5-1-1993

Cohen v. Cowles Media Co.: Burning Sources and Burning Questions

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NOTES

COHEN v. COWLES MEDIA CO.: BURNING SOURCES AND BURNING QUESTIONS

> A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.[1]

I. INTRODUCTION

Historically, "the press has fought to establish an absolute constitutional right to keep confidential sources secret."[2] Recently, though, reporters and editors have not only willingly revealed their confidential sources, but have sought constitutional protection for doing so.[3] This trend prompted one commentator to note that, "a pledge of confidentiality to a source should be neither sought nor granted lightly, for it can encourage irresponsibility and can deprive the news-consuming public of significant, truthful informa-

1. Cohen v. Cowles Media Co., 14 Media L. Rep. (BNA) 1460 (Minn. Dist. Ct. 1987) (denied defendant's summary judgment motion) [hereinafter *Cohen I*], 15 Media L. Rep. (BNA) 2288 (Minn. Dist. Ct. 1988) (denied motions for judgment notwithstanding the verdict or new trial) [hereinafter *Cohen II*], *aff'd in part and rev'd in part*, 445 N.W. 2d 248 (Minn. Ct. App. 1989) [hereinafter *Cohen III*], *aff'd in part and rev'd in part*, 457 N.W. 2d 199 (Minn. 1990) [hereinafter *Cohen IV*], *cert. granted*, 111 S. Ct. 578 (1990) [hereinafter *Cohen V*], *rev'd and remanded*, 111 S. Ct. 2513 (1991) [hereinafter *Cohen VI*]. *Quoted from Cohen III*, 445 N.W. 2d at 268 (Crippen, J. concurring in part, dissenting in part).

2. Comment, *Reporter Privilege: Shield or Sword? Applying a Modified Breach of Contract Standard When a Newsperson "Burns" a Confidential Source*, 42 FED. COMM. L.J. 277, 316 (1990) [hereinafter Fed. Comm. Comment].

3. *See generally Cohen I, II, III, IV,V, VI. See also* Ruzicka v. Conde Nast Publications, Inc., 939 F. 2d 578 (8th Cir. 1991); Scheetz v. The Morning Call, Inc., 1991 WL 195046 (3d Cir. 1991); Doe v. American Broadcasting Companies, 549 N.E. 2d 480 (1989).

tion."[4] Upon this backdrop, members of the press have urged courts to include First Amendment protections when adjudicating the asserted breach of a confidentiality promise to a news source.

This Note will explore the legal implications of a breach of confidentiality by examining *Cohen v. Cowles Media.*[5] After presenting the substantive and procedural facts that eventually brought Cohen before the U.S. Supreme Court, the Court's decision itself will be scrutinized. This Note will then present the five most common methods of analyzing the press' breach of confidentiality to an anonymous source, discuss their pros and cons, and propose an alternative methodology better suited to the analysis of future breaches. The proposed methodology is similar to the promissory estoppel analysis applied by the majority of the Minnesota Supreme Court in *Cohen*,[6] but includes modifications protective of both First Amendment interests and the position of the confidential source.[7] This methodology requires courts to make a threshold determination of both the existence of the promise and a determination of whether or not it was broken, and then to balance the interests of the state in enforcing the promise under state promissory estoppel law against the interests of the free press and the protections afforded them under the First Amendment.

II. From An Unkept Promise To The Supreme Court

On October 27, 1982, Dan Cohen, a public relations director for a Minnesota advertising agency and supporter of Republican gubernatorial candidate Weelock Whitney,[8] approached several journalists[9] with potentially damaging information about Marlene Johnson, the Democratic-Farmer-Labor candidate for Lieutenant Governor.[10] In two private discussions - one with reporter Lori Sturdevant of the *Minneapolis Star Tribune* and the other with reporter Bill Salisbury of the *St. Paul Pioneer Press* - Cohen allegedly stated:

I have some documents which may or may not relate to a candi-

4. Fed. Comm. Comment at 283.
5. *See supra* note 1.
6. *See infra* notes 245-286 and accompanying text.
7. *See infra* notes 257-286 and accompanying text.
8. Brief for Respondents Northwest Publications, Inc. at 2-3, *Cohen V, cert. granted*, 111 S. Ct. 578 (1990) (No. 90-634) [hereinafter *Respondents Brief*]. *See also Cohen IV* at 201 (Cohen planned to bill the campaign for time he spent working in this capacity).
9. *Respondents Brief* at 4 (Cohen also met with reporters from the Associated Press and WCCO-TV.).
10. *Id.* at 2 (The Republicans were trailing the Democrats by 18 points.)

> date in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and you will also agree that you're not going to pursue with me a question of who my source is, then I'll furnish you with the documents.[11]

Sturdevant and Salisbury apparently agreed,[12] and Cohen provided them with copies of court records revealing that Marlene Johnson had been charged with three counts of unlawful assembly in 1969 and convicted of one count of petit larceny in 1970.[13]

On the same day that this information was received, each paper contacted Marlene Johnson for her reaction.[14] Additionally, the *Star Tribune* conducted its own investigation revealing that the last person to request the court records regarding Johnson was employed by Dan Cohen.[15] Thereafter, over the objections of the reporters[16], the editorial staffs of each newspaper independently decided to break the promise of confidentiality and published Cohen's name with the story.[17] Each newspaper then printed seperate articles that "included claims by the Democratic camp that the news had been leaked by the Republican campaign as a 'last-minute smear campaign.' "[18] Cohen was subsequently fired from his job.[19]

Cohen brought an action in Minnesota District Court against the *Star Tribune* and the *Pioneer Press* alleging breach of contract and fraud.[20] Reasoning that in this case, the First Amendment functions as an absolute bar to liability,[21] the newspapers re-

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11. *Id. See also* Brief for Petitioner Dan Cohen at 3, *Cohen V, cert. granted*, 111 S. Ct. 578 (1990) (No 90-634) [hereinafter *Petitioners Brief*].

12. Neither one of the reporters informed Cohen that their decisions could be later overruled by each of their editors, and each reporter agreed without reviewing the actual information. *Cohen IV* at 200. *See also Respondents Brief* at 5.

13. The charges for unlawful assembly for protesting against discriminatory hiring practices were dismissed. Additionally, the petit larceny conviction for the theft of $6 in sewing materials committed when she was "upset and disoriented by her father's recent death," and was vacated a year later. *Respondents Brief* at 5.

14. *Cohen IV* at 200.

15. *Respondents Brief* at 3.

16. *Respondents Brief* at 3. The editorial staffs of each newspaper decided that it would be inappropriate to conceal the indentity of the source of the news and ran stories indentifying Cohen.

17. *Respondents Brief* at 2-3. *See also Cohen IV* at 201.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 11. *See generally* Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609 (1991) [hereinafter Levi]; Fed.

quested that summary judgment be granted in their favor. The trial court rejected this contention, refusing to recognize a constitutional issue.[22] After a trial on the merits, the jury returned a verdict for Cohen on both the fraud and breach of contract claims and awarded him $200,000 in compensatory damages and $500,000 in punitive damages.[23] Both newspapers appealed.[24]

The Minnesota Court of Appeals unanimously affirmed the breach of contract verdict as well as the compensatory damages award, but reversed the fraud verdict and the punitive damages award.[25] The court found that since the reporters originally had the intention of performing their contracts with Cohen, they could not have committed misrepresentations.[26] Thus, a finding of fraud could not be supported.

A divided court,[27] however, affirmed the breach of contract and compensatory damages award.[28] The majority found that both newspapers entered into confidentiality contracts, Cohen's lawsuit did not constitute state action that would "trigger first amendment scrutiny,"[29] his interest in enforcing his rights under contract outweighed any First Amendment defense that the newspapers could assert,[30] and the reporters' confidentiality promises acted as a waiver of any First Amendment right that they may have possessed.[31] The dissent reasoned that the judicial enforcement of a

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Comm. Comment; Note, Labunski, *When a Promise Is Not a Promise: The Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources*, 12 HASTINGS COMM. & ENT. L.J. 565 (1990) [hereinafter Labunski].

22. *Respondents Brief* at 11. Thus, the court refused to find that the First Amendment acted as either a complete or partial barrier to Cohen's contractual claims.

23. *Id.*

24. *Id.*

25. *Id.* at 12.

26. *Cohen III* at 259, 260. This finding resulted from the lack of evidence that the reporters who promissed Cohen confidentiality knew that their editors could override these promises pursuant to their newspapers' policies.

27. The court was divided by a vote of two to one. *Id.* at 251.

28. *Id.* at 252 (The major issues that the court considered were whether the First Amendment barred Cohen's contract action given that the reporters' disclosure was "truthful and newsworthy," and whether Cohen's misrepresentation action was properly denied at the appelate level.).

29. *Id.* at 254.

30. *Id.* at 256 ("The governmental interest in allowing the civil damage award in the instant case [was claimed to] outweigh the intrusion on press freedom.").

31. *Id.* at 258. The waiver argument was central to the analysis of the majority. First, the court established that in order for the press to waive its First Amendment protections, it must be done "in clear and compelling circumstances." Relying on Erie Telecommunications, Inc. v. City of Erie, Pennsylvania, 853 F. 2d 1084, 1096 (3d Cir. 1988), the court found that the press can only waive their First Amendment protections if " 'the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so

monetary judgment against the newspapers constituted state action and that an adverse judgment against them both "usurped editiorial decisionmaking" and chilled the free press.[32] Also, the dissent concluded that the promises the reporters made to Cohen did not constitute valid contracts[33] and did not satisfy the "stringent conditions" necessary to waive First Amendment guarantees.[34]

Granting both Cohen and the newspapers their petitions for further review, the Minnesota Supreme Court agreed to hear the appeal.[35] The court affirmed the decision of the court of appeals decision, holding that under Minnesota law, the *Pioneer Press* and the *Star Tribune* should prevail on the fraud claim.[36] However, in

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of its own volition, with full understanding of the consequences of its waiver.' " Specifically, the court decided that in *Cohen*, the "seasoned reporters" who gave Cohen their pledge of confidentiality knowing he was a "prominent Independent Republican" involved in the gubernatorial election campaign "understood that they were waiving the right to publish a potentially newsworthy item [Cohen's identity] in return for obtaining another potentially newsworthy item." Finally, the court characterized the waiver as "part of a negotiated agreement between experienced reporters and an experienced political operative." *Cohen III* at 258.

32. *Cohen III* at 263 (Crippen, J., dissenting) (Judge Crippen believed that the press, "not the courts," should "decide when promises on content should be made and . . . when publication is important.").

33. Judge Crippen stressed that this case did not present "a regular contract claim." Instead, he believed that it constituted "an agreement not to publish [and] a pledge not to excercise press freedom." *Id.* at 263.

34. *Id.* at 266. The dissent believed the waiver argument was flawed. Claiming that the majority's reliance on the language of *Erie Telecommunications* was "incomplete," the Court stressed that, according to *Erie*, there could be "no such waiver absent 'clear and compelling circumstances.' " Additionally, the dissent relied on Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1931) to stress that courts must " 'indulge even a reasonable presumption against waiver' of any fundamental constitutional right," and National Polymer Products, Inc. v. Borg-Warner Corp., 641 F. 2d 418, 424 (6th Cir. 1981) which found that "[i]f a waiver is identified, it 'must be narrowly construed to effectuate the policies of the First Amendment.' " After applying this caselaw to the facts at issue in *Cohen*, the dissent found that "[t]he circumstances . . . do not constitute, clearly and compellingly, a case where first amendment freedom has been renounced" because Cohen "neither sought nor obtained a deliberative pledge of anonymity by media editors," and that "[g]iven [the] publication of true facts on an important event of a political campaign, the clear and compelling case . . . is for upholding press freedom." Lastly, after discovering "no precedent for a finding of waiver by agreement on the part of the press, and no more than mixed indications regarding waiver by agreement for any political speech," the dissent found that under the circumsances presented by *Cohen*, there was no waiver of First Amendment press protections. *Cohen III* at 266, 267, 268 (Crippen, J., dissenting).

35. *Cohen IV* at 200.

