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Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations

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ARTICLE

DANGEROUS LIAISONS: SEDUCTION AND BETRAYAL IN CONFIDENTIAL PRESS-SOURCE RELATIONS

Lili Levi*

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“The relationship between sources and journalists resembles a dance, for sources seek access to journalists and journalists seek access to sources. Although it takes two to tango . . . more often than not, sources do the leading.”

INTRODUCTION

The mythology of democracy reserves an honored place for the press. Fiercely independent, vigorous and critical, the news media of this vision serve the public interest in robust, informed debate and accountable government. For true believers in this romantic notion, the Watergate scandal represents the apotheosis of a watchdog press, capable even of toppling a President.

Yet, skeptics might tell a conflicting story. History shows the press as far more lapdog than watchdog. Today, spin doctors, sound bites, staged media events, and campaign spot ads dominate politics and the news. Instead of Watergate, we have the authorized leak, through which political operatives plant misleading information, manage the news, and orchestrate public debate from behind the scenes.

3. See generally, e.g., M. HERTSGAARD, ON BENDED KNEE: THE PRESS AND THE REAGAN PRESIDENCY (1988); E. ABEL, supra note 1; J. McGINNIS, THE SELLING OF THE PRESIDENT (1969); Carlson, The Image Makers, Wash. Post Mag., Feb. 11, 1990, at 12. As pointed out in a recent article in the popular press, professional publicity experts “have made a multibillion dollar industry” out of attempts to influence news reports, and “the White House has raised press manipulation to a virtual art form.” Cose, Shopping in the News Bazaar, TIME, Mar. 26, 1990, at 64. The article quotes a journalism scholar’s estimate that 40% of
Neither version of the story, of course, captures the full truth. Journalists and newsmakers both cooperate and compete to influence the public’s perception of reality. Nowhere is this ambiguity more evident than in the press’ relationships with its confidential sources. After all, while confidential sources provided the Washington Post with much of its ammunition during Watergate, it is equally true that reliance on confidential sources makes the media dangerously vulnerable to manipulation.

The dilemma is particularly acute today, as relationships of confidentiality between the press and its sources increasingly become a staple of modern newsgathering. On the one hand, the control of information under the aegis of the Imperial Presidency, the centralized government information apparatus, and the secrecy-obsessed national security establishment all suggest that much important information can only be obtained by promising anonymity to sources.7

On the other hand, since anonymity for its own sake has come to develop a certain cachet, journalists run the risk of overusing the device and allowing confidential sources to manage the news and use the press to mislead.8 References to anonymous sources and unattributed information in published reports can reinforce the impression that, far from arming the public with sufficient...
information to understand events, reporters often mediate coded conversations between elites with agendas impenetrable to all but the most sophisticated pundits. When reporting on the basis of confidential sources, journalists become simultaneously active and passive—uncovering some information which might not otherwise come to light, but also serving as the carriers of someone else's message without providing a dictionary with which to interpret the vocabulary.

Although reporters typically abide by an ethic of preserving confidentiality against government encroachment, the tensions inherent in the press' reliance on confidential sources occasionally lead news organizations to divulge the identities of their confidential sources voluntarily. Historically, most "burned" sources have simply accepted their exposure or sought personal redress. However, in a controversy recently in the public eye, one source whose name was disclosed in the context of a state election campaign retaliated against the press in the courts. He persuaded a jury that by disclosing his name the newspapers had breached a contract with him. While this source was not the first disappointed promisee to sue the press for having disclosed his identity, he was the first to obtain a contract judgment at trial. His verdict on the contract claim withstood judicial review both at the trial and the intermediate appellate levels. Although his contract victory was reversed by a sharply divided panel of the Min-

9. See infra note 306 and accompanying text.
10. See infra notes 102-03 and accompanying text.
13. See infra note 109 and accompanying text. Tort claims such as fraud, misrepresentation, breach of confidentiality, intentional or negligent infliction of emotional distress, and invasion of privacy may be available to sources to whom promises of confidentiality have been made and broken. See cases cited in infra note 107. Nevertheless, virtually all of these tort claims are premised on the breach of the reporters' promise and not simply upon the injury to the plaintiff. Accordingly, this Article will not separately address such tort claims. Much of the contract analysis should prove relevant to the question of whether to permit a tort action as well, particularly when the reason for bringing the action in tort is principally to avoid technical rules regarding contract or contract damages.
nesota Supreme Court, the United States Supreme Court recently agreed to hear his appeal.14

The Court's review is limited to the question whether the first amendment precludes recovery for confidential sources whose identities have been disclosed by the press in the context of political contests.15 How the Court decides this case, however, will naturally have a significant impact on the incidence and character of contract claims by disclosed sources. If, for example, the Court rejects any absolute first amendment defense in these circumstances, such claims are likely to appear before the courts with greater frequency.16 Voluntary disclosures of source identities are no longer aberrant situations discussed only within the journalistic fraternity. In a way, recent national debate on the ethical obligations of reporters toward their confidential sources has made the practice of disclosure respectable, albeit controversial. It is likely that, as politics continues to be dominated by "negative" campaigning17 and new evidence surfaces about government disinformation efforts,18 reporters will increasingly be confronted with situations in which promises of confidentiality will test their abilities to report events fully and independently. Thus, when properly viewed, contract claims by sources will raise not only is-

15. Id.
17. See, e.g., L. Sabato, supra note 2, at 321-26; Devlin, Campaign Commercials, in POLITICAL PERSUASION, supra note 2, at 207, 209-10; Schwartz, Radio Advertising in Campaigns, in POLITICAL PERSUASION, supra note 2, at 65; Oreskes, "Attack" Politics, Rife in '88, Comes into its Own, N.Y. Times, Oct. 24, 1989, at A24, col. 4; Cocco, Smears and Fears: The '88 Campaign, NEWSDAY, Nov. 6, 1988, at 4; McDonald, Midterm MudSlinging, MCLEAN'S, Nov. 3, 1986, at 22; Peterson, Offbeat Issues Proliferate, Wash. Post, Nov. 5, 1984, at A3, col. 1; When "Dirty Tricks" Enter the '82 Campaign, U.S. NEWS & WORLD REP., Sept. 20, 1982, at 37 (reporting on survey that showed increase in negative political ads from one-fourth in the mid-1960's to one-half by the early 1980's); Clymer, Voters Grow Weary of Negative Campaign Tactics, N.Y. Times, Oct. 13, 1980, at B5, col. 3.
sues concerning private actors but also fundamental issues about the role of the press and the character of politics in a democracy.

Accordingly, the manner in which courts conceptualize the issue has important consequences. Yet, neither the few cases on point nor the scholarly literature persuasively address the circumstances in which the courts should grant relief to exposed sources.\(^1\) Three approaches predominate. The first emphasizes freedom of contract; the second, the press' protection under the first amendment; and the third, the courts' traditional "policing" of agreement terms under the doctrine of promissory estoppel.

The first two approaches simply beg the question; the third fails to do it justice.

The freedom of contract approach\(^2\) mechanically concludes that all promises of confidentiality by the press should presumptively be enforced as contracts simply because of their voluntary and promissory character. However, this misperceives the character and overstates the simplicity of contract law. It is simply not true that all promises are enforced as contracts without substantive inquiry into whether enforcement is consistent with public policy goals. Moreover, in simply assuming that first amendment values are not implicated by the press' promises to sources, this approach naively avoids all of the actual complexities of the issue.

The second approach, which relies on the first amendment, has

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19. Despite significant commentary in the press on the issue, only three law review pieces have thus far seriously attempted to address this specific problem. See Note, When a Promise Is Not a Promise: The Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources, 12 COMM./ENT. L.J. 565 (1990) [hereinafter COMM./ENT. Note]; 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 (1990) [hereinafter FED. COMM. Comment]; Minnesota Note, supra note 16.


20. See infra Section II.A.
both a strong and a less absolute version. The strong version\textsuperscript{21} consists of an argument that any imposition of contract damages on the press in these circumstances would flatly violate the freedom of the press guaranteed by the first amendment. Yet, the issues posed by voluntary disclosures of sources cannot simply be wished away by reflexive invocations of first amendment immunity. The Supreme Court's consistent refusal to find the first amendment a bar to private tort actions against the press\textsuperscript{22} strongly suggests that constitutional protection does not flatly immunize the media against all lawsuits by sources—whether in tort or contract—for disclosure of their identities.

Neither can the problem be solved by a less absolute invocation of the first amendment in the form of the constitutionalized standard of liability applied in defamation cases.\textsuperscript{23} First, an attempt to translate that actual malice standard into the context of disclosures of true information is unworkable and ironically leads to press-restrictive, rather than press-protective results. Second, while the defamation cases accept that the interest in reputation always has some value, the same cannot be said of every source’s interest in confidentiality.\textsuperscript{24} Moreover, even the defamation cases recognize variable interests in the protection of reputation depending on the public or private status of the plaintiff. Thus, the defamation cases neither require the application of a constitutionally heightened malice standard to all breaches of confidentiality nor serve as useful guides for determining the weight to be

\begin{itemize}
\item \textsuperscript{21} See infra Section II.B.1.
\item \textsuperscript{23} See New York Times, 376 U.S. at 280 (holding that first amendment requires public official defamation plaintiffs to show actual malice); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (extending actual malice standard to public figure plaintiffs); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding that states could impose any standard of liability short of strict liability in defamation cases brought by private plaintiffs, but that presumed or punitive damages would not be available without a showing of actual malice). See infra Section II.B.2.
\item \textsuperscript{24} As will be discussed infra, in Sections III.B., IV.A. and IV.B., confidentiality has both desirable and undesirable social effects in different circumstances. Cf. Branzburg v. Hayes, 408 U.S. 665, 691 (1972) (noting, in the process of rejecting first amendment reporter’s privilege in grand jury proceedings, that the preference for anonymity of sources involved in criminal conduct “is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection”).
\end{itemize}
accorded to different confidentiality promises. Third, the outcome-determinative focus in *New York Times Co. v. Sullivan* on the potential self-censorship or "chilling effect" of the imposition of tort liability on the press is not helpful in this context because any rule on this question may theoretically cause a chilling effect—either on sources or on reporters.\(^\text{28}\)

The third approach to the problem of source disclosure—the promissory estoppel model—is no less subject to criticism. While abstractly suggesting that the approach requires a fact-specific balancing of interests, the only court to have thus far attempted to apply this analysis has sought recourse in a thinly-disguised categorical first amendment rule and has provided virtually no guidance for a more fact-specific analysis.\(^\text{27}\)

All current approaches to the issue of source exposure are also inadequate in a final way. While we can discern unanalyzed assumptions about the nature of the press in all of them, none take the opportunity, so perfectly presented by the complexities of the confidentiality problem, to develop a realistic and nuanced picture of the ambiguous institutional character of the modern press in its relations with government and other authoritative sources.\(^\text{28}\)

Those who favor the freedom of contract approach deny the press any special role as one of the "great interpreters" between the government and the people.\(^\text{29}\) They perceive the press uni-dimensionally, as a powerful and overly-privileged elite that improperly seeks to use the Constitution to exempt itself from the ordinary obligations of other citizens. The other two approaches which consider first amendment interests presume a contrary, but equally idealized vision of the press by eschewing any assessment of its actual power position. A more realistic assessment of the press would admit both its power and independence as an institution and also its considerable manipulability by government.\(^\text{30}\)

An application of contract law or first amendment doctrine without sensitivity to this "realpolitik" of the press is not jurispruden-

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26. In the alternative, empirical data which can be read to cast doubt on the probability of a chilling effect on either reporters or sources in the contract area makes it all the more necessary to question the appropriateness of the defamation analogy. *See infra* text accompanying notes 177-81.
27. *See Cohen IV*, 457 N.W.2d at 199; *see also infra* Section II.C.
28. *See infra* Section III.A.
30. *See infra* Section III.A.
tially sound or socially useful, and may not even be sufficiently press-protective.

This Article proposes an alternative—contextualist—approach to the problem of voluntary press disclosures of sources. Recognizing that practices of secrecy or confidentiality have both constructive and destructive consequences in social life generally and in the press context specifically, this Article argues that there can be no a priori, blanket rule concerning the enforcement of press promises of confidentiality to sources. Rather, such cases must be decided contextually, in light of the particular characteristics of the relationship at issue, the history of the American press, and the democratic values that we, as a society, consider to be implicated in press-source confidentiality.

We can glean such values from the idealized models or prototypes of news sources which pervade both legal and popular culture. The model of the sympathetic whistleblower, compelled by altruistic concerns to disclose wrongdoing at significant personal risk of retaliation, constitutes one extreme of the cultural prototypes of news sources. At the opposite extreme is the “sourcerer,” the despised prototype of a strategically manipulative political operator. Obviously, these prototypes are too uni-dimensional and unambiguous to represent most actual sources or real relationships of confidentiality in the press context. Instead, they serve simply to organize discourse and provide a frame of reference from which to assess the character and consequences of particular promises of confidentiality.

Our sympathetic responses to prototypical whistleblowers and our distaste for “sourcerers” suggest that we have both substantive and institutional concerns about practices of press confidentiality. Substantively, for example, we are concerned with the effect of a particular promise of confidentiality on well-informed, truthful public discourse and the democratic process. Institutionally, our reactions to the prototypes demonstrate a concern about the effect of a particular promise of confidentiality on the institutional independence of the press.

The contextualist approach suggested by this Article requires

31. See infra Section IV.
32. See infra text accompanying notes 365-68.
33. See Smyser, There Are Sources and Then There are Sourcerers, 5 SOC. RESP.: JOURNALISM, L. & MED. 13, 14 (1979) (coining the term “sourcerer”); see also infra text accompanying note 369.
courts to address the particular ways in which these and other social concerns are implicated in any given case. It does so by encouraging triers of fact to develop both a realistic background picture of the institutional relationship between the press and government and a richly-textured, fact-specific, and context-sensitive characterization of the circumstances of particular promises of confidentiality. In more schematic terms, this descriptive enterprise requires that courts, when addressing particular breaches of confidentiality, effectively strive to determine where they fit on the continuum of press-source relationships bounded by the prototypical whistleblower and the prototypical sourcerer. This Article suggests a number of specific considerations as guideposts to orient this kind of contextualizing sensibility.

While the approach suggested here rejects any slavish imitation of the first amendment privilege in the defamation area, it is in fact fully grounded in the democratic ideals underlying the first amendment and compatible with a reinterpreted first amendment approach. Constitutional law has long incorporated common law language and modes of analysis. This Article suggests that the constitutional values at stake in source confidentiality cases would most fruitfully and sensitively be addressed by borrowing from the common law its most nuanced forms of contextual analysis.

Section I of this Article provides a typology of news sources, discusses the background norm of confidentiality in journalism, sets out the occasions of voluntary disclosure when that norm has been subordinated to other interests, and describes the new retaliatory trend of suits against the press by exposed sources. Section II analyzes and outlines the inadequacies of the three predominant current approaches to the problem of contract actions by sources. Section III situates the problem by describing the history of the institutional relationship between the press and government, the particular dangers posed by confidentiality in the press context, and the varying realities of interactions between reporters and sources. Section IV proposes a context-sensitive approach—without resort to simplistic first amendment or contractual conceptions—that takes into account the historical realities of press relationships with government and sources, while providing guidance to courts in their determinations of whether to enforce particular press promises of confidentiality.
I. MEDIA ETHICS, VOLUNTARY DISCLOSURE, AND SOURCE RETALIATION

Confidential sources play a variety of roles in modern news coverage. While reliance by the press on such sources goes back to Colonial times, the practice has become pervasive since the 1960's. Consistent with the dominance of governmental and po-

34. See, e.g., D. BRODER, BEHIND THE FRONT PAGE 319-22 (1987); H. GOODWIN, GROPING FOR ETHICS IN JOURNALISM 120-21 (1983); E. LAMBETH, COMMITTED JOURNALISM: AN ETHIC FOR THE PROFESSION 142 (1986); Blasi, supra note 19, at 245; Osborn, The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas, 17 COLUM. HUM. RTS. L. REV. 57, 73 (1985). Even if a source's information is not directly reported, it may lead a journalist to the discovery of reportable information; set the context for publishable information; or confirm information already gathered from other sources. Blasi, supra note 19, at 246. When confidential sources do provide information for publication, they are often described by code words which refer to their positions. We are all familiar with such general characterizations as "a State Department official," "a source high in the Administration," "a source close to the campaign," and "a diplomatic observer." The specificity of the description provided can range from "the highest authority" (used to indicate the President) to the uninformative "TIME has learned." See C. PRESS & K. VERBURG, AMERICAN POLITICIANS AND JOURNALISTS 131 (1988). Henry Kissinger often required reporters to refer to him as "a senior official on the Secretary of State's plane." T. GOLDSTEIN, THE NEWS AT ANY COST 189 (1985). One experienced journalist has noted that extremely general attributions are often proxies for the reporter's own analysis, when norms of objective journalism will not allow her to report that analysis in a "straight" news story. T. WICKER, ON PRESS 150 (1978).

35. See M. VAN GERGEN, supra note 19, at 5-6; B. FRANKLIN, AUTOBIOGRAPHY 33-34 (L. Lemisch ed. 1961).

36. E. ABEL, supra note 1, at 4, 28, 63 (leaks have grown from "trickle to torrent"); N. ISAACS, supra note 3, at 50, 52 (cloaking sources grew to "grotesque proportions"); J. HULTENG, supra note 6, at 89; S. HESS, THE GOVERNMENT/PRESS CONNECTION 91 (1984) [hereinafter PRESS CONNECTION] (leaking at an all time high in 1982); IMPACT, supra note 4, at 188, 197 (leaks prevalent part of interaction between press and officials); J. DEAKIN, STRAIGHT STUFF 187-88 (1984) ("Most [leaks] are integral though informal instruments of government and diplomacy. ... The government could not conduct its business without them."); N. HENTOFF, THE FIRST FREEDOM 226-27, 241 (1988) (reporting on "pervasive" reliance on confidential sources found by 1973 study of newspaper editors); D. SCHORR, CLEARING THE AIR 179 (1977) ("Watergate had brought the leak into its own."); D. BOORSTIN, supra note 2, at 29-35. One editor has called the reliance on unnamed sources a "cozy" and "convenient" "Washington habit." Editor & Publisher, Sept. 27, 1980, at 22 (remarks of James P. Gannon, Executive Editor of the Des Moines Register and Tribune).

Indeed, some press critics lament what they see as an increasing practice on the part of journalists to suggest anonymity themselves or assume that it is desired by the source. See E. ABEL, supra note 1, at 39; H. GOODWIN, supra note 34, at 123; see also D. SHAW, PRESS WATCH 67 (1984).

Empirical research supports commentators' anecdotal observations regarding reliance on unattributed sources. Professor Vincent-Blasi's empirical study of the press-source relationship in 1971 indicated that confidential sources were relied upon in 22.2% to 34.4% of stories by average reporters surveyed. Blasi, supra note 19, at 247. See also S. HESS, THE WASHINGTON REPORTERS 19 (1981) [hereinafter REPORTERS]; B. SWAIN, REPORTERS' ETHICS
litical news in the media,\textsuperscript{37} by far the largest percentage of news sources consists of government officials and politicians or their representatives.\textsuperscript{38} Non-attribution guidelines have developed for


37. Empirical studies indicate that political news is by far the most significant component of major national newspapers. Leon Sigal, for example, found that 46.5\% of the front pages of The Washington Post and The New York Times over a period of years consisted of news provided by national officials, with 4.1\% based on reports of state and local government officials. A bare 16.5\% of stories on the front pages originated from non-governmental sources. L. Sigal, \textit{Reporters and Officials} 123-25 (1973). Moreover, such political news appears to be primarily national, even in newspapers located outside of Washington. Reporters, supra note 36, at 94-95, 113-14 (finding that in 22 newspapers outside the capital, "[a]ll the top stories from the community, the state capital, and other cities in the home state combined, do not equal the percentage from Washington" and that nearly half of all papers' lead stories came from Washington). One cause of this phenomenon might be that most press outlets around the country often follow the lead of a small number of media elites such as the wire services, the television networks, The New York Times, The Washington Post, and the two leading news magazines in reporting the news. C. Press & K. VerBurg, supra note 34, at 59; Reporters, supra note 36, at 93. CNN's coverage of the Persian Gulf conflict has assured it a place in that elite group. Zoglin, \textit{The Global Village: Live from the Middle East!}, \textit{Time}, Jan. 28, 1991, at 69-71; Cooper, \textit{The Very Nervy Win of CNN}, U.S. \textit{News & World Rep.}, Jan. 28, 1991, at 44.

38. See, e.g., Reporters, supra note 36, at 92-96, 121-22, 126; H. Gans, supra note 1, at 8-13, 15-18 (four sorts of "knowns"—incumbent presidents, presidential candidates, House and Senate members, and other federal officials—found to be subjects of over one-half of domestic news stories in media studied); L. Sigal, supra note 37, at 124 (American and foreign government officials constitute more than three-fourths of all news sources); Brown, Bybee, supra note 36, at 48-51 (more than one-half of sources for front page news stories were affiliated with a governmental body, reaffirming earlier findings of dominance by elite news sources); Osborn, supra note 34, at 73 (reporters relied on confidential sources most frequently in reporting on government affairs); Wulfemeyer, supra note 36, at 82, 85 (high status, official sources quoted most frequently in national magazines). This Article will focus on governmental sources because of their predominance in modern news.

The extensive use of governmental and other authoritative sources by reporters in the conventional media has been credited to a variety of factors, including journalistic conventions and organizational constraints. See, e.g., Brown, Bybee, supra note 36, at 45-46; H. Gans, supra note 1, at 8-13; L. Sigal, supra note 37, at 119-30; see also infra notes 245-59 and accompanying text. The primacy of governmental officials as news sources also follows from the governmental or political character of most news reports in the conventional press.
government's routine, official communications with the press and confidentiality is the rule for informal "leaks" of information. Indeed, Washington insiders have the sense of participating in a "government by leak."

The very pervasiveness of confidential interactions between sources and reporters discourages searching inquiry into journal-

39. A particularized vocabulary has developed, especially among Washington journalists and politicians, to characterize the different degrees of confidentiality available to sources. H. Goodwin, supra note 34, at 128; Rosenfeld, Contradictions Abound in the Use of Confidential Sources, ASNE Bull., Sept./Oct. 1988, at 7-10; Mohr, To Source or Not to Source: That Is the Question, N.Y. Times, June 19, 1984, at A18, col. 3. Obviously, "on the record" conversations refer to those which can be published, quoted, and attributed specifically. J. Deakin, supra note 36, at 69; W. Rivers, The Other Government 127 (1982).

Information provided "on background" can be quoted and published, but its source cannot be identified by name or title. See C. Press & K. Verburg, supra note 34, at 130-31; T. Goldstein, supra note 34, at 189 (1985); W. Rivers, supra, at 127; D. Wise, The Politics of Lying: Government Deception, Secrecy and Power 287-88 (1973). This terminology is ascribed to Franklin Roosevelt, who coined the term for his press conferences. C. Press & K. Verburg, supra note 34, at 130; W. Rivers, supra, at 32-33. It is still often used to refer to the attribution rules at briefings held by officials for groups of reporters. H. Goodwin, supra note 34, at 127.

"Deep background" refers to news stories for which no source can be indicated by any means. See Id.; W. Rivers, supra, at 127 ("[a]nything that is said is usable, but not in direct quotation and not for any type of attribution"); T. Wicker, supra note 34, at 100 (attributing the phrase to George Reedy, Lyndon Johnson's press secretary and defining it as requiring the reporter to "write as if he has gained his information from the air around him, or by meditation, or perhaps through cosmic revelation"); B. Woodward & C. Bernstein, supra note 5, at 71 (deep background source would not be identified to anyone; would never be quoted, even as an anonymous source; and would only serve to confirm information and add perspective).

Finally, "off the record" refers to information which the reporter cannot publish at all. T. Goldstein, supra note 34, at 188-89; H. Goodwin, supra note 34, at 126; W. Rivers, supra, at 127; T. Wicker, supra note 34, at 100-01. The purpose of the off the record conversation is to inform the reporter. T. Goldstein, supra note 34, at 189.

Despite the currency of the vocabulary, however, journalists differ as to the precise definitions of the code words. Rosenfeld, supra, at 7. One author has quoted the Department of Justice in a report on the leaks which led to Abscam in 1981 to the effect that:

The meaning of the term [off the record] to some is that particular information disclosed to reporters may not be used at all. To others, it is that the information must be confirmed by other sources, without attribution to them. To still others, it means that the information may be used on a background basis without direct attribution.

T. Goldstein, supra note 34, at 189-90. Sources have different interpretations as well. E. Abel, supra note 1, at 56; H. Goodwin, supra note 34, at 126; Safire, Off the Record, N.Y. Times, Oct. 29, 1989, § 6, at 16, col. 1. Some commentators suggest that the meaning of the codes depends both on customs in the region and on previous understandings between reporters and their sources. See B. Swain, supra note 36, at 47. New officials bring their own definitions with them. E. Abel, supra note 1, at 56.

40. E. Abel, supra note 1, at 2, 10.
istic practices of confidentiality. Moreover, the routinization of confidentiality encourages the assumption that all confidential press-source relationships share the same characteristics. In fact, such confidential relationships vary widely, in no small part because of fundamental differences among sources. Thus, an understanding of the phenomenon of confidentiality between sources and reporters first requires a sense of the different types of sources.

A. A Typology of Confidential Sources

Confidential news sources can be categorized and distinguished with respect to their identities and positions, their motivations for talking to the press, and their reasons for seeking anonymity.

1. Source Identity

Some confidential sources are part of the government’s formal channels for the dissemination of information. Many government news sources, however, are “leakers,” who provide the press with information on an informal basis. Surveys show that large percentages of Washington officials selectively disclose information to the press.41

41. Official news sources in the executive branch are centralized, with public information staffs at all agencies and the press corps at the White House. PRESS CONNECTION, supra note 36, at 75. See also infra notes 248-49. Congressional information, because it is disseminated by the staffs of the individual members, is not nearly as systematized. See generally PRESS CONNECTION, supra note 36; S. Hess, THE ULTIMATE INSIDERS: U.S. SENATORS IN THE NATIONAL MEDIA 2, 92-93, 105 (1986).

42. There are various definitions of the term “leak.” As one source has put it, “[l]eaks have a negative connotation and therefore are subject to different definitions depending on where people sit and their own standards of practice. One person’s leak is another’s profile in courage. That is one reason why talking about them with reporters and journalists is complicated.” IMPACT, supra note 4, at 169. Elie Abel has recently defined the leak as the “unsolicited disclosure of sensitive information on condition of anonymity.” E. Abel, supra note 1, at 2. Although officials and journalists sometimes distinguish between leakers and confidential sources on the basis of the nature of the information or who initiated the communication, this Article will use the term “leak” to refer to communications in which the information transmitted is considered confidential and in which the source seeks anonymity. See IMPACT, supra note 4, at 171.

Thomas Paine may have been responsible for the first significant leak in American history when he revealed information about a secret arms deal with France in 1778. E. Abel, supra note 1, at 11-15. Leaks were already routine in Washington by 1937, when Leo Rosten observed that Washington reporters would have to rely on informal channels of communication with officials in order to obtain the news. L. Rosten, THE WASHINGTON CORRESPONDENTS 78 (1937).

