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## Confidentially Speaking: Protecting the Press from Liability for Broken Confidentiality Promises—*Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991)

Jeffrey A. Richards

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## CONFIDENTIALLY SPEAKING: PROTECTING THE PRESS FROM LIABILITY FOR BROKEN CONFIDENTIALITY PROMISES—*Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991).

*Abstract:* In *Cohen v. Cowles Media Co.*, the Supreme Court held that the First Amendment does not bar suits against newspapers for breaches of confidentiality promises. By following its cases holding that the press is subject to neutral laws, the Court ignored its precedent mandating that state laws inhibiting publication violate the First Amendment absent a compelling state interest. This Note explores both lines of cases and concludes that application of a state law that inhibits publication is unconstitutional if its utility in effecting a legitimate state interest is outweighed by the public's interest in receiving the information. Therefore, courts should read *Cohen* narrowly, and legislatures should act to shield the press from liability for breach of confidentiality.

Should the press be constitutionally insulated from liability for printing the name of a source despite a promise of anonymity? Until recently, newspaper editors and publishers considered confidentiality promises an ethical obligation. The Supreme Court, however, has added a legal dimension to a newspaper's confidentiality obligation by holding in *Cohen v. Cowles Media Co.*<sup>1</sup> that the First Amendment does not bar actions against a newspaper for breach of a promise of confidentiality.

This Note sets forth the procedural and factual history of *Cohen*, including the rationale of the courts at each level. It also examines two lines of Supreme Court cases that could have controlled the decision in *Cohen*, as well as pressures within the media to reveal sources despite promises of confidentiality. This Note concludes that legislative intervention and a narrow reading of *Cohen* are appropriate to minimize the speech-limiting impact of the Court's ruling because revealing the identity of a confidential source may serve an important political function.

### I. *COHEN v. COWLES MEDIA CO.*: WHEN A WORD IS A BOND

*Cohen v. Cowles Media Co.* arose in the context of a political election. Dan Cohen was the public relations director for the Independent-Republican (IR) gubernatorial candidate Wheelock Whitney.<sup>2</sup> One week before the election, IR supporters unearthed documents proving that the Democratic-Farmer-Laborer candidate for lieutenant governor, Marlene Johnson, had been arrested in 1969 for unlawful

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

2. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 252 (Minn. Ct. App. 1989), *aff'd in part and rev'd in part*, 457 N.W.2d 199 (Minn. 1990), *rev'd*, 111 S. Ct. 2513 (1991).

assembly and again in 1970 for petty theft.<sup>3</sup> A number of IR supporters, including Cohen, met to discuss dissemination of the information. The group decided that Cohen should anonymously release the information because he had the best rapport with the local media.<sup>4</sup> Cohen leaked the information to reporters from the Minneapolis Star and Tribune and the St. Paul Pioneer Press Dispatch in exchange for verbal promises of confidentiality.<sup>5</sup>

Each newspaper subsequently breached its promise of confidentiality. Journalists from both newspapers, after confronting Johnson with the information against her, learned that the unlawful assembly charge was for participation in a labor protest and had later been dropped.<sup>6</sup> The journalists also learned that Johnson's conviction for petty theft had been vacated less than a year after its imposition.<sup>7</sup> Each newspaper independently decided to print the story and Johnson's explanations. More importantly, against the wishes of the journalists who promised Cohen anonymity, the newspapers identified Cohen as the informant.<sup>8</sup> As a result, Cohen was fired from his job at an advertising agency.<sup>9</sup>

#### A. *The Minnesota Trial and Appellate Courts*

Legal action followed the disclosure of Cohen's name. Cohen successfully sued the newspapers for breach of contract and for fraudulent misrepresentation and received both punitive and compensatory damages.<sup>10</sup> A divided Minnesota Court of Appeals affirmed the breach of contract claim but reversed the fraudulent misrepresentation claim and the punitive damages award.<sup>11</sup> The court found that the First Amendment does not shield the press from its contractual obligations and noted that disclosure of Cohen's name had limited public value.<sup>12</sup>

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3. *Id.*

4. *Id.*

5. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 200 (Minn. 1990), *rev'd*, 111 S. Ct. 2513 (1991).

6. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2516 (1991).

7. *Cohen*, 457 N.W.2d at 200-01.

8. *Id.* at 201.

9. *Id.* at 202.

10. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 254 (Minn. Ct. App. 1989), *aff'd in part and rev'd in part*, 457 N.W.2d 199 (Minn. 1990), *rev'd*, 111 S. Ct. 2513 (1991).

11. *Id.* at 262.

12. *Id.* at 257. The court stated, "Reporting that the source was aligned with the IR party in some manner would have satisfied the need to describe the source." *Id.*

*B. The Minnesota Supreme Court*

The Minnesota Supreme Court affirmed the appellate court's reversal of the fraudulent misrepresentation judgment but reversed on the contract claim.<sup>13</sup> The court found that promises of confidentiality are ethical, not contractual, obligations.<sup>14</sup> The court also found that promissory estoppel<sup>15</sup> was inapplicable because the requirement that "injustice can only be avoided by enforcing the promise" was not met.<sup>16</sup> Although the equities of the case favored neither party, the inhibitory effect on the First Amendment of enforcing the press' promises persuaded the court to leave the parties "to their trust in each other."<sup>17</sup> Cohen appealed the dismissal of the promissory estoppel claim to the United States Supreme Court.

*C. The United States Supreme Court*

The United States Supreme Court reversed the Minnesota Supreme Court's decision and remanded the case for decision on the estoppel claim without the First Amendment as a counterweight.<sup>18</sup> The majority initially determined that Minnesota estoppel law as applied to newspapers involved state action implicating the First Amendment.<sup>19</sup> The Court then found inapplicable a line of cases invalidating various state statutes that impeded publication of truthful, lawfully-obtained

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

14. *Id.* at 203.