36. *Id.* at 200, 202 ("[Cohen] admits that the reporters intended to keep their promises . . . . Moreover, . . . the editors had no intention to reveal [his] identity until later when more information was recveived and the matter was discussed with other editors. These facts do not support a fraud claim.")

reversing the breach of contract award,[37] the court held that the promise of confidentiality given to Cohen was not legally enforceable and did not constitute a binding contract.[38] The court recognized that some promises of confidentiality are binding, but stressed that contract law is "an ill fit for a promise of news source confidentiality."[39] Characterizing the relationship at issue in *Cohen* as "an 'I'll-scratch-your-back-if-you'll-scratch-mine' accomodation,"[40] the court decided that both Cohen and the two newspapers had "assum[ed] the risks of what might happen, protected only by the good faith of [each other]."[41] After determining that both the breach of contract and fraud could not to be applied to the situation presented by this case, the court explored the doctrine of promissory estoppel as a possible recourse for the breached promises of confidentiality.[42]

Interpreting Minnesota law,[43] the court made a two-fold determination that promissory estoppel will imply the existence of a legally enforceable contract even where no contract exists in fact, but only if injustice would be avoided solely by its enforcement.[44] Having concluded that some type of a promise existed, the first prong of the definition of promissory estoppel was satisfied. To satisfy the second prong, the court examined each of the reasons as to why the promise was broken.[45] This was done to determine

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37. *Id.* at 202 ("The law, however, does not create a contract where the parties intended none.").

38. *Id. at 203. See also Respondents Brief* at 5 ([S]tate law does not "consider binding every exchange of promises" and "[w]e are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract.") This is largely because the court perceived situations where reporters and sources exchange promises of confidentiality for information as too informal to implicate the elements of a traditional contract.

39. *Cohen IV* at 203 ("To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that special ethical relationship.").

40. *Id.*

41. *Id.* Although the court did not explicitly state what risks these particular parties assumed, it alluded to situations "where disclosure is required to correct misstatements made by the source; and where failure to reveal the source may subject the newspaper to substantial libel damages." *Cohen IV* at 202, n. 4. *See generally* Fed. Comm. Comment; Lubanski; Langley and Levine at 22.

42. *Cohen IV* at 203. *See also Respondents Brief* at 15-16. *Cf Petitioners Brief* at 14.

43. *Cohen IV* at 202, 203. *See also Respondents Brief* at 15.

44. *Id.* at 14. The issue had not been presented to the jury, nor briefed by the parties, but rather came about as a question asked by one of the judges during oral argument.

45. *Cohen IV* at 204 ("For example, was Cohen's name 'newsworthy'? Was publishing it necessary for a fair and balanced story? Would identifying the source simply as being close to the Whitney campaign have been enough?"). *See also Cohen VI* at 2517 (discussing the Minnesota Supreme Court's application of the doctrine of promissory estoppel).

whether enforcing the promise would have avoided injustice.[46]

In doing so, the court relied on a First Amendment-sensitive balancing test.[47] The court balanced First Amendment interests against common law contract interests. On one side of the scale, the court weighed the fact that the promise of confidentiality "arose in the classic First Amendment context of the quintessential public debate in our democratic society."[48] On the opposite side of the scale, the court weighed Cohen's common law contract interest, noting "[t]he potentiality that [he] willingly entered [the contract] albeit hoping to do so on his own terms."[49] After balancing these factors and emphasizing that its holding was narrow, the court refused to find a legally enforceable promissory estoppel remedy.[50] The court did, however, leave open the possibility that instances may exist "where a confidential source would be entitled to a remedy such as promissory estoppel."[51] This, of course, would depend upon which side of the balance is heavier - the First Amendment, or state interests in enforcing promises of confidentiality.[52]

On December 10, 1990, the U.S. Supreme Court granted certiorari to examine the First Amendment questions that *Cohen* presented.[53] In a 5-4 decision, the Court concluded that the First Amendment did not bar the recovery of damages "under state promissory estoppel law, for a newspaper's breach of a promise of

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46. *Cohen IV* at 204. *See infra* notes 210 - 220 and accompanying text.

47. *See Cohen IV* at 205 ("The court must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity. 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."). This was in reference to the political nature of the news material (i.e. a political activist working on behalf of one of the candidates in a hotly-contested election).

48. *Id.* This was in reference to the political nature of the revelation of Cohen's identity as well as an implicit reference to the context in which the disclosure of Cohen's identity was made.

49. *Id.* Thus, the Court gave support to the societal interest in maintaining ordered commercial relationships.

50. *Cohen IV* at 205. *See also Respondents Brief* at 15.

51. *Cohen IV* at 205. For instance, in Ruzicka v. Conde Nast Publications, Inc., 939 F. 2d. at 598, a patient who had been sexualy abused by her therapist gave an interview to *Glamour Magazine* on the condition that she not be made "identifiable." When the article did, in fact, make her identifiable, she sued. Relying on *Cohen*, the 8th Circuit Court of Appeals held that promissory estoppel damages were available as a remedy and remanded the case to the district court to determine the amount of damages, if any. *See supra* note 3.

52. *Cohen IV* at 204, 205. Although the Court did not specifically delineate what situation is required for common law interests in enforcing the promise to outweigh First Amendment protections, it did imply that this would involve a fact specific determination at the trial court level. *Cf.* Levi at 714.

53. *Cohen VI* at 2517.

confidentiality given . . . in exchange for information."[54]

The preliminary question the majority considered was whether or not to dismiss the case on the ground that the promissory estoppel cause of action was neither argued nor presented before the Minnesota Supreme Court.[55] Finding that this issue did "not merit extended discussion,"[56] the Court decided it had jurisdiction to hear the case, and stated that "[i]t is irrelevant . . . whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided."[57]

The Court then examined what it deemed as the critical First Amendment issue.[58] Acknowledging the holding of *New York Times Co. v. Sullivan*,[59] the Court admitted that a private cause of action for promissory estoppel constitutes "state action" within the meaning of the Fourteenth Amendment[60] when First Amendment freedoms are restricted.[61] Therefore, court enforcement of this judgment against the newspapers was state action. After making this determination, the Court addressed the newspapers' reliance on the *Smith v. Daily Mail*[62] line of cases.[63] At issue in *Smith* was whether a West Virginia statute that criminally punished the press

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54. *Id.* at 2516 (Justice White delivered the majority opinion joined by Chief Justice Rehnquist, Justices Stevens, Scalia, and Kennedy; Justice Blackmun filed a dissenting opinion joined by Justices Marshall and Souter; and Justice Souter filed a seperate dissenting opinion joined by Justices Marshall, Blackmun and O'Connor.).

55. *Id.* at 2517 (This was of minor jurisdictional concern, but it does illustrate the manner in which the promissory estoppel argument came about. Its origin was a result of a question posed by one of the judges of the Minnesota Supreme Court.) See also Cohen VI at 2520 (Blackmun, J., dissenting); *Cohen VI* at 2522 (Souter, J., dissenting).

56. *Cohen VI* at 2517.

57. *Id.* (citing Orr v. Orr, 440 U.S. 268, 274-275 (1979); Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 754, n.2 (1985); Mills v. Maryland, 486 U.S. 362, 371, n. 3 (1988); Franks v. Delaware, 438 U.S. 154, 161-162 (1978); Jenkins V. Georgia, 418 U.S. 153, 157 (1979)). The Court stated that this "could not be made more clear than by [the court's] conclusion that 'in this case enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights.'" (citing *Cohen IV* at 205.).

58. *Id.* at 2517 (The Court asked "[w]hether that Amendment bars a promissory estoppel cause of action against respondents.").

59. 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). at 713 (This "limit[ed] a State's power to award damages in a libel action brought by a public official against [a newspaper advertisement] critic[al] of his official conduct.").

60. *Cohen VI* at 2517. "[T]he 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 [and] promissory estopel is a state-law doctrine which, in the absence of a contract, creates obligations never explicitly assumed by the parties." *Id.* at 2518.

61. Thus, this case seems to implicate First Amendment protections. *See* U.S. CONST. amend. I. *See also* U.S. CONST. amend. XIV.

62. Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).

63. *Cohen VI* at 2518.

for the publication of the name of any juvenile offender, without first obtaining the permission of the juvenile court, violated provisions of the First and Fourteenth Amendments.[64] Emphasizing that its holding was narrow, the Court found the statute to be in violation of First Amendment press freedoms. The *Smith* Court held that this sanction violated the First Amendment because the state interest in safeguarding the juvenile's anonymity did not justify the imposition of a criminal punishment for the "truthful publication" of the newspaper's "lawfully obtained" information.[65] The newspapers in *Cohen* contended that if the promissory estoppel approach was used, state officials would also be "constitutionally punishing" them for printing their "lawfully obtain[ed] truthful information about a matter of public significance . . . absent a need to further a state interest of the highest order."[66] However, the Court determined that *Cohen* was not controlled by the *Smith v. Daily Mail* line of cases.[67] Rather, the majority relied on what it called "equally well-established" precedent that found laws of general applicability[68] non-offensive to the First Amendment because their application to the press has only "*incidental effects* on its ability to gather and report the news."[69]

The Court equated the breach of confidentiality in *Cohen* with instances in which newspapers and publishers were required to abide by the application of a variety of disparate generally applicable laws.[70] Thus, the Court covered *Cohen* with its rule that the

64. *Smith*, 443 U.S. at 98.

65. *Id.* at 97.

66. *See Cohen VI* at 2517. This is the test used by the Court in *Smith*. *See also* The Florida Star v. B.J.F., 491 U.S. 524 (1989); Landmark Communications Inc. v. Virginia, 435 U.S. 829 (1978).

67. *Cohen VI* at 2517. This line of cases includes *Smith*, *The Florida Star*, and *Landmark Communications*, each of which stand for the general principle that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith* at 103.

68. State promisory estoppel statutes may be included under the rubric of generally applicable laws. Thus, the majority was able to completly avoid having to construct a test that would be sensitive to First Amendment protections.

69. *Id.* at 2518 (emphasis added). The Court's characterization of the effects on the media as "incidental" indicates that it had made a pre-determination of the effect that it would have. In other words, by characterizing these often harsh effects as "incidental," the Court, by implication, forclosed the possibility that newspapers would have a higher level of protection.

70. *Cohen VI* at 2517-18 ("*Branzburg v. Hayes*, 408 U.S. 665 (1972). The press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws . . . . *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, (1977). Similarly, the media must obey the National Labor Relations Act, *Associated Press v. NLRB*, 301 U. S. 103, and the Fair Labor Standards Act, *Oklahoma Press Publishing Co. v.*

press does not have any special immunity from the application of laws of general applicability.[71] The Court intended this to mean that the media has "no special privilege to invade the rights and liberties of others."[72] Applying this to *Cohen*, they pointed out that the Minnesota doctrine of promissory estoppel is a law of general applicability and, as such, covers "the daily transactions of all the citizens of Minnesota," including the *Star Tribune* and the *Pioneer Press*.[73] Therefore, the Court was able to shoehorn *Cohen* into its category of cases which hold that generally applicable laws are not controlled by the First Amendment. The majority concluded that, in this case, "[t]he First Amendment does not forbid [the doctrine's] application to the press"[74] because the "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations."[75]

The majority dismissed the notion that imposing the doctrine of promissory estoppel and awarding damages would in some way "penalize" the media for disseminating truthful information.[76] Not considering compensatory damages to be a type of penalty,[77] the Court examined the newspapers' reliance on *Smith v. Daily Mail*.[78]

Walling, 327 U. S. 186.").

71. *See id.*

72. *Id.* at 2518 ("Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.") (*citing* Associated Press v. NLRB, 301 U.S. at 132-133.).

73. *Id.* at 2517-18.

74. *Id.* at 2518. *Cf.* Levi; Labunski; Fed. Comm. Comment.

75. *Cohen VI* at 2519. Again, it should be noted that First Amendment press freedoms are not limited to the traditional press. It is possible that quite a few "other persons or organizations" may suffer the same consequenses as the newspapers in this case. Thus, the Court misses the point that these "other persons or organizations" may also grant a promise of confidentiality to a source, and then reveal the source's identity. For example, if a writer for a labor union newsletter granted a promise of confidentiality to a high-ranking, corrupt union representative, would the newsletter be liable for a breach of the promise?

76. *Id.* at 2520 (Blackmun, J., dissenting). This is based on the notion that truthful information regarding a political campaign does not violate the First Amendment. In *Cohen*, this penalty would come in the form of damages. The purely economic nature of the penalty does not make it any less of a punishment. *See also Cohen IV* at 205.

