast a copyrighted dramatic work without liability to the copyright owner."<sup>102</sup>

The Supreme Court has also rejected claims of First Amendment protection from antitrust laws<sup>103</sup> and payment of nondiscriminatory taxes.<sup>104</sup>

---

93. *Id.* at 189.

94. *Id.* at 192-93.

95. *Id.*

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

97. *Id.* at 692.

98. *Id.* at 693.

99. 433 U.S. 562 (1977).

100. *Id.* at 575.

101. *Id.* at 563-64.

102. *Id.* at 575.

103. *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969); *Associated Press v. United States*, 326 U.S. 1, 20, n.18 (1945).

104. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581-83 (1983).

### C. *Balance of Interests*

Justice Souter's dissent in *Cohen* raises another line of cases that emphasizes the balance of interests in favor of the "right to know."<sup>105</sup> In *First National Bank of Boston v. Bellotti*,<sup>106</sup> the Court held that the First Amendment protection is not limited to the expression of the press and individuals.<sup>107</sup> The First Amendment also prohibits limiting the stock of information from which members of the public may draw.<sup>108</sup> The Court placed a higher and broader value on the right of the public to know than on the right of the media or an individual to publish.<sup>109</sup> The information the press provides enables members of the public to make intelligent and informed decisions on public matters.<sup>110</sup>

## IV. THE INSTANT DECISION

### A. *The Majority Opinion*

In deciding *Cohen*, the majority focused on the issue of whether the First Amendment prohibits a plaintiff from recovering damages under state promissory estoppel law for a newspaper's breach of a promise of confidentiality given to a plaintiff in exchange for information.<sup>111</sup> The Court held that the First Amendment does not prohibit recovery.<sup>112</sup>

The defendants first asserted that the Court lacked jurisdiction to determine the validity of a promissory estoppel theory because it is entirely a matter of state law interpretation.<sup>113</sup> The Court rejected their contention because (1) the Minnesota Supreme Court based its holding on the conclusion that such a theory would violate the First Amendment and (2) the defendants defended themselves throughout the suit by contending the First Amendment bars a promissory estoppel cause of action against the press.<sup>114</sup> The Court

105. *Cohen*, 111 S. Ct. at 2522-23.

106. 435 U.S. 765 (1978).

107. *Cohen*, 111 S. Ct. at 2523; *Bellotti*, 435 U.S. at 783.

108. *Bellotti*, 435 U.S. at 783. *See also* *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).

109. *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981).

110. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). *See supra* notes 4-9 and accompanying text.

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

112. *Id.*

113. *Id.* at 2517.

114. *Id.*

has jurisdiction to hear state law claims that raise federal constitutional questions and defenses.<sup>115</sup>

After establishing jurisdiction, the Court decided "whether a private cause of action for promissory estoppel involves 'state action' within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered."<sup>116</sup> Referring to the Court's analysis in *New York Times Co. v. Sullivan*,<sup>117</sup> the majority determined that the enforcement of a successful promissory estoppel suit by the court would restrict First Amendment freedoms of the defendants under the auspices of state courts.<sup>118</sup> This involvement constitutes "state action" under the Fourteenth Amendment.<sup>119</sup>

After determining the presence of state action, the Court addressed whether the state action violates the defendants' First Amendment rights.<sup>120</sup> The Court balanced the constitutional rights of a free press<sup>121</sup> against the enforcement of laws of general applicability.<sup>122</sup>

The Court began by rejecting the line of cases proffered by the defendants<sup>123</sup> that protects the press from punishment if the information published is obtained lawfully and involves a matter of public significance.<sup>124</sup> The Court concluded that because the information published in *Cohen* was obtained by breaching a promise of confidentiality, the information was not obtained lawfully, and its publication was not protected by the Constitution.<sup>125</sup>

The Court relied on the line of cases<sup>126</sup> that hold 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>127</sup> The Court concluded that the doctrine of promissory

115. *Id.*

116. *Id.*

117. *See supra* notes 57-60 and accompanying text.

118. *Cohen*, 111 S. Ct. at 2518. *Cohen* was remanded to the Minnesota Supreme Court to determine the validity of a promissory estoppel claim; therefore, Minnesota courts would be enforcing any judgment rendered against the defendants. *Id.* at 2519-20.