15. The Minnesota Supreme Court was the first to apply promissory estoppel to Cohen's broken confidentiality promise as a manner more flexible than rigid contract analysis to weigh the enforceability of a promise. *Id.* The court believed that the newspapers' promises of confidentiality could have implicitly created a contract "in law where none exists in fact" if the promises reasonably induced definite action by the promisee and if "injustice [could] only be avoided by enforcing the promise[s]." *Id.* at 203-04.

16. *Id.* at 204. Both parties, the court intimated, tried to manipulate the agreement to their own benefit. Cohen may have used the agreement to insulate himself from responsibility for dissemination of misinformation damaging to his political opponents. The newspapers may have induced Cohen into providing information by promising him anonymity although they never intended to protect Cohen's identity.

17. *Id.* at 205.

18. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2519-20 (1991).

19. *Id.* at 2517. The newspapers argued that the Supreme Court lacked jurisdiction to hear the case because state law alone determines when an agreement becomes a binding contract. The newspapers also argued that the First Amendment dicta by the Minnesota Supreme Court was mere surplusage, and thus, no First Amendment question was properly before the Court. Respondent Cowles Media Cos. Brief in Opposition to Certiorari at 6-7, *Cohen* (1991 U.S. Briefs LEXIS No. 90-634); Respondent Cowles Media Cos. Brief at 9-12, *Cohen* (1991 U.S. Briefs LEXIS No. 90-634). The Court, however, stated, "Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment." *Cohen*, 111 S. Ct. at 2517.

information.<sup>20</sup> Instead, the Court based its decision on cases holding that “neutral laws” were applicable to the press.<sup>21</sup> The Court found that Minnesota’s doctrine of promissory estoppel was a law of general applicability and therefore should be equally applicable to the press as to the general public.<sup>22</sup>

Several justices dissented, reflecting divergent views about the constitutional standard to be applied when state law inhibits publication. Justice Blackmun argued that the majority erred in relying upon the principle that the press is subject to general laws.<sup>23</sup> Blackmun further argued that Minnesota’s estoppel law would place a burden on the First Amendment, impermissibly punishing the expression of truthful information.<sup>24</sup> Justice Souter argued that neutrally-applied laws might be as intrusive on First Amendment protections as laws aimed at speech itself.<sup>25</sup> Souter stated that a balancing test weighing competing state and constitutional interests was necessary to decide cases such as *Cohen*.<sup>26</sup> Souter concluded that publishing Cohen’s name was vital to foster a better-informed Minnesota citizenry, which in turn is necessary for prudent self-government.<sup>27</sup> The state interest in protect-

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20. *Id.* at 2518; *see, e.g.*, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *see also infra* notes 48–56 and accompanying text.

21. *Cohen*, 111 S. Ct. at 2518. “Neutral laws” are laws that do not single out the press for regulation and thus only incidentally affect their right to publish. The majority in *Cohen* stated that the enforcement of “general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.” Quoting from *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937), the majority concluded that “[i]t is therefore beyond dispute that [t]he 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.” *Cohen*, 111 S. Ct. at 2518; *see also infra* notes 41–47 and accompanying text.

22. *Cohen*, 111 S. Ct. at 2518–19.

23. *Id.* at 2520 (Blackmun, J., dissenting). Because the First Amendment protections involved in this case would be equally available to non-media defendants, Justice Blackmun argued, “[t]he majority’s admonition that [t]he publisher of a newspaper has no special immunity from the application of general laws, . . . and its reliance on the cases that support that principle, are therefore misplaced.” *Id.*

24. *Id.* at 2521–22. The majority countered Blackmun’s argument by stating that compensatory damages are not technically punishment and that, in any case, the characterization of the award makes no difference when a neutral law is being applied. *Id.* at 2519. In rebuttal, Justice Blackmun pointed out that the Court has consistently held “that the imposition of civil liability based on protracted expression constitutes ‘punishment’ of speech for First Amendment purposes.” *Id.* at 2522 n.4. Blackmun’s position is consistent with the conclusion of this Note. *See infra* notes 73–77 and accompanying text.

25. *Cohen*, 111 S. Ct. at 2522 (Souter, J., dissenting).

26. *Id.* It is unclear whether Souter would go so far as to wholly abandon the “neutral application” test as this Note does. *See infra* notes 64–68 and accompanying text.

27. *Cohen*, 111 S. Ct. at 2523 (Souter, J., dissenting). Justice Souter stated:

The propriety of [Cohen’s] leak to respondents could be taken to reflect on his character, which in turn could be taken to reflect on the character of the candidate who had retained

ing agreements between parties was therefore outweighed by the greater constitutional interest in disseminating information important to political debate.<sup>28</sup>

## II. THE COMING OF *COHEN*: TWO VIEWS ON THE PRESS' RIGHT TO PUBLISH IN THE FACE OF PROHIBITIONS

The Supreme Court identified two separate and apparently conflicting lines of cases that might determine whether the First Amendment bars informants' suits against newspapers for breaking promises of confidentiality.<sup>29</sup> One line of cases holds that the First Amendment does not shield the press from neutral laws.<sup>30</sup> Another line of cases suggests that states may not enforce laws that punish the press for publishing truthful information absent a compelling state interest.<sup>31</sup>

### A. *No Exception for the Press: The Branzburg Cases*

The Supreme Court has long insisted that the Constitution accords journalists no special privilege from legal process.<sup>32</sup> In *Branzburg v. Hayes*,<sup>33</sup> the Court held that the First Amendment does not accord a journalist immunity from answering grand jury questions about confidential sources, especially in light of the public interest in criminal prosecution.<sup>34</sup> Notwithstanding a journalist's promise of confidential-

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him as an advisor. An election could turn on just such a factor; if it should, I am ready to assume that it would be to the greater public good, at least over the long run.

*Id.*

28. *Id.*

29. *Id.* at 2518.