77. *Id.* at 2519. This notion has not been afforded much weight by other commentators and courts. If to punish is to deter, and compensatory damages can be said to have a deterring effect on the media's decision to print other relevant stories that may be in violation of confidences already given, then it seems to be a form of punishment. In this situation, punishment is not merely an incidental effect of the award of damages, it is the principal effect on the newspapers resulting from the award of damages. *See also Cohen IV* at 205.

78. *Cohen VI* at 2519. *See supra* note 63.

"[R]ather than a [criminal] punishment imposed by the state,"[79] the majority equated compensatory damages with a "liquidated damages provision" of contract law, stating that the payment of these damages are simply an additional cost of "acquiring newsworthy material to be published at a profit."[80] Finding the payment of compensatory damages to be "constitutionally indistinguishable from a generous bonus paid to a confidential news source," the Court further distinguished *Cohen* from the *Smith* line of cases. [81]

The Court then looked to the press' reliance on the content-sensitive second prong of the test in *Smith v. The Daily Mail* and *The Florida Star v. B.J.F.* The Court distinguished these cases by pointing out that the "content" of both of these publications that could have resulted in liability was defined by the state where, in *Cohen*, "Minnesota law simply requires those making promises to keep them."[82] The majority also distinguished the *Smith* line of cases by stressing that the newspapers in *Cohen* may not have even "lawfully obtained"[83] Dan Cohen's name for the purpose of publishing it.[84]

Lastly, the Court addressed the argument that granting the promissory estoppel claim will "chill" truthful reporting "because news organizations will have legal incentives not to disclose a confidential source's identity even when that person's identity is itself

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79. This is a reference to the type of punishment imposed by the state in *Smith*. *See Smith*, 443 U.S. at 97.

80. *Cohen VI* at 2519. The Court seems to imply that this type of arrangement is no different from "tabloid" newspapers that simply pay large sums of cash to "sources" for stories to print. *See also Cohen IV* at 203 ("[A] payment of money which taints the integrity of the newsgathering function, such as money paid a reporter for the publishing of a news story, is forbidden by the ethics of journalism.").

81. *Cohen VI* at 2519 (Regardless of this characterization, the Court implied that even if the compensatory damages were a form of punishment, it would "[make] no difference for First Amendment purposes when the law being applied is a general law and does not single out the press.").

82. *Id.* Here, "[t]he parties themselves . . . determine the scope of their legal obligations and any restrictions which may be placed on the publication of truthful information are self-imposed.").

83. *Smith*, 443 U.S. at 97.

84. *Id.* ("Unlike the situation in *The Florida Star v. B.J.F.*, where the rape victim's name was obtained through lawful access to a police report, respondents obtained Cohen's name only by making a promise which they did not honor."). However, this distinction does not hold up under careful scrutiny. While breaking a promise of this nature may border on the unethical, it does not rise to the level of being unlawful. Thus, if the Court was resting its distinction on whether the newspapers lawfully obtained Cohen's name, and no finding was made by any court, based on any evidence, that they did not, this distinction is misplaced.

newsworthy."[85] They dismissed this altogether by stating that "it is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them."[86]

In the first of two dissents, Justice Blackmun, joined by Justices Marshall and Souter, advocated the application of *Smith v. Daily Mail*.[87] They asserted that "the judicial enforcement of . . . a promissory estoppel claim constitutes state action under the Fourteenth Amendment [and] that the use of that claim to penalize the reporting of truthful information regarding a political campaign [would] violate the First Amendment."[88]

The dissent disagreed with the majority's contention that *Cohen* was controlled by the *Branzburg* line of cases.[89] First, they did not recognize the Minnestota Supreme Court's decision in *Cohen* as creating "any exception to or immunity from" Minnesota law for the press.[90] In doing so, the dissent cited the lower court's application of *New York Times v. Sullivan* which held 'that a state may not adopt a state rule of law to impose impermissible restrictions on the federal constitutional freedoms of speech and press."[91] Thus, the dissent found that any First Amendment protections given to the newspapers should also be applicable, and available, to other persons or organizations that are not members of the press.[92]

The dissent also addressed the Court's reliance on the *Branzburg* line of cases and the contention that the media is not exempted from generally applicable laws.[93] The dissenters emphasized the fact that *Branzburg* "did not involve the imposition of

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85. *Cohen VI* at 2519.

86. *Id.* For this notion, the Court generally relied on the holding of *Branzburg v. Hayes*, which found that the First Amendment does not protect the press from the force of copyright laws.

87. *Cohen VI* at 2513, 2520 (Blackmun, J., dissenting).

88. *Id.*

89. *Id.* (The dissent disagreed "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.").

90. *Id.* ("[T]he Court's decision is premised, not on the identity of the speaker, but on the speech itself. . . . It is of 'critical significance' that 'the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign.' ") (citing *Cohen IV* at 205).

91. *Cohen IV* at 205.

92. *Cohen VI* at 2520 (Blackmun, J., dissenting)(citing Lovell v. Griffin, 303 U.S. 444, 452 (1938)). *See also supra* note 75.

93. *Cohen VI* at 2520 (Blackmun, J., dissenting).

liability based upon the content of speech."[94] Making a contrary determination based on the content of the speech rather than the effects of the speech, the dissent believed that *Hustler Magazine, Inc. v. Falwell* was "precisely on point."[95]

Hustler involved a suit between a nationally known public figure and a nationally distributed magazine for damages for libel and intentional infliction of emotional distress as a result of an ad parody which appeared in the magazine and portrayed the public figure as "having engaged in a drunken incestuous rendezvous with his mother in an outhouse."[96] In *Hustler*, the Court held that the First and Fourteenth Amendments prohibited "public figures and public officials [from] recover[ing] for the tort of intentional infliction of emotional distress . . . without showing . . . that the publication contain[ed] a false statement of fact which was made with actual malice," as defined by *New York Times v. Sullivan*.[97] The dissent pointed out that in *Hustler*, "[t]here was no doubt that Virginia's tort of intentional infliction of emotional distress was 'a law of general applicability' unrelated to the supression of speech."[98] Nonetheless, since the law was used to restrict the freedom of expression, it became subject to the limitations imposed by the requirements of the First Amendment."[99] Furthermore, the dissent attacked the majority's characterization of the "incidental effect" that the state promissory estoppel statutes will have by reminding them that "the publication of important political speech [was] the [only] claimed violation."[100] As a result, the dissenters contended that "as in *Hustler*, the law may not be enforced to punish the expression of truthful information or opinion."[101]

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94. *Id.* at 2521 (Blackmun, J., dissenting) (footnote omitted) ("In Branzburg, for example, this Court found it significant that 'these cases involve no intrusions upon speech or assembly, no . . . restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. . . . [N]o penalty, civil or criminal, related to the content of published material is at issue here.' ") (citing *Branzburg* at 681; Associated Press v. NLRB, at 103, 133 (1937); Associated Press v. United States, 326 U.S. 1, 20, n.18 (1945); and Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969).).

95. *Cohen VI* at 2521 (Blackmun, J., dissenting) (citing Hustler Magazine, Inc., v. Falwell, 485 U.S. 46 (1988)) (In *Hustler*, "the use of a claim of intentional infliction of emotional distress to impose liability for the publication of a satirical critique violated the First Amendment.").

96. *Hustler*, 485 U.S. at 46.

97. *Id.* at 56.

98. *Cohen VI* at 2521 (Blackmun, J., dissenting).

99. *See id.* at 2521, 2522.

100. *Id.* at 2521 (Blackmun, J., dissenting).

101. *Id.* (Again, the dissenters stressed that "the imposition of civil liability based on protected expression constitutes 'punishment' of speech for First Amendment purposes.

Yet, this dissent did admit "that truthful speech may . . . be sanctioned consistent with the First Amendment, [as long as it is] . . . in furtherance of a state interest 'of the highest order.' "[102] Therefore, since the Minnesota Supreme Court found that the interest of the state was "far from compelling," the dissent weighted the balance in favor of the newspapers.[103]

The second dissenting opinion, authored by Justice Souter and joined by Justices Marshall, Blackmun, and O'Connor, concluded that *Cohen* did not fall within the line of cases controlled by *Branzburg* because "commercial activities and relationships," as opposed to the content of the publications, were central to the holdings of those cases.[104] These dissenters found that while generally applicable laws affecting the content of publications may satisfy constitutional requirements,[105] laws of general applicability may often be equally as restrictive on First Amendment rights as other laws specifically aimed at the speech itself.[106] Therefore, the dissenting Justices found that they needed "to articulate, measure, and compare the competing interests involved" before they could decide whether the protections afforded by the Constitution should be triggered.[107] Thus, these dissenters advocated the use of a balancing test.[108]

Though they be civil, the sanctions . . . are no more justifiable as 'a cost of aquiring newsworthy material,' than were the libel damages at issue in New York Times, a permissible cost of disseminating newsworthy material.").

102. *Cohen VI* at 2522 (Blackmun, J., dissenting) (citing *Smith*, 443 U.S. at 103). Unfortunately, the dissenters do not define what a state interest of the highest order may include.

103. *See Cohen IV* at 204-5. To determine if the interest of the state was compelling, the lower court looked at whether the maintenance of ordered commercial relationships would be upset by a First Amendment bar to recovery for breached promises of confidentiality. After finding that this promise did not constitute a contract in law, the court decided that it would not.

104. *Cohen VI* at 2522 (Souter, J., dissenting) (These dissenters were making reference to *Branzburg*, *Zacchini*, *Associated Press*, and *Oklahoma Press Publishing*.). *See supra* note 70.

105. *Cohen VI* at 2522 (Souter, J., dissenting) (This is true only " 'when [such effects] have been justified by subordinating valid governmental interests, a prerequisite to consitutionality which has necessarily involved a weighing of the governmental interest involved . . . . Whenever, in such a context, these constitutional protections are asserted against the excercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved.' ") (citing Konigsberg v. State Bar of California, 366 U.S. 36, 51 (1961).

106. *Cohen VI* at 2522 (Souter, J., dissenting).

107. *Id.* In doing so, the dissent made reference to the weighing test of Hustler. *See also Petitioners Brief* at 20.

108. *Cohen VI* at 2522 (Souter, J., dissenting) (The dissent pointed out that this "has been the Court's recent practice in publication cases.").

Additionally, the dissent claimed a balancing test was appropriate "because the burden on publication is [not] in a sense 'self-imposed' by the newspaper's voluntary promise of confidentiality."[109] Thus, in the balance, the dissenters considered the interest that the public had in obtaining Cohen's name. In fact, the dissent called this interest "integral to the balance that should be struck in this case."[110] Deciding where this issue would balance, and claiming "[t]here can be no doubt that the fact of Cohen's identity expanded the universe of information relevant to the choice faced by Minnesota voters in that State's 1982 gubernatorial election, the publication of which was thus of the sort quintessentially subject to strict First Amendment protection, the dissenters seemed to favor the public interest."[111] In short, the dissenters found that the interest of the state "in enforcing a newspaper's promise of confidentiality" was not enough to overcome the First Amendment "interest in [the] unfettered publication" of Cohen's identity.[112]

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109. *Cohen VI* at 2522, 2523 (Souter, J., dissenting). The dissenters claimed that to do so would suggest both "the possibility of waiver" and "a conception of First Amendment rights as those of the speaker alone, with a value that may be measured without reference to the importance of the information to public discourse." As to the waiver issue, the dissenters relied on Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 to show that its requirements were not met in *Cohen*. For an extended discussion of this issue, see *supra* note 32. As to the furtherance of public discourse, the dissenters relied on CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) for the proposition that the public's right to know information is more important than the media's right to disseminate it. Also, quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the dissenters warned that "[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." *Cox*, 420 U.S. at 492.

110. *Cohen VI* at 2523 (Souter, J., dissenting) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. In this context, '[i]t is the right of the [public], not the right of the [media], which is paramount.' ") (citing CBS, Inc. v. FCC, 453 U.S. 367 (1981)). *See supra* note 7.

111. *Cohen VI* at 2523 (Souter, J., dissenting) (As the dissent argued, the justification for Cohen's disclosue to the press "could reflect on his character, which in turn could be taken to reflect on the character of the candidate who had retained him."). It should be noted that there are situations where the identity of the source may not be newsworthy. For a brief discussion of one such situation, see *supra* note 51.