43. For example, 42% of the federal officials responding to a survey stated that they
While anyone within government can leak to the press, empirical observation shows some patterns in the identity of leakers. Most leaks do not originate from press offices or other formal government spokesmen. Nor, with the exception of "whistleblowing," is leaking a common practice in the career or lower civil service. Rather, it is high-level public officials—members of the cabinet or close Presidential advisors—who often use the leak as a device to disseminate information. Congress as well is often a source of leaks, not only about legislative business, but about executive branch affairs as well.

Leakers provide three kinds of information to the press: public material which is not widely disseminated; material which some officials seek to keep confidential; and material whose confidentiality is assured by law, regulation, or oath. Some leaks consist of information in which the source has little personal stake but which she has obtained peripherally in the course of her involvement in the world of Washington. By contrast, other leakers provide information on subjects of professional concern to them.

2. Motivations for Leaking

News sources are not all simply altruistic actors who seek to promote the public interest. Unsurprisingly, there are a multi-

44. E. Abel, supra note 1, at 17; Press Connection, supra note 36, at 75.
45. See infra note 59.
46. E. Abel, infra note 1, at 4, 17, 35; Impact, supra note 4, at 201; Press Connection, supra note 36, at 75. Hodding Carter has reportedly said that the leaks "that matter" in Washington are almost always the work of "political players rather than bureaucratic moles." E. Abel, supra note 1, at 67.
47. E. Abel, supra note 1, at 4, 17, 35 (on White House leakers); Press Connection, supra note 36, at 76 (most executive branch leakers are political appointees); M. Grossman & M. Kumar, supra note 4, at 159. Although there seems to be some dispute as to whether journalist James Reston or President Kennedy coined the phrase, it is now popular to note that "the ship of state is the only vessel to leak from the top." E. Abel, supra note 1, at 17; Press Connection, supra note 36, at 76; A. Schlesinger, The Imperial Presidency 355 (1973).
48. E. Abel, supra note 1, at 17; Impact, supra note 4, at 136; Press Connection, supra note 36, at 76; Reporters, supra note 36, at 99 (13% of all press contacts are with Congressional staff members).
49. Impact, supra note 4, at 170.
50. Press Connection, supra note 36, at 77.
51. Id.
52. Id. at 92.
plicity of motives for leaking. One persuasive typology of leaks identifies the ego leak, the goodwill leak, the policy leak, the animus leak, the trial balloon leak, and the whistleblower.

53. This typology is developed in Press Connection, supra note 36, and has been used by other observers of government-press relations as well. See, e.g., E. Abel, supra note 1, at 18-21.

54. The ego leaker leaks in order to "satisfy a sense of self-importance." Press Connection, supra note 36, at 77. Hess suggests that "ego is the most frequent cause of leaking [in Washington], although it may not account for the major leaks." Id. See also B. Swain, supra note 36, at 20; cf. D. Cater, The Fourth Branch of Government 125 (1959) (suggesting that the primary cause of leaks is "the power struggle" within government—a political motivation—rather than the motivation of vanity).

55. Goodwill leakers leak with the long-range pragmatic motive of developing good relationships with the press as "a play for future favor." Press Connection, supra note 36, at 77. Martin Linsky's study of how the press affects federal policymaking indicates that 39.7% of public official respondents who leaked information to the press said that they did so in order to develop good relationships with reporters. The study also indicates that this figure may be understated. Impact, supra note 4, at 239.

56. Hess defines a policy leak as "a straightforward pitch for or against a proposal." Press Connection, supra note 36, at 77. Commonly, aides attempt to use the policy leak to pressure official decisionmaking on policy matters. See E. Abel, supra note 1, at 19 (suggesting that Stockman's purpose was to develop a connection with an important news organization and to "prod and influence" the focus of its coverage). See W. Greider, The Education of David Stockman and Other Americans (1982); infra note 406.

57. The animus leak is "used to settle grudges." Press Connection, supra note 36, at 77. Its purpose is primarily to harm another person and undermine her position. See also E. Abel, supra note 1, at 20 (recounting the belief of most reporters that prematuré rumors in 1981 about the removal of Secretary of State Alexander Haig were the work of hostile forces in the administration); Impact, supra note 4, at 172 (leaks about Ed Meese). 16.5% of the respondents to a survey of federal officials admitted that they had disclosed information to the press to undermine another's position. Id. at 238. Given the less-than-honorable nature of the rationale, we may question whether this figure does not in fact underestimate the percentage of leakers who served as news sources for this reason.

58. The trial balloon leak "reveal[s] a proposal that is under consideration in order to assess its assets and liabilities." Press Connection, supra note 36, at 77. Of course, it is often impossible to identify whether something is a trial balloon (unless it is explicitly floated as an option). See G. Juergens, News from the White House 41-42 (1981).
We can add to that basic typology the reverse effect leak and the record correction leak. Leaks can be intended to communicate with a variety of constituencies: foreign governments,
officials within government, the general public, or a smaller affected group. Government sources who admit to leaking most often claim policy-related motivations, including communicating with extra-governmental constituencies and directing attention to policy items.

The identities and positions of sources can sometimes suggest their motives for leaking. Staff members, for example, are more likely to leak for reasons of ego or self-aggrandizement. Those who have extraneous information which does not directly affect them may leak in order to establish goodwill with journalists. Sources who support or oppose particular proposals have incentives to leak for policy reasons, and frustrated civil servants may see the press as a last resort for the correction of a problem they cannot ameliorate through regular channels. Animus leaks, however, seem to run the gamut of source descriptions, although one study found that executive branch personnel were more likely than congressional sources to leak in order to undermine someone's position.

Of course, while these descriptions are generally useful in categorizing leaks, the leakers’ motives for dissemination are not always apparent. Sources seldom explain their motives to reporters. Moreover, any given leak can have a number of motivations that are neither exclusive nor contradictory. Finally, leaks may

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62. Leakers in administrative agencies, for example, may reveal information to journalists in order to bring it to the President's attention without having to go through the official channels. C. PRESS & K. VERBURG, supra note 34, at 247. See also infra text accompanying note 306 (discussing the impact on public understanding of communications intended to be fully comprehensible only to subgroups).

63. IMPACT, supra note 4, at 197.

64. PRESS CONNECTION, supra note 36, at 77.

65. Id.

66. Id.

67. Id.

68. IMPACT, supra note 4, at 144. One possible explanation is that a united front is expected at the senior, appointive level of the executive branch. In Congress, on the other hand, legislators do not see themselves as part of a single team and have a tradition of airing policy disputes in public. Id.

69. E. ABEL, supra note 1, at 10.

70. Id. at 21; PRESS CONNECTION, supra note 36, at 78; IMPACT, supra note 4, at 192. This is evident from the fact that while Hess, for example, characterizes the Pentagon Papers disclosure as a policy leak, it could well be categorized as a whistleblower leak as well. See PRESS CONNECTION, supra note 36, at 77-78; E. ABEL, supra note 1, at 20. Similarly, politically-motivated leaks can at the same time satisfy desires for self-aggrandizement and competitiveness or malice.
not always be the products of rational calculation.  

However broad-brush, the typology of leaking suggests not only the possible motivations for the practice, but also why it is widely deemed necessary. Naturally, the reasons for ego leaks are psychological. The other sorts of leaks can be traced in large part to characteristics of modern government. While it is often useful to refer in discourse to government as a monolithic entity, it is more accurate to admit that the state does not speak with one voice. Governmental structure and decisionmaking are based on the fragmentation of authority, and both intra and inter-branch rivalries characterize the relationships within government. Access to the media is seen by governmental actors as an efficient way of building support and helping to influence the resolution of intragovernmental competitions. Accordingly, leaking increases when government is most acutely torn by power struggles, controversy, and crisis.

3. Leaks versus Plants

Some apparent leaks are in fact "plants"—authorized distributions of information to the press for which no particular government agent wishes to take public responsibility. Many White

71. IMPACT, supra note 4, at 192. Hess, for example, characterizes some leaks as "no-purpose" leaks, arising from the "gregarious nature" of politicians. PRESS CONNECTION, supra note 36, at 78. Linsky says that the transfer of information in these circumstances is "a by-product of a personal relationship between the reporter and the leaker . . . characterized by ongoing conversation and mutual trust." IMPACT, supra note 4, at 195.

72. See IMPACT, supra note 4, at 11. The legislative branch is split by party affiliations. Various executive departments, such as the State and Defense departments, have traditional rivalries and often conflicting interests. See PRESS CONNECTION, supra note 36, at 82-83. The executive consists of a bureaucratic permanent government and a top layer of political appointees. The White House and Congress are often adversaries, especially when there are party differences. REPORTERS, supra note 36, at 101. Even within a single administration in the White House, there will virtually always be disarray and factionalism at some point with respect to decisionmaking. High officials compete with each other for influence over the President. E. ABEL, supra note 1, at 42. The problem is particularly acute when decisions are made by committee at the White House and cabinet levels. PRESS CONNECTION, supra note 36, at 91.

73. IMPACT, supra note 4, at 11.

74. E. ABEL, supra note 1, at 2, 28, 30, 63.

75. Abel defines a plant as "a disclosure designed to advance administration interests and goals." Id. at 2. A number of apparent leaks in the past decade have subsequently been revealed as plants. For example, one unnamed source told the Washington Post that "[t]here [was] no evidence that reporters were told anything we didn't want them to know" in connection with a Reagan administration debate on U.S. air strikes against Syrian positions in Lebanon. S. KLAINDMAN & T. BEAUCHAMP, THE VIRTUOUS JOURNALIST 199
House leaks are planted to serve presidential goals. Purposes for such authorized leaks include testing the political waters for a policy; lying to the press or the public; securing advance publicity for a news event in order to marshal support; unofficially indicating displeasure in order to silence opponents; signalling policies to foreign governments; and attempting to generate friendly press coverage.

Since authorized leakers virtually always deny planting infor-

(1987) (quoting Cannon, Justice Probe Fails to Disclose Source of Leaks on Mideast, Wash. Post, Dec. 16, 1983, at A1). See also C. Press & K. VerBurg, supra note 34; at 119 (on the Reagan administration disinformation campaign against Libya, waged by planting stories in the American press suggesting an imminent American attack); E. Abel, supra note 1, at 36-37, 43 (characterizing leaks of disinformation in Libyan incident as a "dubious gift" to the press); D. Broder, supra note 34, at 191 (discussing disinformation in Libyan incident and apparent double standard of Reagan administration in sanctioning disinformation while directing the FBI to set up special units to discover leaks of government information); J. Deakin, supra note 36, at 185-89 (providing examples of presidential leaks, even of classified documents); D. Wise, supra note 39, at 105-09 (noting that even classified documents have been leaked with authorization); A. Schlesinger, supra note 47, at 329-57 (discussing efforts by the executive branch to reform the secrecy system).

The term "plants" is also used to refer to situations in which government officials, instead of leaking a story themselves, have a third party do so in order to conceal the actual source of the information even from journalists. C. Press & K. VerBurg, supra note 34, at 119-20; T. Wicker, supra note 34, at 91, 95-96. For example, the White House staff may give a third party a planted question to ask the president at a press conference. C. Press & K. VerBurg, supra note 34, at 16, 119.

Naturally, authorized leaks to the press are not solely the province of government. It is also evident that sources in the private sector—corporate sources, for example—may be authorized to leak information to the press without public attribution for a variety of reasons, often economic, but sometimes political as well. Some suspect, for example, that Henry Kravis himself may have leaked information about the terms of KKR's then-secret purchase offer for RJR Nabisco's stock. See Thomas, Greed, N.Y. Times Book Rev., Mar. 29, 1990, at 5.

76. M. Grossman & M. Kumar, supra note 4, at 159. For example, Press and VerBurg report former Secretary of Health, Education, and Welfare Joseph Califano's claims that White House officials leaked attacks on cabinet members with President Carter's tacit approval. C. Press & K. VerBurg, supra note 34, at 118. They also recount the charge that Lyndon Johnson arranged to have a television journalist reassigned from the White House by leaking manufactured scoops to him. Id. Johnson has also been charged with having leaked a Top Secret memorandum which implicated the Kennedy administration in the overthrow and assassination of President Diem of South Vietnam. See, e.g., D. Wise, supra note 39, at 117-18, 127-29. Similarly, it is now clear that members of the Nixon administration were responsible for leaking the information that ultimately led to the resignation of Justice Abe Fortas from the United States Supreme Court. Epstein, The American Press: Some Truths About Truths, in ETHICS AND THE PRESS 68 (1975). Authorized leaks have also been used in connection with inter-service rivalries within the Pentagon. See D. Wise, supra note 39, at 284-85.

77. C. Press & K. VerBurg, supra note 34, at 118-19; J. Deakin, supra note 36, at 188; D. Wise, supra note 39, at 282.
mation, many of their cleared disclosures will appear unofficial and unauthorized. Yet, subsequent events will sometimes fuel speculations that an apparent leak is in reality a plant. This might occur, for example, if the information is sensitive and the administration neither strongly protests its disclosure nor tries to establish the identity of the source. However, in many instances—and despite attempts to speculate—neither the press recipient of the information, nor the reading public, will know whether or not the disclosure is authorized. Numerous examples of contradictory speculations in the press as to the origin and character of anonymously leaked information demonstrate the difficulty of distinguishing between plants and unauthorized disclosures.

Moreover, in view of the complexity of government today, leaks may be authorized at many different levels, leading to major definitional problems. Leaks authorized by members of Congress or by cabinet departments, for example, may be unauthorized from

78. Thus, for example, while Attorney General Richard Thornburgh instituted investigations designed to identify leakers in the Justice Department, some charged that the leaks leading to the investigations were in fact planted by Thornburgh to undermine opposition Democrats. See, e.g., Epstein, Information Leakers Unlikely to be Caught, Miami Herald, June 3, 1989, at A13, col. 1; McGee & Marcus, Probe of Gray's Office Causes Uproar, Wash. Post, June 1, 1989, at A20, col. 1; see also E. Abel, supra note 1, at 30-31 (describing the Washington Post's uncertainty as to the status of a leak from a congressional staffer, subsequently confirmed by a CIA official, that the CIA was financing the Nicaraguan contras).

79. E. Abel, supra note 1, at 43.

80. Stephen Hess provides excellent examples of leaked stories during the Reagan administration in which observers could not determine the motives or identity of the leakers. Press Connection, supra note 36, at 78, 82-85. The stories were variously viewed as planned leaks, or the work of whistleblowers, or distributions by White House dissidents. Id. at 84-85. See also Impact, supra note 4, at 189-93 (describing the same phenomenon of confusion and speculation in connection with leaked stories about the criminal investigation of Vice President Agnew in 1973); E. Abel, supra note 1, at 22 (stories about Alexander Haig).

81. This is, of course, a problem that plagues all leaks, not only those that might be suspected of being plants. See E. Abel, supra note 1, at 24-25; Impact, supra note 4, at 195.

A number of contradictory motivations can rationally be attributed by readers and analysts to sources whose identities remain unknown. For example, anyone on either side of the 1985 Soviet-American arms control summit could have had rational reasons for leaking a letter from Secretary of Defense Weinberger to President Reagan about Soviet arms control violations. E. Abel, supra note 1, at 22-24. See also infra note 314. Speculations as to identity and motive can become particularly misleading in view of the fact that many leaks are not well-orchestrated and do not perform any function particularly well. See Press Connection, supra note 36, at 78; infra note 319.
the point of view of the White House. Leaks authorized by the White House may be contrary to the interests of other executive agencies. Thus, vantage point does affect the characterization of disclosures as leaks or plants.

4. Reasons for Anonymity

Why do leakers request anonymity? Some do so programmatically, because they fear that the substantive aims they hope to accomplish by providing information to the press would be undermined if they were identified. This could occur in a number of situations. For example, a source seeking to float a trial balloon might fear that his position on a policy may become reified if publicly advanced under his name. Alternatively, desired policy effects may be diluted if an appearance of neutrality is undermined by disclosure of a source's identity and partisan affiliations. Similarly, anonymity is predictably requested by those who wish to undermine another's position without taking public accountability for the harmful act. By contrast, the identity of some other sources is irrelevant to the substance and effect of the

82. See, e.g., M. Grossman & M. Kumar, supra note 4, at 159 (noting that those sources who have little stake in a particular administration's success may be willing to provide information that the White House does not wish to have disseminated). Abel tries to solve this problem by distinguishing between disclosures authorized on high authority and those not so authorized, but this itself is a manipulable and imprecise distinction. See E. Abel, supra note 1, at 43. For example, Henry Kissinger, infamous for his official (but unattributed) leaks to the press during his government tenure, was himself the subject of politically motivated leaks. Columnist Jack Anderson's Pulitzer Prize-winning report on the 1971 Indo-Pakistani War disclosed secret minutes of a National Security Council subcommittee meeting which showed an administration "tilt" toward Pakistan, despite Kissinger's public claims of neutrality. See S. Hersh, The Price of Power 465-76 (1983); D. Wise, supra note 39, at 51-52, 300-01. It was only two years later, as a result of Watergate disclosures, that the source of the minutes was determined to be a Navy stenographer acting on the orders of the Joint Chiefs of Staff. Thus, unbeknownst to the public and probably to Jack Anderson as well, it was members of the Joint Chiefs who were attempting to discredit Kissinger via use of the press. Epstein, supra note 76, at 65-66.

83. Thus, government can play a "double game" when one agency wishes to publicize something for propaganda reasons while another is concerned that its release might affect the national security. See E. Abel, supra note 1, at 48-49 (describing leaks about the United States' interception of Libyan communications).

84. This focus on the strategic or programmatic use of confidentiality is not meant to deny the self-protective character of all requests for anonymity. All leakers fear some sort of personal reprisal if their identities are disclosed. Thus, they all have self-protective motives for requesting confidentiality. See infra note 86.

85. For example, while "smearing" the opposition in an election campaign has a long history in American politics, "to be caught smearing makes virtually certain a backfire effect that can defeat the candidate." B. Felknor, Dirty Politics 129 (1966).
information they impart, and self-protection is their main reason for requesting anonymity.\(^86\)

**B. The Ethic of Non-Disclosure**

By and large, the articulated ethic on the part of reporters and media organizations has been to keep promises of confidentiality when they have been made.\(^87\) Many reporters have braved contempt citations and jail terms by refusing to name their sources in response to judicial or legislative orders.\(^88\)

\(^86\) Naturally, there is no bright line rule that will allow us to distinguish between such strategic and self-protective requests for anonymity in all instances.

Self-protective concerns include fear of criminal liability, civil liability in a third-party lawsuit, economic consequences such as loss of employment, reputational injury, and physical harm. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 691, 693 (1972); H. Goodwin, supra note 34, at 118-19 (reporting that some sources for Malcolm Johnson's exposé of organized crime in 1948 would have been killed if identified).

The Reagan administration's attempts to pass legislation to prevent leaks, as well as the array of existing possible sanctions against government leakers, demonstrate the potential dangers posed for government sources who disclose information to the press without authorization. See, e.g., D. Broder, supra note 34, at 185-89; P. Stoler, The War Against the Press: Politics, Pressure and Intimidation in the 80's 11 (1986); DuVal, The Occasions of Secrecy, 47 U. PITT. L. REV. 579, 588-89 (1986). Syndicated columnist Jack Anderson has charged that politicians "isolate, intimidate, and hassle [whistleblowers] once they are detected." Anderson, No Reward for Whistle-blowers, Jan. 14, 1982, quoted in C. Press & K. Verburg, supra note 34, at 134. Whistleblowing can lead to negative consequences in the private sector as well. See generally A. Westin, supra note 59.

Even sources strategically seeking anonymity can fear that their political aims will not be achieved if they are identified and that they may themselves be exposed to reputational and economic harm as a result. See infra text accompanying notes 111-22.


\(^88\) This Article will not consider such compelled disclosure situations. Suffice it to say, however, that since the first amendment does not confer on the press an unqualified privilege to refuse to disclose information obtained confidentially during the newsgathering process (see Branzburg v. Hayes, 408 U.S. 665 (1972)), members of the press are vulnerable to contempt citations for refusing to respond to judicial or legislative orders seeking source identities unless a relevant state shield law precludes such inquiries. See, e.g., Marcus, supra note 19, at 859-64.

Despite the imposition of sanctions, however, the history of journalism in this country provides numerous examples of reporters' refusals to disclose their confidential sources. Benjamin and James Franklin and John Peter Zenger appear to be the earliest such resist-
The most common explanation for the ethic of non-disclosure is that, without guarantees of anonymity, sources would be discouraged from disclosing information to the press. As a consequence, the public would be deprived of important and newsworthy information that would not otherwise come to light.

This ethic of non-disclosure may also result from institutional concerns of the press. The confidentiality issue often arises when the government uses its subpoena power to compel reporters to disclose their sources. Keeping promises of confidentiality in those circumstances clearly reinforces the press' independence from government.

See M. Van Gerpen, supra note 19, at 5-6; B. Franklin, supra note 35, at 33-34; V. Buranelli, The Trial of Peter Zenger 57 (1957). During the 1800's, records reveal that five journalists reported to have refused to divulge their sources to Congress or state legislatures were jailed for contempt. M. Van Gerpen, supra note 19, at 6-8, 11; F. Marbut, News from the Capital 139-46, 158 (1971); Ex parte Nugent, 18 F. Cas. 471 (C.C.D.C. 1848) (No. 10,375). See also Bainbridge, Subpoenaing the Press, A.B.A. J., Nov. 1, 1988, at 72 (reporting jailing of Baltimore Sun reporter in 1896 for refusing to disclose his sources for a report that tied public officials to illegal gambling operations). Twentieth Century examples are even more numerous. See M. Van Gerpen, supra note 19, at 8-11, 13-26. Among others, Paul Mallon of the United Press in 1929 (W. Rivers, supra note 39, at 30-31; F. Marbut, supra, at 158-61; D. Cater, supra note 54, at 96); Myron Farber (In re Farber, 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978)); Peter Bridge (M. Van Gerpen, supra note 19, at 17); William Farr (In re Farr, 36 Cal. App. 3d 577, 11 Cal. Rptr. 649 (1974)); Earl Caldwell (see Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), rev'd sub nom. Branzburg, 408 U.S. at 665); and—most recently—Brian Karem (Jailed Reporter Names Woman Who Aided Him and Is Freed, N.Y. Times, July 11, 1990, at A13, col. 1) have all been jailed for failing to divulge confidential sources.

This was the central argument used by the press in its attempt in Branzburg to establish a full-fledged first amendment privilege against compelled disclosure of news-gathering information, and it carried the minority. Branzburg, 408 U.S. at 710 (Stewart, J., dissenting) ("The Court thus invites state and federal authorities ... to annex the journalistic profession as an investigative arm of the government."). See also J. Olen, Ethics in Journalism 43 (1988); B. Swain, supra note 36, at 52.
In contrast to these basically utilitarian reasons, the practice of non-disclosure may also be supported by notions of honor.\textsuperscript{93} Just as "gentlemen" do not betray confidences, others in our culture obey norms of loyalty and civility that go beyond the dictates of a mere cost-benefit analysis.\textsuperscript{94} In addition, there appears to be a quasi-professional ethic among journalists that includes an obligation, as such, not to reveal confidences.\textsuperscript{95}

Finally, there may also be a psychological, ego-related explanation for the ethic of confidentiality. Being privy to others' confidences makes journalists members of the knowledgeable elite, the "in-group."\textsuperscript{96} It may give them a sense that they have control over

\begin{itemize}
\item \textsuperscript{93} See D. Broder, \textit{supra} note 34, at 321 ("you cannot burn your sources . . . [t]hat is a matter of honor . . . "); B. Swain, \textit{supra} note 36, at 52 (justifying protection of sources on the basis of "personal honor"); Zuckerman, \textit{supra} note 89, at 61 (quoting Marvin Kalb: "If I gave somebody my word that I would not quote him or identify him, then I would not quote or identify him, period.").
\item \textsuperscript{94} See generally V. Navasky, \textit{Naming Names} (1980) (describing the general norms of loyalty and confidentiality that are part of American culture and the ways in which they were both tested and affirmed during the McCarthy era); Post, \textit{The Social Foundations of Privacy: Community and Self in the Common Law Tort}, 77 \textit{CALIF. L. REV.} 957 (1989) (arguing that the tort of invasion of privacy is premised on social rules of civility and respect that are part of one's membership and status in the community). This is not to suggest, of course, that norms of civility cannot themselves be justified by a utilitarian analysis.
\item \textsuperscript{95} See, e.g., M. Van Gerpen, \textit{supra} note 19, at 7 ("professional honor" cited by reporters in 1871 for refusal to reveal to Senate source of classified treaty). I use the term "quasi-professional" because of the ambiguous status of journalism as a profession. Tom Goldstein, formerly of the New York Times, has said that "journalism is not a profession in the traditional sense of the word." T. Goldstein, \textit{supra} note 34, at 162. Journalists do not adhere to a single code of ethics (see infra note 291); they are not licensed and do not submit to a centralized governing or disciplinary body; they are not subject to educational or other specialized requirements for entry into the occupation; and they see themselves as independent and quixotic crusaders after truth and justice. Indeed, journalists fear licensing—a traditional litmus test of professional status—because it permits government control. See id. at 164; J. Hulteng, \textit{supra} note 6, at 204-07; D. Weaver & G. Wilhoit, \textit{supra} note 61, at 104, 143-45. Yet, journalists engage in a significant amount of self-criticism; have adopted codes of ethics; have in the past established advisory self-regulatory bodies like the National News Council; see themselves at least in part as having the socially responsible mission of representing and informing the public; and are members of a powerful establishment. Moreover, there are sometimes convenience-based limitations on accreditation ("credentials" or "press passes") for attending events which, when they involve government, can resemble de facto licensing systems. T. Goldstein, \textit{supra} note 34, at 163-65. The same can be said for governmentally-imposed pooling requirements. Journalists color themselves as professionals when it is in their self-interest to do so and paint themselves out of the professional fraternities when this is in their self-interest. In this sense, they occupy a hybrid or ambiguous position.
\item \textsuperscript{96} See, e.g., T. Wicker, \textit{supra} note 34, at 131-32; T. Crouse, \textit{The Boys on the Bus} 5 (1973) (describing "the methedrine buzz that comes from knowing stories that the public could not know for hours and secrets the public will never know"); H. Goodwin, \textit{supra}
events. Specifically, it may foster a sense of power to recognize that, armed with inside knowledge, they can participate in an exclusive dialogue with an elite group of readers and policy-makers who themselves control and shape events. It also may give reporters the psychologically satisfying sense that they are reliable and trustworthy people.

What is salient about these traditional bases for the ethic of non-disclosure, however, is that none of the justifications hinges on the needs, fears, and expectations of the sources themselves.

97. Indeed, Joseph Kraft criticized what he took to be a "new narcissism" in journalism, "consisting in the belief that because we describe events, we make them happen." J. Kraft, The Imperial Media 39-40, quoted in Media Elite, supra note 96, at 123.