119. *Id.* at 2518.

120. *Id.*

121. *See supra* notes 63-73 and accompanying text.

122. *See supra* notes 77-104.

123. *See supra* notes 63-73 and accompanying text.

124. *Cohen*, 111 S. Ct. at 2518.

125. *Id.* at 2519.

126. *See supra* notes 77-104 and accompanying text.

127. *Cohen*, 111 S. Ct. at 2518.

estoppel is a law of general applicability.<sup>128</sup> Therefore, if general laws apply to the press and the effect on the press is only incidental, the First Amendment does not forbid their application to the defendants in *Cohen*.<sup>129</sup>

The Court stressed that the application of promissory estoppel does not single out the press.<sup>130</sup> In responding to Justice Blackmun's dissent,<sup>131</sup> Justice White wrote that the enforcement of a promissory estoppel action would not punish the press because compensatory damages are not a form of punishment.<sup>132</sup> Justice White equated the damages with liquidated damages pursuant to a contract provision or a "generous bonus" to a confidential source.<sup>133</sup> Both represent the "cost of acquiring newsworthy material to be published at a profit, rather than a punishment imposed by the State."<sup>134</sup> In *Cohen*, any restrictions on publication were self-imposed because they were created when the defendants breached their promises to the plaintiff.<sup>135</sup> The state is merely requiring that those making promises must keep them or must compensate the other party for their breach.<sup>136</sup>

Finally, the Court rejected Cohen's request that the jury verdict be reinstated, awarding him \$200,000 in compensatory damages.<sup>137</sup> The Court remanded to the Minnesota Supreme Court to determine whether a promissory estoppel claim had been established and whether Minnesota state law might protect the press from that claim.<sup>138</sup> The Minnesota Supreme Court held

---

128. *Id.* at 2518-19.

129. *Id.* at 2519.

130. *Id.* "[E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations. . . . It does not target or single out the press." *Id.* See *supra* notes 63-104 for a discussion of laws which do violate the First Amendment right of the press in contrast to laws of general applicability.

131. *Cohen*, 111 S. Ct. at 2520-22.

132. *Id.* at 2519. Justice White distinguished the case at hand with Blackmun's analysis of *Smith v. Daily Mail Publishing Co.* See *supra* notes 63-66.

133. *Cohen*, 111 S. Ct. at 2519.

134. *Id.*

135. *Id.* The majority distinguished *Florida Star v. B.J.F.* when they found that breaching the promise to Cohen disqualified the defendants for First Amendment protection for lawfully obtained information. *Id.* *Florida Star* is discussed *supra* text accompanying notes 70-72.

136. *Cohen*, 111 S. Ct. at 2519.

137. *Id.*

138. *Id.* at 2520. On remand, the Minnesota Supreme Court held that (1) plaintiff may pursue a theory of promissory estoppel on appeal, although he started with a contract theory at trial, under these circumstances; (2) Minnesota's free speech clause does not afford greater protection to a confidentiality promise in this case than is afforded under the First Amendment, nor does enforcement of this confidentiality

that damages for breach of the promise were sustainable under promissory estoppel.<sup>139</sup>

### *B. Justice Blackmun's Dissent*<sup>140</sup>

In contrast to the majority, Justice Blackmun embraced the line of First Amendment cases typified by *Smith v. Daily Mail Publishing Co.*<sup>141</sup> He concluded that using a promissory estoppel claim to penalize publication of truthful information about a political campaign violates the First Amendment.<sup>142</sup>

Justice Blackmun rejected the argument for enforcement of generally applicable laws,<sup>143</sup> because he concluded the analysis should focus on the speech and not the speaker.<sup>144</sup> Constitutional freedoms of speech and press are not restricted to the media but apply to non-media defendants equally.<sup>145</sup> Therefore, the majority's reliance on the cases that supported the general applicability of laws to publishers was "misplaced."<sup>146</sup>

Justice Blackmun specifically distinguished the majority's line of cases. He pointed out that in the majority's line of cases the Court imposed liability on media defendants for conduct unrelated to the content of speech.<sup>147</sup> In contrast, the promise in *Cohen* was related to speech, because publication triggered the breach of the confidentiality promise that led to liability.<sup>148</sup>

promise violate public policy; (3) the jury award of compensatory damages for breach of a confidentiality promise is sustainable on the theory of promissory estoppel. *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 390-92 (Minn. 1992).