112. *Cohen VI* at 2523 (Souter, J., dissenting) (However, the dissenters refused to find that a breach of a promise of confidentiality of the sort implicated in *Cohen* could never be remedied. In fact, they "conceive[d] of situations in which the injured party is a private individual, whose identity is of less public concern than that of the petitioner; liability there might not be constitutionally prohibited."). *See supra* notes 51, 110.

III. A Breached Promise of Confidentiality: Five Current Modes of Analysis

Courts and commentators have struggled to seek a form of analysis to apply to fact situations such as the one this Note examines.[113] This is best exemplified by the variety of approaches that have been taken in deciding *Cohen*. Each decision, at every level, from the trial court to the U. S. Supreme Court, has been at odds with the decision(s) below - and no two opinions agree.[114] Much disagreement exists regarding both the issues that are implicated by this type of situation as well as the approach that should be taken in the resolution of the issues that are implicated. The currently available material written on the type of confidentiality breach at issue in *Cohen* suggests five different approaches. These include: traditional contract analysis;[115] strict First Amendment analysis;[116] modified contract / limited First Amendment analysis;[117] promissory estoppel analysis;[118] and contextualist analysis.[119] Since each is unique - with its own benefits and detriments - they will be discussed individually.

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113. *See generally,* Comm. Ent. Note; Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 Minn. L. Rev. 1553 (1989) [hereinafter Minnesota Note]; Fed. Comm. Comment; Levi.

114. *See generally, Cohen I, II, III, IV, VI.*

115. *See* Fed. Comm. Comment; Comm. Ent. Note; Minnesota Note. *Cf Levi* at 644-5. This approach focuses on the common law contract interests of the source promised confidentiality, and applies traditional contract law to remedy the breach of the promise. *See infra* notes 120 - 146 and accompanying text.

116. *See generally,* Fed. Comm. Comment; Comm. Ent. Note; Minnesota Note. *Cf.* Levi at 644-5. This approach views the First Amendment as a total barrier to civil suits based on the breached promise of confidentiality. It is highly deferential to the press in that it allows the unhampered publication of a source's identity. *See infra* notes 147 - 157 and accompanying text.

117. *See generally,* Fed. Comm. Comment; Com. Ent. Note; Minnesota Note. *Cf.* Levi at *644-5.* This approach borrows from the defamation area in an effort to satisfy concerns raised by the implication of First Amendment press protections. *See infra* notes 160 - 194 and accompanying text.

118. *See generally,* Fed. Comm. Comment; Comm. Ent. Note; Minnesota Note. *Cf.* Levi at 644-5. This approach attempts to strike a balance between the strict First Amendment and traditional contract approaches. It relies on balancing the interests of state promissory estoppel law against First Amendment press protections. The basic difference between this approach and the modified contract approach rests on the characterization of the promise at issue as either a pure contract or a non-contractual agreement between the parties, that the court may turn into a contract if it meets promissory estoppel requirements. *See infra* notes 196 - 219 and accompanying text.

119. *See* Levi. The contextualist approach seems to be the most difficult to apply because it relies on no real test. It requires that the trier of fact focus on five "reality-based" factors before deciding whether to allow recovery for the breached promise. *See infra* notes 220 - 245 and accompanying text.

A. Contract As Promise (of Confidentiality): The Traditional Contract Approach

Proponents of the traditional contract approach[120] have addressed the breach of confidentiality between reporter and source in terms of traditional contract law.[121] A traditional contract analysis suggests the notion that an enforceable contract and all the elements that comprise it are usually present whenever a promise of confidentiality is given in exchange for news that is published.[122] The meeting or conversation that occurs between members of the press and the source usually constitutes the offer and acceptance, and the promise of confidentiality given to the source and the newsworthy information given to the press is characterized as consideration. Thus, once it is determined that the confidentiality agreement between the source and the reporter meets the requirements of a valid contract, failing to maintain the promised confidentiality will breach the "mutual agreement," and result in a breach of contract.[123] However, in order to succeed on such a claim, the source must first show not only the existence of a contract, but its breach as well.[124]

Under traditional breach of contract analysis, "the focus [i]s more on whether a binding promise was intended and breached, not so much on the contents of that promise or the nature of the information exchanged for the promise."[125] Using a similar approach, the Minnesota Court of Appeals found that the "neutral principles" inherent in contract law would not invoke the protections of the First Amendment and that the state interest in enforcing private contracts "outweighed any constitutional free press

120. *See* Fed. Comm. Comment at 29-30. *See also* Minnesota Note at 1567; Comm. Ent. at 6-7; Levi at 645-48. These included the *Cohen* trial court, appellate court, Minnesota Supreme Court Dissent, and the several commentators listed above.

121. *See* Fed. Comm. Comment at 308.

122. Minnesota Note at 1567 (This refers to the elements of offer, acceptance, and valuable consideration.) (citing J. MURRAY, MURRAY ON CONTRACTS §16, 18 (2d rev. ed. 1974)). "A fourth element is implied; the parties must have intended legal consequences to attach to their agreement, and courts use an objective test to determine whether the manifestations made by the parties would demonstrate the requisite intention to a reasonable person." *Id., n. 77. These elements are met in Cohen.* As the majority of the Minnesota Court of Appeals found, the materials that Cohen gave to the press and the promise of confidentiality that the press gave to him, constituted "sufficient consideration" for a contract, and the meeting between Cohen and the reporters (where they "bargained" for the information) constituted "offer and acceptance."

123. Comm. Ent. Note at 6.

124. *See* Minnesota Note at 1567 (footnotes omitted).

125. *Cohen VI* at 204.

rights."[126]

The advocates of a traditional contract approach to confidentiality agreements between reporters and their sources usually contend that its neutral application does not implicate the protections of the First Amendment because it does not constitute state action.[127] On a policy level, they claim that court enforcement of these agreements "promotes society's interest in achieving stable relationships by allowing individuals to rely on others' promises and by compensating parties when agreements are breached."[128] However, a contract of this nature will be enforced only if the personal need for its enforcement clearly outweighs public policy.[129]

While some courts and commentators agree with this approach, others have viewed its application as "inadequate" for the type of situation in which Cohen and the two newspapers found themselves.[130] One commentator has even suggested a liberalization of traditional contract analysis by requiring courts to examine five "complex" and "determinative" issues before deciding whether to enforce the confidentiality promise.[131] Unfortunately, this complex set of factors results in a less than adequate, impractical, and difficult application.

On a basic level, critics of this scheme maintain that when applying traditional breach of contract methodology to this situation, a court is likely to be forced into imposing "absolute liability" on the media for an "editorial decision" while disregarding the facts that led to the breach in the first place.[132] They perceive "the kind of commercial activity that is typically the subject of contracts" to be fundamentally different from "the gathering and reporting of news."[133] This distinction is important because traditional contract

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126. *Id.* at 204 (citing 45 N.W. 2d at 254-57.).

127. Levi at 645 (footnote omitted). *See also Cohen VI* at 2516, 2517.

128. Minnesota Note at 1574-75 (footnotes omitted). Advocates of a traditional contract approach also often indicate that the larger the interest of the source in protecting their anonymity, the larger the damages award becomes once the confidentiality agreement is breached.

129. *See* Comm. Ent. Note at 7.

130. *Id.*

131. Comm. Ent. Note at 7 (These include: "the parties expectations, forfeiture from non-enforcement of the contract, the public interest in enforcing the contract, the strength of the public policy and the possibility of furthering that policy."). This, however would further complicate an already problematic and subjective balancing formula by including and mandating the consideration of issues that are inherently subjective and difficult to measure and balance.

132. *Id.* at 1578 (footnotes omitted).

133. Langley & Levine, *Broken Promises*, COLUM. JOURNALISM REV. 21 (July/Aug. 1988) at 24 (This is a difference that makes the law of contracts and the first amendment

analysis has historically been applied to formal commercial contracts rather than arguably informal situations such as reporter-source confidentiality promises which are often better characterized as something akin to a moral covenant. If this approach to the breach of confidentiality agreements is used, public officials, who are usually those persons promised confidentiality, would have the power to call upon the courts to punish reporters who accurately identified them as sources of published information."[134] Thus, a great amount of protection is provided for the source, while very little protection is provided for the media.[135] Even if it is the press that volitionally promises confidentiality in the first place, this unequal distribution of protection between the press and the source runs afoul of basic notions of fairness. Additionally, if this approach is combined with the waiver argument first articulated by the Minnesota Court of Appeals, the analytical balance will become tilted in favor of the source from the very beginning.[136]

It has also been noted that this approach will "chill" the media's editorial freedom in disseminating information that is newsworthy.[137] Therefore, it has been argued that the traditional contract approach "is neither adequate in its denial of state action nor faithful to the body of contract law which it purports to apply," and "it displays a marked hostility toward the press and its public role."[138] The highly formalistic nature of this approach denies the notion that confidentiality promises between sources and reporters "are not contracts for the sale of goods or services."[139] Rather, a promise of confidentiality is quite different from a typical commercial contract. To portray an arguably ethical or moral promise as

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strange bedfellows.).

134. *Id.* at 24 (This illustrates that litigation can be "a powerful weapon with which to punish reporters."). See also *Cohen IV* at 199, 200.

135. *See* Comm. Ent. Note at 7 ("For this reason, journalists rightly fear that sources might intentionally relay false information and thereafter attempt to use anonymity as a shield against responsibility.").

136. The notion that the press waives its First Amendment right to reveal the source's identity by promising the source confidentiality in exchange for information effectively reduces the entire calculus to a simple contract analysis by eliminating the discussion of First Amendment protections. *See supra* note 35. *See also Cohen III* at 258. *Cf.* Cohen III at 266, 267, 268 (Crippen, J., concurring in part, dissenting in part); *Cohen VI* at 2522, 2523 (Souter, J., dissenting). Although this may prompt newspapers to candidly inform sources that confidentiality is not absolute, believing that this result (regardless of its facial benefits) is an adequate justification for ignoring the First Amendment in a situation where the First Amendment is clearly implicated seems absurd.

137. Minnesota Note at 1576.

138. Levi at 646 (footnotes omitted). *See also* Fed. Comm. Comment; Comm. Ent. Note.

139. Levi at 648.

such seems not only simplistic, but inaccurate.[140]

Unlike typical commercial contracts, the press' grant of confidentiality seems to be far less volitional. Actually, most commentators agree that the press, rather than the source, occupies a subordinate position at the time the actual promise of confidentiality is made.[141] Also, as is exemplified by *Cohen*, the press may not be aware of all the information necessary to volitionally grant confidentiality. For example, the identity of the informant may not itself become newsworthy until the source's information is revealed to the press - usually *after* the promise of confidentiality has been given.[142] Moreover, even if the agreement was admittedly volitional, "not all voluntary promises are enforced as contracts without substantive inquiry into their social worth."[143]

When analyzed under the traditional breach of contract approach, some commentators have characterized promises of confidentiality as "agreements for the suppression of speech," rather than agreements for the dissemination of news.[144] Thus, court enforcement of an agreement that results in limiting the protections of First Amendment press freedoms implicates state action and triggers First Amendment scrutiny.[145] Finally, as this approach asserts, even assuming that this situation does not implicate First Amendment protections, "the freedom of contract approach represents a crude and inaccurate characterization of contract law" when it is applied to reporter-source confidentiality promises.[146]

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140. *See* Jack Colldeweih and Samuel Pleasants, *Confidential Sources - The Reporter's Privilege Muddle*, COMMUNICATIONS AND THE LAW, Vol. 13, No. 4, December 1991, pp 14-19 [hereinafter, *Colldeweih*].

141. Often, the press is at the mercy of the source. Sources frequently not only dictate the terms of the confidentiality agreement, but are generally in control of all aspects of the reporter-source relationship, such as where the meetings take place (if at all), and when and how information is exchanged, etc. Of course, the press has no constitutional right to receive information. It only has a constitutional right to attempt to obtain newsworthy information. *See generally, New York Times, The Florida Star, Smith v. Daily Mail. See also infra* note 142.

142. *See Cohen IV* at 203 ("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 judgement after the information received is put in the larger context of the news.").

143. Levi at 648, 649 (footnote omitted).

144. *Id.* at 648. Professor Levi points out that in agreeing to maintain confidences, the press, in essence, agrees to refrain from printing certain information (i.e. the source's identity). Thus, the press has agreed to suppress its own speech. *See also Cohen III* at 263 (Crippen, J., dissenting) (Judge Crippen viewed it as a "pledge not to excercise press freedom.").