98. Media Elite, supra note 96, at 113, 123-24; B. Swain, supra note 36, at 13-15. The appeal of being privy to the inner circles of power is amply demonstrated by the fact that many reporters have offered advice to presidents and been their confidants. See Linsky, Practicing Responsible Journalism: Press Impact, in Responsible Journalism 142 (D. Elliott ed. 1986) [hereinafter Practicing Responsible Journalism] and sources cited therein.

99. The psychological satisfaction in keeping one's word and being perceived as reliable by a group is for many people part of a sense of adulthood and responsibility. This perception has power in the lives of ordinary citizens, who believe in being "team players" and not "telling tales out of school." These and other closely related norms exist throughout our culture, permeating such sub-cultures as criminals and youth gangs. See, e.g., J. Moore, Homeboys 86, 217 n.3 (1978) (characterizing strong barrio loyalties as intensified by gang tradition and noting that "snitches" are ostracized and marked for death). People have suffered punishment rather than "ratting" on their friends, while status as a "snitch" is itself enough to lead to excommunication from the group. It is said that organized crime has a tradition of individuals "taking the fall" for others, in exchange for financial and personal loyalty by the organization. To be a "stand up guy" in this context is necessary for self-respect and for the respect of the community. Of course, this element of personal justification dovetails with the honor-based rationale explored above. See supra notes 93-95 and accompanying text. It is also striking that in the context of counter-cultural groups, the ego-gratification of refusing to divulge information is presumably influenced by the group's general hostility to the government (or the mainstream social group) requesting disclosure. Nevertheless, while that same dynamic is obviously not operative with regard to press-source relations, the institutional discomfort of the press with government may make it an apt analogy. See infra Section III.A. on the role of the press.

100. Thus, reporter shield laws have been interpreted to confer a privilege against disclosure on the reporter rather than the source. See, e.g., Tofani v. State, 297 Md. 165, 170, 465 A.2d 413, 416 (1983); Lightman v. State, 15 Md. App. 713, 724, 294 A.2d 149, 156 (1972), aff'd per curiam, 226 Md. 550, 295 A.2d 212, cert. denied, 411 U.S. 951 (1973);
C. The Occasions of Voluntary Disclosure

Since the ethic of non-disclosure is not fundamentally premised on the interests of sources, the rule of anonymity has at times been honored in the breach. Some journalists have disclosed their sources pursuant to court order.\textsuperscript{101} Others have voluntarily and directly divulged their sources and failed to abide by confidentiality norms.\textsuperscript{102} Still others have used various methods to identify


101. One commentator has charged that "untold numbers" of journalists have disclosed their sources pursuant to court order, but that it is impossible to specify the numbers because such incidents are not widely publicized. H. Goodwin, supra note 34, at 117. See also Langley & Levine, supra note 16, at 21. Nevertheless, there are some examples of journalists and news organizations providing the identities of sources pursuant to subpoena. See, e.g., In re Wayne, 4 Dist. Ct. 475, 478 (Hawaii 1914); M.L. Stein, Shaping the News 143 (1974); M. Van Gerpen, supra note 19, at 27.

102. See Minnesota Note, supra note 16, at 1566; Smyser, supra note 33, at 17-18. While voluntary revelations of source identities are difficult to document, some significant segments of the journalistic community have admitted to circumstances in which they would favor such disclosure. In a 1982 study undertaken for the American Society of Newspaper Editors, for example, 62% of the responding publishers, editors, and staff members approved of breaching confidentiality in "unusual circumstances," such as the discovery that the source had lied to the reporter. P. Meyer, Ethical Journalism 209 (1987) (also showing that 12% favored breaching confidentiality if the "editor and reporter agree that the harm done by keeping it is greater than the harm caused by breaking it"). See also Rosenfeld, supra note 39, at 9-10 (describing recent ASNE survey with small sample of respondents); Langley & Levine, supra note 16, at 22 (quoting Bob Woodward for the view that death or the discovery that the source of a story on crime is involved in the crime himself are two additional circumstances in which disclosure would be warranted).

The following examples are illustrative of circumstances in which reporters or news organizations have voluntarily disclosed the identities of their sources. Bob Woodward disclosed in his book on the CIA that William Casey had served as one of his confidential sources. B. Woodward, Veil: The Secret Wars of the CIA 14 (1987); Langley & Levine, supra note 16, at 21. In the same year, Newsweek reported that Lieutenant Colonel Oliver North had been the magazine's anonymous source for its October, 1985, cover story on the Achille Lauro hijacking. See Walcott, You Can Run But You Can't Hide, Newsweek, Oct. 21, 1985, at 22-32; Newsweek Says North was a Source of Leaks, N.Y. Times, July 20, 1987, at A6, col. 3. In his testimony before the Senate, North had justified his and the Reagan administration's lack of candor with Congress in the Iran/Contra affair by claiming that failure to disclose was the only responsible course in view of the tendency of members of Congress to leak sensitive information to the press. North referred in particu-
lar to leaks which permitted the press to report on the United States' interception in 1985 of an Egyptian plane carrying the Achille Lauro hijackers. See Zuckerman, supra note 89, at 61. In the wake of Newsweek's revelation, Time stated: "It was hardly a secret in Washington that North had provided information on many stories to a variety of news organizations, including TIME." Id. See also infra notes 301 and 402-03.

Similarly, during the Carter administration, a reporter divulged that press secretary Jody Powell had confidentially communicated damaging and false information about Senator Charles Percy to him. See Minnesota Note, supra note 16, at 1566 n. 76 (citing Smyser, supra note 33, at 17-18). In addition, UPI revealed Jody Powell as the source of a briefing on President Carter's diplomatic mission to Jerusalem in March, 1979. M. Grossman & M. Kumar, supra note 4, at 160.

During the Nixon administration, the Washington Post disclosed that Secretary of State Kissinger had suggested to pool reporters, in a deep background conversation, that Richard Nixon might cancel his planned trip to Moscow in 1971. Editor Ben Bradlee ordered Kissinger to be named in the story because he apparently thought that Kissinger's statements were tantamount to an administration policy pronouncement. B. Swain, supra note 36, at 49. See also D. Wise, supra note 39, at 301-02 (quoting Bradlee on disclosure of Kissinger's identity: "I'm sick and tired of diplomacy by backgrounder.").

David Wise revealed in 1973 that Herb Klein held a background briefing for reporters during the Pentagon Papers controversy in 1971 in which he stated that the Nixon administration was more worried about setting a precedent for future leaks than about the national security impact of publication of the papers. Id. at 151.

In 1972, the author of a Life magazine exposé (of Democratic Senator Joseph Tydings's 1970 attempt to use his influence to benefit a corporation in which he held stock) admitted to David Wise that Charles Colson, Special Counsel to President Nixon, had assisted him in obtaining the story. Id. at 11-12. While Tydings had charged that Life had been used by the Republican administration to ensure his defeat in the coming election, President Nixon's press secretary completely denied any White House involvement at the time. Id. at 12.

In a different type of situation, former New York Times reporter Sidney Zion disclosed on a radio talk show in 1971 that Daniel Ellsberg was the source of the Pentagon Papers. T. Goldstein, supra note 34, at 156. Admittedly, reports of that incident indicate that Ellsberg's identity was a poorly kept secret by that time anyway. Id. at 157.

In an analogy to the disclosure of source identities discussed here, it has been reported that journalists do not always abide by the off the record rules of their governmental sources. See C. Press & K. Verburg, supra note 34, at 131. For example, Newsweek journalists who covered both presidential campaigns in the 1984 election year—on the basis of an understanding that their observations would be off the record until after the election—issued a special election issue containing a report of their coverage entitled "Exclusive: The Untold Story of Campaign '84." Id. Milton Coleman, a Washington Post reporter, revealed first to another reporter and then in a first-person article that Presidential candidate Jesse Jackson had referred to Jews as "Hymies" and to New York as "Hymietown" during a conversation in 1984 in which Coleman thought that Jackson asked for his comments to be on background. See, e.g., D. Broder, supra note 34, at 347-51; T. Goldstein, supra note 34, at 187-88; Coleman, 18 Words, Seven Weeks Later, Wash. Post, Apr. 8, 1984, at C8. As noted at supra note 55, William Greider wrote a magazine article in 1981 (and later a book) based on a series of extremely candid off the record interviews with David Stockman, the Reagan administration's Budget Director. Stockman claimed that he and Greider had a misunderstanding as to the terms of disclosure. See infra note 406; W. Greider, supra note 55. Daniel Schorr reported on CBS in late 1974 that President Ford had warned "associates" that investigations of the CIA might uncover evidence of the agency's involvement in assassinations. T. Wicker, supra note 34, at 196.
sources indirectly. In the past decade, examples of voluntary

The candid statements by Ford were made at a briefing lunch for New York Times' staff which Schorr did not attend. The New York Times did not itself carry the story because, when it checked with Ford's press secretary, it was told that the President's comments had been off the record. Id. at 188-96. In yet another famous breach of confidentiality during the Vietnam era, then-Secretary of State Dean Rusk was publicly identified as having responded to a journalist's question at a background briefing by asking him "whose side" he was on. Greenfield, Whose Side Are We On?, Newsweek, Sept. 3, 1990, at 76. In terms of local revelations, journalists disclosed off the record admissions of an extra-marital relationship by San Antonio Mayor Henry Cisneros in 1988. Maraniss, The Tumult of Mayor Cisneros, Wash. Post, Oct. 24, 1988, at C1. These examples surely support journalist James Deakin's view that off the record information "seldom stays off the record very long." J. Deakin, supra note 36, at 70-71.

103. Indirect revelations are often explicit enough to be widely understood. Reporters use a number of techniques for identifying sources indirectly. One such method is to narrow the field of possible sources by identifying those who were not sources. See Langley & Levine, supra note 16, at 22 (noting that by denying the rumor during the 1988 presidential campaign that candidate Richard Gephardt was the source of a videotape which demonstrated rival Joseph Biden's plagiarism of a campaign speech, the New York Times "narrowed the field of its sources" and "ultimately contributed to the reluctant admission by the head of the Dukakis campaign that he had been the source . . . .").

In addition, the way in which a story is written may disclose possible sources to "discerning" readers. See, e.g., D. Broder, supra note 34, at 321-22 (providing example); T. Wicker, supra note 34, at 80-81 (describing how the august Arthur Krock of the New York Times discerned that references to "friends of the President" in a story written by Wicker during the Kennedy administration referred to Kennedy himself). Careful, professional readers can also often detect the identities of major unnamed sources in exposés because of the relatively gentle treatment of those sources. T. Wicker, supra note 34, at 135 (discussing major sources for The Final Days and The Best and the Brightest). But see J.W. Dean, III, Lost Honor 30-31 (1982) (recalling that the attempt to identify Deep Throat "became an Establishment parlor game") and supra notes 78 and 81 for examples of contradictory speculations as to source identities.

Moreover, the identifying information used to refer to a source may itself become associated with that particular source over time. T. Wicker, supra note 34, at 82 (noting that the phrase "highest authority" became a well-known indirect reference to the President during the Kennedy administration). Or the reference to a job title may be specific enough in the circumstances that knowledgeable persons can at least narrow the field of possibilities. The cognoscenti are then often able to read between the lines of the story to speculate on the identity of the source. (This is, of course, most likely in connection with official government sources and highly placed individuals.)

Reporters can also give very broad hints of their sources' identities. For example, while Roger Mudd did not specifically name Alexander Haig as the source of background information in a 1981 NBC news story, he did reportedly say that the source "has a brother who is a Jesuit priest; . . . once worked for Richard Nixon; . . . used to be a four-star general; and . . . recently said at the White House, 'I am in control here.' " H. Goodwin, supra note 34, at 128. See generally Wallach, I'll Give It to You on Background, 5 Washington Q. 53 (Spring 1982) (on "between the lines" revelations). These sorts of hints and references were used by reporters to effectively disclose Henry Kissinger's identity in stories based on background briefings with him. J. Deakin, supra note 36, at 69-70 (reporting references such as "the senior official who spoke with a German accent"); Wallach, supra, at 53.

Another sort of indirect revelation occurs when reporters, who themselves feel bound by
revelations of source identities have led to nationwide coverage and a journalistic controversy as to the ethical obligations of reporters to their sources.\textsuperscript{104}

D. The New Trend of Source Retaliation

Internal journalistic debate about ethics has not been the only result of press breaches of promises of confidentiality, however. While most anonymous sources whose identities have been divulged by the press have not sought legal redress, a few—like Daniel Cohen\textsuperscript{105} and Joseph Fries\textsuperscript{106}—have brought breach of contract actions against the offending news organizations.\textsuperscript{107} All

though several courts have allowed such contract claims to withstand summary disposition,\textsuperscript{108} Cohen is the first news source to

search has disclosed nine cases in which subjects of coverage have sued the press for disclosure of their identities or activities. All but three of these cases introduce a breach of contract theory in addition to traditional tort claims. See Ruzicka v. Conde Nast Publications, Inc., 733 F. Supp. 1289 (D. Minn. 1990) (tort and breach of contract claims against magazine by victim of sexual abuse who argued that although her name was not used in article, description sufficiently identified her in contravention of agreement for anonymity); Huskey v. National Broadcasting Co., 632 F. Supp. 1282 (N.D. Ill. 1986) (tort and breach of contract action based on network program on prison conditions which contained footage, taped without consent, of plaintiff inmate in exercise cage); Cullen v. Grove Press, Inc., 276 F. Supp. 727 (S.D.N.Y. 1967) (breach of privacy and defamation action by correctional officers against distributor of documentary on conditions in institutions for the criminally insane which depicted inmate strip searches and was commercially distributed, contrary to filmmaker’s assurances); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, \textit{cert. denied}, 444 U.S. 984 (1979) (defamation and breach of contract action by psychiatrist against writer whose novel depicted nude encounter session with person recognizable as plaintiff, despite agreement that author would not disclose events at group therapy workshop); Stevenson v. Nottingham, 4 Media L. Rep. (BNA) 1585 (Fla. Cir. Ct. 1978), \textit{aff'd}, 371 So. 2d 604 (Fla. Dist. Ct. App. 1979) (invasion of privacy suit in which plaintiff claimed that newspaper identified her in story about drug treatment program in which she was participant, despite agreement not to do so); Doe v. American Broadcasting Co., 152 A.D.2d 482, 543 N.Y.S.2d 455 (App. Div.), \textit{appeal dismissed}, 74 N.Y.2d 945, 549 N.E.2d 480, 550 N.Y.S.2d 278, (1989) (breach of contract and tort claims by rape victims whose facial features were recognizable in segments of program on rape despite agreement that their identities would be protected); Virelli v. Goodson-Todman Enters., Ltd., 142 A.D.2d 479, 536 N.Y.S.2d 571 (1989) [hereinafter \textit{Virelli I}] (invasion of privacy, intentional infliction of emotional distress and negligence claims by plaintiffs portrayed in article on drug abuse despite interview agreement that identities would be protected), \textit{appeal after remand}, 159 A.D.2d 23, 558 N.Y.S.2d 314 (1990) [hereinafter \textit{Virelli II}] (tortious breach of confidence claims on facts of \textit{Virelli I}); Santiago v. WNJU Broadcasting Corp., No. 88 Civ. 7118 (JFK) (S.D.N.Y. 1989) (breach of contract and tort action against broadcaster for failure to abide by agreement to disguise appearance of broadcast interviewee in program on domestic violence); Garfinkle v. CBS, Inc., Index No. 10804/88 N.Y. Supreme Court, Kings County (filed Jan. 15, 1985) (breach of contract, breach of warranty, and tort action against broadcaster for disclosure of identity of broadcast interviewee who discussed the death threats against him subsequent to disarming an attacker).

In an analogous context, convicted murderer Jeffery MacDonald sued journalist Joe McGinniss for breach of contract in connection with McGinniss’ book, \textit{Fatal Vision}, claiming that in writing a book which painted MacDonald as guilty of murder, McGinniss had breached his original agreement to write the story from MacDonald’s point of view. See J. MALCOLM, \textit{THE JOURNALIST AND THE MURDERER} 6-7 (1990).

\textsuperscript{108} The claims survived pre-trial dismissal in Doe v. ABC, 152 A.D.2d at 482, 543 N.Y.S.2d at 455 (denial of broadcaster’s motion for summary judgment affirmed), \textit{Huskey} 632 F. Supp. at 1282 (defendant’s motion to dismiss denied), and Fries v. NBC No. 456687 (Super. Ct. Cal. 1982) (defendant’s motion to dismiss denied). See Minnesota Note, \textit{supra} note 16, at 1555 n.14; Carrizosa, \textit{Reporter on Trial in Suit for Release of Source’s Name}, Los Angeles Daily J., Mar. 14, 1983, at 1, 2, col. 2. The cognizability of contract claims was also implicitly recognized in \textit{Ruzicka}, although the plaintiff there did not meet the heightened standards of proof imposed by the court for source contract suits.
have obtained a jury verdict for breach of contract.\textsuperscript{109}

Cohen and Fries each illustrate one of the categories of the typology of classical news leaks.\textsuperscript{110} Police officer Joseph Fries was a whistleblower, attempting to publicize what he saw as his department hierarchy's inadequate response to alleged improprieties committed by a superior officer.\textsuperscript{111} Like other whistleblowers, he

\textsuperscript{109} See Cohen IV, 457 N.W.2d at 200. (Although the plaintiff psychiatrist in Bindrim did obtain a jury verdict on his breach of contract claim, he was the model for a character in plaintiff's fictional account and therefore cannot be characterized as a classic news source.) Cohen was originally awarded $700,000 in compensatory and punitive damages at the trial level. While the intermediate appellate court affirmed the jury's verdict as to $200,000 in damages for his contract claim, it reversed the punitive damages award and the misrepresentation verdict. Cohen III, 445 N.W.2d at 251-52. The Minnesota Supreme Court affirmed the reversal of the misrepresentation claim and also reversed the contract judgment. Cohen IV; 457 N.W.2d at 200.

Of the other contract cases cited in supra note 107, the following appear to have been settled: MacDonald, (J. Malcolm, supra note 107, at 56; Chineson, Bad Business in the Book Business, Legal Times, May 21, 1990, at 70), Santiago and Garfinkle (telephone conversation with CBS Litigation Counsel S. Lowy), Doe, Huskey, and Fries (see M. Franklin, Mass Media Law 589 (3d ed. 1987)). The plaintiff in Ruzicka, 733 F. Supp. at 1300-01; was found not to have met her burden of proving the terms of her confidentiality agreement and the existence of a breach. In Bindrim, 92 Cal. App. 3d at 82, 155 Cal. Rptr. at 41, the appellate court affirmed the trial court's decision to strike the plaintiff's jury verdict on the contract count.

Although the courts did not rule on contract claims in Stevenson, Virelli I, or Virelli II, they did affirm the dismissals of the plaintiffs' tort claims. In Cullen, the plaintiffs' motion for a preliminary injunction was also dismissed on what appeared to be first amendment grounds, but the court's analysis is unclear. On the one hand, Cullen suggests, without elaborating, that plaintiffs' claims of an agreement to limit the content and distribution of the film "would not provide a basis for relief, provided the film is within the protection of the First Amendment." Cullen, 276 F. Supp. at 731. On the other, the court explicitly noted that its decision does not "constitute an adjudication of rights of . . . state officials suing for breach of contract, if any, with respect to conditions for exhibition of the film." Id.

\textsuperscript{110} See supra Section I.A. This distinguishes Cohen and Fries from the other plaintiffs in contract actions against the press. As the descriptions of their claims indicate, supra note 107, those plaintiffs were the direct subjects of news stories; they generally revealed private and embarrassing information about themselves, and they were not intentionally identified by the press because of their status as sources. In all of the cases but Cullen, the plaintiffs were also private actors rather than government officials or political players.

\textsuperscript{111} Because the court imposed a fault standard of proof on the plaintiff and the first trial ended in a hung jury, with a subsequent settlement at the beginning of the second trial, the litigation does not provide an authoritative statement of precisely what happened. Nevertheless, contemporaneous press reports suggest the following scenario: Fries was apparently part of a group of police officers who disapproved of the Santa Clara police chief's leniency in suspending the assistant police chief for only three days in response to allegations that the assistant chief had harassed and suggested suicide to an emotionally unstable former officer. See Carrizosa, supra note 108, at 1; Cox, Reporter Sued for Disclosing Source, Los Angeles Daily J., Mar. 14, 1983, at 2, col. 2. Fries believed that the assistant chief should have been fired and the incident made public. He apparently leaked
was subjected to ostracism by his peers and forced to leave the department after the reporter to whom he had leaked his story disclosed his identity to fellow police officers.

By contrast, Daniel Cohen's disclosure of information to the press was a politically motivated plant. Cohen, a public relations specialist and former elected county official, was a politically active Republican with close, although unofficial, ties to the Republican candidate in the 1982 Minnesota gubernatorial election. As part of an orchestrated effort by Republican supporters and campaign officials shortly before the election, when polls indicated that the Republican slate was far behind the Democrats, Cohen disclosed to four media organizations that the Democratic candidate for Lieutenant Governor had an arrest record. He requested confidentiality from the reporters so that the information would hurt the Democratic campaign without reflecting badly on

information to the press because he was afraid that the Police Officers' Association would not take a sufficiently firm stand on the issue. Carrizosa, supra note 108, at 1. See also Source Confidentiality: A Matter of Contract?, Broadcasting, Aug. 25, 1980, at 106. (It should be noted that the defendant broadcaster in Fries disputed the extent of the alleged promise of confidentiality. See id.; Source Confidentiality Suit Ends in Deadlock, Nat'l L.J., Apr. 2, 1984, at 9 [hereinafter Source Confidentiality Suit].)

112. Cohen IV, 457 N.W.2d at 200, 201 n.3.

113. Brief for Appellant at 5, Cohen III, 445 N.W.2d 248 (No. C8-88-2631, C0-88-2672); Oberdorfer, supra note 11, at 8, Trial Transcript at 747, Cohen (No. 79-8806).

114. Marlene Johnson, the Democratic candidate for Lieutenant Governor, had been arrested in 1969 for unlawful assembly in connection with a civil rights protest and had been convicted in 1970 of a petty theft involving six dollars worth of sewing supplies. The arrest for unlawful assembly had been dropped and the conviction for theft vacated in 1971. Cohen IV, 457 N.W.2d at 200-01. The Minnesota Supreme Court noted that Cohen was apparently unaware of the substance of Johnson's criminal record because the court records he had been given did not contain the underlying facts of the charges. Id. at 201 n.2; Trial Transcript at 144, 168, Cohen (No. 79-8806).

Cohen did not provide any substantive information prior to the reporters' agreements not to disclose his identity. He simply proposed the following:

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

Cohen IV, 457 N.W.2d at 200; Trial Transcript at 155, Cohen (No. 79-8806).

The information about Johnson's criminal record had apparently been discovered in public records by a member of the Republican campaign after rumors suggested impropriety in her record. The decision to have Cohen reveal the information to the press was made at a meeting of influential Republicans and campaign insiders. See Cohen III, 445 N.W.2d at 252; Trial Transcript at 142-43, 147, Cohen (No. 79-8806).
the Republicans.\footnote{See Cohen IV, 457 N.W.2d at 200; Trial Transcript at 150, 378, Cohen (No. 79-8806).}

Despite the objections of the reporters who had granted Cohen confidentiality,\footnote{Of the two objecting reporters, one decided to remove her by-line from the story as a protest against the newspaper's decision to reveal Cohen's identity. Cohen IV, 457 N.W.2d at 201.} the editorial staffs of the defendant newspapers determined that it would be inappropriate to conceal the identity of the source of the news\footnote{Some of the editors believed that if they did not run the story, they could be perceived as suppressing information damaging to the Democratic campaign, which the newspaper had endorsed. Id.; Trial Transcript at 1310-11, Cohen (No. 79-8806). At the same time, they considered it unsatisfactory to describe their source as a Whitney supporter, a Whitney campaign member, or a prominent Republican because they thought that such veiled references "would be misleading and cast suspicion on others." Cohen IV, 457 N.W.2d at 201. The editors thought that veiled references would be particularly misleading, given that the Whitney campaign had issued denials of any involvement in Cohen's actions. Trial Transcript at 1150-52, 1310-13, Cohen (No. 79-8806). See Brief for Respondents Northwest Publications, Inc. at 7, Cohen V, cert. granted, 111 S. Ct. 578 (1990) (No. 90-634).} and ran stories identifying Cohen.\footnote{Cohen IV, 457 N.W.2d at 201-02. It should be noted here that the other two news organizations approached by Cohen did not disclose his identity. Id. at 201 n.1.} The newspaper stories included claims by the Democratic camp that the news had been leaked by the Republican campaign as "a last-minute smear campaign."\footnote{I refer to the widely publicized incident in which John Sasso, director of Michael Dukakis's campaign staff, leaked a videotape damaging to then-candidate Joseph Biden. See, e.g., Broder & Edsall, Dukakis Aides Quit Over Biden Tape, Wash. Post, Oct. 1, 1987, at A1; Taylor, Democrats Differ on Harm to Dukakis Campaign, Wash. Post, Oct. 1, 1987, at A18; see also Morgenthau, Dirtball Politics, Newsweek, June 19, 1989, at 32 (on backlash to memorandum by communications director of the Republican National Committee which suggested that newly-elected Speaker of the House Thomas Foley was homosexual); Borger, Anatomy of a Smear, U.S. News & World Rep., June 19, 1989, at 40 (same); Squires, When Confidentiality Itself is Source of Contention, Journalism Ethics Rep. 1985-86, at 7 (recounting the leak to the Chicago Tribune, by political enemies of Mayor Harold Washington, of an illegally-produced tape of the mayor's unflattering remarks about a political ally); and supra note 85, and infra notes 121, 375, on the disapproving public response to negative campaigning and "smear" campaigns. Admittedly, "smear" campaigns and "dirty politics" are far from new in the history of American elections. See generally B. Felknor, supra note 85; see Comment, Misrepresen-}

With the identification of Cohen and his relationship to the Republican campaign, the stories were no longer simple revelations of misdeeds in the Democratic candidate's past. They became part of a controversy concerning unattributed "smear tactics" in political campaigns that was later to assume national prominence in our most recent Presidential contest.\footnote{Id. at 202.} But the editors' decision to disclose Cohen's identity did
not merely affect the editorial pages of newspapers.\textsuperscript{121} Cohen was fired from his job the day after the public revelation of his name as the newspapers’ source.\textsuperscript{122}

Daniel Cohen and Joseph Fries’ contract suits to obtain redress for their injuries squarely raise the issue of how courts should treat media decisions to breach confidentiality agreements, especially given the wide range of contexts in which the agreements occur.