139. *Cohen*, 497 N.W.2d at 388.

140. *Cohen*, 111 S. Ct. at 2520. Blackmun is joined by Justice Marshall and Justice Souter. *Id.*

141. 443 U.S. 97 (1979). *See supra* notes 63-66.

142. *Cohen*, 111 S. Ct. at 2520.

143. Justice Blackmun did not reject the validity of the cases holding the general applicability of laws; however, he decided they did not control in *Cohen*. In fact, Justice Blackmun joined with the majorities in both *Branzburg v. Hayes*, 408 U.S. 665 (1972) and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

144. *Cohen*, 111 S. Ct. at 2520.

145. *Id.*

146. *Id.*

147. *See supra* notes 77-104 and accompanying text. Justice Blackmun mentions one exception to his charge in a footnote. *Cohen*, 111 S. Ct. at 2521 n.1. Only *Zacchini* involved a dispute about the right of publication of certain information. *Id.* at 2520-21.

148. *Id.*



Justice Blackmun found that *Hustler Magazine, Inc. v. Falwell*<sup>149</sup> mirrors the issues in *Cohen* "precisely."<sup>150</sup> In that case the Court found that the media defendant's First Amendment rights would be violated by the imposition of liability under a state claim of infliction of emotional distress, a law of general applicability.<sup>151</sup> To succeed under the state law claim, a plaintiff would have to show that the publication contained a false statement that was made with actual malice.<sup>152</sup> Virginia's interest in protecting its citizens from emotional distress was subordinated to the First Amendment.<sup>153</sup>

In applying *Hustler* to *Cohen*, Justice Blackmun found that the enforcement of a promissory estoppel claim against the defendants would have more than an incidental effect on their speech, because the speech itself is the violation.<sup>154</sup> Therefore, any liability attached to that publication would punish the exercise of a First Amendment right in the absence of a state interest "of the highest order."<sup>155</sup>

### C. Justice Souter's Dissent<sup>156</sup>

Like Justice Blackmun, Justice Souter rejected the doctrine of laws of general applicability as dispositive in *Cohen* and instead weighed the interests of the public, the media, and potentially injured parties.<sup>157</sup>

He emphasized that freedom of speech and the press belong to more than the media.<sup>158</sup> He stated that "freedom of the press is ultimately founded on the value of enhancing such discourse for the sake of a citizenry better informed and thus more prudently self-governed. . . . '[i]t is the right of the [public], not the right of the [media], which is paramount.'<sup>159</sup>

In *Cohen*, Justice Souter found that the scale should tip in favor of the public interest to know about Cohen's activities in support of a political

149. 485 U.S. 46 (1988).

150. *Cohen*, 111 S. Ct. at 2521.

151. *Hustler*, 485 U.S. at 48 (defendant published a satirical critique portraying the plaintiff, a television evangelist, as having engaged in a "drunken incestuous rendezvous with his mother in an outhouse.").

152. *Id.* at 56.

153. *Id.* at 50.

154. *Cohen*, 111 S. Ct. at 2521.

155. *Id.* at 2521-22.

156. *Id.* at 2522. Justice Souter is joined by Justices Marshall, Blackmun and O'Connor. *Id.*

157. *Id.* at 2522-23.

158. *Id.* at 2523.

159. *Id.* at 2523 (quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981)). For a discussion of the role of the press, see *supra* notes 4-9 and accompanying text.

candidate.<sup>160</sup> However, Justice Souter wrote that the weighing process could result in a different outcome under different circumstances, particularly if the identity of the source were of less public significance.<sup>161</sup>

### V. Comment

After *Cohen* visited the undisturbed frontier where the First Amendment clashes with promises of confidentiality to news sources, the Court returned with a deceptively straightforward holding that will create inconsistency and confusion. It is likely to lead to a floodgate of litigation.<sup>162</sup>

The advisory holding only determined that Cohen could bring a claim of promissory estoppel in Minnesota state courts without violating the press' First Amendment rights, if such a claim was otherwise supportable under Minnesota law.<sup>163</sup> The Court could award no damages to Cohen, nor could it order injunctive relief.<sup>164</sup> Cohen's success under the state law claim was not assured. Cohen's knowledge that the court records he provided related to charges that had been dismissed and vacated indicated he may not have had the "clean hands"<sup>165</sup> required to obtain equitable relief. If the Court left Cohen's suit unresolved on the merits and subject to failure under state law, then what does the *Cohen* decision signal to the media and its news sources?