145. *Id. See also supra* note 52.

146. *Id.* (footnote omitted). This approach asserts that this is because "there are recognized instances in which 'the interest in freedom of contract is outweighed by some over-

B. Shield, Not Sword - The Strict First Amendment Approach

This approach to the breach of reporter-source confidentiality agreements views the First Amendment as a complete shield for the press against all liability resulting from published information.[147] Proponents of this approach maintain that since the Supreme Court has historically granted editors the power to determine what stories to print, they should also have complete freedom to publish the name of the source promised confidentiality.[148] They point to other areas protected by First Amendment press freedoms where "[i]nformation about an individual that is embarrassing, causes extreme emotional distress, or is false and defamatory but published without the requisite degree of fault," are protected by the First Amendment.[149] In *Cohen*, the information given to the press as well as the act of giving it "is a public and political matter" that the Court had viewed as being central to the protections of the First Amendment.[150] Thus, it would seem that an argument could be made supporting the view of the First Amendment as a complete bar to suits for the breach of a promise of confidentiality.

However, the Supreme Court has never endorsed the existence of an absolute press privilege to print *all* true information.[151] Rather, the Court has usually balanced First Amendment press interests against various common-law causes of action.[152] One com-

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riding interest of society,' " and "even traditional contract doctrine has . . . recognized situations in which public or social interests place limitations on the freedom of contracting individuals." *Id.* at 648.

147. *See* Minnesota Note at 1571 (This is based on the notion that since "the function of the media is to publish information, sources arguably assume the risk that journalists will disclose more information than sources intend.").

148. *Id.* at 1577.

149. *Id.* (Using First Amendment tort law to illustrate this, these theorists believe that "the First Amendment imposes such limits on press liability to enable the press to perform its constitutionally recognized role."). Instances where the requisite degree of fault is lacking may be exemplified by *N. Y. Times v. Sullivan* and *Hustler v. Falwell* where the Court, in each case, found that neither publication had exhibited "actual malice" in printing the challenged information.

150. *Cohen III* at 265 (Crippen, J., dissenting) (citing First National Bank of Boston v. Bellotti, 435 U.S. 765, 776.).

151. *See* Levi at 657.

152. Minnesota Note at 1572. For examples of a few of the many instances where the Court has employed some sort of balancing test to determine if First Amendment press protections have been violated, see Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (The Court held that the First Amendment protected editorial discretion in "decisions made as to . . . content of the paper, and [the] treatment of public officials - whether fair or unfair."); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (The Court held that the First Amendment did not allow criminal punishment for the truthful

mentator noted that a strict First Amendment analysis that serves as a total barrier to enforcing promises of confidentiality leads to harmful consequences, such as granting "the press unlimited power to abrogate legitimate agreements, without regard to the harm . . . [it] may cause sources, leav[ing] important interests unprotected and tip[ping] the balance too far in favor of free press interests."[153] Further, given the fact that the press may be sued in tort for defamation, invasion of privacy, and the like, "[t]here is no principled reason to conclude that . . . [the press] must be precluded from access to courts for redress of all breaches of confidentiality promises by reporters."[154] Although a strict First Amendment approach may be more efficient[155] than any of the other approaches discussed in this Note, basic notions of fairness and equity suggest that the views of the source must be heard in a claim for breach of a promise to the source.[156]

It is doubtful that the Court will ever "interpret its first amendment jurisprudence to require a bar to . . . causes of action against the press for breaching promises of confidentiality to sources."[157] Strict First Amendment analysis simply is not faithful to First Amendment precedent, nor is it an acceptable or fair balance of the interests of the press and the source. However, this should not completely preclude courts from factoring First Amendment protections into the balance.

C. Modified Contract / Limited First Amendment Approach: Balancing Applied

One commentator has noted that "requiring members of society to keep their promises is unobjectionable, [and that] . . . requiring the press to honor its contractual undertakings, or to follow generally applicable laws . . . is rarely thought to present a

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publication of information obtained from the confidential proceedings of a judicial commission.); and *Smith* (The Court held that the First Amendment did not allow criminal punishment for the publication of lawfully obtained truthful information of a juvenile criminal defendant's name, despite a statute prohibiting such publication.).

153. Minnesota Note at 1571-2 (footnote omitted).

154. Levi at 657.

155. One could envision that a strict First Amendment approach could create a per se rule with regard to reporter-source confidentiality breaches that would completely preclude a source from even advancing a claim for the breach of such a promise.

156. Even if the reporter were to give the source Miranda-like warnings, disavowing any potential liability against future breaches, the source would still be at a disadvantage. The only difference is that this scheme would alert the source to his disadvantageous position from the beginning of the relationship.

157. *Id.* (footnotes omitted).

first amendment problem."[158] However, in the context of confidentiality agreements between sources and reporters, these same commentators believe that press freedoms should not be limited where "core press functions" may be abridged.[159] Therefore, the advocates of this approach maintain that some type of balancing should be required in order to satisfy the tensions between First Amendment press interests and source confidentiality expectations.[160]

As a result, the modified contract / limited First Amendment approach has been proposed for addressing the breach of confidentiality agreements between reporters and sources.[161] This approach, analogous to the "actual malice" standard of *New York Times v. Sullivan*,[162] attempts to integrate the traditional contract approach with the strict First Amendment approach.[163] To accomplish this goal, a heavier burden of proof is first placed on the source to prove not only that a contract of confidentiality exists, but that its terms are identifiable.[164] Secondly, borrowing from the defamation area, it requires the source to prove that the person promising confidentiality acted with "common law malice"[165] in breaching the confidentiality promise. The first part of this modified breach of contract approach requires that sources produce "clear and convincing evidence,"[166] rather than a preponderance of the evidence, that an agreement existed and that it was breached by the media.[167] The need for the "clear and convincing" burden of proof is a result of the "inherent vagueness and imprecision" of

158. Minnesota Note at 1572-3 (footnotes omitted).

159. *Id.* at 1573. These core functions include being a conduit of information to the public and acting as a check on the actions of the government.

160. *See id.* (footnote omitted) ("In developing a standard, courts must balance a state's interest in enforcing its common-law contract rules for the benefit of news sources against the potential abridgment of interests protected by the free press clause of the first amendment.").

161. *See generally* Fed. Comm. Comment; Comm. Ent. Note; Minnesota Note.

162. *See supra* note 92.

163. *See supra* note 117.

164. *Id.* at 1586-7. This approach follows the judicial trend of creating specific rules for particular types of contract cases. Whether or not the source, as opposed to the media, should bear the heavier burden of proof is a policy choice on the part of the advocates of this approach. *See infra* notes 163, 164. *See also* Fed. Comm. Comment at 310.

165. *See* Minnesota Note at 1580.

166. Minnesota Note at 1579, n. 152 ("Clear and convincing evidence is an intermediate standard of proof, demanding more than a preponderance of the evidence but less than evidence beyond a reasonable doubt.") (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 271 (1986) (Rehnquist, J. dissenting).

167. Minnesota Note at 1579, 1580, 1584 (footnotes omitted) (Supporters of this approach claim that "the standard also gives the media 'breathing space' to make editorial decisions about when the public interest demands that they breach a confidentiality agreement.").

promises of confidentiality between sources and the press.[168] The higher burden of proof will require the informant to demonstrate in near-absolute terms that an actual and certain contract between the parties was actually in existence.[169] This higher standard is used in this approach "because a media defendant [often] faces difficulty in refuting a source's claim that confidentiality was [actually] promised."[170] In fact, it is also this concern that forms the rationale supporting the decision to place this heavier burden on the source rather than the press. Proponents of this approach claim that this heightened burden helps to "strike a balance between strict liability for contract breaches and absolute protection for the press."[171]

The second part of this approach is also similar to defamation law in that it requires a showing of "reckless disregard" by the press.[172] Similar to the "actual malice" standard employed in defamation law, this prong borrows the "reckless disregard" standard from defamation jurisprudence and applies it to the breach of promissed confidentiality.[173] However, the use of this standard is not intended to be "a blind application of the *Times* rule."[174] Sev-

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168. Fed. Comm. Comment at 310 (footnote omitted). *See also*, Vincent Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 231, 284 (After empirically studying over 1500 members of the media, Blasi concluded that, among other things, reporter-source relationships are often unstable and imprecise where confidentiality agreements are concerned.).

169. *Id.* (footnote omitted). "It is hoped that this higher burden will discourage disgruntled sources from bringing frivolous claims based on misunderstanding of a vague agreement," or when "the media entity involved denies that it promised confidentiality or disputes key terms of an alleged confidentiality agreement." Minnesota Note at 1580.

170. Minnesota Note at 1579 (footnote omitted).

171. *Id.* at 1582-3 ("So long as a journalist knows why the source seeks confidentiality, and understands the likely harm to the source from breach, a court is likely to impose liability for such a breach.").

172. *Id.* at 1580-1 (footnotes omitted) (This approach, however, claims that "the meaning of reckless disregared in this context . . . differs from its meaning in the defamation context.").

173. Fed. Comm. Comment at 311 (footnote omitted) ("This will make it more difficult for juries to award vast sums, unless the source can show that the news organization acted with culpable recklessness. Since the threat of huge punitive damage awards deters news organizations from exploring controversial areas with great potential for liability, this requirement will offset that chilling effect."). *See also* Minnesota Note at 1580, 1581 ("A heightened burden of proof is necessary to preserve first amendment values . . . . To impose liability under this standard, a factfinder must find that the media . . . published the information in violation of the confidentiality agreement without giving due deference to the source's rights.").

174. Minnesota Note at 1580, 1581 (footnote omitted) (At least the proponents of this approach claim it is not. They claim that "although *New York Times* and its progeny generally ilustrate the weight courts should give the competing interests involved in such a case, the nature of the contract cause of action and of the competing interests to be balanced

eral considerations are necessary in order to determine whether recklessness exists. Among them are "the extent of a media defendant's knowledge of the reasons why a source requested confidentiality, the defendant's reason for publishing the specific information, and the newsworthiness of that information."[175] Therefore, when this approach is applied, a trier of fact who finds the information that is published to be extremely newsworthy, may not even find the existence of recklessness. In fact, this would be the case "even if [the] journalist knew that [this] disclosure could cause a [particular] source great harm."[176]

Proponents claim that the end result of this arrangement is that sources will be given "a strong incentive to carefully negotiate the terms of confidentiality agreements," as well as "an incentive to make certain that reporters understand the consequences of breaching such agreements."[177] This is true regardless of what the source may have to lose. Therefore, as opposed to the strict First Amendment approach, the media is restricted from being able to freely breach an agreement merely because a source has little to lose from the breach."[178]

One commentator has even suggested adding several considerations to the balance when using this approach. While these considerations may only further complicate an already complex approach, this commentator has suggested that the addition of these factors to the balancing process will help the press equalize the inequities that proponents of this approach perceive to exist between the source and the media. The considerations that have been suggested include: "(1) the public's need to know the source's identity;[179] (2) the importance of the attributed information to

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preclude simple application of the *Times* standard.").

175. *Id.* at 1581 ("[S]uch considerations are significant because 'reckless disregard' is a standard of culpability that has meaning only when the defendant's conduct is measured against competing considerations.") (footnote omitted).

176. *Id.* at 1583 (This approach "[r]ecognizes that a recklessness standard requires a factfinder to weigh the utility of the defendant's conduct against the foreseeable harm to the plantiff.").

177. *Id.* at 1582 ("So long as a journalist knows why the source seeks confidentiality, and understands the likely harm to the source from breach, a court is likely to impose liability for such a breach.").

178. *Id.* at 1582, 1583.

179. Fed. Comm. Comment at 312 ("If the public will be significantly misled by not knowing the source of the information the balance leans toward disclosure. However, if the source's identity will not appreciably change the public's perception of the credibility of the information, then the source's interests should prevail."). This is exactly the case in *Cohen*. Additionally, if the source is a public figure whose identity would, in itself, be newsworthy as a part of the story, the public's need to know would be significant. *See also Cohen VI* at

public debate;[180] (3) the severity of the harm suffered by the source;[181] (4) the specificity of the disclosure;[182] (5) the circumstances surrounding the formation of the contract;[183] and (6) the history and clarity of the relationship and the agreement."[184] Each of these considerations, however, may also be included as sub-parts of those already outlined.[185]

Advocates of this approach claim that its benefits are two-fold. First, they believe it will act as a shield for the press against any chilling effects that can result from claims for "imprecise agreements" for confidentiality. Also, this approach leaves room for some amount of editorial freedom that the press may wish to exercise in breaching agreements where they do not "recklessly ignore" the deleterious effects that these breaches will have on the source.[186] At least one commentator has disagreed, however, stating that "[t]he importation of the reckless disregard standard from the

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2523 (Souter, J., dissenting).