30. See *supra* note 21 and *infra* notes 41–47 and accompanying text.

31. See *infra* notes 48–56 and accompanying text.

32. The Court has recognized the role of the press as being a vehicle for individual expression, an educator of the public, and a check on the government. 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, 1558–59 (1989). The press, however, has been afforded little constitutional protection. The Supreme Court has articulated lofty ideals for upholding freedom of the press in many cases. See *NAACP v. Button*, 371 U.S. 415, 433 (1963) (“These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society.”); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (“[T]he suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.”). But the Court has consistently rejected any argument that the First Amendment grants favored constitutional status to the press and is “suspicious of any claim of privilege that appear[s] to elevate journalists above other citizens.” LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-22, at 971 (2d ed. 1988). But see Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975) (arguing that the press holds special constitutional status because it is protected as an institution).

33. 408 U.S. 665 (1972).

34. *Id.* at 690–91.

ity, the journalist must inform the grand jury of a source's identity if the grand jury requires such information in its investigation of a crime.<sup>35</sup>

Despite the *Branzburg* decision, lower courts consistently have read *Branzburg* to recognize some privilege of confidentiality.<sup>36</sup> *Branzburg* holds only that First Amendment freedoms are not abridged when journalists are required to appear and testify before state or federal grand juries.<sup>37</sup> Thus journalists might enjoy a general privilege in civil cases, legislative or administrative hearings, or other forms of investigation.<sup>38</sup> Moreover, five justices in *Branzburg* expressly recognized constitutional protection of confidentiality under certain circumstances.<sup>39</sup> Finally, in the wake of *Branzburg*, many states enacted shield laws offering varying protections of confidentiality promises.<sup>40</sup>

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35. *Id.* at 707-08. The Court noted that "[g]rand juries are subject to judicial control and subpoenas and 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." *Id.* at 708. Thus the majority "trusted that judges supervising grand jury investigations would be sufficiently sensitive to first amendment concerns to minimize the danger of such abuse." TRIBE, *supra* note 32, at 971.

36. *See, e.g., In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir. 1982) (nonparty witness cannot be compelled to disclose sources when sources' identities bore only tenuous relationship to antitrust claims), *cert. denied sub nom. Arizona v. McGraw-Hill, Inc.*, 459 U.S. 909 (1982); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (journalist cannot be compelled to disclose confidential sources in discovery even though the information was crucial to litigants' case); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980) (journalists have a First Amendment, non-absolute privilege against compelled disclosure of confidential informants' identities), *cert. denied*, 450 U.S. 1041 (1981).

37. *Branzburg*, 408 U.S. at 667.

38. Civil, legislative, and administrative action involve a lesser countervailing interest to journalistic immunity than criminal actions. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1000 (4th ed. 1991); *see, e.g., Democratic National Committee v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973) (journalists enjoy a qualified privilege of confidentiality in civil actions).

39. In a dissenting opinion, Justice Stewart, joined by Justices Brennan and Marshall, recognized a qualified privilege of confidentiality for the press. Stewart argued that to overcome the privilege of immunity, the government must demonstrate probable cause to believe that a journalist has information relevant to a potential violation of the law. The government must prove that the information could not be obtained by means less intrusive on First Amendment rights and that there is a compelling interest in obtaining the information. *Branzburg*, 408 U.S. at 725. Justice Douglas' dissent argued that journalists have an absolute right to refuse to appear before a grand jury unless the reporter is implicated in the crime. *Id.* at 711. Justice Powell, in concurrence, emphasized the limited nature of the Court's decision, arguing that the First Amendment intrusions should be balanced against the community interest in criminal investigation on a case-by-case basis. *Id.* at 709. The tentative nature of Justice Powell's concurrence led Justice Stewart to comment that *Branzburg* was decided by a vote of four-and-a-half to four-and-a-half. Stewart, *supra* note 32, at 635.

40. *See Paul Marcus, The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 859 (1983). At least twenty-three states have enacted legislation providing immunity for journalists refusing to divulge

## The Press and Confidentiality Promises

Although the press may enjoy a qualified privilege of confidentiality, the press does not enjoy constitutional protection from laws of general application.<sup>41</sup> The press is not exempt from obeying federal copyright laws in publishing copyrighted material.<sup>42</sup> The press must obey the National Labor Relations Act<sup>43</sup> and the Fair Labor Standards Act.<sup>44</sup> The press may not restrain trade in violation of federal antitrust laws.<sup>45</sup> The press has no greater right than the general public to acquire information about prison conditions.<sup>46</sup> The press is also subject to nondiscriminatory state tax laws.<sup>47</sup>

### *B. Protecting the Press' Right to Publish Truthful Information Absent a Compelling State Interest: The Daily Mail Cases*

Although the press is not immune from laws of general application, a line of Supreme Court decisions demonstrates the Court's reluctance to impose penalties on newspapers for violating state statutes when reported information is lawfully-obtained and truthful.

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confidential information before grand juries. See ALA. CODE § 12-21-142 (1986); ARIZ. REV. STAT. ANN. § 12.2237 (1982); ARK. CODE ANN. § 16-85-510 (Michie 1987); CAL. EVID. CODE § 1070 (West 1966 & Supp. 1990); DEL. CODE ANN. tit. 10, §§ 4320 to 4326 (1975); ILL. ANN. STAT. ch. 110, §§ 8-901 to 8-909 (Smith Hurd 1984 & Supp. 1991); IND. CODE ANN. § 34-3-5-1 (Burns 1986); KY. REV. STAT. ANN. § 421.100 (Baldwin 1979 & Supp. 1991); LA. REV. STAT. ANN. §§ 45:1451 to 45:1454 (West 1982); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1989); MICH. COMP. LAWS ANN. § 28.945(1) (West 1985 & Supp. 1991-1992); MINN. STAT. ANN. §§ 595.021 to 595.025 (West 1988 & Supp. 1992); MONT. CODE ANN. §§ 26-1-902, 26-1-903 (1988); NEB. REV. STAT. §§ 20-144 to 20-147 (1987); N.J. STAT. ANN. § 2A:84A-21 (West 1983); N.M. JUD. RULE 11-514 (Michie 1986); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1992); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (Anderson 1981); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); ORE. REV. STAT. §§ 44.510 to 44.540 (1991); PA. STAT. ANN. tit. 42, § 5942 (1982); TENN. CODE ANN. § 24-1-208 (1980 & Supp. 1991). Some state courts, however, have argued that shield laws violate federal and state constitutions. See generally James C. Gooddale, *Courts Begin Limiting Scope of Various State Shield Laws*, 1 NAT'L L.J. 28 (1978). Although there is no federal law equivalent to the state shield laws, Department of Justice regulations recognize a qualified privilege. See 28 C.F.R. § 50.10 (1991) (establishing requirements for compelling journalists to testify).