The majority in *Cohen* uses the broad brush of laws of general applicability to paint a simplistic facade over a more complex mural of competing constitutional, state, and public interests. Specifically, the opinion (1) ignores the substantial impact on free speech and press; (2) contradicts the holding in a substantially similar case, *Hustler Magazine, Inc. v. Falwell*;<sup>166</sup> and (3) begs for inconsistent results among the states. This section discusses these criticisms and an alternative standard and applies it to *Cohen*.

160. *Cohen*, 111 S. Ct. at 2523.

161. *Id.*

162. See *supra* note 3 for a listing of recent cases involving promises of confidentiality.

163. *Cohen*, 111 S. Ct. at 2518-19. See *supra* note 138 for the Minnesota Supreme Court's analysis of the case on remand.

164. *Cohen*, 111 S. Ct. at 2519-20.

165. "[E]quity will not grant relief to a party, who, as actor, seeks to set judicial machinery in motion and obtain some remedy, if such party in prior conduct has violated conscience or good faith or other equitable principle." BLACK'S LAW DICTIONARY 250 (6th ed. 1990) (*cited in* Franklin v. Franklin, 283 S.W.2d 483, 486 (Mo. 1955)).

166. 485 U.S. 46 (1988).

### A. *The Chilling Effect on a Free Press*

Justice White found that the imposition of civil liability for a breach of a promise of confidentiality would have only "incidental" and "insignificant" effects on newsgathering.<sup>167</sup> He defended against the dissenters by stating that the press is not singled out in *Cohen*.<sup>168</sup> He stated that this was merely a consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them.<sup>169</sup>

In placing the press on the same constitutional plane as other citizens, Justice White ignored the fact that "normal citizens to whom generally applicable laws apply are not in the business of information gathering and delivery."<sup>170</sup> Because news organizations, unlike other entities, inherently rely on confidentiality agreements "to achieve the larger societal good of uncovering scandal, corruption and abuse," the promissory estoppel analysis in *Cohen* is in practice only applicable to news organizations.<sup>171</sup> It is not generally applicable to everyone, which distinguishes *Cohen* from the majority's line of general applicability cases.<sup>172</sup> *Cohen* effectively singles out the media, even though the Court's analysis sounds "neutral on its face."<sup>173</sup>

One journalist noted that the conclusion in *Cohen* reveals a disturbing recent trend in Supreme Court cases in which laws are given minimal scrutiny because their impact on constitutional rights appears merely "incidental."<sup>174</sup> Justice Souter pointed out in his dissent that laws of general applicability can restrict First Amendment rights just as severely "as those directed specifically at speech itself."<sup>175</sup>

To avoid litigation, media organizations will need to revamp their policies on promises of confidentiality. Reporters will probably be stripped of the absolute authority to make such promises and simultaneously will lose some of their flexibility in newsgathering. Given the choice between playing it safe and risking public exposure, sensitive news sources may opt to be quiet. However, if news sources still perceive apparent authority in reporters to make

167. *Cohen*, 111 S. Ct. at 2519.

168. *Id.*

169. *Id.*

170. Karl Olson & Benjamin A. Holden, *An Oath Of Silence: Contract Damages Come to the Information Industry When a Reporter Breaches a Deal With a Source*, THE RECORDER, Oct. 14, 1991, at 8.

171. *Id.*

172. *Id.*

173. *Id.*

174. James, *supra* note 3, at S4.

175. *Cohen*, 111 S. Ct. at 2522.

such promises, and if reporters do not dispel that perception, a simple policy change will probably not shield the media. In the end, media organizations will have to scrutinize more closely both the kinds of promises their reporters make and the professional integrity of the reporters who make them. The heightened awareness to keeping promises will benefit sources; however, the press' ability to perform its three traditional roles<sup>176</sup> will be reduced. Hesitant editors may bow to the greater pressure of threatened civil liability rather than the duties to inform the public and keep government accountable.