180. Fed. Comm. Comment at 312, 313 (This "depends on how vital the information is to public debate. If the information concerns a trivial matter, then the identity of the source is unimportant to the public. However, if the information pertains to a controversial issue, then how the public shapes its discussion of the issue may very well depend on knowledge of the source."). This consideration is also fraught with problems. An issue that is "controversial" to some may not be controversial to all, and even assuming that it is, the identity of the source linked to the issue may not be helpful in shaping public opinion on that issue. Also, the nature and motive(s) of the source are very difficult to measure due to their inherent subjectivity and the danger of injecting moral judgements into the calculus.

181. *Id.* ("Measuring the gravity of the source's interest depends largely on the severity of the harm to the source from the disclosure. If the source is a 'whistleblower' who reveals corruption in an institution or in government, disclosure will probably subject the source to severe economic, mental, and perhaps even physical harm . . . . On the other hand, a source with a questionable past is less likely to suffer damage to his 'reputation' and thus is less deserving of redress.").

182. *Id.* at 314 ("How specifically the reference is attributed to the source is important in determining the severity of his injury."). In other words, whether or not a reader of the story is able to determine the identity of the source of the story, as well as the source's relationship to the story aids in proportionally determining the extent of the source's injury. *See also supra* note 3.

183. *Id.* at 315 ("A showing of fraud or deception by either party in the making of the agreement would seriously weaken that party's relative interest under this balancing approach.").

184. *Id.* at 317 ("Although under this scheme the plantiff would have to prove the existence of an agreement by clear and convincing proof, evidence of the history of the relationship and the terms of this and past confidentiality agreements would be helpful in weighing the competing interests.").

185. Minnesota Note at 1585 ("[G]iving the press some protection against source contract suits should not cause sources to become generally less willing to speak to journalists. [S]ources are already exposed to disclosure in the course of judicial proceedings, and evidently are not thereby deterred from communicating with the press.").

186. Levi at 660 ("By contrast to the defamation context, the disclosures at issue in contract actions by sources consist of true information.").

defamation area is neither workable nor constitutionally required."[187]

This criticism maintains that importing the reckless disregard standard from defamation law to contract actions for breaches of confidentiality necessitates that the standard be written "in terms of reckless disregard as to the effects of the disclosure" rather than "in terms of the press' knowledge of the substantive character of the information."[188] Also, it is claimed that not all confidential sources possess expectations of anonymity that are "prima facie valuable."[189] Further, the fear of a chill on press freedoms "at least theoretically" affects not only the press, but each side of the balance.[190]

Lastly, it is claimed that since the Constitution allows for the complete "chill" of many types of speech, as well as the partial "chill" of many others, the First Amendment does not prohibit restrictions that may result in press self-censorship.[191] Thus, the application of "heightened fault standards" to sources that are intended to minimize the chill on all types of political speech gained through promises of confidentiality by the press may not be appropriate in analyzing confidentiality cases.[192] While it has been argued that this scheme will induce sources to be more specific when making their "contracts" for confidentiality, the actual result may be quite different. In fact, sources fearing exposure may be more reluctant to come forward with their information in the first

187. *Id.* ("Given that confidentiality is always requested self-protectively and that reporters inevitably know of some potentially harmful effect to the source of being identified, it is difficult to discern how voluntary disclosures by the press would not virtually always rise to the level of reckless disregard.").

188. *Id.* at 661, 662 (footnotes omitted) ("Even if the interest in confidentiality at issue in contract actions by sources were presumed to have some baseline social value, there is no reason to suppose that such a state interest in confidentiality would have to remain constant across all promises of anonymity to all sources. . . . Thus, it begs the question to propose a balancing approach analogous to the one used in the tort context on the basis of an assumption of equivalent legitimacy in the interests to be balanced. . . . In other words, some degree of self-censorship is a danger for either rule regarding enforcement in contract actions. . . . In any event, the possibility and extent of chilling effects - whether on sources or reporters - are less certain and predictable in the confidentiality context than in the defamation cases, thereby again casting doubt on the appropriateness of the defamation analogy.") (footnotes omitted).

189. *Id.* at 662.

190. *See id.* at 664-5 (footnotes omitted). A failure to enforce confidentiality promises could not only "discourage sources from sharing information with the press, thereby limiting information available to the public," but "the possibility of extensive damage awards in contract actions may lead reporters to minimize their reliance on confidential sources and to forego stories based on unattributed information." *Id.* at 662.

191. Levi at 665 (footnotes omitted).

192. *Id.* (footnote omitted).

place.[193]

Most importantly, this balancing would become exponentially more complicated with each additional consideration that is included in the balance. In fact, for this type of balancing to result in a speedy and smooth application, the number of factors must be kept as small as possible, and the factors considered must lend themselves to a speedy and minimally subjective determination. To ignore these realities of actual application will result in decisions that are, at their worst, subject to the changing whims of courts and judges, and, at their best, lengthy and economically burdensome on both the press and the source.[194]

D. Estopping The Press: The Promissory Estoppel Approach

A fourth mode of analysis applied to reporter-source confidentiality agreements consists of two parts, and is best explained by the Minnesota Supreme Court opinion in *Cohen v. Cowles Media*. Although this type of analysis varies in degree, it can generally be defined as a promissory estoppel analysis. Before applying this analysis, the Court articulated two reasons not to apply traditional contract analysis.[195] The Court found that the "contracts" at issue were not even intended by the parties to be legally binding,[196] and that under these circumstances, the imposition of traditional contract law would be too rigid in light of the "special ethical relationship" that existed between the parties.[197] Thus, the court justified

193. *See* Minnesota Note at 1575. *Cf* Langley and Levine at 25 (Claiming that sources with newsworthy information wanting it to be disseminated to the public, disclose the information regardless of the protection that was granted. In other words, their primary goal was to have the information published, rather than have it be contingent on a grant of confidentiality.).

194. *See generally*, Colldeweih and Levi.

195. *See* Levi at 666, n. 187 (This author asserts that in doing so, the Court "avoided the question of state action and the First Amendment.").

196. *Cohen IV* at 203 (The court came to this conclusion after finding that in the "special" context of newsgathering where "promises are usually given clandestinely and orally, [and] are often vague, [and] subject to misunderstanding" neither the reporters nor the source believe that they are creating a "legally binding contract."). Whether or not it was a correct conclusion under the circumstances, the court asserted it as being one of the reasons it based its decision on promissory estoppel principals rather than contract principals.

197. *Id.* (The court found that the reporters and the source "are not thinking in terms of offers and acceptances in any commercial or business sense." They both "understand that the reporter's promise of anonymity is given as a moral commitment" that, by itself, cannot support a contract.). However, if all sources thought that the promises were being given only as a "moral commitment," it would seem to follow that they would also realize that a "moral commitment" is, at the very least, shaky ground to rest a disclosure on. Moreover, if their

its use of a promissory estoppel analysis.

Recognizing that promissory estoppel will "impl[y] a contract in law where none exists in fact,"[198] the court stated that "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."[199] As to the first requirement, the court found that the newspapers unquestionably promised Cohen that he would be treated as an anonymous source.[200] According to the court, this promise was intended to prompt Cohen to hand over the information that he had to the reporters.[201] Expecting the promise to be kept,[202] Cohen furnished the reporters with the information.[203] However, the third requirement "that injustice can only be avoided by enforcing the promise,"[204] necessitated that the court look at what it termed "a transaction fraught with moral ambiguity."[205]

To this end, the court did not limit its inquiry to only whether there was a promise and whether it was broken, but instead the court examined each of the reasons why the promise was broken.[206] Emphasizing that there can never be a neutral approach to the First Amendment,[207] the court "weigh[ed] the same considerations . . . weighed for whether the First Amendment ha[d] been violated."[208] This was done to determine "whether 'injustice' would [have] result[ed] from a refusal to enforce [the] promise."[209] Thus, the court balanced the interest of the state in protecting promises of confidentiality against First Amendment press freedoms.[210] As a result, First Amendment press interests became part of this court's promissory estoppel analysis. The final balance weighed "constitu-

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identity were found out they would be subject to either economic loss (as a result of being fired) or the scorn of others (whether co-workers, employers, or the public).

198. *Id.* at 203.

199. *Id.* at 203-4 (footnote omitted).

200. *Id.* at 204.

201. *Id.*

202. *See Petitioners Brief* at 3.

203. *Cohen IV* at 204.

204. *Id.*

205. *Id.* at 202 (By "moral ambiguity," the court was making a reference to the evidentiary record of the case that contained "the unanimous testimony of reporters, editors, and journalism experts [who claimed] that protecting a confidential source of a news story is a sacred trust, a matter of 'honor,' of 'morality,' and required by professional ethics.").

206. *Id.*

207. *Id.* at 205.

208. *Id.* (This required the court to balance "the common law interest in protecting a promise of anonymity" against First Amendment press interests.).

209. *See Cohen IV* at 199.

210. *Id.* at 205.

tional rights of a free press against . . . common law interest[s] in protecting a promise of anonymity."[211] Admitting that this could "mean second-guessing the newspaper editors,"[212] the court held that the "enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights."[213] Although the court left open the possibility that situations could exist that would entitle a confidential source to a promissory estoppel remedy, they restricted it to instances where the considerations of the First Amendment are outweighed by the interest of the state in enforcing the confidentiality promise.[214]

One criticism regarding the inclusion of First Amendment considerations in the promissory estoppel approach was voiced by the Minnesota Supreme Court dissent when it claimed that doing so would "carve out yet another special privilege in favor of the press that is denied other citizens."[215] While the dissenters found that the press should be free to "print anything they choose to print," they also required that the press be held "legally responsible" for any broken promises of confidentiality or negligent acts connected to what the press chooses to print.[216] Additionally, a rather basic criticism noted by one recent commentator is that the Minnesota Supreme Court never fully explained its rationale for concluding that confidentiality promises between the media and sources should not be legally binding.[217]

The major criticism of this approach, however, is that while requiring "a complex balancing of factors," and "observ[ing] the complexities of the relationship" involved in typical confidentiality agreements between reporters and sources, the Minnesota Supreme Court "neatly sidestepped the obligations it had deemed

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211. *Id.*

212. *Id.* (footnotes omitted). This may be a necessary evil when attempting to protect First Amendment freedoms.

213. *Id.* (A primary reason for this conclusion was that the confidentiality promise came about "in the classic First Amendment context of the quintessential public debate" regarding "a political source involved in a political campaign" where civil suits based on the breach of confidentiality could "chill public debate.").

214. *See id.* Unfortunately, the court neglects to mention what such a case would look like.

215. *Cohen IV* at 205 (Yetka, J., dissenting).

216. *Id.* at 206 (The dissent found that the analysis should be "free of any special protection carved out by New York Times v. Sullivan or any of its progeny.").

217. Levi at 670 (footnote omitted) ("The court asked (without answering) . . . whether the source's identity was newsworthy and whether characterizations short of outright identification would have served the press' asserted reasons for disclosure.").

necessary."[218] Thus, the court never really provided a clear explanation of the factors to be considered or the weight afforded each when using a promissory estoppel analysis. Finally, the court did not explain how the considerations involved in its First Amendment-sensitive balance would be applied to situations that are not political in nature.

E. Considering All The Factors: The Contextualist Approach

Another approach offered as a way to analyze a suit for the breach of a reporter-source confidentiality agreement may be called the contextualist approach.[219] In contrast to the other approaches discussed in this Note, as well as most approaches in First Amendment jurisprudence, this method relies on "a historically and democratically grounded" scheme that is intended "to foster an attitude and direct a sensibility," rather than a more traditional balancing of interests test.[220] This approach requires that courts "develop richly textured pictures of the circumstances of confidentiality and where they fall on the imaginary spectrum between the whistleblower and the strategic manipulator."[221]

The contextualist approach recommends that triers of fact address five important considerations in the determination of whether the press should be held accountable for confidentiality

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218. *Id.* at 670 (Unfortunately, the court "neither balanced nor provided the criteria for doing so;" [and] "[w]hen faced with the complexity of the task required, and the fact that it would involve a series of explicit value choices to decide when deniability by sources is desirable, the Cohen court threw up its hands.").