II. CURRENT APPROACHES TO BREACH OF CONTRACT CLAIMS BY NEWS SOURCES

Contract actions by sources for breach of promises of confidentiality have led to judicial and scholarly disagreement. Currently, we can discern three approaches to sources’ contract claims. One approach—the freedom of contract model—focuses unreflectively on the private interest of sources and mechanically applies contract law to enforce promises of confidentiality. Another obvious and familiar approach—the first amendment model—focuses primarily on press interests by either invoking the first amendment as a ban on contract actions or by importing first amendment-based privileges from the defamation area to serve as limiting principles in contract suits. The third existing approach—the

tation in Political Advertising: The Role of Legal Sanctions, 36 Emory L.J. 853, 853-58 (1987). Some such campaigns disseminate outright falsehood, distortion, or innuendo. As the enormous recent publicity about the problems with negative campaigning makes clear, there seems to be a consensus that such untruths disseminated by political opponents are “dirty” and undesirable in the political arena. In other situations, the unflattering claims about opponents may themselves be true. They have, nevertheless, led to criticism when they have been anonymously made by political enemies of the candidate, particularly when the original revelation is not particularly earth-shaking. Historical examples of anonymous tips analogous to Cohen’s include the revelation by political opponents during the 1972 election that Thomas Eagleton had a history of psychiatric treatment, see R. Dinkin, supra note 2, at 190-91, and Democrat Lyndon Johnson’s leaks to friendly Republicans of unflattering information collected through FBI surveillance about his opponents within the Democratic party, see H. Bray, The Pillars of the Post 109 (1980). Similarly, The New York Times' documentary evidence which served to expose the corrupt Tweed Ring in the late 19th Century was apparently given to the newspaper by an agent of Samuel Tilden, himself a member of Tammany Hall, who Boss Tweed refused to endorse for President. See J. Altschull, Agents of Power: The Role of the News Media in Human Affairs 76-77 (1984).

\textsuperscript{121} See Cohen IV, 457 N.W.2d at 202. Editorial commentary in issues of the defendant newspapers focused on Cohen’s “sleazy” tactics and depicted him in a cartoon with a garbage can labeled “last minute campaign smears.” \textit{Id.}

\textsuperscript{122} \textit{Id.}
promissory estoppel model—seeks to mediate between public and private interests. On the one hand, it denies the appropriateness of pure contract as a rubric for confidentiality actions by sources. On the other, it leaves open the possibility of promissory estoppel claims which require the balancing of sources’ interests with the first amendment concerns of the press.

A. Freedom of Contract Model

Some claim that voluntary agreements of confidentiality between the press and its sources should be enforced without a view to their substance, in keeping with the facilitative function of contract law. In this view, the press, like any other contracting party, should simply be bound by its promises. Proponents of the freedom of contract approach in this context suggest that the neutral application of private contract law to enforce promises of confidentiality by the press does not involve the level of state action that would trigger first amendment scrutiny. This ap-


124. This freedom of contract model describes the decisions of the trial and intermediate appellate courts in Cohen and the dissenting opinions in the decision of the Minnesota Supreme Court. These judges would thus all support the jury’s finding of a breach of contract in Cohen.

This Article will not discuss the highly contested philosophical question of why promises should be deemed binding. While some contend that contract enforcement is based on the “promise principle”—namely, the moral obligation entailed by promises—see, e.g., C. FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 16-17 (1981)—others claim more relational, see, e.g., I. MACNEIL, THE NEW SOCIAL CONTRACT (1980), or economic efficiency bases for contract, see, e.g. R. POSNER, ECONOMIC ANALYSIS OF LAW 79-85 (3d ed. 1986).

125. For example, the trial court declined to grant the defendants summary judgment on first amendment grounds, asserting that the contract verdict presented “no claim of constitutional dimension.” Cohen I, 14 Media L. Rep. (BNA) at 1464. See also Cohen II, 15 Media L. Rep. (BNA) at 2290-91 (denying defendants’ first amendment claims in motion for judgment notwithstanding the verdict).

In affirming this point, the majority of the intermediate appellate court agreed that the first amendment was irrelevant because the threshold requirement of state action had not been met. Cohen III, 445 N.W.2d at 254-56. Because the private law of contract “do[es] not sanction any particular speech,” and because “an award of contract damages . . . does not sanction the words or conduct themselves, but rather the failure to honor a promise,” the court found the contract judgment to constitute neutral, not speech-suppressive, private action. Id. at 256.
proach is neither adequate in its denial of state action nor faithful to the body of contract law which it purports to apply.\textsuperscript{126} Worse, it displays a marked hostility toward the press and its public role.\textsuperscript{127}

In a similar vein, the dissents to the Minnesota Supreme Court's reversal of the judgment contended that the first amendment "has nothing to do with the case." \textit{Cohen IV}, 457 N.W.2d at 207 (Kelley, J., dissenting).

In a related argument suggesting the inapplicability of the Constitution, Daniel Cohen's brief submitted to the United States Supreme Court argues that the press defendants waived any first amendment privilege to disclose his identity by having "knowingly and voluntarily" promised not to do so. Brief for Petitioner at 20-22, \textit{Cohen V}, cert. granted, 111 S. Ct. 578 (1990) (No. 90-634).

This Article will not specifically deal with the waiver argument, however, because it simply restates the decisional issue, rather than resolving it. It does not answer the question of whether a state, by enforcing a body of law, can constitutionally condition reporters' newsgathering activities on the loss of first amendment rights. See \textit{Sherbert v. Verner}, 374 U.S. 398 (1963) (holding unconstitutional a state decision which forced a choice between receiving governmental benefits or following religious precepts). \textit{See generally Sullivan, Unconstitutional Conditions}, 102 Harv. L. Rev. 1413 (1989). Indeed, some would suggest that the public interest in informed debate would militate against allowing voluntary waivers of first amendment rights. See \textit{id.} at 1479 (citing to authorities who suggest that structural values in well-informed public deliberation limit the extent to which government can condition its employees' rights to divulge information). Whether or not we are persuaded by societal arguments for the inalienability of constitutional rights, however, it is clear that waiver is a legal conclusion, rather than an unmediated individual action which displaces judicial inquiry. In sum, while the conduct of the press may be pertinent to first amendment analysis, invocation of waiver principles cannot simply foreclose constitutional review. See Brief for Respondents Northwest Publications, Inc. at 46-49, \textit{Cohen V}, cert. granted, 111 S. Ct. 578 (1990) (No. 90-634).

Moreover, the waiver argument is problematic even on its own doctrinal terms. There is little doubt that constitutional rights—including first amendment rights—will not easily be deemed waived. See, \textit{e.g.}, \textit{Brookhart v. Janis}, 384 U.S. 1 (1966) ("[t]here is a presumption against waiver of constitutional rights"). Courts will not find waiver without clear and compelling evidence that constitutional rights were abandoned voluntarily, knowingly, and intelligently. See, \textit{e.g.}, \textit{Curtis Publishing Co. v. Butts}, 388 U.S. 130, 145 (1967) (noting Court's unwillingness to find waiver unless "clear and compelling"); \textit{Ruzicka v. Conde Nast Publications, Inc.}, 733 F. Supp. 1289 (D. Minn. 1990) (arguing that this waiver standard, developed by the Court in the due process context in \textit{Fuentes v. Shevin}, 497 U.S. 67 (1972) and \textit{D.H. Overmyer v. Frick}, 405 U.S. 174 (1972), is fully applicable to the purported waiver of first amendment rights). Without exploring the obvious definitional complexities entailed by this standard, I would question the appropriateness of assuming that blanket waivers of first amendment rights are voluntarily triggered by simple promises of confidentiality, regardless of circumstances subsequent to the time of promising.

\textsuperscript{126} For other commentators who have considered and rejected a traditional contract approach in press-source disclosure cases, see \textit{Fed. Comm. Comment}, \textit{supra} note 19, and \textit{Comm./Ent. Note}, \textit{supra} note 19.

\textsuperscript{127} Such a devaluation of the press' interests is especially clear in the language of the opinions of the dissenting Minnesota Supreme Court justices in \textit{Cohen}. Justice Yetka's dissent complained of the irresponsibility and sensationalism of the press, \textit{Cohen IV}, 457 N.W.2d at 206 (Yetka, J., dissenting), bemoaned the majority's action in "carv[ing] out yet another special privilege . . . denied other citizens," \textit{id.} at 205 (Yetka, J., dissenting), and
Since New York Times Co. v. Sullivan,\textsuperscript{128} the Supreme Court has consistently scrutinized common law defamation and privacy rules under the first amendment.\textsuperscript{129} Although the action in New York Times was a civil action between private parties, the Court nevertheless found the test of state action to be "not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."\textsuperscript{130} Admittedly, the Court expressed this unambiguous assumption of state action in the context of tort claims, in which courts enforcing the common law would be adjudicating state-created rights and duties.\textsuperscript{131} Those who would characterize contract law as simply the enforcement of private orderings rather than state-created duties might then suggest that tort and contract actions do not entail an equal level of state involvement.\textsuperscript{132}

The problem with this distinction is that it is faithful neither to contract nor to tort law. As Professor Tribe has put it, "In an era in which contract and tort merge . . . this distinction is hardly satisfactory."\textsuperscript{133} As will be discussed below, positive governmental choices infuse the law of contract: in the rules concerning formation and remedies, in gap-filling rules, and in rules which require substantive decisions as to the acceptability of certain sorts of promises.\textsuperscript{134} Similarly, many modern scholars see tort law less as

\begin{itemize}
  \item \textsuperscript{128} 376 U.S. 254 (1964).
  
  
  \textsuperscript{130} New York Times, 376 U.S. at 265.
  
  \textsuperscript{131} See L. Tribe, supra note 129, at 1713.
  
  \textsuperscript{132} Id. at 1714.
  
  \textsuperscript{133} Id.
  
  \textsuperscript{134} Id. See infra text accompanying notes 141-44; see also Braucher, Contract Versus Contractarianism: The Regulatory Role of Contract Law, 47 Wash. & Lee L. Rev. 697, 699 (1990).  
\end{itemize}
the external imposition of social rules about conduct than as a scheme of initial risk allocation designed to facilitate future negotiation between parties.\textsuperscript{138} Accordingly, the simplistic distinction between private and public in the operation of contract, as opposed to tort law, is illusory.\textsuperscript{136}

Neither is it workable to distinguish the \textit{New York Times} line of precedent—as the intermediate appellate court in Cohen attempted to do—by distinguishing the "neutral" application of contract law from defamation law, which "inherently limits the content of speech."\textsuperscript{137} The focus on form rather than substance simply ignores the fact that promises of confidentiality by the press are not contracts for the sale of goods or services, but rather, agreements for the suppression of speech. Whether or not courts should ultimately find such agreements enforceable, it is at least clear as a threshold matter that an agreement to suppress speech is not speech-neutral, and that its enforcement suppresses speech just as much as the enforcement of defamation law.

Even if there were no state action triggering first amendment scrutiny, the freedom of contract approach represents a crude and inaccurate characterization of contract law. The \textit{Restatement (Second) of Contracts} defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy. . . ."\textsuperscript{138} Although classical contract doctrine is premised on the assumption that "[i]n general, parties may contract as they wish,"\textsuperscript{139} there are recognized instances in which "the interest in freedom of contract is outweighed by some overriding interest of society."\textsuperscript{140} Even traditional contract doctrine has thus recognized situations in which public or social interests place limitations on the freedom of contracting individuals.\textsuperscript{141} Accordingly, not all volun-

\textsuperscript{135} L. Tribe, \textit{supra} note 129, at 1714.
\textsuperscript{136} \textit{See also} Ruzicka v. Conde Nast Publications, Inc., 733 F. Supp. 1289 (D. Minn. 1990) (finding state action "because, for the purposes of state action, there is no meaningful difference between the contract action brought here and an action for defamation").
\textsuperscript{137} \textit{Cohen III}, 445 N.W.2d at 255.
\textsuperscript{138} \textit{Restatement (Second) of Contracts} § 1 (1981). Even though the definition appears circular, it at least implicitly assumes that there are some sorts of promises which will not be enforceable as contracts.
\textsuperscript{139} \textit{Id.}, ch. 8, introductory note.
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} In terms of the bargaining process, for example, the requirement of consideration precludes the enforcement of agreements to give gifts. E.A. Farnsworth, \textit{supra} note 123, § 2.5, at 46-48. Doctrines of mistake, frustration, unconscionability, duress, and undue influence, for example, also limit the enforcement of private agreements. \textit{Id.} §§ 4.19, 4.28; Mac-
tary promises are enforced as contracts without substantive inquiry into their social worth. Moreover, the doctrine of promissory estoppel allows parties to be bound in situations which, for


Even in arm’s length transactions, parties are bound to act with one another “in good faith and in accordance with reasonable standards of fair dealing.” Restatement (Second) of Contracts § 161(b) (1981). Misrepresentations may make a contract voidable. See id. § 164. In terms of substantive considerations, the doctrine of illegal agreements and other contracts against public policy serves to deny enforcement to agreements seen by courts to be inconsistent with public policy. See E.A. Farnsworth, supra note 123, § 325-30; Restatement (Second) of Contracts § 178 (1981); see also infra note 142. These, among other doctrines, indicate that “a great deal of promise breaking is tolerated and expected” and that “beneath the covers we are firmly committed to the desirability of promises being broken, not just occasionally but quite regularly.” Macneil, supra, at 729.

It is of course beyond the scope of this Article to discuss all the nuances of contract law that would be implicated by source actions against the press. Rather, I simply seek to demonstrate the unobjectionable proposition that not all promises are enforced as contracts and, indeed, that contract law does not per se preclude the type of contextual analysis suggested later in this Article.

142. For example, as noted in supra note 141, illegal bargains and contracts contrary to public policy are not enforced. See Kostritsky, Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory, 74 Iowa L. Rev. 115, 117 n.5 (1988), and authorities cited therein. The various public policies which limit the enforcement of agreements have been classed by commentators as including morality principles, economic liberty interests, interests in electoral and judicial integrity, and fiduciary responsibilities. Id. See, e.g., E.A. Farnsworth, supra note 123, § 5.2, at 331-32; 6A A. Corbin, Corbin on Contracts §§ 1373-1517 (1962). Thus, for example, many states have abolished the cause of action for breach of promise to marry. See Coombs, Agency and Partnership: A Study of Breach of Promise Plaintiffs, 1 Yale J.L. & Feminism 5 (1989). Contracts to promote gambling are deemed unenforceable. See, e.g., Kyne v. Kyne, 16 Cal. 2d 436, 438, 106 P.2d 620, 621 (1940), cited in Kostritsky, supra, at 117 n.5. Traditional views of contract doctrine suggest that promises governing family relations are also unenforceable. Restatement (Second) of Contracts §§ 189-91 (1981); Balfour v. Balfour, 2 K.B. 571 (1919). Agreements to vote in a particular way are characterized as contrary to public policy because they are deemed to corrupt the electoral process. See, e.g., Livingston v. Page, 74 Vt. 356, 52 A. 965 (1902) (promise by candidate to pay for support by newspaper said to be unenforceable because contrary to public policy); Restatement (Second) of Contracts § 178 (1981). Restrictive covenants, restraints on the alienation of property, and anticompetitive agreements have also been found unenforceable as undermining principles of wealth maximization and economic liberty. E.A. Farnsworth, supra note 123, § 5.2, at 331-32; Restatement (Second) of Contracts §§ 186-88 (1981) (promises in restraint of trade). The public policy in favor of the exercise of fiduciary responsibilities has rendered unenforceable agreements of corporate directors which limit their discretion to vote or otherwise act in their best judgment as representatives of the shareholders. See E.A. Farnsworth, supra note 123, § 5.2, at 332 n.14; 6A A. Corbin, supra, § 1454.
various formal reasons, might fail to satisfy the classical elements of contract.\textsuperscript{143}

Thus, whether contract law is characterized as primarily facilitative of private bargains with some narrow exceptions, or as a body of public law, it is undeniable that not all voluntary promises are enforced as contracts while some obligations are enforced even if they do not formally qualify as such.\textsuperscript{144}

\textsuperscript{143} See, e.g., E.A. Farnsworth, \textit{supra} note 123, § 2.19, at 89; \textit{Restatement (Second) of Contracts} § 90 (1981); Knapp, \textit{Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel}, 81 Colum. L. Rev. 52 (1981); Metzger & Phillips, \textit{The Emergence of Promissory Estoppel as an Independent Theory of Recovery}, 35 Rutgers L. Rev. 472, 486 (1983). Whether promissory estoppel is seen as a general method of legitimizing the promisee's reliance interest, see, e.g., Metzger & Phillips, \textit{supra}, or simply as a judicial method of circumventing formal contract rules to give effect to the parties' real intentions to enter into legally binding relationships, see, e.g., Barnett & Becker, \textit{Beyond Reliance: Promissory Estoppel, Contract Formalities and Misrepresentations}, 15 Hofstra L. Rev. 443 (1987), it is at least an extension of the traditional contract doctrine.

\textsuperscript{144} There is currently a debate among contract scholars as to whether contract law is primarily a regime facilitative of private autonomy or simply another instance of public law. Beginning with the Realists, the characterization of contract law as primarily facilitative of private bargains has come under attack. Morris Cohen, for example, characterized contract as "a subsidiary branch of public law, . . . a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction." Cohen, \textit{The Basis of Contract}, 46 Harv. L. Rev. 553, 586 (1933). See also Fuller, \textit{Consideration and Form}, 41 Colum. L. Rev. 799, 806 (1941); Llewellyn, \textit{What Price Contract?—An Essay in Perspective}, 40 Yale L.J. 704, 729 (1931). Recognition of the policy choices made in the enforcement of contracts has led some post-Realist writers to suggest that collectivist and paternalistic notions and considerations of substantive fairness undermine the purportedly purely private character of contract law. See, e.g., Braucher, \textit{supra} note 134, at 701-02; Dalton, \textit{supra} note 141, at 1010; Feinman, \textit{Critical Approaches to Contract Law}, 30 UCLA L. Rev. 829, 831-32 (1983); Kennedy, \textit{Form and Substance in Private Law Adjudication}, 69 Harv. L. Rev. 1685, 1717-22 (1976); Metzger & Phillips, \textit{supra} note 143. The strongest proponents of this critical approach contend that the treatment of the public aspects of contract as simply exceptions to the private and facilitative character of the great bulk of contract doctrine is nothing more than an illegitimate attempt to mask the fundamentally public character of all contract law. See Dalton, \textit{supra} note 141, at 1013-14.

By contrast, other scholars embrace the private and voluntaristic description of contract law. See, e.g., C. Fried, \textit{supra} note 124; Barnett, \textit{A Consent Theory of Contract}, 86 Colum. L. Rev. 269 (1986); Kostritsky, \textit{A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense}, 33 Wayne L. Rev. 895 (1987). Some of them suggest that even doctrines which appear to reflect substantive social policy concerns are consistent with a model of autonomy and private ordering. See, e.g., Kostritsky, \textit{supra} note 142.

This Article does not seek to enter the fray on this particular issue. It is sufficient to note that sophisticated scholars of neither school would deny the fact that all of contract law is not simply the enforcement of the parties' pleasure. Whether or not the reason for the exclusion of certain promises from enforcement is economic efficiency or some other value eclipsing the pure bargain, the fact is that the crude notion of freedom of contract does have limits.
Admittedly, contracts of confidentiality have been enforced in circumstances involving explicit promises of confidentiality outside the press context. Most private actions involving such explicit promises of confidentiality arise in the contexts of protecting proprietary information and government secrecy. In those situations, the application of contract law appears to be based on the desirability of enforcing a public norm whose authority has been established in other, non-contractual areas. While it has been stated in dicta that "the contract of private parties to retain in confidence matter which should be kept in confidence will be enforced by injunction and compensated in damages"—suggesting that all such explicit promises will be enforced in the usual course—the nature of the agreements at issue and their relational character indicate the courts' assumption as to their social value. Specifically, the cases enforcing government secrecy agreements appear to rest on the fundamental interest in national security protected by secrecy contracts. Simi-
larly, agreements not to disclose confidential business
dentiality so essential to the effective operation of our foreign intelligence service." Id. at 509 n.3. These compelling interests would have justified speech restrictions even in the absence of a secrecy agreement. Id. The CIA director had a statutory obligation to protect intelligence sources and methods and the secrecy agreement was deemed to be an "entirely appropriate" method of satisfying that directive. Id. Even though the government did not contend that Snepp's book actually contained classified information, his publication "exposed the classified information with which he had been entrusted to the risk of disclosure." Id. at 511. The central significance of national security to the enforcement of the contract is also evidenced by the Court's acknowledgement in Snepp that CIA employees would have the right to publish unclassified material. Id. See Sullivan, supra note 125, at 1503 (arguing that the result in Snepp was justified, if at all, by the compelling interest in national security and not because the confidentiality agreement was deemed not to pressure expressive rights); see also Snepp, 444 U.S. at 521 n.11 (Stevens, J., dissenting); Marchetti, 466 F.2d at 1313, 1317. Thus, even when dealing with CIA security agreements, courts continue to recognize the first amendment interests implicated in the contracts. See, e.g., McGehee v. Casey, 718 F.2d 1137, 1141 n.10 (D.C. Cir. 1983), cited in Note, The Constitutionality of Expanding Prepublication Review of Government Employees' Speech, 72 CALIF. L. REV. 962, 1006 n.266 (1984). Judge Frank Easterbrook has argued that Snepp should not be seen primarily as a national security case, but rather as a case involving property in information, in which Snepp waived his first amendment disclosure rights by contract. Easterbrook, Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information, 11 SUP. CT. REV. 309, 339-52 (1981). Easterbrook's purpose, however, is to show that cases in areas other than intellectual property involve intellectual property issues about incentives for the production of new information. He is certainly not suggesting that contracts of confidentiality such as that involved in Snepp should be enforced simply because they are contracts. For approaches contrary to Easterbrook's, see, e.g., R. Dworkin, A Matter of Principle 395-97 (1985) and sources cited in Sullivan, supra note 125, at 1479.

Moreover, the national security contract cases involve employment relationships which, as will be discussed below, impose higher duties than those under ordinary contract principles. See Snepp, 444 U.S. at 518-19 (Stevens, J., dissenting) (characterizing contract as a duty "imposed in aid of the basic duty to maintain confidentiality"). Indeed, courts have countenanced a particularly reduced speech interest for government employees (at least where the speech at issue does not concern the employee qua citizen). See Fischl, Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?, 10 CARDOZO L. REV. 729 (1989); Cheh, Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information, 69 CORNELL L. REV. 690, 700-04 (1984).

In addition, the security contract cases are subject to the general criticism that they failed adequately to address the particular vulnerability to censorship of government employee speech; the social benefits of leaking government information; and the overbreadth of the CIA agreements at issue in light of the government's tendency to overclassify confidential information. See Medow, The First Amendment and the Secrecy State: Snepp v. United States—Are There Alternatives to Government Censorship?, 130 U. PA. L. REV. 775 (1982). In view of the predominantly critical scholarly reaction to Snepp, courts should resist the temptation to extend the case beyond its specific facts. See, e.g.; Anawalt, A Critical Appraisal of Snepp v. United States—Are There Alternatives to Government Censorship?, 21 SANTA CLARA L. REV. 697 (1981); Comment, Government Information Leaks and the First Amendment, 64 CALIF. L. REV. 108, 144-45 (1976); Note, Enforcement of CIA Secrecy Agreements: A Constitutional Analysis, 15 COLUM. J.L. & SOC. PROBS. 455 (1980); Comment, Snepp v. United States: The CIA Secrecy Agreement and the First
information—which also generally involve parties in some sort of special, fiduciary relationship—also promote the socially desirable goals of facilitating business, promoting commercial morality and inducing investment in the production of socially desirable information.

Accordingly, although explicit promises of confidentiality have in the past been enforced by courts outside the press context, those cases hardly require automatic enforcement of all press promises to news sources. Moreover, courts have never pro-

Amendment, 81 COLUM. L. REV. 662 (1981); Note, United States v. Marchetti and Alfred A. Knopf Inc. v. Colby: Secrecy 2; First Amendment 0, 3 HAST. CONST. L.Q. 1073 (1976).

149. The most common agreements of this type involve contracts of confidentiality between employers and employees. 2 M. JAGER, supra note 145, at § 13.01(1), 13-2. As Jager points out, agreements to protect trade secrets “can also arise in situations where a trade secret is disclosed to a third party such as a vendor, supplier, investor or promoter; or submitted for consideration to potential licensees or manufacturers.” Id.

150. See M. JAGER, supra note 145, §§ 1.0-1.04. Yet, although enforcement of trade secret and other confidentiality agreements serves those laudatory functions, it also interferes with competition and the mobility of labor. Therefore, when courts are faced with such agreements, they need to balance the interest in proprietary information and the interest in employee mobility, RESTATEMENT (SECOND) OF CONTRACTS §§ 186-88 (1981), or achieve the same result by a narrow characterization of the scope of the confidentiality agreement or the trade secret.

The courts’ approach to restrictive covenants in employment contracts—generally known as non-competition covenants—is instructive in that regard. There, the courts explicitly balance the interests set out above and impose a reasonableness limitation on the scope of the agreement restraining competition. This is due to their general distaste for agreements in restraint of trade and competition. See, e.g., Mantek Div. of NCH Corp. v. Share Corp., 780 F.2d 702, 711 (7th Cir. 1986); Grant v. Carotek, Inc., 737 F.2d 410 (4th Cir. 1984) (requiring that non-competition clause be “strictly construed” to determine reasonableness of restraint); American Hardware Mut. Ins. Co. v. Morgan, 705 F.2d 219 (7th Cir. 1983) (enforcing a covenant not to compete only to extent necessary to protect the employer’s “legitimate business interest”); American Inst. of Chem. Eng’rs v. Reber-Friel Co., 682 F.2d 382 (2d Cir. 1982) (requiring non-competition covenants to be “rigorously examined and narrowly enforced”); 2 E.A. FARNSWORTH, supra note 123, § 5.3, at 16-27. In any event, the fact that many trade secret cases involve employees who, as servants or agents, are classic examples of individuals in a traditionally confidential relationship imposing its own extra-contractual fiduciary duties, makes it difficult to distinguish the extent to which liability is imposed for the breach of the explicit promise of confidentiality as a contractual matter.

151. Nor is automatic enforcement in the press context dictated by the cases in other areas in which implied promises of confidentiality have been enforced in confidential relationships. With respect to the latter, breach of implied contract is only one of a number of legal doctrines used to justify liability. See Note, Breach of Confidence: An Emerging Tort, 82 COLUM. L. REV. 1426, 1437-48 (1982) [hereinafter Columbia Note] and cases cited therein. The particular basis of liability in some of these cases is not clear. See, e.g., MacDonald v. Clinger, 84 A.D.2d 482, 486, 446 N.Y.S.2d 801, 804 (1982) (in action against psychiatrist for disclosing confidential information about patient to patient’s wife, recovery based on tort duty “springing from but extraneous to” physician-patient contract);
tected confidentiality at all costs, even in admittedly confidential relationships. Thus, the fundamental problem with the freedom

Doe v. Roe, 93 Misc. 2d 201, 208-13, 400 N.Y.S.2d 668, 673-77 (Sup. Ct. 1977) (in action against psychiatrist for disclosing confidential information about patient in book, strong public policy in favor of plaintiff found in state licensing and disciplinary statutes, Hippocratic Oath, professional code of ethics, fiduciary nature of relationship and implied covenant of secrecy in contract between the parties: "[w]hat label we affix this wrong is unimportant"); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 587-88, 367 P.2d 284, 289-90 (1961) (while sources of public policy discussed imply duty in tort, principal reliance on breach of implied contract). Some courts explicitly admit that the particular legal theory chosen is merely a formality: "For the purposes of what we shall say it will be assumed that, for so palpable a wrong, the law provides a remedy." Smith v. Driscoll, 94 Wash. 441, 442, 162 P. 572, 572 (1917), quoted in MacDonald, 84 A.D.2d at 483, 446 N.Y.S.2d at 802-03. Others are even more explicitly instrumental. See, e.g., MacDonald, 84 A.D.2d at 486, 446 N.Y.S.2d at 804 (in which the court stated that a mere contract duty would be insufficiently protective of plaintiff, given the limitations on contract damages). This Article will only discuss these cases to the extent that courts hinge their resolution on contract principles.