### B. *Inconsistency with Hustler*

The detrimental effect of the imposition of civil liability on First Amendment rights creates the basis for the Court's opinion in *Hustler Magazine, Inc. v. Falwell*.<sup>177</sup> *Hustler* addresses facts and constitutional issues similar to *Cohen* but differs in its holding.

In *Hustler*, the Court found that the media defendant's First Amendment rights would be violated by the imposition of liability under a state infliction of emotional distress claim.<sup>178</sup> According to Justice Blackmun's dissent in *Cohen*, the *Hustler* court did not question that the Virginia tort was "a law of general applicability' unrelated to the suppression of speech."<sup>179</sup> Virginia's interest in protecting its citizens from emotional distress, however, was subordinated to the First Amendment.<sup>180</sup> The Court held that "when used to penalize the expression of opinion, the law was subject to the strictures of the First Amendment."<sup>181</sup>

To protect the media's First Amendment rights, the Court in *Hustler* concluded that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'"<sup>182</sup>

Despite the protection afforded in *Hustler*, the majority in *Cohen* rejected any imposition of stricter requirements on the plaintiff for proving his claim of promissory estoppel.<sup>183</sup> The *Cohen* court distinguished *Hustler* on the

176. See *supra* notes 4-9 and accompanying text.

177. 485 U.S. 46 (1988).

178. *Id.* at 48. See also *supra* note 149-153 and accompanying text.

179. *Cohen*, 111 S. Ct. at 2521. To succeed under the state law claim, a plaintiff would have to show that the publication contained a false statement which was made with actual malice. *Id.* See also *Hustler*, 485 U.S. at 50.

180. *Cohen*, 111 S. Ct. at 2521; *Hustler*, 485 U.S. at 50.

181. *Cohen*, 111 S. Ct. at 2521.

182. *Hustler*, 485 U.S. at 56.

183. *Cohen*, 111 S. Ct. at 2519.

kind of injury sustained and the theory used.<sup>184</sup> Cohen sought compensation for a breach of promise for which he lost his job, whereas Falwell claimed injury to his state of mind.<sup>185</sup> The Court simply seems more comfortable extending the stricter requirements of a libel and defamation claim to the tort of intentional infliction of emotional distress than to promissory estoppel for a breach of promise.

In reviewing all of the cases discussed in *Cohen*, only *Hustler* comes close to mirroring the facts and constitutional context of *Cohen*. The majority's cases supporting the doctrine of laws of general applicability fail to address the constitutional concerns, while the dissent's First Amendment protection cases (except for *Hustler*) deal almost exclusively with criminal, not civil, liability. Furthermore, the cases have little application when the method of newsgathering is improper. *Hustler* addresses the constitutional questions and deals specifically with imposition of civil liability on the press under a state law claim. Therefore, the Court in *Cohen* should have followed *Hustler* and protected the press from the promissory estoppel claim with the imposition of stricter requirements for proving the elements.

### C. Potential for Inconsistent Results

The *Cohen* court remanded the case to the Minnesota Supreme Court to decide whether *Cohen* could prevail on a promissory estoppel theory or if state law protected the newspaper.<sup>186</sup> One commentator noted that this approach "creates the real possibility that the First Amendment will apply to the States only to the extent that state laws classify a protected speech interest."<sup>187</sup> The danger is that the laws concerning confidentiality agreements will vary from state to state and will depend on each state's supreme court interpretation, particularly the free speech clause of its state constitution.<sup>188</sup>

The *Cohen* majority's laws of general applicability doctrine fails to address the competing interests of the state, public, and press.<sup>189</sup> One commentator noted that

it makes every free speech, press and religion case one that distorts these interests, such that the contours of the First Amendment are constantly

---

184. *Id.*

185. *Id.*

186. *Id.* at 2520. See *supra* note 138.