41. See *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937).

42. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

43. *Associated Press v. NLRB*, 301 U.S. 103 (1937).

44. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

45. *Associated Press v. United States*, 326 U.S. 1 (1945).

46. *Pell v. Procunier*, 417 U.S. 817, 827-28, 830 (1974).

47. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).



### 1. *Protecting Accurate Publication of Lawfully-Obtained Information Absent a Compelling State Interest*

Supreme Court decisions suggest that a newspaper has the constitutional right to publish information obtained legally unless the state can demonstrate a compelling interest in inhibiting publication. For example, the Supreme Court has ruled that a state may not penalize newspapers for publishing the name of a rape victim obtained from public records open to public inspection.<sup>48</sup> Also, a state may not enjoin a newspaper from publishing the name and photograph of the subject of a juvenile proceeding.<sup>49</sup> Additionally, in *Smith v. Daily Mail Publishing Co.*,<sup>50</sup> the Court ruled that states may not insulate juvenile criminal proceedings from media coverage.<sup>51</sup> The Court stated that “if a newspaper lawfully obtains truthful information<sup>52</sup> 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>53</sup> The Court found that protection of juvenile offenders’ anonymity is an insufficient state interest to override a newspaper’s First Amendment right to publication.<sup>54</sup>

### 2. *Protecting Publication of Truthful Information*

Supreme Court decisions also suggest that a newspaper has the right to publish truthful information. For example, the First Amendment protects the press against actions by public figures for intentional infliction of emotional distress unless the statement can be demonstrated to be false and made with actual malice.<sup>55</sup> The First Amendment also bestows upon the press an absolute privilege to report

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48. *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (Florida statute making newspaper civilly liable for publishing rape victim’s name held unconstitutional when the information was obtained from a publicly-released police report); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (civil damage award against a newspaper for broadcasting the name of a rape-murder victim deemed unconstitutional because the records were accessible to the general public).

49. *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977).

50. 443 U.S. 97 (1979).

51. The case involved a West Virginia statute that criminalized the publication of any juvenile offender’s name without the written approval of the juvenile court. *Id.* at 98.

52. The press learned of the shooting through legally monitoring a police radio frequency and then learned the name of the juvenile suspect from various persons at the scene of the crime. *Id.* at 99.

53. *Id.* at 103.

54. *Id.* at 104.

55. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). “Actual malice” means knowledge that the statement was false or made with reckless disregard as to whether it was true. *Id.*

personal facts about private individuals so long as the facts are true and accessible to the public.<sup>56</sup>

### III. MEDIA PRESSURES TO BREAK PROMISES OF CONFIDENTIALITY: MIXED SIGNALS FROM THE INDUSTRY

Resistance to a general privilege of confidentiality for journalists exists not only within the courts but also within the media. The press is the leading advocate of First Amendment rights, yet within the news industry a journalist's right to protect source confidentiality is restricted.<sup>57</sup> Most news organizations now require reporters to reveal their sources to their editors.<sup>58</sup> Additionally, some news organizations specify that only the organization—and not the individual reporter—can promise anonymity.<sup>59</sup> Recent political turmoil has also compelled some journalists to reveal their sources in the interest of fair and thorough reporting.<sup>60</sup> Increasingly, journalists indicate that disclosure of confidential information about anonymous informants serves the public interest.<sup>61</sup>

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56. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494–96 (1975). The Court stated, “We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man.” *Id.* at 496.

57. See Monica Langley & Lee Levine, *Broken Promises*, COLUM. JOURNALISM REV., July/Aug. 1988, at 21. Reporters may reveal their sources only for certain reasons. First, professional responsibility obligates the press to identify a confidential source when disclosure is necessary to set the record straight. *Id.*; see, e.g., *infra* note 60. Second, failure to identify a source may expose a newspaper to liability in million-dollar libel suits. Langley & Levine, *supra*, at 21. Third, unforeseen events may have changed the situation dramatically since the promise of anonymity was made. Dicke, *supra* note 32, at 1578. Fourth, information offered by a source may implicate the source in a criminal investigation. *Id.* Finally, discovery that a source lied makes the source's identity and motive newsworthy. *Id.*

58. Langley & Levine, *supra* note 57, at 22.

59. *Id.* Restricting individual journalists' ability to promise anonymity is due in part to Janet Cooke's admission in 1981 that she fabricated her Pulitzer Prize winning story about “Jimmy,” an eight-year-old heroin addict. *Id.*; see also HAROLD L. NELSON et. al., THE LAW OF MASS COMMUNICATIONS 417 (1989).

60. In 1987, Newsweek revealed that Lt. Colonel Oliver North leaked information concerning the interception of an Egyptian plane carrying the suspected hijackers of the *Achille Lauro*. Newsweek disclosed North's identity as the informant after North, during the Iran-Contra hearings, claimed that the revelation “very seriously compromised our intelligence activities.” Langley & Levine, *supra* note 57, at 21. As Harry Johnson, general counsel for Time, Inc. suggests: “This kind of action is symptomatic of the times, when reporters—and editors particularly—are less enamored of confidential sources.” *Id.* at 22.

61. See Dicke, *supra* note 32, at 1566.

#### IV. THE ROAD NOT TAKEN: *DAILY MAIL*, NOT *BRANZBURG*, SHOULD HAVE CONTROLLED *COHEN*

The Supreme Court erred in applying *Branzburg* rather than *Daily Mail* to the facts in *Cohen*.<sup>62</sup> The Court erred in finding that the First Amendment was not implicated in promissory estoppel claims for breach of a promise of confidentiality. The Court also erred in ruling that civil sanctions did not punish the press. Finally, the Court erred in finding that promises of confidentiality are legal—rather than merely ethical—obligations. The Court should have applied the *Daily Mail* test to the facts in *Cohen*.<sup>63</sup> The Court should have found that Minnesota does not have a compelling interest in enforcing the newspapers' confidentiality promises.