Confidentiality has been implied in the context of professional relationships. The most commonly litigated professional relationship in this connection is that between physician and patient and, more specifically, the psychiatric relationship. See Columbia Note, supra, at 1429-34. While there are few claims of breach of attorney-client confidentiality outside the disciplinary proceeding context, courts have recognized in dicta the possibility of such damages actions. See id. at 1433 n.26. Legally enforceable obligations of confidentiality have also long been recognized in the context of the fiduciary relationship between principals and agents. See Restatement (Second) of Agency §§ 13, 387, 395, 396 (1957). Certain other relationships of trust (such as the banker-depositor relationship and that between public school officials and students) have also led courts to imply enforceable obligations of confidentiality. See Blair v. Union Free School Dist. No. 6, 67 Misc. 2d 248, 324 N.Y.S.2d 222 (Dist. Ct. 1971); Peterson, 83 Idaho at 578, 367 P.2d at 284.

Even in these cases, however, courts have grounded their background assumptions of confidentiality on society's interest in promoting the relationships at issue. See, e.g., Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 350, 363-70 (1989) (describing and criticizing the traditional justifications for protecting the lawyer-client relationship). These are generally relationships that are characterized by an imbalance of power, knowledge, and access to knowledge. See K.L. Scheffele, Legal Secrets 173 (1989). People seek advice and counsel from various sorts of professionals, for example, because they themselves do not have the knowledge, expertise, or capacity to solve their problems. They are also consequently unable to monitor, evaluate, or police the activities of the professionals. One party's exclusive access to knowledge fosters trust and vulnerability on the part of the other party. By acknowledging a high level of duty on the part of professionals, courts in effect adopt rules that seek to balance such inequalities of power and knowledge.

152. A certain level of disclosure of confidential information has been permitted by courts: when keeping secrets would cause harm to others, to promote public safety, to disclose fraud or crime, to protect oneself, in the interest of a third party, and if disclosures were in the public interest. See Columbia Note, supra note 151, at 1464-68 and cases cited therein. The scope of these exceptions is admittedly unclear and variable in the cases, however. See, e.g., Doe, 93 Misc. 2d at 214, 400 N.Y.S.2d at 677 (rejecting defendant psychiatrist's public interest defense for disclosure of private and embarrassing personal information, but not reaching issue of whether "important scientific discovery" would outweigh patient's privilege); Columbia Note, supra note 151, at 1464-65.
of contract approach is that the existence of an agreement of confidentiality between a reporter and a source does not address whether that agreement should be treated as an enforceable contract.

Indeed, as a matter of policy, it is far from clear that such agreements should unthinkingly be enforced. The underlying policy promoted by permitting contract actions in the press context is a policy favoring the protection of sources. Yet such a policy has not been adopted as a constitutional matter in the context of government compelled disclosure. And, courts in jurisdictions which have passed reporter shield laws have explicitly interpreted the privilege to be the reporter's rather than the source's. Thus, given the way in which courts have analyzed and applied the reporter's privilege, it is a weak support for claims by sources. Moreover, the relationship-based justifications for enforcement of confidentiality in other contexts do not suggest a parallel conclusion for the area of press relations. In traditional professional and other fiduciary relationships, for example, confidentiality is enforced in large part because the professional or fiduciary has the opportunity and holds the position of power, information, and expertise that create the potential for abuse of the client. There is, however, a broad range of relationships between reporters and sources. In many of them, it is the reporter, rather than the source, who is at an informational disadvantage and in a position

153. As to the policy of promoting the dissemination of information, see discussion of the chilling effect at infra notes 176-84 and accompanying text.
154. Indeed, the Court in Branzburg v. Hayes, 408 U.S. 665, 690-91 (1972), explicitly refused to find a first amendment privilege for journalistic non-disclosure in grand jury proceedings. See supra note 24. Even those Justices who would have established a reporter's constitutional privilege against compelled disclosure in Branzburg disavowed "concern[] with the parochial, personal concerns of particular newsmen or informants. . . . [S]ociety's interest [in the reporter-informer relationship] is not in the welfare of the informant per se, but rather in creating conditions in which information possessed by news sources can reach public attention." Branzburg, 408 U.S. at 726 (Stewart, J. dissenting). Even most courts allowing a qualified first amendment privilege under a narrow reading of Branzburg have applied a balancing test in civil cases and sometimes required source disclosure. See Marcus, supra note 19, at 850-59.
155. See supra note 100; see also Lipps v. State, 254 Ind. 141, 258 N.E.2d 622 (1970); Shindler v. State, 166 Ind. App. 258, 335 N.E.2d 638 (1975); Lightman v. State, 15 Md. App. 713, 294 A.2d 149, aff'd, 266 Md. 550, 295 A.2d 212 (1972), cert. denied, 411 U.S. 951 (1973); Marcus, supra note 19, at 846. This is so because the shield laws are not seen as protecting sources per se, but rather, the reporters' newsgathering processes.
156. See supra note 151.
157. Id.
158. See infra Section III.C.
of relative powerlessness. Accordingly, the very argument for professional and fiduciary duties of confidentiality becomes an argument for not enforcing confidentiality agreements in at least some reporter-source relationships.\textsuperscript{159}

B. First Amendment Model

1. First Amendment Immunity

By stark contrast to adherents of the freedom of contract model, some suggest that the first amendment should be interpreted as a complete barrier to contract causes of action for breaches of journalists' promises to confidential sources.\textsuperscript{160} Even if the Supreme Court's decision upholding a confidentiality contract between the CIA and a former agent in \textit{Snepp v. United States}\textsuperscript{161} were thought insufficient to cast suspicion on this position, the Court's consistent recognition of tort actions against the press\textsuperscript{162} demonstrates that the first amendment does not immu-

\textsuperscript{159} Id.


\textsuperscript{162} Thus, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and subsequent defamation cases have established that, although the first amendment requires standards of liability protective of the press in suits brought by public figures, it does not shield the press completely from application of defamation law. Similarly, while the Court has extended such first amendment-based protections to the press in other actions which effectivley raise reputational interests, it has shown no inclination to preclude such actions. See \textit{Hustler Magazine, Inc. v. Falwell}, 485 U.S. 46 (1988) (intentional infliction of emotional distress); \textit{Cantrell v. Forest City Publishing Co.}, 419 U.S. 245 (1974) ("false light" invasion of privacy). Indeed, just as the first amendment limits a state's power to impose tort liability for libel, so might the constitutional right to privacy, see \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965), bar any state effort to exempt the press entirely from liability for invasions of privacy.

Cases outside the area of reputational injuries have been subject to even fewer constitutional limits. Despite the first amendment, the Court has upheld various statutes which provide sanctions for the unauthorized dissemination of information. The copyright laws,
nize the press from lawsuits simply because the claims relate to expressive behavior.\textsuperscript{163}

There is no principled reason to conclude that, although individuals can sue the press for defamation, invasion of privacy, publicity, and similar torts, they must be precluded from access to courts for redress of all breaches of confidentiality promises by reporters. It is quite unlikely that the Supreme Court would interpret its first amendment jurisprudence to require a bar to all contract causes of action against the press for breaching promises of confidentiality to sources.\textsuperscript{164} The Supreme Court's decisions insulating the press from liability for the publication of truthful, newsworthy information in certain circumstances do not suggest a different conclusion. The Court has never held that there is an absolute privilege to publish all true information, regardless of what other interests are implicated.\textsuperscript{165}

for example, treat expression as property and limit the circumstances in which it can be used without consent. \textit{See}, e.g., 17 U.S.C. §§ 102, 106 (1988); \textit{see also} Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 569 (1985) (copyright action against magazine for publication of portions of unpublished presidential memoirs not barred by first amendment.) Similarly, in the "right of publicity" context, the Court has held that the first amendment did not immunize a defendant broadcaster from liability for a state law claim that it infringed an entertainer's right to control the publicity given to his act by videotaping his entire performance without his consent and then airing it in its entirety in the station's news program. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

163. Moreover, the press, in its commercial capacity, has also been subject to laws of general application, including unfair competition, trespass, breach of privacy and various federal statutes, such as the antitrust laws. In Associated Press v. NLRB, 301 U.S. 103 (1937), for example, the Court held that the first amendment did not bar the application of section 7 of the National Labor Relations Act, which protects employees' attempts to organize and bargain collectively, to the Associated Press. \textit{See also} Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (no immunity from application of the Sherman Act); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (no immunity from application of Fair Labor Standards Act); \textit{cf.} Grosjean v. American Press Co., 297 U.S. 233 (1936) (taxation).

164. This would be so unless, of course, the kind of damages we associate with tort are seen as somehow more worthy of legal protection than those associated with contract. None of the Court's first amendment jurisprudence indicates a principled basis for such a distinction, however.

165. \textit{See} Florida Star v. B.J.F., 109 S. Ct. 2603 (1989) (holding that newspaper's publication of rape victim's name in violation of state confidentiality statute did not give rise to liability in private action by victim when government inadvertently reported name in an incident report available in public press room); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) (reversing newspaper indictment for publishing name of juvenile criminal defendant despite statute prohibiting publication without judicial approval because identity lawfully obtained); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (concluding that first amendment barred criminal punishment of newspaper for publication of information about proceedings of state judicial review commission despite statute
2. Defamation Privilege in Contract Actions

A more limited first amendment approach to source-press con-
rendering proceedings confidential); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (holding unconstitutional a state court's pretrial order enjoining press from publishing identity of juvenile defendant accused of murder because detention hearing was open to press and public); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (finding unconstitutional the imposition of liability on the press in an invasion of privacy action for broadcasting the name of a rape victim when victim's identity obtained from court records).

First, the Court in these cases has consistently noted the narrowness of its holdings and has explicitly declined to decide "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments." See also Florida Star, 109 S. Ct. at 2613 ("Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected . . . ."); id. at 2608 ("Our cases have carefully eschewed reaching this ultimate question."); Edelman, Free Press v. Privacy: Haunted by the Ghost of Justice Black, 68 TEX. L. REV. 1195 (1990) (criticizing the Court's approach in Florida Star for failing to give adequate weight to the plaintiff's privacy interest).

Second, most of the cases express the rationale that the information published was not unlawfully obtained by the press (Florida Star, 109 S. Ct. at 2609-11; Smith, 443 U.S. at 103-04; Oklahoma Publishing, 430 U.S. at 311) and focus on the publicly available nature of the information reported (see Florida Star, 109 S. Ct. at 2610; Oklahoma Publishing, 430 U.S. at 311; Cox Broadcasting, 420 U.S. at 491-95). One can also see in the cases the theme that when the information is reported by the government, or in governmental proceedings, sanctions for publication become "anomalous." Florida Star, 109 S. Ct. at 2610-11. This is not only because the government in those situations has other, more limited means of guarding against dissemination, id. at 2611, but because of the importance of the press' role in reporting on and subjecting governmental proceedings to public scrutiny. See, e.g., Cox Broadcasting, 420 U.S. at 491-92; see also Florida Star, 109 S. Ct. at 2608, 2611 (citing Cox and suggesting that even if that role is not directly implicated when no adversarial proceedings have begun, the article at issue involved the investigation of a violent crime, itself a matter of "paramount public import"); Landmark Communications, 435 U.S. at 859 (noting that publication of information "clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect").

Third, truth has never been a complete defense to sanctions against the press for its expressive activity in other contexts. The press clearly does not have the right to publish schedules of troop movements in wartime, see Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 604 (1975) (Brennan, J., concurring), or to violate secrecy agreements by disclosure of classified information, even if the published material is concededly true, see supra note 148. Despite the Court's expressed distaste for prior restraints, it has, in an analogous situation, upheld disclosure of information to the press conditioned upon the press' agreement not to publish it. In Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), for example, the Court unanimously rejected a newspaper's claim that a "gag order" was unconstitutional under the first amendment. The newspaper was a defendant in a defamation action. The state court, after ordering the plaintiff to disclose certain information in discovery, entered a protective order barring the defendant newspaper from publishing the information. The Supreme Court noted that the newspaper had no constitutional right of access to the information; that it had only received the information as a result of the court's discovery order; that it could disseminate the information if it were obtained through means outside of the judicial process; and that the rule under which the gag order was issued
tract actions involves the adoption by analogy of some variant of the "actual malice" standard of *New York Times Co. v. Sullivan*\(^{166}\) in an effort to balance first amendment interests with interests in the protection of sources' promissory expectations.\(^{167}\)

furthered a substantial government interest unrelated to the suppression of expression. If the first amendment is not undermined by situations in which the government itself can effectively condition the release of information to the press on the press' non-disclosure of the information, then it seems quite unlikely that all private agreements to keep information confidential would ipso facto be held unconstitutional under the first amendment. See also *Nation Enters.*, 471 U.S. at 569; *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 (1979) (closure to press of pretrial suppression hearing justified by defendant's sixth amendment rights); *Zachini*, 433 U.S. at 578; *Butterworth v. Smith*, 110 S. Ct. 1376 (1990), holding that a state could not constitutionally impose criminal sanctions on a grand jury witness for revealing his own grand jury testimony after the expiration of the grand jury's term, is not to the contrary.

Neither does the absolutist rhetoric about editorial independence in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974) (holding unconstitutional a state right of reply statute) lead to the conclusion that editorial decisions to breach promises of confidentiality to sources are immune from state sanction as part of an inviolate editorial process. In holding inviolate the editorial process by which newspapers would decide what matters to include in their pages, the Court did not deal with an explicit undertaking later reneged by the press. Moreover, *Herbert v. Lando*, 441 U.S. 153, 167-68 (1979), demonstrated that the editorial process is not privileged from scrutiny by a defamation plaintiff, and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), showed that the state can constitutionally impose restrictions on the content of broadcast speech as a condition for obtaining a state-granted broadcast license. See B. SCHMIDT, FREEDOM OF PRESS v. PUBLIC ACCESS 233-35 (1976) (questioning the extent to which even the Court in *Miami Herald* meant to enunciate a principle of total inviolability of the editorial process in the access situation).

166. 376 U.S. 254, 279-80 (1964). See also *St. Amant v. Thompson*, 390 U.S. 727 (1968). The "actual malice" standard requires public officials and public figure plaintiffs in defamation actions to prove that the defendant publishers made defamatory statements with knowledge that they were false or with reckless disregard of their truth or falsity. *New York Times*, 376 U.S. at 279-80. The terms "reckless disregard" and "actual malice" will be used interchangeably in the following section.

167. The court in *Fries v. NBC*, No. 456,687 (Super. Ct. Cal. 1982), suggested that the California tort law privilege of communications to people with a common interest would serve as a limit on the recovery of damages in the plaintiff's contract claim. See supra notes 106 and 109. In order to recover, the plaintiff would have to show that the defendant had breached its agreement with "wanton and reckless disregard of the consequences" to the plaintiff. *Source Confidentiality Suit*, supra note 111, at 9; *Carrisoza*, supra note 108, at 1.

The application of some form of the actual malice standard has also been suggested in the literature. See *Winfield*, STANDING A PRIVILEGE ON ITS HEAD, 7 COMM. LAW. 3, 4 (1989); Minnesota Note, supra note 16, at 1573-74 ("As in the area of defamation, courts should graft a constitutional standard onto common-law contract rules for cases in which confidential sources sue the media."). The balancing approach suggested in the Minnesota Note, supra note 16, consists of a two-pronged analysis under which plaintiffs would be required first, to prove by clear and convincing evidence, the existence of a confidentiality agreement; and second, to show that the media breached that agreement "with reckless disregard for the source's interests in seeing the promise of confidentiality honored." *Id.* at 1579-82. The second prong would require a factfinder to "find that the media defendant
Such an imported tort standard would focus exclusively on the actions and state of mind of the press defendant.

The importation of the reckless disregard standard from the defamation area is neither workable nor constitutionally required. First, the translation of the reckless disregard standard from the context of public figure defamation suits to that of contract actions by sources necessarily makes it both meaningless and overbroad. By contrast to the defamation context, the disclosures at issue in contract actions by sources consist of true information. This requires the reckless disregard standard to be phrased not in terms of the press' knowledge of the substantive character of the information, but in terms of reckless disregard as to the effects of the disclosure. Yet, what does it mean to ask whether the press showed reckless disregard of the consequences of disclosure? 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. Consequ-

published the information in violation of the confidentiality agreement without giving due deference to the source's rights." Id. at 1581. Application of the proposed recklessness standard would require consideration of "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." Id. For an analogous tort-based approach, see COMM./ENT. Note, supra note 19 (suggesting a tort model akin to the British breach of confidence tort in which courts would have to balance source's need for confidentiality with press' need to inform public).

Finally, although no explicit claims for breach of contract were made in Virelli I, 142 A.D.2d 479, 536 N.Y.S.2d 571 (1989), or Virelli II, 159 A.D.2d 23, 558 N.Y.S.2d 314 (1990), see supra note 107, the plaintiffs' various tort claims were dismissed because they did not satisfy the heightened fault standard of gross irresponsibility adopted by New York State in connection with defamation actions by private persons concerning speech about matters of legitimate public concern. In Virelli I, the court held that the plaintiff's negligence claim warranted dismissal because its origin in an alleged breach of an agreement of confidentiality did not suffice to distinguish it from the defamation and invasion of privacy claims as to which New York had adopted a heightened fault standard. Virelli I, 142 A.D. 2d at 487, 536 N.Y.S.2d at 576, supra note 107. The court's application of the gross irresponsibility standard—rather than an actual malice burden—in the breach of confidence context suggests that it might adopt defamation law's status-based fault distinctions for breach of contract actions in the confidentiality context.

168. This Article will not address the formal and technical suggestion of the court's dictum in Ruzicka v. Conde Nast Publications, Inc., 733 F. Supp. 1289, 1300 n.12 (D. Minn. 1990), that the imposition of a fault requirement in contract actions would be inappropriate. See supra notes 107-08.

169. The Minnesota Note admits, for example, that "[s]o long as a journalist knows why the source seeks confidentiality, and understands the likely harm to the source from
quently, the reckless disregard requirement would not perform its intended press-protective function.\textsuperscript{170}

Second, while the interest in reputation is assumed always to have some value to be balanced against the interest in robust public debate,\textsuperscript{171} not every source's expectation of confidentiality is prima facie valuable.\textsuperscript{172} Moreover, the Supreme Court has not interpreted the first amendment as imposing a heightened fault standard even in all situations in the defamation context. Indeed,
since *Gertz v. Robert Welch, Inc.*,\(^{173}\) the Court has recognized variable levels of state interest in the protection of reputation.\(^{174}\) 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.\(^{175}\) 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.

Third, while the defamation context presents a relatively simple conflict between interests in reputation and interests in minimizing press self-censorship and the attendant chill on robust public debate, the specter of a chilling effect at least theoretically weights both sides of the balance in confidentiality cases. In other words, some degree of self-censorship is a danger for either rule regarding enforcement in contract actions. On the one hand, non-enforcement of promises of confidentiality may discourage sources from sharing information with the press, thereby limiting information available to the public. On the other hand, 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.\(^{176}\) Conse-

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174. In *Gertz*, the Court established that the state had a higher interest in protecting the reputational interests of private persons who, unlike their public figure counterparts, do not voluntarily choose to expose themselves to public scrutiny and do not have access to the means to rebut defamatory statements about them. *Id.* at 342-47. To put it differently, the invariable first amendment interest of protecting free and open public discourse was more easily outweighed by the state's interest in protecting private rather than public figures' reputations.

175. Indeed, the Court's methodology in *Gertz*—of contextually assigning variable weight to the state interest—would suggest otherwise. The distinction made there between private and public persons is also unpersuasive when translated to the context of confidentiality. Public figures are accorded lessened protection because they have voluntarily thrust themselves into the public realm and assumed the risk of public scrutiny, and because they are presumed to have access to the press to rebut charges against them. *Id.* Because all confidential sources—even otherwise public figures—seek to contract to be private in their confidential relationships with the press, the rationales used to justify the distinction between public and private figures in the defamation context are inapposite. Therefore, the defamation standards need not logically require the public figure contract plaintiff to meet a higher burden.

quently, this type of press self-censorship might equally impoverish public debate. Thus, the inquiry into self-censorship in the confidentiality context is more complex and less clearly outcome-determinative than in the defamation area.

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. The concern about a chilling effect on the press in the defamation context arose from the Supreme Court’s suggest that such a chilling effect was in fact operative when, shortly after the original decision in Cohen, one of the defendant newspapers withdrew all 640,000 copies of its Sunday magazine from warehouses around the state prior to delivery. The magazine contained a story naming a source who claimed that she had been promised anonymity and threatened a lawsuit if she were identified. Editors could not determine whether the freelance writer of the piece had in fact granted the source anonymity. Radolf, Anonymous Sources: Newspaper Issues New Guidelines After Losing Court Case, Editor & Publisher, Aug. 27, 1988, at 17.

Those who express concern about the chilling effect of contract liability on the press also suggest that the possibility of financially onerous liability is exacerbated because of the expansiveness of contract theory and the consequent probability of numerous frivolous lawsuits. The appellate brief for Cowles Media Company in Cohen III, for example, sets out a series of six hypothetical situations in which questions of fact might arise for unpredictable juries if the contract cause of action were permitted. Brief for Appellant at 23-24, Cohen III, 445 N.W.2d 248 (Minn. Ct. App. 1989) (No. 80-88-2672). Those hypotheticals raise the questions not only of contract suits claiming that the journalist did not adequately protect a source’s identity because knowledgeable readers were able to deduce it from a description, and contract suits about the precise promise made to sources and the particular terms of the promises, but also the possibility that, once permitted, contract actions could be brought for such infractions as the imbalance of a story promised to be fair, or the timing of a publication.

177. Despite the numerous affidavits by journalists claiming that confidential sources would be deterred from talking to the press if reporters were compelled to divulge their identities pursuant to subpoena, the Supreme Court, in Branzburg v. Hayes, 408 U.S. 665, 693-94 (1972), found the predictions of such chilling effects to be inconclusive and speculative. See also Beaver, The Newsmen’s Code, The Claim of Privilege & Everyman’s Right To Evidence, 47 Ore. L. Rev. 243, 251-52 (1968) (reporting lack of evidence of chill prior to Branzburg). While Branzburg has been criticized for this proposition, and while self-censorship is difficult to measure, there is some empirical evidence that reporter shield laws do not play a large role in sources’ decisions to talk to the press, see Note, News-Source Privilege in Libel Cases: A Critical Analysis, 57 Wash. L. Rev. 349, 364 n.89 (1982), and that compelled disclosure poisons the reporter-source “atmosphere” rather than drying up sources completely, Blasi, supra note 19, at 284.

These empirical studies, since they address source self-censorship in the subpoena context, may not be fully predictive of the chilling effect on sources of voluntary disclosures by the press. That is because some of the studies conclude that “sources continue to divulge information on a confidential basis only because the reporter has impliedly or explicitly demonstrated a willingness to face incarceration rather than violate a source’s trust.” Osborn, supra note 34, at 77.
recognition of the inevitability of false speech in free debate. At least in terms of the number and likelihood of claims, there is a significant difference between the risk of liability for injuries to the world at large on the basis of inevitable occurrences and damages assessed for a deliberate breach of a specific understanding with a particular person. Thus, the promissory nature of the relationship between reporters and sources limits the risk of a chilling effect on the press.

Moreover, anecdotal data from some journalists and editors indicate that confidentiality is presently provided too easily and that sources will often agree to speak on the record when pressed. Just as those sources might not be discouraged from communicating with the press despite the absence of possible contractual remedies for exposure, so too the predicted chilling effect on journalists of enforcing promises of confidentiality may be equally overstated. Particularly because there are economic incentives for the press to rely on confidential sources in providing the news, we cannot predict the extent of the chill. It may be that the only real effect of permitting damage recoveries in source contract suits would be to cause journalists to use confidential sources more carefully—with more specific understandings of the sources’ motives, the terms of the confidentiality agreement, and the reporters’ own authority, as well as more explicit disclosures to the sources as to what they can expect.

Finally, the first amendment does not simply preclude any rules that would have a self-censorship effect on the press. Certain sorts of expression can constitutionally be chilled alto-


179. See, e.g., E. Lambert, supra note 34, at 143 (quoting Newsday editor to the effect that 60% of his sources would agree to disclosure if he were at risk of going to jail); B. Swan, supra note 36, at 50-51; Poll Finds Editors Split on Naming of Sources, Editor & Publisher, Sept. 27, 1980, at 22 (respondents believed that on average, 56% of sources would speak on the record if pressed hard enough); Johnston, The Anonymous-Source Syndrome, Colum. Journalism Rev. 54, 57-58 (Nov./Dec. 1987).

180. See infra notes 251-65, 285, 289-90 and accompanying text (addressing how competition between news organs and institutional needs and conventions of newsgathering lead to reliance on confidential news sources).

181. Theorists of the law and economics school might note that, given certain assumptions about sources’ unwillingness to leave the market, journalists might respond to a rule enforcing promises of confidentiality by seeking to contract out of potential liability rather than simply by becoming timid and afraid to report the news. One can envision some kind of form contract specifying these issues, like informed consent forms or Miranda warnings.
gether\textsuperscript{182} and other sorts of speech merit differential degrees of protection from the chilling effect.\textsuperscript{183} Since courts may well find that promises of confidentiality should be “chilled” in certain circumstances, it is inappropriate to apply heightened fault standards designed to reduce the chilling effect on political speech across the board to all promises of confidentiality by journalists to sources.\textsuperscript{184}

This is not to say, of course, that the first amendment is irrelevant to press breaches of promises of confidentiality. Although the actual malice standard established in the defamation area is not itself appropriate for simple transplantation, both social policy and the first amendment may require a limitation on the ordinary standard of contract liability in actions brought by sources whose identities have been inadvertently disclosed. In other words, unless contract is to be read as fundamentally distinct from tort, the first amendment’s preclusion of strict liability in the defamation context might well constrain traditional contract liability when the disclosure by the press is inadvertent or accidental.\textsuperscript{185}

C. The Promissory Estoppel Model

The third existing approach to press-source suits, consisting of a two-step analysis, is reflected in the opinion of the Minnesota Supreme Court in \textit{Cohen v. Cowles Media Co.}\textsuperscript{186} In the first step of its analysis (and by direct contrast to the proponents of the freedom of contract model), the court concluded that promises of confidentiality to sources by the press should not be enforced as

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{184} \textit{See infra} Section III.B. and Section IV.
\item \textsuperscript{185} Under traditional contract law, liability may be imposed in the event of a breach even if the promisor took all reasonable precautions to avoid it. \textit{3 E.A. Farnsworth, supra} note 123, § 12.8, at 190 (describing contract as a strict liability cause of action). Thus, contract law could lead to liability even for inadvertent disclosures resulting from technical failures or from other unforseeable circumstances against which reasonable precautions would not guard.
\item \textsuperscript{186} \textit{Cohen IV}, 457 N.W.2d 199 (Minn. 1990).
\end{enumerate}
\end{footnotesize}
contracts for two reasons. First, it found that they were not intended to be legally binding.\textsuperscript{187} Second, it saw contract law as an "ill fit" in the press-source context, imposing "an unwarranted legal rigidity on a special ethical relationship."\textsuperscript{188}

In the second step, the court purported to apply a promissory estoppel analysis to determine whether the promise at issue should nevertheless be enforced. The promissory estoppel analysis, in requiring the factfinder to decide whether "injustice" would result from a refusal to enforce a promise, involves a balancing of the free speech interests of the press with the state interest in protecting promises of anonymity.\textsuperscript{189} Thus, the court considered first amendment interests as part of its common law determination of whether justice would be served by enforcement of the promise. While the court in \textit{Cohen} did not foreclose the possibility that promissory estoppel might render enforceable some promises of anonymity to sources,\textsuperscript{190} it concluded that "the law best leaves the parties . . . to their trust in each other" when promises of anonymity both arise "in the classic first amendment context of the quintessential public debate" of elections and are given to "a political source involved in a political campaign."\textsuperscript{191}

The court's contract analysis assumes its conclusion and is highly mechanical. The court clearly recognized that the decision to enforce particular promises was a substantive one based on policy considerations.\textsuperscript{192} Yet, instead of explicitly explaining the value choice involved in choosing not to enforce press promises,\textsuperscript{193}

\textsuperscript{187} \textit{Id.} at 203. By holding that promises of confidentiality are not contracts as a doctrinal matter, the court obviously avoided the question of state action and the first amendment.