187. James, *supra* note 3, at S4.

188. Ethan Bronner, *Justices Say Sources Can Sue Media; A Broken Vow of Confidentiality Ruled Actionable*, THE BOSTON GLOBE, June 25, 1991, at A1, A8.

189. James, *supra* note 3, at S4.

moving. This alone is not a vice—expression is variable and dynamic—but the generally applicable law exception, ignoring as it does the core First Amendment concerns because they do not apply, produces results in each case that redefine the role of the expressive interest without the promise that the interest will be considered squarely in a future case.<sup>190</sup>

The variance among states would be especially vexatious to media organizations whose operations cross state borders. For example, a newspaper reporter, circulating in a tri-state area, makes a promise of confidentiality over the telephone to a source who works in a neighboring state. The source resides in the third state. The jurisdiction chosen by the aggrieved source would be crucial to the outcome of the case, because all three states could have different approaches to breaches of confidentiality agreements. The newspaper's free speech protection and liability would depend almost entirely on the source's choice of forum and cause of action.

Television and radio stations, particularly national broadcasters, would face an even more complex and forbidding task. To decrease the likelihood of liability, national and regional media organizations may eventually have to conform their newsgathering techniques to the state whose laws are most hostile to the press. The media-friendly laws of neighboring states would only hold significance for media organizations operating entirely within the state.

Commentators are also concerned about the expansion of *Cohen* to cases that have a mixture of elements under a breach of promise and libel or defamation.<sup>191</sup> According to one article, "Unhappy sources and other potential plaintiffs may try to dress up libel claims as breaches of contract or promissory estoppel to avoid the constitutional protections and privileges the press enjoys in libel actions."<sup>192</sup>

Jane Kirtley, executive director of the Reporters Committee for Freedom of the Press, said the Court is "driving a wedge between sources and reporters" by changing a relationship based on trust to one governed by contractual arrangements.<sup>193</sup> She said "the ruling also would draw courts and lawyer[s] more deeply into [editorial] decisions about using confidential

---

190. *Id.*

191. See Olson & Holden, *supra* note 170, at 8. As an example, a reporter calls a source who is involved in a public dispute with an official. The reporter wants the source's side of the story and asks the source to comment so that the reporter can write a fair and balanced story. The official has already commented extensively. The source cooperates. The story appears with a disproportionate number of quotes from the official rather than the source. The scenario includes both a promise and a story slighting the source. *Id.*

192. *Id.*

193. Campbell, *supra* note 3, at 2.

sources."<sup>194</sup> "I predict this decision will create lots of problems for journalists," said Kirtley. "Sources who leak information and then get into trouble will claim they were promised certain things."<sup>195</sup>

Although *Cohen* may rightly prod media organizations to be more responsible newsgatherers, the decision is sure to touch off a powder keg of litigation in the fifty states.<sup>196</sup>

#### D. Alternative Standard

This section explores an alternative standard to the rule in *Cohen* to better serve the competing interests of the press, state and public. The alternative is a two-prong construct developed by a *Minnesota Law Review* commentator.<sup>197</sup> It focuses on the definity of the alleged confidentiality agreement and injects a fault element similar to libel and defamation cases.<sup>198</sup>

Under the first prong of the standard, a plaintiff is required to "produce clear and convincing evidence" that a promise of confidentiality had been made and that a media organization breached the promise by publishing the confidential information.<sup>199</sup> This high standard of proof protects the media's First Amendment rights by discouraging frivolous suits, especially when the existence of the promise is hotly disputed.<sup>200</sup> The second prong of the standard requires the plaintiff to prove that the media organization breached the promise with reckless disregard to the plaintiff's interests in the promise. The prong incorporates the "reckless disregard" standard from *New York Times Co. v. Sullivan*,<sup>201</sup> which established a fault standard for public figure defamation cases.<sup>202</sup>

In the context of promises of confidentiality, the reckless disregard standard differs from *New York Times*.<sup>203</sup> A court should consider (1) the media organization's knowledge of why the source wanted confidentiality, (2) the media organization's reason for publishing the information, and (3) the newsworthiness of the confidential information.<sup>204</sup>

---

194. *Id.*

195. Savage, *supra* note 27, at 1.

196. See *supra* note 3 and accompanying text.

197. See Dicke, *supra* note 2.

198. *Id.* at 1579.