Although the Court in *Cohen* erred in failing to apply the *Daily Mail* test, opportunities exist to minimize the negative impact of *Cohen* on freedom of the press. Lower courts should apply *Cohen* only when enforcement of the confidentiality promise is necessary to prevent substantial injustice and when compensatory damages are equivalent to bonuses newspapers pay to informants. Further, state legislatures can protect the press from liability for breaking promises of confidentiality by enacting shield laws.

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62. The *Daily Mail* cases and the *Branzburg* cases cannot be reconciled with the facts in *Cohen*. The *Daily Mail* cases invalidated statutes inhibiting the ability of the press to print information contained in records otherwise accessible to the general public. Therefore, the *Daily Mail* cases arguably stand for the proposition that the press should be given rights granted to the public generally. Such an argument appears consistent with the *Branzburg* cases, which hold the press to duties imposed upon the public generally. The *Daily Mail* cases would thus be inapplicable to *Cohen* because Cohen's identity as the informant was not a matter of public record. But the *Daily Mail* cases are not driven by the public records distinction. Instead, the *Daily Mail* progeny suggests that absent a compelling state interest, state laws may not punish the press for publishing information so long as the information was legally-obtained and truthful. See *supra* notes 48–56 and accompanying text. In both *Cohen* and the *Daily Mail* cases, state law prevented disclosure of information that was neither privileged nor in the public interest to disclose. If the *Cohen* Court had believed that the *Daily Mail* progeny was indistinguishable from the facts in *Cohen*, it could have avoided the *Daily Mail* protection for the press only by limiting those cases to their facts. However, the Court in *Cohen* made no effort to limit the *Daily Mail* precedents to their facts, believing that *Cohen* would fail the *Daily Mail* standard because the compensatory damages were not technically punishment and the information was not legally obtained. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2519 (1991). But see *supra* note 24, *infra* notes 73–77 and accompanying text.

63. That is, the Court should have weighed the state's interest in enforcing confidentiality promises against the public's interest in obtaining information relevant to a political campaign.

A. *Broken Promises of Confidentiality Invoke First Amendment Protections When the Public Interest in Receiving the Information Outweighs the State's Interest in Restricting the Information*

The first issue in determining *Branzburg's* applicability to the facts in *Cohen* is whether a promissory estoppel claim for a broken confidentiality promise triggers First Amendment protection. The Court stated that such a promissory estoppel claim does "not offend the First Amendment simply because [its] enforcement against the press has incidental effects on its ability to gather and report the news."<sup>64</sup> However, analyzing laws on the basis of neutral intent is illusory and should not be dispositive. A neutral law severely inhibiting the press' ability to publish truthful information strikes stronger at First Amendment protections than a blatantly discriminatory law with only minimal effect on a newspaper's content.<sup>65</sup> The Court should have examined the effect of the inhibiting law on the press' ability to print information serving the public's interest.<sup>66</sup> The public interest should be balanced against the state's interest in the inhibiting law.<sup>67</sup> Such a policy balance protects both legitimate state interests and the public's right to receive important information.<sup>68</sup> The publication of Cohen's name provided important information to Minnesota voters, and any law inhibiting dissemination of the information implicates the First Amendment.

Publishing Cohen's name and the information he provided was necessary to fully inform the public of important events in the Minnesota political process. The information itself necessitated publication because of Cohen's own efforts in releasing the information to several

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64. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2518 (1991).

65. *See id.* at 2522 (Souter, J., dissenting).

66. *Carey v. Brown*, 447 U.S. 455, 467 (1980) (speech addressing public matters rests "on the highest rung of the hierarchy of First Amendment values . . ."); *First National Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (speech addressing public or political matters is "at the heart of the First Amendment's protection." (citing *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940))).

67. The Court has recognized the utility of balancing free speech interests against state interests. *See Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986) (courts must weigh injury to the First Amendment against the state's interest in and necessity of the infringement) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) (the state's interest must be balanced against First Amendment interests in protecting expression); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (states "must weigh the interests in privacy with the interests of the public to know and of the press to publish").

68. *Dicke*, *supra* note 32, at 1572 ("When new causes of action . . . chill the exercise of first amendment functions, courts must respond with a standard that reconciles the competing interests.").

different news media.<sup>69</sup> It was necessary to publish Cohen's name because if the paper had simply identified the informant as a person close to the Whitney campaign, the public would not have fully understood the nature of the relationship between the campaign and Cohen.<sup>70</sup> Publication of Cohen's identity provided important political information for Minnesota voters because Cohen's partisan past, coupled with his arguable attempt to misinform the public, could be attributed to the Whitney campaign.<sup>71</sup> The newspaper's prerogative to publish Cohen's name despite promises of confidentiality was therefore the sort of right "quintessentially subject to First Amendment protection."<sup>72</sup>

### *B. Civil Sanctions Punish the Press for Broken Promises of Confidentiality*

The second issue in determining *Branzburg's* applicability to the facts in *Cohen* is whether Minnesota's promissory estoppel doctrine "punishes" the press when applied to broken promises of confidentiality.<sup>73</sup> The *Cohen* majority stated that application of Minnesota's promissory estoppel doctrine would not punish the newspapers because the newspapers themselves determined the scope of any legal obligations and restrictions on publication,<sup>74</sup> and compensatory damages in *Cohen* were constitutionally equivalent to bonuses paid to confidential sources.<sup>75</sup> It is well-established, however, that civil sanctions may have a punitive effect when they are a result of a civil action to

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69. Releasing the information to multiple news organizations increased the competitive pressure to publish the information. Withholding the story was not an option because the newspapers were compelled to print the story to avoid being accused of a cover-up to protect the Democratic-Farmer-Laborer campaign, which the Star-Tribune had endorsed a few days prior to running the story. Respondent Cowles Media Cos. Brief at 12, *Cohen* (1991 U.S. Briefs LEXIS No. 90-634).