219. *Id.* at 714 ("[A]lthough this will require courts explicitly to measure shades of gray, guideposts in that project can be discerned from the cultural values underlying our sympathy for whistleblowers and from the realities of the press' relationship with government."). *See infra* note 221. *See supra* note 182.

220. Levi at 715. This is the basic difficulty with this approach. Whether or not it is a sensitive and fair way to explore the problems created by a breach of reporter-source confidentiality, it is perhaps better suited for theoretical discussions rather than a realistic method of resolving disputes that are constrained by limited judicial resources. The judicial energy required to "develop richly textured pictures," etc., seems enormous. One can only imagine a panel of judges, or even one judge, mulling over the question of where to place a source on the "imaginary spectrum" that this approach describes. Even a novice barely versed in the realities of judicial decision-making could understand how much of a drain on judicial resources that the adoption of this approach could cause. *See also*, Dan Paul, *Why a Shield Law*, 29 U. MIAMI L. REV. 459 (1975) (This author opposes a case-by-case approach to the settlement of reporter-source confidentiality disputes because of the financial costs involved, as well as the uncertainty of legal results.).

221. *See id.* at 715 (This article provides a comprehensive definition of "whistleblower" and "strategic manipulator"). *See supra* note 182.

breaches:[222] "(1) the character of the source's substantive information; (2) the source's reasons for leaking; (3) the relevance of the source's identity; (4) the press' reasons for disclosure; and (5) the nature of the relationship between the reporter and the source."[223] While the inclusion of these factors gives this method the appearance of a balancing of interests or totality of the circumstances approach, it is not, nor does it claim to be.[224]

The first consideration the contextualist approach examines is the "character of the source's information."[225] When addressing this consideration, the approach suggests that courts examine four characteristics: (1) "falsity;"[226] (2) "press manipulation;"[227] (3) its "nature and importance;"[228] and (4) the "criminality of the original disclosure."[229] The examination of the four characteristics that support "the character of the source's substantive information" is important to the eventual determination of whether the First Amendment protects the press' breach of confidentiality.

The next consideration this approach suggests courts address

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222. *Id.*

223. *Id.* at 716 (By including these considerations in the analysis, this approach "cautions judges to eschew comforting platitudes about the press either as a fierce guardian of freedom or as an unprincipled seeker after fortune . . . [and] . . . explicitly requires them to focus on the actual democratic values at stake in the interactions between the press and its confidential sources."). Although these considerations are intended to implicate the "democratic values at stake" when confidentiality promises are given and breached by the press, the contextualist approach never defines these "democratic values." The contextualist approach claims that the five considerations included in its analysis are not to be balanced against each other by triers of fact, but rather are just to be addressed with no particular weight or emphasis placed on any one consideration.

224. *See* Levi at 715.

225. Levi at 715.

226. *Id.* (footnote omitted) (This characterization is claimed to be important "[b]ecause by and large the press is the only mass conduit of most information, manipulating or misleading the press necessarily disempowers the public as well.").

227. Id. at 718 (This characterization is claimed to be important because "[t]he nature and importance of the information provided by the source are obviously relevant both to the substantive concern of promoting well-informed public discourse and to the institutional value of enhancing the independent, critical role of the press.").

228. *Id.* at 719 (footnote omitted) (This approach claims this characteristic is valuable because "[t]he press defendant will presumably argue, as a threshold or categorical matter, that its promise of confidentiality should not be enforced when the initial leak by the source would itself constitute a criminal act or would otherwise violate statutes or administrative rules.").

229. *Id.* (This characteristic is claimed to be important because "[s]ometimes, the source's subordinate role in her hierarchy and her whistle-blowing reasons for leaking will be clear. Similarly, it will sometimes be obvious that a source with a political interest in an issue engaged in a trial balloon or policy leak. Conversely, the fact that the exposed information had little relevance to the leaker's position and occupation might suggest that the information was revealed for ego, goodwill, or animus reasons.").

is "the source's reasons for leaking" the information.[230] This has been claimed to be necessary in order to get a better picture of the context of the moment the original promise of confidentiality was made.[231] Under this approach, courts are also required to consider "the relevance of the source's identity."[232] This requires an inquiry into the reasons the source asked for confidentiality and "whether, and to what extent, his identity was relevant to the story" given to the newspapers.[233] This, too, has been claimed to aid in the determination of the extent of First Amendment protections available to the press. Additionally, the contextualist approach examines "the press' reasons for [the] disclosure"[234] in order to reveal the character of the press' motive(s).[235] The approach warns, however, that this may not be easy, and "cannot be considered independently of other factors."[236] Lastly, the contextualist approach recommends that "the nature of the relationship" be considered.[237] By looking into the "power" and "sophistication" of the source, as well as the "relationship" between the source and the reporter, this analysis hopes to determine whether enforcing the promise of confidentiality would be "fair."[238] In so doing, the contextualist approach suggests that courts examine two characteristics of the "nature of the relationship between the reporter and source." These characteristics include "the particular dynamics of the interaction" and the "specificity of the non-disclosure agreement."[239] These

230. *Id.*

231. *Id.* at 720. This results in necessarily characterizing the promise in a light favorable to the source and not the press, or vice-versa.

232. *Id.* at 720-1 (footnote omitted) (This has been claimed to be "useful in determining whether the disclosure of the source's identity permitted the press to assert its independence and to trigger a readjustment of the distribution of power between the government and its citizens.").

233. *Id.* at 722.

234. *Id.* (However, it must be kept in mind that this is multi-dimensional and, in fact, "there may be multiple motivations for a particular breach of a promise of confidentiality.").

235. This approach implies that the motive(s) behind the disclosure help to determine the extent of First Amndment protections available to the press. In fact, the motives behind the action of either the source or the press may not even be relevant. *See infra* notes 246 - 287 and accompanying text.

236. Levi at 725.

237. *Id.*

238. *Id.*

239. *Id.* at 726 (footnote omitted) (Courts should not only examine the "dynamics of the relationship between the reporter and the source," but they should also look at the 'particulars of the agreement of confidentiality" in order to best determine whether or not the source and the reporter "initially understood one another's assurances and expectations." This is due to the fact that many reporter-source confidentiality promises are given orally and some are even "implicit or are sought part-way through the process of disclosure

characteristics are examined in order to aid courts in their determination of whether the First Amendment may protect the press' disclosure of the identity of the confidential source.[240] Thus, this approach attempts to provide "a reality-based framework for the judicial descriptive moment," through a "richly descr[iptive]" look at the press and its history. [241]

Although the contextualist analysis stands apart from the other approaches discussed in this Note, it is far from perfect. As a result of the scheme's basic "assumption that the judicial decision-making process is not too different from the highly context-sensitive way in which we regularly make decisions in our lives,"[242] it is of little or no use to a judiciary that either does not, or cannot, render its decisions as we make them in our lives. Indeed, this is usually the case because most courts are constrained by crowded calenders and limited resources that have made it traditionally more efficient to rely on balancing tests, and the like, when addressing issues of constitutional significance. The contextualist approach also requires courts to be sensitive to the "power," "position," and "motivation," of sources and reporters as well as the "effects" of the disclosure of the source's identity.[243] However, admitting that "[a]ny proposal that appears to invoke a variety of contextual factors . . . inevitably raises questions about identifying methodology," the implication is raised that the approach is incomplete.[244] In fact, it is. While it offers several factors to consider, it does not preclude the addition of other factors nor the subtraction of current ones. This uncertainty makes the realistic application of this approach even more difficult. The framework employed by this approach claims to be "reality-based," yet its application is far from being so. Unfortunately, since the application of this approach denies the reality of judicial decision-making, it simply can-

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rather than at the beginning.").

240. *Id.* According to this approach, an explanation of these characteristics will necessarily result in finding out "what is truly at stake for the culturally valued norms of well-informed public discourse, democratic government, and an independent press" that form the rationale behind the First Amendment. *Id.*

241. *Id.* at 717.

242. *Id.* at 715. Professor Levi gives no specific legal examples of "context-sensitive" ways decisions are made, but says that it "does not attempt the theoretical project of articulating jurisprudential justifications for the approach it suggests. Nor does it seek formally to espouse any particular decisionmaking theory in the social science literature." Instead, this approach "is intended both to suggest and to represent a useful, common-sensical way of structuring and guiding judicial inquiries." *Id.*

243. *Id.*

244. *Id.*

not serve as a realistic alternative to the resolution of suits for the breach of confidentiality promises.

IV. An Alternative Approach

Now that the five common methods of analyzing the breach of confidentiality agreements between the media and anonymous sources have been examined, this Note will offer an alternative. This alternative method of analysis satisfies the concerns of both the press and the source while offering adequate protection to each. To do so, it borrows from the promissory estoppel approach,[245] the contextualist approach,[246] and the modified contract / limited First Amendment approach.[247] Thus, this alternative considers the First Amendment protections granted to the press,[248] the First Amendment obligations the press has to the public,[249] the interest of the state in enforcing the press' promise of confidentiality,[250] the interest of the source in having the press' promise kept,[251] and the source's interest in maintaining its anonymity once confidentiality has been promised.[252] At the same time, this approach is able to remain within the confines established by the Supreme Court decision in *Cohen*.[253] In essence, this alternative integrates First Amendment protections and specific press-source-society considerations into a traditional promissory estoppel analysis, in order to create a workable analytic approach that can be realistically applied to the disposition of suits for reporter-source breaches of confidentiality.

As previously discussed, each of the five current approaches to

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245. *See supra* notes 196 - 219 and accompanying text.

246. *See supra* notes 220 - 245 and accompanying text.

247. *See supra* notes 152 - 195 and accompanying text.

248. *See U.S. Const.* amend 1. *See also Smith v. Daily Mail* at 97 (The Court held that "absent a need to further a state interest of the highest order," the press may print "lawfully obtain[ed] truthful information about a matter of public significance.").

249. American Society of Newspaper Editors, *Statement of Principles*, Article I ("The primary purpose of gathering and distributing news and opinion is to serve the general welfare and enabling them to make judgments on the issues of the time.").

250. The state's interest is in maintaining "stable relationships by allowing individuals to rely on others' promises and by compensating parties when agreements are breached." Levi at 645.

251. If it is the case that the source relied on the press' promise, the rationale for this element is self-evident.

252. This consideration is founded on the source's expectation of privacy, as well as principles of reliance.

253. Although the Supreme Court held that state promissory estoppel statutes are laws of general applicability which are not superceded by the First Amendment, they did not foreclose its consideration in the balance inherent in promissory estoppel analysis.

the resolution of reporter-source confidentiality breaches have individual problems that make them unworkable, impractical, or unsuited to the task.[254] Moreover, the *Cohen* Court seems to have foreclosed the application of all but one of these five approaches - namely, the promissory estoppel approach.[255] Although the Court held that the First Amendment cannot totally bar suits against the press for the breach of a confidentiality promise to a source, the Court did not foreclose the inclusion of First Amendment protections in the balancing test inherent in the third prong of traditional promissory estoppel analysis.[256] As a result, this Note is able to advocate a First Amendment-sensitive promissory estoppel approach to resolve reporter-source confidentiality disputes. Thus, First Amendment interests are included in this analysis.

This First Amendment-sensitive approach requires courts to individually address the three prongs that compose traditional promissory estoppel law. As defined by the Minnesota Supreme Court, these include whether or not: (1) "a promise [existed that was] expected or reasonably expected to induce definite action by the promissee," (2) the promise "induce[d] action" by the promisee, and (3) "injustice can be avoided by enforcing the promise."[257] It is under each prong that the considerations and concerns of the press, the source, and society are included in order to produce an equitable result.

Under the first prong, the nature of the original promise of confidentiality is examined.[258] This is necessary to protect the interest of the state in enforcing the press' promise of confidentiality, the interest of the source in having the press' promise (if any) kept, and the interests of the press in protecting itself from false or frivolous claims. Of course, an examination of the nature of the promise will require triers of fact to closely scrutinize the circumstances surrounding the actual exchange between the press and the source,[259] as well as the context of the situation.[260] Therefore, this examination allows triers of fact to use the same tools and methods they have traditionally used in determining whether or not any promise had existed between two opposing parties.