199. *Id.*

200. *Id.* at 1579-80.

201. 376 U.S. 254, 280 (1964).

202. *Id.* at 279-80.

203. Dicke, *supra* note 2, at 1581.

204. *Id.*

The use of the two-prong test strikes a compromise between the constitutional indifference of strict liability and absolute First Amendment protection for the press.<sup>205</sup> The source's interest in compensation for harm is mitigated by stricter requirements for proving a claim for breach of a confidentiality promise.<sup>206</sup>

In applying this standard to *Cohen*, the first part of the test is satisfied, because both parties agreed that a confidentiality agreement existed.<sup>207</sup> The analysis then falls on the second prong.<sup>208</sup> Arguably, one could conclude that both parties in *Cohen* have strong arguments under the three considerations outlined above.<sup>209</sup> The newspaper reporters and editors naturally realized that Cohen wanted confidentiality to avoid damage to his standing in the community, particularly at his work place. However, Cohen's high visibility in the community made his involvement newsworthy, especially in the context of a political campaign. Further, Cohen's confidential report withheld crucial details about the disposition of the charges against Johnson. Cohen argued that the newspapers could have informed the public sufficiently by identifying him as a "Republican party activist."<sup>210</sup> Unfortunately, applying this test to the facts in *Cohen* results in an ambiguous conclusion. The test is only slightly more helpful than the Court's rationale.

Although the commentator in the *Minnesota Law Review* outlines more concrete criteria for cases in which a promise of confidentiality is breached, the alternative standard does not adequately replace the protections of free speech and press offered by the First Amendment.<sup>211</sup> The standard merely interjects an additional element and toughens the level of proof required for the imposition of liability on media organizations.

Both the majority in *Cohen* and the standard above ignore a concern that is fundamental to the First Amendment. The importance of the First Amendment springs from its protection of speech that might be suppressed if it is onerous to the government or the majority.<sup>212</sup> While breaking promises is generally disfavored in this society, to compromise the protection of the First Amendment as a remedy is to bow to the very pressure from which the authors of the amendment sought to isolate the press.

---

205. *Id.* at 1582.

206. *Id.*

207. *Id.* at 1584.

208. *Id.*

209. *Id.* at 1584-85.

210. *Id.* at 1585.

211. U.S. CONST. amend. I.

212. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.7, at 940-41 (4th ed. 1991).



The Court could have relied on its earlier decision in *Hustler*<sup>213</sup> to find in favor of the publishers or at least to establish a standard that could be applied uniformly to subsequent cases. If applied to *Cohen*, the *Hustler* opinion would (1) subordinate state law claims, such as promissory estoppel, to the First Amendment when the law penalized freedom of expression and (2) interject a heightened burden of proof on public figures. The heightened burden, involving proof of actual malice, would be similar to the standard proposed by other commentators;<sup>214</sup> however, by adopting *Hustler* as controlling authority, the Court could avoid the chilling effect of *Cohen* and prevent the inevitable cries for the Court to concoct a new standard specifically for breaches of confidentiality promises.

## VI. CONCLUSION

*Cohen* assumes a peculiar position among the cases involving media defendants. Because of the Court's failure to recognize the special role of confidentiality promises in traditional press activity, the Court has cast itself into the position of second-guessing editorial decisions when news sources become disgruntled. This decision smacks of inadvertent judicial activism in a Supreme Court that many claim has entered a new era of conservatism.

Despite the constitutional indifference of *Cohen* and its propensity to foster inconsistent results, the opinion rightfully encourages the media to take more seriously its confidentiality agreements. Because a lawsuit for a breach of promise can only compensate a party for an injury already incurred, the reliability of these promises ultimately rests in the professional ethics expected of reporters, editors, and the media in general.<sup>215</sup> Unless the media can assure sources confidentiality when requested and adhere to those obligations, sources may simply choose to disappear.<sup>216</sup>

HAROLD B. OAKLEY

---

213. 485 U.S. 46 (1988).

214. See Dicke, *supra* note 2.

215. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 202 (Minn. 1990), *rev'd*, 111 S. Ct. 2513 (1991).

216. *Id.* at 202-03.