70. The euphemism "a source close to the Whitney campaign" could be interpreted as merely a Whitney supporter and not a person occupying a leadership role in the campaign's decisions.

71. De Tocqueville articulated the link between the press and sovereignty: "When the right of every citizen to a share in the government of society is acknowledged, everyone must be presumed to be able to choose between . . . various opinions . . . The sovereignty of the people and the liberty of the press may therefore be regarded as correlative . . ." ALEXANDER DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 1980 (1845), cited in Dicke, *supra* note 32, at 1559 n.27.

72. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2523 (1991) (Souter, J., dissenting).

73. The *Daily Mail* cases are not applicable unless state laws punish the press for publishing legally obtained, truthful information. *Cohen*, 111 S. Ct. at 2518-19; *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

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

75. *Id.*

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enforce a law.<sup>76</sup> Furthermore, the newspapers in *Cohen* did not contemplate bonuses in Cohen's case, and there is no indication that the newspapers had previously made or could have readily afforded such payments. The Court should have recognized that the potentially adverse impact on the papers' ability to publish information was equivalent to punishment.<sup>77</sup>

### C. *The Duty of Confidentiality Is an Ethical, Rather Than Legal, Obligation*

The third issue in determining the applicability of *Branzburg* to the facts in *Cohen* is whether the newspapers legally obtained Cohen's name.<sup>78</sup> The Court stated that the newspapers may not have procured Cohen's name legally because they "obtained Cohen's name only by making a promise which they did not honor."<sup>79</sup> Yet such an argument begs the question. Because there is no prohibition against making confidentiality promises, the newspapers obtained the information lawfully; they only may be liable for breaching a promise in publishing the information. By stating the illegality of the newspaper's action as a reason to find the newspapers liable, the Court assumes the very conclusion it wishes to reach.

In addition, by stating that Cohen's name may not have been legally obtained, the Court confused an ethical duty with legal liability. Confidentiality promises are widely recognized as an ethical obligation, regardless of the legal duty accompanying them.<sup>80</sup> Accordingly,

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76. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (punishment of error risks chill on exercise of First Amendment guarantees); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386 (1973) (First Amendment does not protect newspaper from punishment for libel).

77. See *supra* note 24 and accompanying text. Moreover, the newspapers' reported accurate political information important to the public. Such information may not be sanctioned. *Garrison v. Indiana*, 379 U.S. 64, 74 (1964) ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.").

78. The *Daily Mail* requirement of a compelling state interest is inapplicable unless the information was obtained lawfully by a newspaper. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

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

80. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990), *rev'd*, 111 S. Ct. 2513 (1991). The Minnesota Supreme Court stated: "The parties understand that the reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract." *Id.* at 203; see also *Cruikshank v. Ellis*, 226 N.W. 192, 194 (Minn. 1929). The American Newspaper Guild's Code of Ethics states, "Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigative bodies." See *Sanford V. Teplitzky & Kenneth A. Weiss, Newsman's Privilege Two Years After Branzburg v. Hayes: The First Amendment In Jeopardy*, 49 TUL. L. REV. 417, 418 n.7 (1975).

maintenance of confidentiality promises falls within editorial discretion. Until *Cohen*, the government could not intrude<sup>81</sup> on the editorial process<sup>82</sup> without violating the First Amendment.<sup>83</sup>

Decisions about newsgathering techniques and editorial content should remain with the press. Newspapers' decisions to grant or break promises of confidentiality are governed by a strict ethical code and the press' duty to inform the public.<sup>84</sup> Promises of confidentiality are based on the tenets of good journalism.<sup>85</sup> Newspapers do not intend to legally bind themselves to confidentiality promises because certain conditions may ethically justify the promise's breach.<sup>86</sup> Except under limited circumstances, courts should not interfere with a journalist's decision concerning confidential sources.

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81. Arguably, however, Minnesota's promissory estoppel doctrine does not regulate the content of a newspaper but merely the extension of false promises. In other words, *Cohen* might only stand for the proposition that newspapers may print what they wish, but if they breach promises of confidentiality in the process, they may not avoid liability by hiding behind the First Amendment. Yet the assertion that awarding damages will not influence the exercise of First Amendment rights goes against the weight of authority. Members of the Supreme Court have recognized that the very possibility of engaging in protracted litigation may impermissibly chill the exercise of First Amendment rights. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting). Significantly, one newspaper recently prevented distribution of an entire section after a source claimed that publication of a story contained in the section would violate her confidentiality agreement with a reporter. Albert Scardino, *Newspaper in New Case Over Naming Source*, N.Y. TIMES, July 24, 1988, § 1, at 14. Because the newspaper's editors could not verify whether the agreement in fact existed, they decided not to publish the story rather than risk litigation. *Id.* Though attempting only to compensate Cohen, the Supreme Court's decision cannot help but affect the content of what the media publishes.

82. The Court has recognized that the "choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment," a process critical to the sound exercise of First Amendment freedoms. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

83. The Supreme Court has ruled that "regardless of how benefit-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." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976) (citing *Miami Herald*, 418 U.S. at 259).

84. Despite the broken promise of confidentiality in *Cohen*, the press has a long tradition of protecting confidential sources. See Marcus, *supra* note 40, at 817. Journalists have gone to great lengths to protect confidential sources, including serving lengthy jail terms. See Dicke, *supra* note 32, at 1564; *In re Farber*, 394 A.2d 330 (N.J. 1978) (affirming New York Times Journalist Myron Farber's conviction for refusing to produce material documents in a murder trial).

85. Todd F. Simon, *Libel as Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM L. REVIEW 449, 473-74 n.121 (1984) (the primary purpose of gathering and publishing the news is to serve the general welfare by informing the public).