\textsuperscript{188} \textit{Id}.

\textsuperscript{189} \textit{Id.} at 204-05.

\textsuperscript{190} \textit{Id.} at 205 ("There may be instances where a confidential source would be entitled to a remedy such as promissory estoppel, when the state's interest in enforcing the promise to the source outweighs First Amendment considerations, but this is not such a case.").

\textsuperscript{191} \textit{Id}.

\textsuperscript{192} Unlike the proponents of the freedom of contract approach, the court here recognized that the law did not consider every promise binding and cited exclusions based on public policy grounds. \textit{Id.} at 203. Even the choice of language in its references to contract law as "ill fit" and "inappropriate" in the context of the press' promises to sources indicates the court's implicit recognition that the application of contract law involved policy-based choices on the part of courts. \textit{Id}.

\textsuperscript{193} As Morris Cohen aptly observed:

\begin{quote}
In enforcing contracts, the government does not merely allow two individuals to do what they have found pleasant in their eyes. Enforcement, in fact, puts the machinery of the law in the service of one party against the other. When that is
the Minnesota Supreme Court disingenuously sought to mask its substantive decision about press promises and reporter-source relationships under the guise of a doctrinal determination of intent.\textsuperscript{194}

As the court recognized, however, the parties to the confidentiality agreement “unquestionably” intended that their promises be kept.\textsuperscript{195} While the court asserted that “each party . . . assume[d] the risk of what might happen, protected only by the good faith of the other party,”\textsuperscript{196} it provided no evidence that this assumption was in fact the likely expectation of the parties, given their social and professional context. One could just as easily speculate that, in light of both the traditional ethic of journalistic non-disclosure and the examples of reporters who have endured jail terms rather than divulge their sources, the expectation of the parties was that anonymity would be maintained. In view of that assumption, it is unlikely that either party contemplated disclosure and a subsequent lawsuit.\textsuperscript{197} In addition, the possibility of an appeal to the courts might well have been contemplated by the source, even if not the reporter. If that were the case, courts would necessarily choose to affirm one party’s intent rather than the other’s by choosing not to enforce the promise.\textsuperscript{198}

Moreover, as a general norm of contract law, parties need not in fact consider or intend the legal consequences of the actions by which they manifest their assent in order to be bound.\textsuperscript{199} In addi-

\textsuperscript{194} Thus, the court artificially distinguished its promissory estoppel analysis from its contract determination, noting that “[u]nder the contract analysis . . . the focus was more on whether a binding promise was intended and breached, and not so much on the contents of the promise or the nature of the information exchanged for the promise.” Cohen IV, 457 N.W.2d at 204.

\textsuperscript{195} Id. at 202.

\textsuperscript{196} Id. at 203.

\textsuperscript{197} Indeed, one of the traditional criticisms of the attempt to hinge contract law on the subjective intent of the parties is that it is impossible for courts to divine subjective intent. See, e.g., Cohen, supra note 144, at 575-78. That is particularly the case when the courts attempt to determine the intent of parties who did not anticipate an issue at the time of promising. Id. at 576-77 (“most litigation arises in this field precisely because of the advent of conditions that the two parties did not foresee when they entered into the transaction”).

\textsuperscript{198} See Dalton, supra note 141, at 1107 (making this argument in an analysis of judicial approaches to the enforcement of cohabitation agreements); Braucher, supra note 134.

\textsuperscript{199} See E.A. Farnsworth, supra note 123, § 3.6, at 113-16.
tion parties who seek not to be legally bound to their promises traditionally have to manifest quite clearly their intentions not to be bound. In any event, while the idea of subjective intent is still used to justify the notion of contractual obligation, the objective theory of contract interpretation has dominated contract rhetoric since the mid-19th Century. In interpreting intent to be bound under an objective approach, courts must base their decisions on what the parties should have reasonably intended, under circumstances as the courts see them. In turn, that attempt to discern the intentions of the hypothetical reasonable person must necessarily rest on policy-based judgments on the part of the court that particular expectations are reasonable and that a particular set of promises should or should not be enforced.

The fact that the court in Cohen attempted to disguise its policy determination by shoehorning it into the apparently doctrinal rubric of the parties’ intent is not the only problem with the court’s argument for the inappropriateness of contract. The central difficulty is that, even on a policy analysis, the court did not explicitly explain why promises in the context of the reporter-source relationship should not be considered binding. After all, explicit promises of confidentiality have in the past been enforced by courts as contracts and contracts to maintain confidentiality have even been implied on the basis of confidential relations.

200. See, e.g., id. § 3.7, at 116; 1 A. Corbin, Corbin on Contracts § 34 (1963); J. Murray, Murray on Contracts § 20, at 30-32 (2d rev. ed. 1974); 1 S. Williston, A Treatise on the Law of Contracts § 21 (W. Jaeger 3d ed. 1957); Restatement (Second) of Contracts § 21 (1981) (“Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.”). Indeed, scholars suggest that courts refuse to honor even explicit manifestations of intentions not to be bound in certain circumstances. See, e.g., Holmes, The Freedom Not to Contract, 60 Tul. L. Rev. 751, 755 (1986).

201. See, e.g., G. Gilmore, supra note 123, at 35-44; Farnsworth, "Meaning" in the Law of Contracts, 76 Yale L.J. 939, 945 (1967); see also Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911), aff’d, 201 F. 664 (2d Cir. 1912).

202. See, e.g., Dalton, supra note 141, at 1055-56; Restatement (Second) of Contracts §§ 2(1), 2 comment b (1981).

203. The reasonable person inquiry in this context might be said to involve two questions: (1) whether a reasonable source would believe that a reporter was promising not to reveal her identity under any circumstances; and (2) whether a reasonable person would believe that the reporter is bound by such a promise. Both questions require courts to adopt substantive, policy-based criteria of reasonableness against which they can test the parties’ expectations.

204. See supra notes 145-47, 149, 150 and accompanying text.
ships. And simply characterizing a relationship as "ethical" does not a fortiori mean that its obligations cannot—and should not—be enforced by contract law.

In fact, what lies behind the court's decision not to treat confidentiality promises in these circumstances as binding is, in the first place, an adoption of a particularly limited and commercial vision of contract. Having limited the realm of contract to the market, and having adverted to the unenforceability of promises in the family context, the court then sub silentio relegated the reporter-source relationship to the allegedly unregulated realm of the family. In making that distinction, it raised two problems. First, courts have, in fact, contemplated the possibility of contracts in personal and intimate relationships. Second, the Cohen court did not provide an explanation of why the relationship between reporters and their sources should be seen as entailing merely "ethical" obligations and thus as more family-like than commercial.

205. See supra note 151. I am not, of course, suggesting that all such agreements should be viewed as binding contracts as a matter of policy. See id., in which I argue that traditional justifications for enforcing confidentiality in other relationships do not easily fit the varied relationships between reporters and sources. Nevertheless, the Cohen court dismissed contract for all these relationships without providing an adequate distinguishing analysis.

206. Cohen IV, 457 N.W.2d at 203. Indeed, the distinction assumed by the court between ethical and legal obligations raises a host of jurisprudential issues which it is beyond the scope of this Article to address further.

207. This is evidenced by the court's characterization of the parties' intentions: "They are not thinking in terms of offers and acceptances in any commercial or business sense." Id.

208. It chose to characterize the relationship between reporters and sources as involving "an 'I'll-scratch-your-back-if-you'll-scratch-mine' accommodation," in which "[e]ach party . . . assumes the risks of what might happen, protected only by the good faith of the other party." Id.

209. See, e.g., Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (in which the California Supreme Court found that the plaintiff had properly stated a cause of action in express contract for breach of an oral cohabitation agreement). While the majority in the early English case of Balfour v. Balfour, 2 K.B. 571 (1919), established a presumption that agreements between spouses for support should normally not be deemed enforceable contracts, a concurrence admitted that "[i]t may be, and I do not for a moment say that it is not, possible for such a contract as is alleged in the present case be made between husband and wife. The question is whether such a contract was made." Id. at 574.

210. Indeed, even accepting the court's assumption of an antinomy between market and family in classic contract law, press-source relationships do not fit neatly into the dichotomy. The relationships partake both of the realm of community, trust and vulnerability and of the realm of self-interested dealing and manipulation. See infra Section III.C.

Moreover, the assumption of a clear antinomy between market and family in the law,
The court's promissory estoppel analysis, while less wooden than its approach to the contract question, is flawed as well. It simply does not deliver what it promises. The court properly admitted that the promissory estoppel analysis requires a complex balancing of factors. It discussed the "moral ambiguity" of the transaction in which promises of confidentiality are extracted; it noted that both sides of the dispute in Cohen "proclaim their own purity of intentions while condemning the other side for 'dirty tricks'"; and observed that "deniability, depending on the circumstances, may or may not deserve legal protection." Yet, having observed the complexities of the relationship between sources and reporters and having admitted the necessity of balancing, the court neatly sidestepped the obligations it had deemed necessary. It neither balanced nor provided criteria for doing so.

Instead, refusing overtly to choose any particular vision of the meaning and significance of the facts in the Cohen case, the court took refuge in a categorical rule, based on a talismanic invocation of the notion that the first amendment protects speech about public figures in political campaigns. When 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. But it did not explain why the political nature of the speech at issue forecloses any inquiry into the other circumstances of promise and breach. And it provided no guidance at all on how to consider the issue in circumstances not involving the campaign context at issue in Cohen itself.

while apparently persuasive to the Cohen court, has been strongly challenged. See, e.g., Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497 (1983); see also Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 563 (1983) (noting counter-principles within private law categories). It also ignores the suggested inconclusiveness and indeterminacy of the arguments used to support non-enforcement of promises in the intimate context. See Dalton, supra note 141, at 1099-1100.

211. For a skeptical view of the enterprise of promissory estoppel analysis in general, see Feinman, Promissory Estoppel and Judicial Method, 97 Harv. L. Rev. 678 (1984) (disputing the determinacy of judicial methods of applying promissory estoppel doctrine).

212. Cohen IV, 457 N.W.2d at 204-05. The court asked (without answering), for example, whether the source's identity was newsworthy and whether characterizations short of outright identification would have served the press' asserted reasons for disclosure. Id. at 205.

213. Id. at 204.

214. Id.
III. THE HISTORY AND CHARACTER OF PRESS-SOURCE CONFIDENTIALITY

The existing categorical approaches to the problem of press promises of confidentiality are doctrinally unpersuasive: they do not establish either that all such promises should be enforced or that none should be. Similarly, those approaches which suggest that some, although not all, promises of confidentiality should be enforced do not provide a principled methodology for making the distinction. Both doctrine and jurisprudence require that a resolution of the issue be historically grounded, as well as highly context and fact-sensitive.\(^{215}\) This, in turn, requires a description of the social reality against which promises of confidentiality are made by the press. That reality consists not only of a range of dynamics in particular relationships between reporters and sources, but also of a highly ambiguous institutional relationship between the press and government.

A. Journalism, Government and the Myth of the Independent Press

The modern press is said to serve various functions critical to a democracy, including informing the public, checking government abuse, and requiring accountability of those whose functions affect the public interest.\(^{216}\) These functions require and assume

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215. The doctrine of contracts against public policy, for example, requires fact-sensitive and value-laden determinations of social policies. The doctrine of promissory estoppel requires the complex balancing of interests to determine whether it would be in the interests of justice to enforce particular promises. See supra Section II.A.

More fundamentally, as the Realists have shown us, legal rules are chosen against a backdrop of social reality, not \textit{in vacuo}, and are constituted by that reality. See \textit{generally} W. Twinning, Karl Llewellyn and the Realist Movement (1973); K. Llewellyn, The Common Law Tradition (1960); Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935); Llewellyn, Some Realism About Realism, 44 Harv. L. Rev. 1222 (1931). The choice of legal rules has consequences for the relationships of those to whom they apply. Thus, when they are chosen without a nuanced and sophisticated understanding of the social reality they are to regulate, they alter balances of power in unanticipated ways and fail in their intended functions.

216. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 726-27 (1972) (Stewart, J., dissenting); New York Times Co. v. United States, 403 U.S. 713, 716-17 (1971) (Black, J.) ("The press was protected so that it could bare the secrets of government and inform the people . . . . And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people . . . ."); Mills v. Alabama, 384 U.S. 214, 219 (1966) ("[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people . . . ."); Garrison v. Louisiana,
the press to be neutral, independent, critical, and powerful.\footnote{217} The romantic image of an adversarial press serving the public "without fear or favor"\footnote{218} has come to dominate much modern discourse about journalism.\footnote{219}

The press is, of course, an increasingly powerful and in many ways independent and critical check on government.\footnote{220} Both scholars and government officials believe that the media's selection and presentation of information have a profound effect on setting the agenda for and defining the scope of public debate on political, economic, and social matters.\footnote{221} The media have re-


\footnote{217. See, e.g., IMPACT, supra note 4, at 19; D. CALLAGHAN, W. GREEN, B. JENNINGS & M. LINSKY, Congress and the Media: The Ethical Connection 35-36 (1985) [hereinafter Ethical Connection] (discussing principle of journalistic autonomy).}

\footnote{218. The reference is to the New York Times' declaration of its mission in the late 19th Century. See H. SALISBURY, Without Fear or Favor x (1980); J. ALTSCHELL, supra note 120, at 54.}

\footnote{219. See IMPACT, supra note 4, at 18-20. Indeed, there are those who criticize the press for being too antagonistic and hostile to government. Id. at 15 (quoting Moynihan and O'Neill).}

\footnote{220. It was, after all, the revelations of two young reporters which focused the nation's attention on the Nixon administration's conduct, kept pressure on government investigators, and ultimately led to the resignation of an American President. B. WOODWARD & C. BERNSTEIN, supra note 5. See also P. STOLER, supra note 86, at 2; H. BRAY, supra note 120, at 134-36.}

\footnote{221. See, e.g., R. ENTMAN, Democracy Without Citizens 8-9, 36 (1989); D. CATER, supra note 54, at 7; S. KLAIDMAN & T. BEAUCHAMP, supra note 75, at 180; W. RIVERS, supra note 39, at 10, 213 (describing Washington news correspondents as "a shadow government"). In addition to its impact on public debate, a relatively recent empirical study suggests that the press also has a significant impact on policymakers themselves—mostly in terms of the policymaking process but also sometimes on substantive policy choices as well. IMPACT, supra note 4, at 112-18; Practicing Responsible Journalism, supra note 98, at 145-46. There has been some debate within the social science community as to the level and nature of the press' power and influence on public attitudes. See C. PRESS & K. VERBURG,
placed the influence and many of the functions of traditional political parties and now serve as the central link between the public and its representatives. Yet, history discloses a far more cooperative than adversarial role for the American press with respect to the government and power elites. In fact, the press has historically enjoyed a symbiotic relationship with government officials and others on whom it reports.

Most newspapers after the American Revolution were expli-

\textit{supra} note 34, at 61-66 and studies discussed therein; P. Clarke & S. Evans, \textit{Covering Campaigns} 6-9 (1983); J. Lichtenberg, \textit{Democracy and the Mass Media} 9 (1990); S. Iyengar & D. Kinder, \textit{News that Matters: Television and American Opinion} 54-62 (1987); McCombs & Shaw, \textit{The Agenda-Setting Function of the Mass Media}, 36 Pub. Opinion Q. 176 (1972). While some early researchers after World War I suggested that the ability of the media to influence people's beliefs was virtually absolute, others concluded that such influence was very selective, affecting only those who had few predispositions on the relevant issue. C. Press & K. Verburg, \textit{supra} note 34, at 61-62. Modern studies too differ in their foci and conclusions, some suggesting that the media may have long-term effects on public opinion; others claiming that they only reinforce existing public beliefs; and still others concentrating on the media's success in agenda-setting. Id. at 63-66. See also R. Entman, \textit{supra}, at 75-88.

Despite some disagreements within the social science community as to the precise effects and extent of media influence, two things are clear. First, the media, along with the politicians they cover, do play a significant role in screening events and focusing the public's attention on issues they select to cover. At the very least, "media messages significantly influence what the public and the elites think, by affecting what they perceive and think about." Id. at 75. Second, the sources of news—politicians and government officials—themselves believe that media coverage is a profoundly important part of the political and governmental process. C. Press & K. Verburg, \textit{supra} note 34, at 66; R. Entman, \textit{supra}, at 86, 126-28; \textit{Impact}, \textit{supra} note 4, at 84-86; Jennings, \textit{Media Coverage of Congressional Elections: An Ethical Perspective}, in \textit{Campaigns in the News} 183, 184 (J.P. Vermeer ed. 1987); \textit{Practicing Responsible Journalism}, \textit{supra} note 98, at 140-41. See also O'Neill, \textit{Media Power and the Dangers of Mass Information}, in \textit{Nieman Reports} 32 (Summer 1985) (quoting Reagan aide Michael Deaver as saying that the presidential staff "would be crazy" not to recognize media influence and construct news events to fit network news programming).

222. R. Dinkin, \textit{supra} note 2, at 159-61; \textit{Impact}, \textit{supra} note 4, at 10, 12, 14-20.

223. \textit{See}, e.g., E. Lambeth, \textit{supra} note 34, at 98-99; \textit{Impact}, \textit{supra} note 4, at 206-11; J. Deakin, \textit{supra} note 36, at 81-82.

224. \textit{See}, e.g., R. Entman, \textit{supra} note 221, at 115; D. Broder, \textit{supra} note 34, at 300; J. Hulteng, \textit{supra} note 6, at 84; M. Schram, \textit{supra} note 2, at 54; J. Altschull, \textit{supra} note 120, at 294; J. Deakin, \textit{supra} note 36, at 81-82; W. Greider, \textit{supra} note 55, at xvii; W. Rivers, \textit{supra} note 39, at 18; M. Grossman & M. Kumar, \textit{supra} note 4, at 1, 13-16; \textit{Reporters}, \textit{supra} note 36, at 126; D. Wise, \textit{supra} note 39, at 310; Langley & Levine, \textit{supra} note 16, at 14.

The following account of the history of American journalism is obviously a broad-brush attempt to identify major trends. It is not intended as a characterization of the developmental stages in every newspaper across the country.

225. During the early colonial period, the few American newspapers tended to be timid and not offensive to government officials. M. Emery & E. Emery, \textit{The Press and America:
citically political party organs, serving as instruments of either the Federalist or the Anti-Federalist parties.\textsuperscript{226} The abusiveness and

AN INTERPRETIVE HISTORY OF THE MASS MEDIA 24-26 (6th ed. 1988); F. HUDSON, JOURNALISM IN THE UNITED STATES FROM 1690-1872, at 51, 769 (1873). Despite the end of official licensing, virtually all publishers prior to the establishment of James Franklin's New England Courant in 1721 had succumbed to official pressure to print "by authority." M. EMERY & E. EMERY, supra, at 28-29. Whether for reasons of ideology or economics, colonial printers proclaimed impartiality and independence from factions as their creed. See, e.g., J. SMITH, supra note 216, at 7, 129 (crediting impartiality to radical Whig principles); Botein, Printers and the American Revolution, in THE PRESS AND THE AMERICAN REVOLUTION 19-20 (B. Bailyn & J. Hench eds. 1981) (suggesting that impartiality was required by printers' needs to please all their customers in an underdeveloped market).

Despite the articulated ideal of impartiality and the generally timid nature of the press, some early papers did express dissent against political and religious authority. See, e.g., M. EMERY & E. EMERY, supra, at 26-33, 38-44; F. HUDSON, supra, at 51; J. SMITH, supra note 216, at 7, 95-100, 124, 162; Mayton, From a Legacy of Suppression to the Metaphor of the Fourth Estate, 39 Stan. L. Rev. 139, 142 (1986) (early press "was robust and flourishing, a frequent and trenchant critic of public matters and public officials"). As discontent with British and colonial policies mounted in the colonies, it became impossible for the press of the day to remain impartial. Botein, supra, at 32-40; J. SMITH, supra note 216, at 37-8.

Many newspapers began actively to reflect the political positions of the American rebels. M. EMERY & E. EMERY, supra, at 48-63. The result was that during the late colonial period, the American newspaper became a highly editorial product, tendentious in its reporting, and obviously partisan in its politics. Anti-British newspapers were central in promoting the War of Independence. See, e.g., P. STOLER, supra note 86, at 26; W. BLEYER, MAIN CURRENTS IN THE HISTORY OF AMERICAN JOURNALISM 79-82 (1927).

Although some local and mercantile matter was apparently available in newspapers of the 18th and early 19th Centuries, those organs mostly expressed opinions on political issues and gave capsule summaries of foreign news gathered from other, usually English, newspaper sources. M. EMERY & E. EMERY, supra, at 65-66; M. SCHUDSON, DISCOVERING THE NEWS 14-15 (1978). The early American newspapers were one-person operations, had no need for newsgathering practices, and represented a forum for the views of their editorial contributors. Any newsgathering that was required was undertaken by free-lance writers. See W. BLEYER, supra, at 74-75.

226. These newspapers were financed by political parties or candidates. See, e.g., J. ALTSCULL, supra note 120, at 68-71; F. HUDSON, supra note 225, at 142-43, 232-34; J. LEE, HISTORY OF AMERICAN JOURNALISM 101-06, 115-17 (1923); F. MARBUT, supra note 88, at 40; M. SCHUDSON, supra note 225, at 15. This is not to say that all newspapers were political; some papers were basically commercial in nature. Id. Nor is it to say that the political party papers were invariably loyal. However, those editors who chose to criticize their political masters appear to have been subject to onerous sanctions. C. PRESS & K. VEJBURG, supra note 34, at 36-37 (describing the prosecution under the Alien and Sedition Act of Charles Holt, editor of a Federalist newspaper, for his criticisms of the Federalist President John Adams).

Moreover, party sponsorship was a significant economic benefit, if not a necessity, to newspapers at the time. For example, The Gazette of the United States, the Federalist party newspaper established by Alexander Hamilton, received all government printing contracts during the administration of George Washington. See C. PRESS & K. VEJBURG, supra note 34, at 36 (citing J.E. POLLARD, THE PRESIDENTS AND THE PRESS 8 (1947)). The existence of such an economic benefit surely tempered criticism of party policies by party newspapers. It was not until the presidency of Abraham Lincoln that the administration
political partisanship of the party press during this period has been extensively documented.\footnote{227} The organizational structure,\footnote{228} type of content, and economic base\footnote{229} of these newspapers made them overtly dependent on their political masters.

The modern concept of an independent commercial press was born in the 1830's, with the establishment of the inexpensive, mass-appeal "penny press."\footnote{227} By relying on street sales and advertising for their economic base,\footnote{228} the penny papers established the precondition for their claims of political independence.\footnote{227} Yet, while the ethic of political independence signified a major change from the preceding journalistic era, it in fact meant little more than that newspapers were independently funded and no longer functioned as official spokesmen of the political parties.\footnote{229} Despite claims of political independence, the penny papers of the 1830's and their successors later in the 19th Century tended to eschew an official news organ and that the practice of awarding such contracts to administration newspapers was eliminated by the establishment of the Government Printing Office. \textit{Id.} at 37. See also W. Rivers, \textit{supra} note 39, at 22-24; D. Cater, \textit{supra} note 54, at 76.


\footnote{228} Newspapers at the time were still small operations, with the editors also serving as reporters, managers, and printers. M. Schudson, \textit{supra} note 225, at 16.

\footnote{229} Newspapers prior to 1830 were expensive, sold primarily by subscription, and read only by the mercantile and political elite. \textit{Id.} at 15. Thus, the economic beneficence of their parties was critical to their success.

\footnote{230} The penny press of the 1830's has been said to have marked a "revolution in American journalism." \textit{Id.} at 14. See also J. Lee, \textit{supra} note 226, at 205.

\footnote{231} M. Emery \& E. Emery, \textit{supra} note 225, at 115-20; M. Schudson, \textit{supra} note 225, at 17-19.

\footnote{232} See M. Schudson, \textit{supra} note 225, at 18, 21-22. These papers neither needed the economic support of political parties nor desired the potential audience fragmentation which might result from too partisan a political stance. \textit{Id.} at 21.

\footnote{233} Some newspapers took political independence to mean that they could simply ignore political editorializing. For others, independence meant that they felt free to switch party affiliations in election endorsements. Many prominent Republican editors, for example, became "mugwumps" by switching their party endorsements in the presidential races of the late 19th Century. M. Emery \& E. Emery, \textit{supra} note 225, at 176, 181. Yet others resisted the call of independence and continued to function as party papers during and after the period of the penny press. C. Press \& K. Verburg, \textit{supra} note 34, at 37; M. Schudson, \textit{supra} note 225, at 91.
praise officials who provided them with exclusive information, evidencing the implicit symbiosis in their relations with government.\textsuperscript{234}

The 19th Century press became increasingly dependent on government, politicians, and other sources of news as a result of economic, institutional, and philosophical factors. The papers of the penny press characterized their mission as the provision of news rather than political commentary.\textsuperscript{235} They sought to reflect the activities and interests of a growing urban, middle-class society\textsuperscript{236} by focusing on factual reporting, particularly of local news and human interest stories.\textsuperscript{237} The emphasis on news diminished the papers' editorial role, enhanced competition for the delivery of timely matter, created a need for newsgathering operations,\textsuperscript{238} and necessarily led to reliance on news sources. When newspaper stories became defined as consisting of facts and quotations from those knowledgeable about them,\textsuperscript{239} sources became central to the

\textsuperscript{234} F. Marbut, supra note 88, at 42 (discussing the 1835 New York Herald).

\textsuperscript{235} M. Emery & E. Emery, supra note 225, at 119-20; M. Schudson, supra note 225, at 14, 24-25. Their modern concept of news reflected not only commercial and political matter, but also myriad other events in social life. M. Schudson, supra note 225, at 22, 26-30.