Under the second prong, the reaction to the promise of confi-

254. *See generally, supra* section II.
255. *See supra* notes 196 -219 and accompanying text.
256. *See supra* notes 207 - 219 and accompanying text.
257. *Cohen IV* at 204.
258. *See supra* note 229 and accompanying text.
259. *See supra* note 230 and accompanying text.
260. *See supra* notes 220 - 245 and accompanying text.

dentiality is examined. This is required to protect the interest of the source in maintaining its privacy once the promise has been given, as well as to protect the press from fraudulent or bad faith disclosures by the source. Like the first prong, this necessitates that courts engage in a relatively subjective determination based on the facts of the disclosure. Thus, there is no need to look at the motives behind the source's disclosure.[261] In fact, all that need be examined is the specific disclosure itself. Again, this examination will require triers of fact to closely scrutinize the actual exchange between the source and the reporter. To do so, courts need only use the tools and methods they have traditionally used in determining whether any bargain has been satisfied.

The subjectivity inherent in the determination of both the first and second prongs of this analysis not only enhances the general desirability of the approach, but also emphasizes the ease of its application. Since both the first and second prongs require a showing by clear and convincing evidence that the agreement existed and was breached by the press, the fairness of this approach becomes evident.[262] The need for this higher burden of proof stems from the vague and imprecise nature of the confidentiality agreement itself.[263] Borrowed from the modified contract / limited First Amendment approach, this standard of proof is required because the press often "faces difficulty in refuting a source's claim that confidentiality was promised."[264]

The third prong of this approach does not enjoy the same level of subjectivity as the first two. In fact, this prong - whether or not injustice can be avoided by enforcing the promise - is objective. As such, it requires courts to engage in exacting and complex decision-making processes and, for the sake of the the First Amendment, it should.[265] Probably the most vital of the three prongs, the third prong of the First Amendment-sensitive promissory estoppel approach is not mutually exclusive of the other two. Even if the first two prongs reveal that a confidentiality agreement was made and breached by the press, and the source revealed the information that was promised, the issue of whether or not injustice can be

261. *See supra* note 241.

262. *See supra* note 165.

263. *See supra* notes 165 -172.

264. Minnesota Note at 1579 (footnote ommitted).

265. Although the Minnesota Supreme Court described this inquiry as being "fraught with moral ambiguity," this approach will attempt to dispell this concern by advancing more specific interests that society, the source, and the media have and that the court did not explain. *Cohen IV* at 202.

avoided by enforcing this promise will be dispositive of the larger issue of press liability.

In order to integrate First Amendment protections into this prong, a balancing test is required. This test empowers triers of fact to balance the interests of both the state and the source in enforcing the promise against the First Amendment interests of society and the press. The only court to have adopted a version of this balancing test for use in determining the outcome of reporter-source confidentiality breaches has been the Minnesota Supreme Court.[266] However, in doing so, the court never specifically set forth the considerations that must be included in the balance.[267]

Striking a balance in favor of either the press or the source necessarily requires courts to "articulate, measure and compare" the competing interests involved.[268] Thus, several specific considerations must be scrutinized. First, the considerations that address the interests in enforcing the promise are examined. These include: the nature of the source; the severity of the harm suffered by the source; the history and clarity of the relationship between the source and the press; and the history and clarity of the original confidentiality agreement. It is important that each of these considerations be given equal weight[269] in determining the level of interest that the source and the state have in compensating the breach of confidentiality.[270]

Examining the nature of the source is important in determining which way the balance will tilt because it indicates both the level of public scrutiny that the source is accustomed to,[271] and the degree of privacy that the source is entitled to.[272] If the source is a private individual, never before subject to public scrutiny, the balance will tilt in favor of the source. On the other hand, if the source is a public figure, the balance would favor the press.

Next, the severity of the harm suffered by the source is important in determining the balance. This consideration is straightforward - the worse the harm suffered by the source, the more the

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266. *See generally, Cohen IV.*

267. *See supra* note 271 and accompanying text.

268. *Cohen IV* at 202.

269. *See supra* notes 127 - 130.

270. *See Cohen VI* (Only compensatory damages may be sought.). Although the *Cohen* court only addressed the issue of damages, this test could theoretically be used in seeking preliminary relief. However, this would implicate important prior restraint questions that may even bar such an approach.

271. This is similar to the distinction between public and private individuals in First Amendment defamation jurisprudence.

272. This is also borrowed from general defamation law.

balance will favor the source. Of course, if the source suffers only minor harm, the balance will naturally shift toward the press.[273]

The clarity and history of the relationship between the source and the press, as well as the clarity and history of their original agreement, aid in deciding which way the balance will tilt. Although the first two prongs of this approach require that the source must prove both the existence and breach of an agreement by clear and convincing evidence, the circumstances constituting the relationship, and the making and terms of the agreement also aid in weighing the competing interests.[274] For example, if the relationship is somewhat nebulous,[275] and the agreement and its terms are not specific,[276] the balance will favor the press. On the other hand, if the relationship is certain, and the terms of the agreement specific, the balance will lean toward the source.

Since any balancing of interests approach relies on the equitable resolution of competing interests, the side of the balance that addresses the First Amendment interests of society and the press necessitates the inclusion of several additional considerations. These are: the newsworthiness of the information; the public's need to know the identity of the source and the relevance of the source's identity to the story; the importance of the revelation of the source's identity to public debate; and the specificity of the disclosure itself. The inclusion of these considerations addresses First Amendment interests and completes the analysis. Again, it is important that each consideration be afforded equal weight in calculating the final balance.

The newsworthiness of the information is a relevant factor because it is an indication of the level that "well-informed public discourse"[277] is enhanced. In fact, Article I of the Ethical Principles of the American Society of Newspaper Editors states that "[t]he primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time."[278] As a result, the more newsworthy the identity of the source, the more the bal-

273. *See supra* note 180.

274. *See supra* notes 184 - 185 and accompanying text.

275. One time sources that do not make it clear that they are speaking with the press in confidence, and sources that have had existing, non-confidential relationships with the reporter may fall into this catagory.

276. "Specific" refers to the exactness of the agreement.

277. Levi at 718, 726. *See supra* note 228.

278. American Society of Newspaper Editors, *Statement of Principles*, Article I. *See also Cohen VI* (Souter, J., dissenting).

ance is weighted in favor of the press. On the other hand, if the identity of the source has little or no value as news, the balance will shift in favor of the source. Although this approach admits the subjectivity inherent in the examination of a consideration such as "newsworthiness," it is a necessary consideration in the measurement of the competing interests involved. Moreover, it is an interest that courts have measured in the past.[279]

Next, the public's need to know the identity of the source and the relevance of the source's identity to the story, is relevant in determining the balance. Thus, courts must examine whether or not the continued anonymity of the source will "significantly mislead" the public in its full understanding of the story.[280] If the public will not be misled by the continued anonymity of the source, the balance will lean towards the source.[281] However, if "not knowing the source" will "significantly" mislead the public, the balance will shift in favor of the press.[282] For example, if the source is a public figure whose identity would be newsworthy as a part of the story, the public's need to know would be significant. Additionally, the more relevant a source's identity is to the story, the more the balance will favor the press, while the less relevant it is, the more the balance will tilt toward the source. Therefore, as the source's relevance to the story increases, so too does the public's need to know the source's identity.

The importance of the revelation of the source's identity to public debate must also be factored into the balance. This consideration is dependent "on how vital the information is to public debate."[283] "If the information concerns a trivial matter, then the identity of the source is unimportant to the public."[284] However, "if the information pertains to a controversial issue, then how the public shapes its decision of the issue may very well depend on knowledge of the source."[285] As a result, if the revelation is important to public debate, the balance will shift in favor of the press, but if the revelation is of little or no importance to public debate, the balance will tilt toward the source.

Finally, the specificity of the disclosure must be examined and

279. *See e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972) and Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).

280. *See generally, Cohen VI*

281. FED. COMM. Comment at 312.

282. *Id.*

283. *Id. at 313.*

284. *Id.*

285. *Id.*

weighed into the balance. By and large, this factor goes to the degree of injury suffered by the source.[286] Consequently, the more specific the disclosure is, the more the balance will shift toward the source. However, the less specific the disclosure by the press, and the less an average reader is able to determine the source's relationship to the story, the more the balance will favor the press.

In sum, this alternative approach is designed to take into consideration the interests of the press, the source, and society when determining whether or not the press should be held liable for a breach of reporter-source confidentiality. By equitably balancing these interests within a traditional promissory estoppel analysis, a workable analytic approach is created that can be realistically applied by courts. For these reasons, as well as the others outlined above, this Note advocates the application of this First Amendment-sensitive promissory estoppel approach for resolving disputes over the breach of reporter-source confidentiality promises.

V. CONCLUSION

The decision of the *Cohen* Court seems to make it clear that First Amendment press protections are on slippery ground. Not only may the press be punished for refusing to disclose confidential sources,[287] it may now be punished for disclosing a confidential source.[288] As *Cohen* illustrates, the Court is currently unwilling to *explicitly* offer First Amendment protections as part of its consideration of whether the press may disclose a confidential source. Worse yet, the *Cohen* opinion offers little in the way of novel analysis. Given the background of the case, the decisions of the lower courts, and the variety of approaches discussed by commentators, it is surprising that the Court's opinion occupies as little space in the reporter as it does.

Although the Court seems to endorse the promissory estoppel approach, albeit not an explicit First Amendment-sensitive approach, the Court does nothing to provide the tools necessary to balance the competing interests at stake. Thus, a mode of analysis is needed to equitably calculate and weigh these competing interests. As discussed, a better approach is a hybrid of the promissory

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286. Thus, if a reader is able to determine the identity of the source of the story, as well as the source's relationshiip to the story, the greater the harm is to the source. *See also* Fed. Comm. Comment at 314.

287. *See generally* Branzburg v. Hayes, 408 U.S. 665 (1972).

288. *Cohen VI* at 2523 (Souter, J., dissenting) (The "punishment" is presumably economic in nature.).

estoppel,[289] contextualist,[290] and modified contract / limited First Amendment approach.[291]

This alternative combines specific press, source, and societal considerations with First Amendment protections under a promissory estoppel analysis that equitably resolves disputes concerning the breach of reporter-source confidentiality agreements.[292] Thus, triers of fact can be provided with the certainty of realistic application that a balancing approach provides, as well as the equity and fairness provided by the inclusion of specific considerations that address source, press, and societal interests. Also, this approach would empower courts to consider First Amendment press protections while affording sources a remedy for their detrimental reliance on the press' breached promise.

The analysis of suits for the breach of reporter-source confidentiality agreements has been, and continues to be, exceedingly complex. However, as courts and commentators struggled to determine which approach best fit these cases, the Supreme Court, through its *Cohen* decision, seemed to limit the selection to only one - the promissory estoppel approach.[293] Fortunately, however, their decision did not completely foreclose the inclusion of First Amendment considerations. As a result, the alternative approach discussed in this Note is not only able to remain within the mandate set by the Court, but to include adequate protections for press, source, and societal interests. Foremost among these protections are those granted by the First Amendment.

By applying this First Amendment-sensitive promissory estoppel analysis, whether or not an agreement between the reporter and the source actually existed, whether or not the source expected the agreement to be kept, and whether "injustice"[294] can be avoided by enforcing this promise can be ascertained. While the first two prongs of this approach are concerned with the nuts and bolts of the promise, the resolution of the third prong implicitly requires a balancing of interests.

It has been said that "[s]ome tension necessarily exists between the need for a vigorous and uninhibited press and the legiti-

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289. *See supra* notes 196 - 219. *See also Cohen IV* at 203.

290. *See supra* notes 220 - 245. *See also Levi* at 714.

291. *See supra* notes 159 - 195. *See also* Minnesota Note at 1579.

292. *See supra* section IV.

293. *Cohen IV* at 203. *See supra* notes 196 - 219.

294. This is measured by balancing the First Amendment interests of the press and society against the interests of the source and the state.

mate interest in redressing wrongful injury."[295] In the context of the breach of reporter-source confidentiality agreements, and especially in light of the facts of *Cohen*, this is indeed an understatement. While an approach that quickly, easily, and equitably resolves these tensions would be ideal, such an approach does not exist. However, given the alternatives, constraints, and goals that must be met, the First Amendment-sensitive promissory estoppel approach appears to be the closest to ideal that current jurisprudential sensibilities will allow.

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295. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (citations ommitted).

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