86. See *supra* note 57.

*D. Reputational and Forum Concerns: In Pursuit of a Compelling State Interest*

*Cohen v. Cowles Media Co.* involved the publication of truthful information about a matter of public significance.<sup>87</sup> Therefore, the Court should have considered whether the Minnesota promissory estoppel doctrine—as applied to confidentiality promises by the press—further a compelling state interest.<sup>88</sup> The state interest not only must be sufficiently important in its own right but must also outweigh the harms of judicial enforcement of promises between journalists and their sources.<sup>89</sup> *Cohen* may suggest two possible state interests: First, Minnesota may have an interest in protecting Cohen's reputation from undue ridicule; second, the state may have an interest in providing a forum for promissory estoppel actions against newspapers that breach confidentiality promises. Neither interest, however, is compelling.

*1. Protecting Cohen's Reputation Is Not a Compelling State Interest*

Minnesota may have had an interest in protecting Cohen's reputation from adverse publicity.<sup>90</sup> Such an interest, however, is strikingly similar to interests in anonymity asserted by criminal suspects and judges under investigation for alleged misconduct: Disclosure of names stigmatizes formerly anonymous individuals although they have not been found guilty of any wrongdoing. The stigma does not dissipate easily or soon, regardless of whether the alleged wrongdoer is later cleared. The Supreme Court, however, has found that state interests in protecting the reputation of criminal suspects or judges under investigation are not sufficiently compelling to justify restraints on

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87. See *supra* notes 69–72 and accompanying text.

88. See *supra* notes 64–68 and accompanying text.

89. Broad judicial enforcement of confidentiality promises carries considerable cost to the public. Such promises, usually oral, are often vague and subject to misunderstanding. Problems of proof could convert almost every dispute between journalist and source into factual issues for trial. The cost of litigation and damages could dampen the exercise of First Amendment rights. See *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (sanctions against innocent or negligent misstatement discourages the press from exercising constitutional guarantees). Although problems of proof are involved in most litigation, such problems are especially troublesome in litigation involving freedom of the press because “uncertainty gives rise to self-censorship and inhibits the exercise of First Amendment freedoms.” Dicke, *supra* note 32, at 1570. In the field of defamation, for example, the cost of defending libel suits has caused some publishers to refuse to investigate or publish high-risk stories. *Id.* at 1571, n.103.

90. Cohen claimed that the newspaper articles damaged his reputation and made him so controversial that his employers had to fire him. Respondent Cowles Media Cos. Brief at 21, *Cohen* (1991 U.S. Briefs LEXIS No. 90-634). If his causation argument is correct, then his damages flow entirely from injury to his reputation.



reporting truthful information.<sup>91</sup> Nor are state interests in protecting individuals from the “mental distress from having been exposed to public view” sufficient to justify punishment of truthful information.<sup>92</sup> In like manner, Minnesota does not have a compelling state interest in protecting Cohen’s reputation.

Even if Minnesota did have an interest in protecting Cohen’s reputation, that interest is not protected by a journalist’s privilege of confidentiality. Statutory privileges of confidentiality<sup>93</sup> protect the flow of information, not informants.<sup>94</sup> Claims of privilege under the First Amendment similarly protect the journalist, not the source.<sup>95</sup> Although Cohen may not have sought First Amendment protection when he requested anonymity, the legal status of confidentiality promises determines who, if anyone, is wronged when they are breached. Because Cohen was not protected by the promise, he could not be injured by its breach.<sup>96</sup>

## 2. *Protecting a Promissory Estoppel Claimant’s Right to a Hearing Is Not a Compelling State Interest*

Minnesota may also have a state interest in providing a forum for adjudicating an action authorized under state common law. Yet the application of Minnesota promissory estoppel law to journalistic

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91. *Butterworth v. Smith*, 110 S. Ct. 1376, 1382 (1990) (“[A]bsent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech.”).

92. *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967).

93. See *supra* note 40 and accompanying text.

94. Confidential sources enjoy common law or statutory protection only in the context of the limited privileges protecting reporters from compulsory testimony.

[However] the [journalist’s] privilege is applied, it appears to protect the communicator, not the source. Only the reporter may waive the privilege. Minnesota’s *Cohen* case [prior to the decision of the Minnesota Supreme Court] alone suggests otherwise. Generally, a broken promise by a reporter raises an ethical question but provides no legal cause of action.

DONALD M. GILMORE et. al., *MASS COMMUNICATION LAW: CASE AND COMMENT* 394 (5th ed. 1990); see also *New Jersey v. Boiardo*, 416 A.2d 793, 798 (N.J. 1980) (privilege of confidentiality belongs only to journalists, not to sources).

95. See *Branzburg v. Hayes*, 408 U.S. 665, 695 (1972) (“The privilege claimed is that of the reporter, not the informant.”); *id.* at 737–38 (Stewart, J., dissenting) (“[T]his protection does not exist for the purely private interests of the newsman or his informant . . . . Rather, it functions to ensure nothing less than democratic decisionmaking through the free flow of information to the public.”).

96. By protecting the listener rather than the speaker in privileged communication, the journalist’s privilege differs from other privileges such as attorney-client, physician-patient, clergy-penitent, and husband-wife. Accordingly, some jurisdictions have held that journalistic sources cannot “waive” the privilege and compel unwilling reporters to testify. See *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981). Sources also cannot invoke a confidentiality privilege to prevent a journalist from testifying if the journalist so chooses. *Small v. United Press International*, 1989 U.S. Dist. LEXIS No. 12459 at \*3 (S.D.N.Y. 1989) (Roberts, Mag.).

promises of confidentiality may be decided on a constitutional level without denying sources a forum. If the First Amendment bars actions against newspapers for breach of confidentiality promises, individuals may present their cases—to demonstrate that their situations differ from Cohen's—at motions for summary judgment. The state need not, and does not, provide full hearings for plaintiffs arguing claims under well-settled law.