\textsuperscript{236} M. Schudson, supra note 225, at 22-23, 30-31, 49-50. Schudson has forcefully characterized these newspapers as the outgrowth of a newly developing market economy and entrepreneurial middle class in the mid-19th Century. Although they claimed to speak for "the common man," they instead represented the views and interests of an increasingly successful and urbanized middle class.

\textsuperscript{237} Id. at 14, 26-30. While the penny papers were the precursors of modern objective journalism in their focus on factual reporting, they differed from the articulated ideals of the modern objective press by seeking sensationalistic coverage at the expense of truth. Newspapers in the 19th Century thought nothing of fabricating stories, faking or staging events, and reporting impressionistically. See M. Emery & E. Emery, supra note 225, at 119; T. Goldstein, supra note 34, at 209; N. Crawford, The Ethics of Journalism 39-43 (1924); McDonald, Is Objectivity Possible?, in Ethics and the Press 80-81 (J. Merrill & D. Barney eds. 1975). Some credit the subsequent rise of fact-oriented and impartial reporting to the establishment of the cooperative Associated Press wire service, which had to cater to newspapers of widely differing viewpoints. D. Broder, supra note 34, at 135.

\textsuperscript{238} M. Emery & E. Emery, supra note 225, at 119; M. Schudson, supra note 225, at 23, 25-26. By 1860, 55% of news items were gathered by reporters. M. Emery & E. Emery, supra note 225, at 132. See generally W. Bleyer, supra note 225, at 154-251. It was with the rise of the penny press that journalists as we know them—salaried employees of a newspaper organization—began to characterize the world of newspaper publishing. M. Schudson, supra note 225, at 23-24. Although there were not many reporters on the staffs of the early penny publications, the period from 1830 to 1890 saw a phenomenal growth in the ranks of the salaried journalist. M. Emery & E. Emery, supra note 225, at 212-14. Coverage of the Civil War, for example, required hundreds of correspondents. Id. at 213. By the 1890's, daily newspapers had developed large, sophisticated, and specialized editorial staffs. Id. at 212-14.

\textsuperscript{239} See Reporters, supra note 36, at 17; Sigal, Sources Make the News, in Reading
activity of reporting.

The rhetoric of political independence and a focus on news became commonplace in the late 19th and early 20th Centuries, as the press grew and became increasingly profitable and respectable. Numerous newspapers engaged in crusading journalism which exposed municipal corruption and what the papers saw as government abuse. Yet, due to the low wages paid to reporters by newspapers, many journalists in the late 19th Century sought outside employment with news sources and necessarily compromised their independence. Moreover, many newspapers of the

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240. Some claim that increasing commercialization and standardization led to the dropping of political affiliations "in an effort to create a bland patina." Blanchard, Press Criticism and National Reform Movements: The Progressive Era and the New Deal, 5 Journalism Hist. 33, 35 (1979). The 19th Century signaled a tremendous growth in the number of newspapers and their profitability. J. Altschull, supra note 120, at 65; G. Juergens, supra note 58, at 5-6; M. Schudson, supra note 225, at 65-68. Yet the newspapers of the time were not all of one stripe, at least in style. There developed a fundamental dichotomy between the respectable and the sensationalist press in the 1880's and 1890's, with the successors of the old penny press adopting a model of fair and accurate reporting and the new "yellow" sheets focusing on entertainment and shrill, sensationalistic reporting of events. M. Emery & E. Emery, supra note 225, at 213, 227, 231-34; M. Schudson, supra note 225, at 89-90, 95, 112-14, 118-20. The respectable press, exemplified by the New York Times after 1896, appealed to the educated middle class. M. Schudson, supra note 225, at 90; M. Emery & E. Emery, supra note 225, at 274. The yellow sheets, which made up approximately one-third of metropolitan dailies by 1900, were geared to the uneducated middle and working classes. The dual character of the press of the time led to a "moral" war waged against the yellow sheets by the respectable newspapers. M. Schudson, supra note 225, at 99, 101, 112-14; M. Emery & E. Emery, supra note 225, at 238-41. The dichotomy in the late 19th Century press continued into the 20th, with the sensationalistic tabloids of "jazz journalism" pitted against the respectable press in the 1920's. M. Emery & E. Emery, supra note 225, at 323-24.


242. Blanchard, supra note 240, at 33, 34, 36 (reporting the position of George Seldes, a press critic of the 1930's, who believed that press reports prior to the stock market crash of 1929 were unduly optimistic because many Wall Street reporters were on the payrolls of business and banking interests). See also Smythe, The Reporter, 1880-1900: Working Conditions and Their Influence on the News, 7 Journalism Hist. 1, 6 (Spring 1980) (describing the economic reasons which caused reporters of the period to be gentle to certain political figures, noting that "reporters ... supplemented their incomes by dropping names into stories ... and by assisting favored politicians who might return the favor at a later date"). Smythe characterizes reporting between 1880 and 1900 as "more a way station on the highway to politics, business, literature or editorial work than a profession itself." Id. at 8.
period were the "personal fiefdoms" of their publishers and editors, who often used their news columns as platforms for their own political views, ambitions, and connections. Indeed, consistent with their role as owners of large and profitable business institutions, publishers of the late 19th and early 20th Centuries were by and large conservative in their political endorsements and their coverage of non-mainstream politics.

By the 20th Century, changes in government, institutional characteristics of the press, journalistic conventions, and reportorial ambitions served to further reinforce the news media's dependence on government and news sources. More specifically, these various factors overwhelmingly led the press to report the government's official line on events until the end of the Cold War.

The 20th Century saw a tremendous growth in the size and complexity of the federal government. This growth was accompanied by an explosion in government public relations staffs; the adoption of a classification system and the growth of the isolated national security establishment; the centralization of access to government information; the systematization of govern-


244. The New York Times, for example, has been characterized as the worst of many newspapers which unfairly covered the Sacco and Vanzetti case in 1920. M. Emery & E. Emery, supra note 225, at 303. While papers of the period denounced and exposed corruption, they did not otherwise question the status quo. Id. at 308. The 1930's saw supporters of the New Deal criticizing the press (and its "press lord" publishers) for their opposition to liberal reforms. Id. at 351. Only one-third of the nation's daily newspapers supported Roosevelt in the 1932 and 1936 elections. Id. at 353. Indeed, a small majority of daily newspapers which made endorsements in presidential races has historically supported Republican candidates. Id. at 572. See also D. Broder, supra note 34, at 324.

245. Impact, supra note 4, at 1-2.

246. See D. Broder, supra note 34, at 146; J. Deakin, supra note 36, at 52-53; Press Connection, supra note 36, at 1-3; W. Rivers, supra note 39, at 34-35 (reporting the phenomenal increase in the number of federal press agents beginning with the Eisenhower administration); E.E. Cornwell, Presidential Leadership of Public Opinion 208-52 (1965); D. Cater, supra note 54, at 5. Some estimated that the government had in its employ 19,000 publicity agents by 1977. J. Deakin, supra note 36, at 52-53.


248. Government tightly controls access to certain key types of information, such as
ment "news management"; and the growth of the "imperial presidency." The government's control of access to information and its centralized, aggressive publicity efforts made it both necessary and convenient for the press to rely on official sources in its reporting of news, particularly with respect to the executive branch.

Along with changes in government, conventions of modern newsgathering and dissemination undermined the press' ability to remain consistently independent and critical of government. First, the press' reliance on official government information and sources was institutionalized by the full-fledged adoption of a credo of "objective" reporting and a new image of journalistic sobriety and respectability in the 20th Century. The articulated

military, intelligence, and diplomatic matters. D. Wise, supra note 39, at 27-29. Analogously, access to White House sources is controlled and information favorable to the president is centralized in the White House press office, thereby making it difficult for journalists on the White House beat to obtain any but official information. Practicing Responsible Journalism, supra note 98, at 132; Reporters, supra note 36, at 60; T. Wicker, supra note 34, at 77.

249. The term was apparently coined by James Reston in 1955 during congressional testimony on government information. M. Schudson, supra note 225, at 170. See also Press Connection, supra note 36, at 27-28; J. Altschull, supra note 120, at 70-71 (defining "news management" as a form of "social control" involving attempt to tailor a beneficial image of reality); W. Rivers, supra note 39, at 35. As Michael Schudson has put it, "management of information has been an organized, funded, and staffed function of government for just sixty years." M. Schudson, supra note 225, at 163. See D. Cater, supra note 54, at 21. Of all the parts of government, the White House has the best opportunity for managing the news and controlling the flow of information. Impact, supra note 4, at 132-33. See also Winfield, Franklin D. Roosevelt's Efforts to Influence the News During His First Term Press Conferences, 11 Presidential Stud. Q. 189 (1981).


251. See G. Juergens, supra note 58, at 6; M. Schudson, supra note 225, at 3-11, 121-22, 151-59 (describing the norm of objectivity as the post-World War I reaction to skepticism and loss of faith in the pure character of facts); F. Marbut, supra note 88, at 236; McDonald, supra note 237, at 81. The trend toward objectivity can be observed as early as 1865, but it was not until the 1930's that 80% of the news stories could be characterized as objective. M. Emery & E. Emery, supra note 225, at 217. Some commentators suggest an economic motivation behind the move to reportorial objectivity, in that objective reporting would appeal to a wider audience of readers with differing political views. See, e.g., E. Lambeth, supra note 34, at 72; supra note 237.

252. While reporters in the 1880's and 1890's received popular acclaim, they viewed themselves, and were viewed, as raffish, colorful, cynical, and individualistic; they were not members of the social elite. See P. Clarke & S. Evans, supra note 221, at 2; G. Juergens, supra note 58, at 9-10; E. Lambeth, supra note 34, at 72-73 (discussing objectivity as promoting respectability); M. Schudson, supra note 225, at 68-70, 86-7, 112-14, 153; Greenfield, Ethics: For Wimps Only?, in Journalism Ethics: Why Change? 49 (D. Ramsey, D.
ideal of objectivity led to a journalistic self-perception of independence. Yet, ironically, the press’ embrace of objective journalism and its rejection of an interpretive or explanatory approach to news writing led reporters to act as mere mouthpieces of government. This was due to the fact that objective journalism

Shaps & E. Bassett eds. 1986) ("No journalist in training can ever forget that image out of 'The Front Page,' where misrepresentation and lying and generally having a high old time, was sort of looked on as a kind of attractive self-image. It's the rougish image of the outlaw."); Schmuhl, Introduction: The Road to Responsibility, in The Responsibilities of Journalism 1-3 (R. Schmul ed. 1984); Weaver, The New Journalism and the Old, in Ethics and the Press 97-98 (1975) (characterizing journalism as a low prestige profession until the 1960's).

In contrast to their predecessors, journalists today are generally highly-educated, urbane, very well paid, and often famous. See D. Broder, supra note 34, at 142-43; H. Goodwin, supra note 34, at 285; Media Elite, supra note 96, at 21-28; Reporters, supra note 36, at 82-87. They are no longer part of the "pariah caste" with which Max Weber identified them in 1918. See Reporters, supra note 36, at 116; Weber, Politics as a Vocation, in Essays in Sociology, supra note 247, at 96.

253. See, e.g., D. Hallin, supra note 243, at 7; Ethical Connection, supra note 217, at 12; see also M. Schudson, supra note 225, at 134-59 (suggesting that the belief in objectivity and its attendant independence developed, ironically, because of the press' dawning realization—in light of the growth of public relations and government propaganda during and after World War I—that facts could be manufactured and that values were arbitrary). The increasing importance of reporters, a consequence of objective journalism, changed the character of some of the earlier newspapers which had been little more than extensions of their high-profile editors and publishers. G. Jeurgens, supra note 58, at 9.

254. To the extent that objectivity requires journalists to simply "mirror reality"—and particularly the reality as staged by government actors—it often stands in conflict with the journalistic goal of holding government accountable. R. Entman, supra note 221, at 40; T. Wicker, supra note 34, at 3, 5-7, 36-37 ("[o]bjective journalism preserved . . . the official record" and almost always favored establishment positions). Eric Sevareid charged, for example, that most journalists during the McCarthy era simply and "objectively" reported the Senator's charges, thus legitimating them, because their reportorial philosophy of objectivity did not permit any contextualization, interpretation, or assessment. See D. Cater, supra note 54, at 73, 106-07 (quoting Sevareid); see also R. Entman, supra note 221, at 37-38 ("[o]bjectivity . . . facilitates the manipulation of news slant"); D. Broder, supra note 34, at 137-39; Ethical Connection, supra note 217, at 12; E. Lambeth, supra note 34, at 73; M. Schudson, supra note 225, at 167-68; McDonald, supra note 237, at 81; Weaver, supra note 252, at 96.

Critics of "objective" journalism have by now established a consensus in the journalistic community that reporters "are not simply neutral conduits of information and facts" and that the work of journalism "is an unavoidably active, selective, and interpretive process." Ethical Connection, supra note 217, at 35. See generally Reading the News, infra notes 307-12 and accompanying text. A recognition of the perils of "objective" reporting led to the development of what some have called "interpretive reporting" in the mid-1950's. D. Broder, supra note 34, at 135-39. Interpretive reporting required journalists not only to recount simple facts, but also to explain their meaning or place them in context. Id. at 139. Despite the growth of such interpretive approaches to journalism, however, the Cold War press was still relatively uncritical of government. See infra notes 264-65 and accompanying text.
ism required journalists to relate not their own experiences or understanding of events, but the perceptions of authoritative participants. News stories thus effectively reflected reality through the eyes of powerful news sources. Due at least in part to the strictures of objective style, most coverage of government until the 1970's was drawn from official government press releases, official proceedings, and news conferences.

Second, technological and competitive characteristics of mass communication enabled government officials and other sources of news to package events in a manner most suited to the media.

255. Sigal, supra note 239, at 12, 15.
256. See, e.g., Introduction, in READING THE NEWS, supra note 2, at 8.
257. See, e.g., E. Abel, supra note 1, at 55; N. Crawford, supra note 237, at 77-78; H. Gans; supra note 1, at 280; D. Hallin, supra note 243, at 71-74; L. Sigal, supra note 37, at 104-11 (on journalistic reliance on routine channels of government information); Weaver, supra note 252, at 90 (characterizing American journalism as traditionally "close to, dependent upon, and cooperative with, official sources").

Capitol Hill, where the relationship between reporters and legislators has been described as "cliquish," "cozy," "comfortable," and elitist, is a good example of "clubbiness" and intimacy between the press and government. D. Broder, supra note 34, at 214-19. According to Broder, this clubbiness, with its attendant promotion of the status quo, affected the coverage of Congress and minimized reporting on issues such as institutional reform. Id. at 216.

In even more intimate arrangements with government, several hundred journalists worked with the Central Intelligence Agency from World War II until 1976, when George Bush, then director of the CIA, announced that the agency would no longer enter into contractual arrangements with United States journalists. C. Press & K. Verburg, supra note 34, at 284-85. See also J. Hulteng, supra note 6, at 30-31; H. Bray, supra note 120, at 140-41; H. Goodwin, supra note 34, at 248.

Voluntary censorship of news is an old tradition in American newspapers. See N. Crawford, supra note 237, at 95-97. The post-World War II period, for example, contains some striking examples of newspaper publishers voluntarily agreeing to suppress news for national security reasons. The New York Times elected to suppress the details of a story on preparations for President Kennedy's CIA-backed Bay of Pigs invasion in a move later characterized as "a colossal mistake" by Kennedy himself. D. Broder, supra note 34, at 159; J. Deakin, supra note 36, at 174-79; T. Wicker, supra note 34, at 236-38; D. Wise, supra note 39, at 176; Weaver, supra note 252, at 96-97. The New York Times also withheld publication of the existence of Soviet missile bases in Cuba in 1962, pursuant to a request by Kennedy. T. Wicker, supra note 34, at 235. The New York Times, of course, displayed a more skeptical attitude toward government claims of national security when it published the Pentagon Papers in 1971. See New York Times Co. v. United States, 403 U.S. 713 (1971). Yet, despite that action, the paper nevertheless subsequently held up Seymour Hersh's exposé of the CIA's cover-up of the expensive, useless, and embarrassing Glomar Explorer operation to salvage an old Soviet submarine. T. Wicker, supra note 34, at 213-23; H. Bray, supra note 120, at 147-48.

258. Social scientists and media watchers thus suggest that conventions of modern newsgathering and dissemination themselves undermine the ability of the press to be truly independent. See E. Lambeth, supra note 34, at 66-68; O. Gandy. BEYOND AGENDA SETTING: INFORMATION SUBSIDIES AND PUBLIC POLICY 13 (1982); H. Gans, supra note 1, at 281-
The competitive pressures to obtain scoops, the “dailiness” and event-orientation of journalism, the stringent time deadlines, and the convention of oral research made prepackaged news and authoritative sources convenient and efficient for the press.\(^{260}\)

Third, competitive and careerist motivations of reporters reinforced their reliance on powerful sources. News sources are the gatekeepers for the very commodity on which reporters rely for their career advancement. And they are gatekeepers who can choose among fiercely competitive journalists in the dissemination of their information.\(^{260}\) Since journalistic careers can at the very least be stalled by a reduction in information flow, it is very risky for reporters to antagonize important government officials.\(^{261}\) Moreover, much political reporting in the late 20th Cen-

82 (explaining that powerful elites in society are the most common sources of news because they are the most efficient sources of news); L. Sigal, supra note 37, at 190; Sigal, supra note 239, at 15-25 (on the reliance upon authoritative sources); see also R. Entman, supra note 221, at 19-21, 115; Press Connection, supra note 36, at 48-51; J. McGinniss, The Selling of the President 1968 (1969); Brown, Bybee, supra note 36, at 46. Since broadcast news tends to be short, simplified, personalized, acontextual, and event-oriented, news sources are able to package their information in ways most usable by the broadcast news form. See R. Entman, supra note 221, at 49-53, 59-60 (explaining news selections on the basis of such institutional biases and the ways in which officials can manipulate them); E. Lambeth, supra note 34, at 65-68 (describing organizational constraints on reporting). When politicians time their actions in order to coincide with the needs of the press and plan events for the purpose of having them reproduced, we have the creation of what Daniel Boorstin has called “pseudo-events.” See D. Boorstin, supra note 2, at 21, 30; M. Schudson, supra note 225, at 170-71; see also J. Hulteng, supra note 6, at 88-89; C. Press & K. VerBurg, supra note 34, at 113-16; W. Rivers, supra note 39, at 18-19; T. Wicker, supra note 34, at 168-80 (on competition, dailiness, dilettantism, and event-orientation as limitations on press power); McDonald, supra note 237, at 78.

259. See J. Hulteng, supra note 6, at 86-87 (on the press' tendency to rely on official sources); Reporters, supra note 36, at 14-23; H. Gans, supra note 1, at 116-17, 121-28, 280; Sigal, supra note 239, at 22; supra note 258.

260. C. Press & K. VerBurg, supra note 34, at 66-67 ("They can pick and choose whom to favor, playing one journalist off against others."); T. Wicker, supra note 34, at 129.

An ironic complement to the competitiveness of journalists is that they often exhibit what press critic Timothy Crouse has termed “pack journalism,” the tendency of reporters assigned to the same story to focus on the same issues and reach identical interpretive conclusions. See T. Crouse, supra note 96, at 7 (coining the term to characterize the behavior of reporters covering the 1972 presidential candidates); see also W. Rivers, supra note 39, at 222 (discussing Ben Bagdikian's use of the herd metaphor for political reporting); Reporters, supra note 36, at 130-31. Pack journalism can be as useful as journalistic competitiveness for public officials and candidates who wish to manage the news. E. Lambeth, supra note 34, at 108; H. Goodwin, supra note 34, at 287-91.

261. C. Press & K. VerBurg, supra note 34, at 66-67; P. Stoler, supra note 86, at 127 (characterizing Washington reporters as “captives of their sources” because of their need for access); B. Swain, supra note 36, at 27; T. Wicker, supra note 34, at 129, 134-35; D. Wise, supra note 39, at 242, 310. Press and VerBurg suggest that the timidity of the estab-
tury is organized on the "beat" basis, with reporters having particular sectors of responsibility over relatively long periods of time. Journalists who cover the power elite, particularly on such a long-term basis, run the risk of being co-opted by their sources and adopting their views.

Finally, the Cold War press' uncritical reliance on government was based on a certain naivete. This is not to say that the press was entirely unaware of governmental attempts to control the news flow. Rather, it indicates a naive belief that the government, although it might sometimes suppress or "manage" the news available to the public at large, would nevertheless stop short of lying to the press itself.

A more explicitly competitive, critical, and adversarial stance toward government developed in the late 1960's and early
1970's\textsuperscript{266} when the exposure of systematic government disinformation campaigns and the scandal of Watergate eroded confidence in government.\textsuperscript{267} The norm of objectivity in reporting was criti-

\textsuperscript{266} E. Abel, \textit{supra} note 1, at 29; \textit{Impact}, \textit{supra} note 4, at 41-46; H. Bray, \textit{supra} note 120, at 113-14. Press critics of the early 1970's characterized the growth of an "adversary culture" hostile to the government. D. Broder, \textit{supra} note 34, at 140-41. \textit{See also} M. Schudson, \textit{supra} note 225, at 163. This adversarialism affected the establishment press and gave rise to an alternative, underground press as well. D. Broder, \textit{supra} note 34, at 14-41; M. Emery & E. Emery, \textit{supra} note 225, at 481-83.

Attempts to ferret out wrongdoing—which necessarily pitted journalists against those in government who did not wish their activities exposed—naturally existed prior to the late 20th Century. Benjamin Franklin's brother James printed "without authority" and engaged in "crusade" journalism. W. Rivers, \textit{supra} note 39, at 119. So did many of the yellow sheets of the 1890's. M. Emery & E. Emery, \textit{supra} note 225, at 250-60. The "muckrakers" of the first decade of the 20th Century—so named by Theodore Roosevelt—systematically used magazines to expose corruption. W. Rivers, \textit{supra} note 39, at 119-20; M. Emery & E. Emery, \textit{supra} note 225, at 260-64, 486-87; D. Broder, \textit{supra} note 34, at 139. Newspapers during the New Deal exposed abuses in public welfare programs and their successors during World War II turned their criticism to wartime profiteers and their Washington allies. Id. at 139. All of these crusading reporters were the precursors of today's investigative journalists. M. Emery & E. Emery, \textit{supra} note 225, at 486-87.

\textsuperscript{267} An early example of the exposure of such government disinformation concerned the now-famous U-2 incident in 1960. There, the government's claim that it was not using the secret U-2 plane to spy on the Soviet Union's strategic missiles was publicly proved false when the Soviets captured both a downed U-2 and its pilot. M. Emery & E. Emery, \textit{supra} note 225, at 422; J. Deakin, \textit{supra} note 36, at 155-56; H. Goodwin, \textit{supra} note 34, at 248; D. Wise, \textit{supra} note 39, at 33-35. Unlike the U-2 affair, in which the Eisenhower administration was quickly forced to admit that it had lied, the CIA's support of coups in Guatemala and Indonesia in the 1950's was covered up until much later. \textit{See id.} at 36; J. Deakin, \textit{supra} note 36, at 162.

James Deakin has called the Eisenhower years the "Age of Innocence" for the media, a period in which even the revelation of the U-2 incident would be interpreted as simply a "hasty improvisation," rather than an "element[] in a grand mosaic of lies." \textit{Id.} The Age of Innocence drew to a close after Eisenhower and Kennedy, when governmental lies to the press came to be perceived as systematic. \textit{See generally} J. Orman, \textit{Presidential Secrecy and Deception: Beyond the Power to Persuade} (1980) (describing presidential secrecy and deception from the Kennedy through Ford administrations). There are a number of striking examples of government disinformation and non-disclosure arising out of the Vietnam War, for example. Unbeknownst to the public, the United States, chiefly through the CIA, supported the coup against South Vietnamese President Diem in 1963. D. Wise, \textit{supra} note 39, at 40-41; S. Hersh, \textit{supra} note 82, at 128, 424-25 (describing "knowledge and acquiescence of the American Embassy and White House" in the coup). Reporters and the public only discovered in late 1967 and early 1968 that Lyndon Johnson did not disclose significant evidence, of which he was aware, that reports of North Vietnamese torpedo attacks on American ships in the Gulf of Tonkin in 1964 might well have been erroneous. Instead, he used the alleged attacks to justify air strikes against North Vietnam and to trigger the carte blanche of the Tonkin Gulf Resolution. \textit{See D. Hallin, supra note 243, at 15-22; P. Stoler, supra note 86, at 58-60; T. Wicker, supra note 34, at 152; D. Wise, supra note 39, at 43-46, 345. Until the information was leaked to the New York Times, Richard Nixon and Henry Kissinger used the press to falsely deny America's "se-
cized as a simple legitimation of power, privilege, and the status quo. Some claim that, in addition to external events, the rise in status and prestige of the media also empowered the press to embrace an adversarial role. This increased level of distrust led to a rise in investigative reporting and an asserted reduction in

cret war" in Cambodia. M. Emery & E. Emery, supra note 225, at 509, 515-16; S. Hersh, supra note 82, at 54, 191; A. Schlesinger, supra note 47, at 356-57; T. Wicker, supra note 34, at 200-01. Many have claimed that the size and effectiveness of enemy forces were underreported by military officials during the war in order to present a picture of the conflict more favorable to the American military. See, e.g., T. Wicker, supra note 34, at 161-62; D. Minor, The Information War 42-55, 70-74 (1970) (generally discussing statistical manipulation during the Vietnam War).

Government non-disclosures, cover-ups, and disinformation campaigns did not stop with the Vietnam War. Watergate—as well as the more recent Iran/Contra affair—represent subsequent examples of illegal activities and cover-ups reaching to the highest levels in government. And with respect to disinformation, it was later disclosed that the Reagan administration had used the press in 1986 to publicize false stories of an imminent American attack on Libya as part of a disinformation campaign to keep Muammar Ghadafi guessing as to American intentions. See D. Broder, supra note 34, at 191-92.

The discovery of such governmental lies and omissions naturally led to cynicism on the part of reporters. The Johnson administration was popularly characterized as having a "credibility gap." D. Wise, supra note 39, at 22-23. Toward the end of the Johnson presidency, for example, the following joke made the journalistic rounds:

Do you know how to tell when Lyndon Johnson is not telling the truth? Well, when he goes like this—finger beside his nose—he's telling the truth. When he goes like this—pulling his ear—he's telling the truth. And when he goes like this—stroking his chin—he's telling the truth. But when he starts moving his lips, he's not telling the truth.

W. Rivers, supra note 39, at 40-41. See also id. at 229-31 (quoting reporters on their heightened skepticism subsequent to Vietnam and Watergate); P. Stoler, supra note 86, at 65; T. Wicker, supra note 34, at 15-17, 60-62; D. Wise, supra note 39, at 175. Some of these cynical and skeptical attitudes on the part of the press were due in part to a realization by journalists that "the press had tended to cooperate in its own deception." T. Wicker, supra note 34, at 61.