### V. CUSHIONING *COHEN'S* CRASH: JUDICIAL AND LEGISLATIVE SOLUTIONS

There are two effective methods for limiting the impact of *Cohen*. First, lower courts could construe the decision narrowly, limiting it to its facts. Second, legislatures could pass statutes insulating the press from liability for breach of confidentiality promises. Either method would effectively narrow the number of occasions the *Cohen* decision is applied.<sup>97</sup>

#### A. *Cohen's Application Should Be Limited to Situations in Which Confidentiality Breaches Result in Serious Injustice and in Which Damages Are Substantially Similar to Bonuses*

Courts should limit *Cohen's* applicability to situations in which a breach of confidentiality results in serious injustice that can only be righted by enforcing promises of confidentiality. By suggesting that the newspapers may have obtained Cohen's name unlawfully,<sup>98</sup> the Court presumably meant that information printed in violation of a confidentiality agreement is unlawful because it violates state promissory estoppel law. Accordingly, such information is not legally-obtained and thus not protected by the *Daily Mail* precedents. But even if a state court finds that promissory estoppel encompasses confidentiality agreements, it need not find that the information was illegally obtained. Promissory estoppel requires that injustice can only be righted by enforcing a promise.<sup>99</sup> If breach of a confidentiality prom-

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97. A third method—beyond the scope of this Note—for limiting the impact of *Cohen* is for states to find a protection for the press in their constitutions. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2520 (1991); Daniel R. Gordon, *Progressives Retreat: Falling Back from the Federal Constitution to State Constitutions*, 23 ARIZ. ST. L.J. 801, 815–17 (1991) (state constitutions can be used to limit and distribute power when the Federal Constitution does not); e.g., James W. Talbot, Comment, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 WASH. L. REV. 1099, 1100 (1991) (Washington State Constitution provides greater protection for civil liberties than does the Federal Constitution).

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

99. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) (“The remedy granted for breach may be limited as justice requires.”).

ise works no injustice, or at least none that can be effectively righted by enforcing the promise, then the information has been legally-obtained. In such a case, the *Daily Mail* precedents would be controlling.

Courts could also limit *Cohen's* applicability to situations in which the damages are substantially similar to bonuses paid by the newspaper. The majority in *Cohen* minimized the constitutional significance of the burden placed on the newspapers in compensating Cohen by equating damages with bonuses.<sup>100</sup> At issue before the Supreme Court was \$200,000 in compensatory damages.<sup>101</sup> A larger award might, however, be constitutionally distinguishable from bonuses. Likewise, a smaller award might still be more constitutionally burdensome than bonus payments if the newspaper is small or can demonstrate that it rarely or never gives such bonuses to confidential sources because it cannot afford them. The *Cohen* holding should be limited to situations in which breach of confidentiality has already been held to violate state promissory estoppel law and in which the damage award would be substantially similar to bonuses paid by the newspaper.

#### *B. Legislatures Should Statutorily Protect Editorial Decisions to Breach Promises of Confidentiality*

State legislatures should enact shield laws to insulate the press from liability for breaching promises of confidentiality to informants. A journalist's privilege of confidentiality need not be protected by the First Amendment. In the wake of *Branzburg v. Hayes*,<sup>102</sup> some state legislatures enacted shield laws protecting the media from forced disclosure of confidential sources before grand juries.<sup>103</sup> As the number of contempt actions against journalists dwindled in the mid-1980s, it became apparent that state jurisdictions recognized the legitimacy of a qualified protection for journalists.<sup>104</sup> State shield laws have therefore been increasingly effective.<sup>105</sup> Similarly, following the Court's decision in *Zurcher v. The Stanford Daily*,<sup>106</sup> Congress enacted the Privacy

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

101. *Id.* at 2516-17.

102. 408 U.S. 665 (1972).

103. See *supra* note 40 and accompanying text.

104. NELSON et. al., *supra* note 59, at 404-05.

105. See, e.g., *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1975) (Third Circuit Court of Appeals recognized a strong public interest in a Pennsylvania law protecting newspapers from forced disclosure of sources).

106. 436 U.S. 547 (1978), *reh'g denied*, 439 U.S. 885 (1978) (protection of confidential sources does not bar warrant-based searches of newspaper offices).

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Protection Act<sup>107</sup> to protect the press' interests in confidentiality by limiting police power to search newspaper offices.<sup>108</sup> Some states followed suit.<sup>109</sup> Policy interests in protecting the quality of information available to the public demand that the press should itself determine whether to honor confidentiality agreements.<sup>110</sup> Because the protection of public interests is within the legislature's realm, state legislatures and Congress should enact laws that protect the press from liability for broken promises of confidentiality.

### VI. CONCLUSION

The *Cohen* majority incorrectly found that the First Amendment does not bar actions by plaintiffs seeking damages against newspapers breaching promises of confidentiality. The Court held that the newspapers were subject to Minnesota's neutral doctrine of promissory estoppel without considering whether enforcement of the confidentiality promise denied publication of crucial information. The public had a strong interest in associating Cohen's name with the incomplete information he leaked to the press because his identity revealed unique information about the Whitney campaign. The public's interest in receiving such information should have been balanced against the state's interest in estopping the press from breaching promises of confidentiality.

Minnesota's interest in protecting Cohen from breaches of confidentiality promises was minimal. Protecting Cohen's reputation does not constitute a compelling state interest. Further, providing a forum for promissory estoppel claimants is not a compelling state interest because claimants may still demonstrate a unique claim requiring further hearing at a motion for summary judgment.

Narrow application of the decision and protective legislation shielding the press from liability may limit the damage suffered by the First Amendment in the *Cohen* decision. After all, as Milton argued to Parliament in 1644, "Truth and understanding are not such wares as to be monopolized and traded in by tickets and statutes and standards."<sup>111</sup>

*Jeffrey A. Richards*

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107. Pub. L. 96-440, 94 Stat. 1879 (codified at 42 U.S.C.A. 2000aa-11 (1981)).

108. 42 U.S.C.A. § 2000aa-11 (a) (Attorney General must establish guidelines for procuring material evidence from nonparties which recognize privacy interests).

109. *See, e.g.*, N.J. STAT. ANN. § 2A-84A-21.9 (West Supp. 1991).

110. *See supra* note 71, 84-86 and accompanying text.

111. JOHN MILTON, *Areopagitica*, in *THE PORTABLE MILTON* 151, 181 (Douglas Bush ed. 1977).