This is not to say that American history prior to the Eisenhower administration was devoid of government lies or misleading statements. Commentators suggest two differences between the past and the present in this connection: (1) that the amount of government misinformation grew significantly after World War II, making deception systematic and regular; and (2) that large numbers of people became aware of such government deception only since the 1960's. See D. Wise, supra note 39, at 24-30, 342-43 (quoting Max Frankel).

268. J. Altschull, supra note 120, at 126-29; M. Schudson, supra note 225, at 160-63.

269. See Media Elite, supra note 96, at 27-28. Nevertheless, as noted by the authors of The Media Elite, it is difficult to draw a single conclusion from the enhanced status of the media. Id. While one could surmise that journalists' elite status has diminished the need for deference to government, one could also reach the opposite conclusion, based on the observations that they now have more to lose and are less likely to identify with the views of non-elites.

270. See M. Emery & E. Emery, supra note 225, at 486; M. Schudson, supra note 225, at 189-91.
reliance on government’s official releases. Still, the government continued to use the press to spread false and misleading information. The systemic and institutional factors which led the

271. Despite such a reduction in uncritical reliance on official press releases and sources, mainstream and official sources are still used by news organizations for practical considerations such as cost, ease, and convenience. R. Entman, supra note 221, at 18-19; C. Press & K. Verburg, supra note 34, at 77; D. Hallin, supra note 243, at 71-75; T. Wicker, supra note 34, at 17, 72, 174-80; Brown, Bybee, supra note 36, at 51 (finding that use of routine channels was high in national newspaper stories on government (63.3%), politics (57.3%), and the economy (73.9%)). Reporters in the “outer ring” of news organizations in Washington have limited access to newsmakers and have to rely on official information. Reporters, supra note 36, at 27-28. Similarly, even within the inner ring, White House correspondents (more than others) have to rely on government public information officials because the White House is a controlled environment with limited access to sources and scheduled events. Id. at 60. In addition, newspapers in small cities and towns are less likely to be independent or investigative. T. Wicker, supra note 34, at 22. Many regional and local newspapers reprint or rely substantially on the press releases issued by members of Congress for their districts. Id. at 221-22. See also D. Broder, supra note 34, at 234-36; Ethical Connection, supra note 217, at 17-18 (characterizing relationships between legislators and state and local press as “very cozy”); L. Cannon, Reporting: An Inside View (1977); Cook, Show Horses in House Elections, in Campaigns in the News 175-76 (J.P. Vermeer ed. 1987). But see Brown, Bybee, supra note 36, at 51 (stating that local newspapers were less dependent on routine channels in areas of politics and health than were national outlets).

272. Although, as indicated above, many disinformation campaigns and informational lapses by government were subsequently uncovered, it took the press a long time to recognize that it had been misled. See R. Entman, supra note 221, at 4 (challenging press coverage of the Johnson, Nixon, and Reagan administrations as “too little, too obscure, too late”); D. Broder, supra note 34, at 167 (noting that most reporters ignored Watergate at the beginning and that White House press corps “served as a conduit for . . . a systematic set of official lies about the case”); M. Emery & E. Emery, supra note 225, at 511; M. Hertsgaard, supra note 3, at 302-16 (on press passivity regarding the Iran/Contra affair); E. Lambeth, supra note 34, at 108 (blaming pack journalism for delays in recognizing the meanings of the Gulf of Tonkin resolution and Watergate); T. Wicker, supra note 34, at 60-61 (blaming timidity of most of the press at the beginning of Watergate in part on the press’ belief in the power of the presidential mystique).

Critics claim, for example, that journalists believed and reported false government reports about the progress of the Vietnam War for too long. See R. Entman, supra note 221, at 5; D. Hallin, supra note 243. It was only when Harrison Salisbury reported from Hanoi the bombing of civilian installations in North Vietnam in 1966 that the press in general started to be more critical about official reports of the military conflict. M. Emery & E. Emery, supra note 225, at 476; H. Goodwin, supra note 34, at 249. Similarly, the press accepted at face value Richard Nixon and Henry Kissinger’s early, false assurances that the United States was not bombing Laos or Cambodia. See S. Hersh, supra note 82, at 54; D. Wise, supra note 39, at 344 (on the secret war in Laos). Journalists, blindly following official handouts, failed to understand the unrest in Iran before the overthrow of the Shah. P. Stoler, supra note 86, at 89-91. The press’ failure to quickly grasp the significance of events can also be seen to some extent in the Watergate affair, during which the media, with the exception of the Washington Post, only provided sporadic reports in the 1972 election year. See R. Entman, supra note 221, at 5-6; P. Stoler, supra note 86, at 83-84; K. Lang & G. Lang, The Battle for Public Opinion: The President, the Press, and the
press in the past to rely on government and official information had not fundamentally changed.\textsuperscript{273} Reporters still had overwhelming incentives to rely upon authoritative sources in order to make and explain news.\textsuperscript{274} The adversarial press did act as a check on government in many instances, but it also led to the development of a more complex—and often more problematic—type of dependence on confidential sources.\textsuperscript{275} The particular problems associated with anonymity became even more central when the universe of sources was expanded to include voices critical of official policy.

All this is not to say that the press, notwithstanding its protestations, is simply an unwitting slave to masterful politicians and government officials. The simple fact is that sources need the press. Politicians and government bureaucrats, not to mention business interests, seek favorable, predictable, and frequent press coverage.\textsuperscript{276} News coverage reaches a large percentage of the pub-

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Polls During Watergate (1983). Similarly, despite sporadic stories before November, 1986, the media as a whole accepted until then the Reagan administration's denials of Colonel Oliver North's activities on behalf of the Nicaraguan contras. See R. Entman, supra note 221, at 6-7, 68-74 and sources cited therein. See generally M. Hertsgaard, supra note 3.

273. See supra notes 245-63 and accompanying text. Indeed, some contend that the critical impulse and the adversarial character of the press only become evident when governmental policies are already sharply contested and when government itself is deeply split. See, e.g., M. Hertsgaard, supra note 3, at 93-96; D. Hallin, supra note 243, at 9-11.

274. See, e.g., R. Entman, supra note 221, at 3, 7-8, 19-20; Ethical Connection, supra note 217, at 13; D. Hallin, supra note 243, at 71-75; E. Lambeth, supra note 34, at 5; Epstein, supra note 76, at 60; Weaver, supra note 252, at 91-93; Schudson, supra note 2, at 80-81.

Admittedly, the construction of news is an interactive process; journalists are not merely passive observers and reporters of events. See J. Deakin, supra note 36, at 316-17; Reading the News, supra note 2, at 3-4. The press often does have an effect on the policymaking process, at least to the extent that officials respond to the media. See Practicing Responsible Journalism, supra note 98, at 133-38 (describing interaction between the press and the Carter administration on Love Canal relocation). Yet, this cannot deny the centrality of the primary actors in news events. J. Deakin, supra note 36, at 317-18; Reporters, supra note 36, at 134; B. Swain, supra note 36, at 3 (quoting press commentator Will Irwin on the hearsay nature of journalism); Sigal, supra note 239, at 12, 15. News events are initially determined by governments or "natural forces," not reporters, but the form of events increasingly adjusts to the needs of the media. These accommodations necessarily affect the nature of the events. Reporters, supra note 36, at 134. See infra notes 307-11 and accompanying text.

275. See infra Section III. B., discussing the dangers of confidentiality.

276. Press attention is critical for politicians running for office who need to generate public recognition and support. Impact, supra note 4, at 11; J. Deakin, supra note 36, at 81; Cook, supra note 271, at 161-62. Elected officials need publicity in order to promote their programs and future candidacies. Impact, supra note 4, at 130, 133-35. Appointed
lic, appears more disinterested than paid advertisements, and is thought to influence public opinion.277 At the same time, there are many possible sources of information on many matters, and there is more news than can possibly be covered by any newspaper or broadcaster in any given day. Sources' need for the press thus gives reporters significant leverage and often permits them to take a critical stance toward politicians and government officials.278 Yet, the direct and indirect power of the political establishment often weights the symbiotic relationship against the press.279

Therefore, the current story of the press and the institutions on

officials, bureaucrats, and members of regulatory agencies also need favorable publicity, if only to perform their functions and influence the allocation of governmental resources to their organizations. See id. at 11; Ethical Connection, supra note 217, at 13 (on Congress' need for the media). Indeed, an empirical study indicates that over 75% of senior government officials actively engage in press relations and very few at the highest levels of government are not involved. Impact, supra note 4, at 83. Both politicians and bureaucrats employ professionals to garner favorable media attention. The White House employs the White House press secretary as well as other public relations specialists to orchestrate the dissemination of news. J. Deakin, supra note 36, at 55-59, 206-14. Members of Congress have staffs to handle publicity. D. Broder, supra note 34, at 234. Administrative agencies have public information officers. See generally Impact, supra note 4. Political campaigns increasingly rely on media consultants. See supra notes 2 and 3. Organizations in the private sector also have representatives and lobbyists in Washington. Skilled staffs are employed by corporations, trade associations, civic groups, and educational institutions to generate favorable publicity with press releases. J. Hulteng, supra note 6, at 134. All these professionals—many of them former working journalists—put the best possible "spin" on information they provide journalists. See D. Broder, supra note 34, at 146.

Ironically, in view of the size and complexity of modern government, officials also need the media in order to obtain information about government itself. See Impact, supra note 4, at 70, 84; W. Rivers, supra note 39, at 11-12, 18-19.

277. C. Press & K. VerBurg, supra note 34, at 5-8. And since the development of the mass media, elites are more attentive to general public opinion than to party standing. R. Entman, supra note 221, at 127.

278. J. Deakin, supra note 36, at 85-93.

279. In terms of press "victories," a rather facetious, although probably correct, account suggests that "it takes combined bad luck, inattention, blunders, political treachery, and perhaps even an inclination to commit political hara-kiri for the relationship to turn against the politician." C. Press & K. VerBurg, supra note 34, at 67. See also N. Isaacs, supra note 3, at 54 (characterizing the relationship between reporters and public officials as "purely the angling of baited hooks, with the fingers of politicians firmly on the rods and lines"); W. Rivers, supra note 39, at 13. Particularly in connection with the presidency, the White House press machine is thought by reporters to have "won" the way the president is covered most of the time since the Eisenhower presidency, with the exception of the Carter Administration's handling of the hostage affair. D. Broder, supra note 34, at 194-95. This is in no small part due to the fact that staffing, financial, and deadline limitations on many press organizations give the upper hand to the very large and sophisticated government public relations machine. See, e.g., T. Wicker, supra note 34, at 72.
which it reports is multi-faceted. The press is both critical of government and interdependent with it. Journalists have a profound effect on agenda-setting and policymaking, and news sources have a profound effect on the content of reported news. Shril claims of complete independence and adversarialism, although personally and institutionally satisfying to journalist, do not accurately depict the complex reality of the press' role. Collectively, it is a combination of adversarialism and cooperation; individually, it differs depending on the relationship of particular reporters and sources. A realistic image of the press requires the recognition of the simultaneously powerless and powerful character of modern media.

280. See IMPACT, supra note 4, at 32-36, 79-81, 84-86, 112-18 (96% of senior federal policymakers polled found that press had impact on federal policy); Practicing Responsible Journalism, supra note 98, at 139-40; supra note 221.

281. See, e.g., E. Lambeth, supra note 34, at 97-98 (noting journalistic popularity of self-description as adversarial).

One commentator has interestingly explained the press' adversarial attitude and claimed hostility toward government by the psychoanalytic notion of reaction formation, according to which the subject vehemently denies precisely the thing which most influences his conduct. See Pool, Newsmen and Statesmen: Adversaries or Cronies?, in ASPEN NOTEBOOK ON GOVERNMENT AND THE MEDIA 15 (W. Rivers & M. Nyhain eds. 1973); IMPACT, supra note 4, at 17. Yet another commentator has characterized the myth of a truly autonomous press more positively—as a "functional" myth which may help newspeople resist the temptation of "cooptation" by sources. D. Weaver & G. Wilhoit, supra note 61, at 95. Still another approach is to view adversarialism as a way for reporters to distance themselves from policymaking, in order not to bear any responsibility for the impact of their reporting on government. IMPACT, supra note 4, at 19; Practicing Responsible Journalism, supra note 98, at 138.

282. IMPACT, supra note 4, at 18.

283. O'Neill, supra note 221, at 32.

The national media are now no longer just observers and messengers but lead actors in government, creating, shaping, and often distorting the informational base of decision-making, magnifying as well as reporting the conflicts of power, advocating, nagging, and harassing as well as explaining. They are the targets of manipulation by every party to every issue, the objects of guile and deception, the victims of conflicting pressures, witting and unwitting participants in the management of crisis and in the formation of policy, both the collaborators and adversaries of government.

See also R. Entman, supra note 221, at 7-9 (noting "the paradoxical coexistence of journalistic vulnerability... with the growing power of the press"); C. Press & K. Verburg, supra note 34, at 21 (describing the relationship of press and politicians as one of "guarded cooperation"); E. Lambeth, supra note 34, at 5 (characterizing consensus view that strict media independence is a "myth"); J. Altschull, supra note 120, at 253; J. Deakin, supra note 36, at 53 ("Journalists are inescapably manipulated by the government in the ordinary process of gathering and reporting news."); D. Weaver & G. Wilhoit, supra note 61, at 95 (image of completely-independent journalists is a "romantic myth"); Practicing Responsible Journalism, supra note 98, at 140 ("The engagement [between the
B. The Types of Dangers Posed by Confidential Sources

Confidential communications are the medium of exchange between reporters and government officials because there are significant incentives for reporters to use confidential communications widely. One obvious incentive is the concern that at least some important stories would be less likely to emerge without promises of anonymity to the source.

But there are additional incentives which lead to the excessive use of confidentiality. First, given the tradition of confidential communications even in connection with trivial stories, it would be difficult for a reporter to succeed in the competitive climate of political reporting without using confidentiality as an inducement.\footnote{284} A scoop from a source on an important story may well mean a Pulitzer prize for the reporter and boosted circulation for her newspaper.\footnote{288} A carefully cultivated long-term relationship with an important source can provide a reporter entree into “the big leagues,” both in government and in journalism.\footnote{286} Second, re-

\footnote{284. See supra note 260. There are, after all, many other reporters in Washington, and a source could easily find one who would be willing to promise anonymity in return for information. The reporter less willing to adhere to the traditional norms of confidential discourse would then be at a significant competitive disadvantage. The Washington Post quickly learned this lesson when it declined to send reporters to background briefings, only to find that other news organizations failed to support its boycott. See infra note 296.}

\footnote{285. See D. Wise, supra note 39, at 310. Modern press organs are businesses, subject to the same competitive pressures as the ordinary enterprise in American society. See generally B. Bagdikian, THE MEDIA MONOPOLY (1987). Their success as businesses hinges on their audience reach. Reporting a “hot” story, getting an “exclusive,” or “scooping” the competition by being the first to report a story are all deemed ways of increasing audience reach and advancing competitive position. See, e.g., E. Lambeth, supra note 34, at 67. Exclusive, important stories benefit both the careers of individual reporters and the standing of their press employers. C. Press & K. Verburg, supra note 34, at 15-16.}

\footnote{286. See, e.g., T. Wicker, supra note 34, at 132. It can do so in a variety of ways. First, the reporter can rise in his own institution or create opportunities to advance to more prestigious institutions if he is well connected with news sources who provide important information. Second, access to important newsmakers puts the reporter into the elite of those who know and shape policy. Reporters seek proximity to “powerful and colorful people.” Reporters, supra note 36, at 52. Third, and in view of the revolving door between journalism and government, connections in the power elite may well advance the
porters, like others, are not immune to the romance and allure of having secrets. Many post-Watergate reporters seek to mold themselves in the heroic and glamorous image of intrepid investigative journalists who break earthshaking stories on the basis of tips by anonymous sources. Third, to the extent that reporters are allowed to withhold source identities, even from their editors, reporters gain autonomy within their organizations. Finally, reporters recognize that much more work against tight deadlines would be required in order to gather information more easily and conveniently obtained from a source in exchange for confidentiality.

Despite the many incentives to rely on confidential sources, the journalistic community recognizes that anonymity presents an opportunity for highly invidious consequences. However unrealistically, the industry-wide code of ethics for the newspaper indu-

journalist's mobility into high-echelon public positions. See, e.g., D. Broder, supra note 34, at 146-47, 359-64; W. Rivers, supra note 39, at 98 (stating that many government “flaks” are recruited from the Washington press corps). Moreover, by participating in small background sessions—with their attribution limitations—the included reporters can feel more privileged than excluded members of the journalistic corps. Wallach, supra note 103, at 53.

287. One commentator suggests that there is a “mystique” to the use of confidential sources, as increasing numbers of reporters come to believe that their reports will be “more interesting and dramatic if they contain a secret source or two.” H. Goodwin, supra note 34, at 122-23. See N. Isaacs, supra note 3, at 52.

288. H. Bray, supra note 120, at 135; M. Schudson, supra note 225, at 188, 191; T. Wicker, supra note 34, at 15, 145-46.


290. See B. Swain, supra note 36, at 50 (quoting Larry Batson of the Minneapolis Tribune); see also H. Goodwin, supra note 34, at 123.

291. Associations of journalists have adopted several codes of ethics since the early 20th Century. The ethics code of the Kansas Editorial Association, adopted in 1910, was reportedly the first such document. H. Goodwin, supra note 34, at 14. A number of state press associations, as well as individual newspapers, followed suit. Id. The American Society of Newspaper Editors (“ASNE”) adopted the first national code of ethics in 1923. Id. Similarly, the Society of Professional Journalists, Sigma Delta Chi, adopted a code in 1926. Id.; Schmuhl, supra note 252, at 3. Both of those associations later revised their codes—ASNE in 1975 and Sigma Delta Chi in 1973. Id. at 7-8; H. Goodwin, supra note 34, at 14-15. The Radio-Television News Directors Association (“RTNDA”) has also adopted a code, applicable to broadcast journalists. Id. at 130; P. Meyer, supra note 102, at 17-24.

The early codes were no more than general ethical statements which served as aspirational norms. H. Goodwin, supra note 34, at 14. Most did not address the issue of confidential sources specifically. See N. Crawford, supra note 237, at 183-240 (reproducing various early codes). Like the current codes, they had no enforcement mechanisms. H. Goodwin, supra note 34, at 14. An early attempt (in 1924) to have reporters expelled from or censured by ASNE for violation of its code did not carry a majority of the membership and no such sanctions have been imposed since. Id. at 14-15; P. Meyer, supra note 102, at
try counsels caution in the grant of promises of confidentiality. Similarly, most major news organizations have policies discouraging the practice. Nevertheless, numerous journalists and editors claim that the practice of granting confidentiality has been


292. The Statement of Principles of ASNE states that “[p]ledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly. Unless there is a clear and pressing need to maintain confidences, sources of information should be identified.” American Society of Newspaper Editors, Statement of Principles, Article VI Fair Play (Oct. 23, 1975), quoted in Iowa Note, supra note 291, at 695-96. Similar references to confidentiality exist in the policy statements of the wire services and many news organizations. The Code of Ethics of the Associated Press Managing Editors Association, for example, states that “[n]ews sources should be disclosed unless there is clear reason not to do so. When it is necessary to protect the confidentiality of a source the reason should be explained.” Associated Press Managing Editors Association Code of Ethics, Responsibility (Apr. 15, 1975).

293. Jones, supra note 160, at 22; T. Goldstein, supra note 34, at 219-21 (referring to findings of a 1983 study conducted by the ethics committee of ASNE); H. Goodwin, supra note 34, at 16-17, 124-26, 130-32. See generally Iowa Note, supra note 291, at 642-49 (discussing the adoption of written standards by news organizations).

For instance, the editor of The Los Angeles Times issued a memorandum in 1982 stating that “[u]nnamed sources should not be used unless there is no other way to get needed information in the story . . . . When we do use them, we should give the reader all the information we can—short of indirectly identifying the source—that establishes his or her credibility . . . .” Memorandum from William Thomas, quoted in T. Goldstein, supra note 34, at 219-20. The Louisville Times and Courier Journal—whose policies have apparently been copied by many other news organs—requires that “extreme caution” be exercised in the use of anonymous sources; that the reason for the source’s anonymity be explained in the story; that information from an anonymous source be confirmed with other sources; and that anonymous sources not be allowed to attack anyone’s character or credibility in print. H. Goodwin, supra note 34, at 130-31 (quoting Louisville Times and Courier Journal policies). The same sort of conditional approval of the use of confidential sources can be found in the policy statements of the Philadelphia Inquirer, the Washington Post, the Associated Press, and the television networks. Id. at 131-32. The New York Times forbids the use of anonymous pejorative remarks and does not permit direct quotes by unnamed sources. T. Goldstein, supra note 34, at 220.

Many news organizations try to ensure the accuracy of their unidentified sources by requiring additional cross-checks whenever possible. Poll Finds Editors Split on Naming of Sources, supra note 179, at 22. Moreover, many now require their reporters to provide their editors and producers with the names of unidentified sources, either as a matter of course or upon request by the editors on sensitive stories. See, e.g., National News Council, Who Said That?, A REPORT TO THE NATIONAL NEWS COUNCIL ON THE USE OF UNIDENTIFIED SOURCES 2, 7 (1983). A study by the ethics committee of ASNE in 1983 concluded that newspapers generally had adopted a rule requiring reporters to disclose their sources to their editors. T. Goldstein, supra note 34, at 219. See also H. Goodwin, supra note 34, at 125-26. At the New York Daily News, for example, lead editors were instructed after the discovery of reportorial deceptions at other news organizations, see infra note 296, that they had an obligation to request source identification on “sensitive” stories and to ask for corroboration of the source’s information. T. Goldstein, supra note 34, at 217-18.
abused by the press.\textsuperscript{294} They suggest that confidentiality be

294. See E. Abel, supra note 1, at 39; N. Isaacs, supra note 3, at 52-54; Foreman, Confidential Sources: Testing the Readers’ Confidence, 10 Soc. Resp.: Journalism, L. & Med. 24 (1984); Adler, Reflections on Political Scandal, N.Y. Times Book Rev., Dec. 8, 1977, at 20. Further complicating the picture is the fact that editors and publishers may, for institutional reasons, be less willing than journalists to use confidential sources.

At some level, there is an inherent ambivalence in the relationships between reporters and editors. See D. Broder, supra note 34, at 311-12 (“Editors are friends and adversaries.”); L. Sigal, supra note 37, at 20-31, 49-52. Editors clearly represent the newspapers and broadcast entities—the institutions—by which they are employed. Although many of their decisions are dictated by their own news judgments, they are part of the management of the news organization. See B. Swain, supra note 36, at 33. While they are often former reporters, they have achieved a sufficient increase in institutional status to move up in the hierarchy. They are not out “on the beat” gathering stories. They are not the parties creating and nurturing relationships with sources in order to obtain information. They do not compete with reporters. Rather, they assign scarce space to reporters who compete with one another for it. Sometimes, “[t]hey have their own ideas of what makes a good story and try to influence which stories a reporter pursues.” D. Broder, supra note 34, at 312.

Reporters, on the other hand, compete with one another for space in the newspaper or time on the broadcast outlet. In order to do that, they are “whip[ped] and goad[ed]” by editors to tie up stories and make deadlines. Id. at 311. They develop relationships with sources and participate directly in the gathering of news. Their focus is on their own stories rather than the contents of the newspaper as a whole. Their role is to resist their editors’ attempts to edit their pieces and undermine their independence.

The use of confidential sources may well be an area in which reporters and their editors will clash. See, e.g., P. Meyer, supra note 102, at 209 (describing ASNE survey which found that while 40% of staff members thought confidentiality should be kept at all costs, only 20% of the editors thought so; survey also showed that 71% of editors, in contrast to 51% of staff members, thought that confidentiality should be breached in some unusual circumstances). Anecdotal evidence seems to support the hypothesis of some difference between reporters and editors on the issue of breaching confidentiality. It is clear, for example, that in Cohen the reporters wished to keep their promises of confidentiality to Cohen and were overborne by their editors. See supra notes 116-20 and accompanying text. The reporters presumably were thinking of their responsibility to their sources and of their future ability to gather the news. Perhaps they were also trying to establish their own autonomy from their editors. The editors, on the other hand, testified that they were thinking about the integrity of the newspaper as an institution. See Oberdorfer, supra note 11, at 8 (quoting journalist professor’s view that the Cohen case was “a battle between editors and reporters”); Randolph, Editors, Reporters at Odds Over Confidential Sources, Wash. Post, June 13, 1988, at A4, col. 2 (quoting characterization of Cohen as trial between reporters and editors). Similarly, the Editor in Chief of Newsweek stated that the magazine’s obligations to its readers required disclosure of Oliver North’s identity as a confidential source for the magazine’s reporting of the Achille Lauro hijacking in 1985. He approved the disclosure over objections by Newsweek’s Washington bureau. Zuckerman, supra note 89, at 61. See also supra note 102.

When the Washington Post disclosed Henry Kissinger as the source of a 1971 deep background story on Nixon’s plans for a summit in Moscow, see supra note 102, the reporter on the story charged the paper with engaging in “unprofessional, unethical, cheap journalism,” while editor Ben Bradlee excoriated the background briefing as a way for government to use the press without taking responsibility. See D. Wise, supra note 39, at 301-02.
granted only when absolutely necessary in order to obtain important information.\textsuperscript{285}

Recent expressions of antipathy to grants of confidentiality have been triggered by two events. First, revelations that anonymity has been used by reporters for prestigious news organizations to mask fabrication of sources have rekindled challenges to traditional journalistic practices of confidentiality.\textsuperscript{286} Second, fear

Publishers, even more than editors, have the reputation and economic status of their newspapers as a central concern. In a libel case discussed at infra note 400, for example, the Daily News in Los Angeles ordered two of its reporters to disclose their sources. The paper faced damages of $60 million in the suit, and the publisher argued that the survival of the paper outweighed the reporters' promises of confidentiality. \textit{See, e.g.}, Friendly, \textit{Reporters Who Hid Identity of Sources Win Libel Ruling}, N.Y. Times, Jan. 3, 1984, at B9, col. 1.

Nevertheless, despite these differences, both reporters and editors work for the same institution and are rewarded commensurately with its success. It benefits both reporters and editors for their institution to "get the scoop" on a story in advance of their competitors in the marketplace. Moreover, many journalists—including David Nimmer from the Minneapolis Star—contend that they have not been prohibited by management from writing stories even if they were critical of major advertisers. B. Swain, \textit{supra} note 36, at 36-37. And both editors and publishers criticized the Daily News' attempt to force their reporters to disclose sources in a libel action in 1982. \textit{See Libel Decision Against Coast Paper is Lifted}, N.Y. Times, Mar. 23, 1983, at A24, col. 4; Lindsey, \textit{Paper Orders Reporters to Identify Source Accusing Ex-Iran Hostage}, N.Y. Times, Dec. 24, 1982, at A8, col. 1; \textit{infra} note 372.

295. Even Bob Woodward of Watergate fame is quoted as expressing dissatisfaction with the reliance on confidential sources as a matter of course. \textit{See} National News Council, \textit{supra} note 293, at 16.

296. As a result of the recognition that a climate accepting of secret sources can lead to the perpetration of hoaxes and frauds by unscrupulous journalists, news organizations have publicly reevaluated their norms with regard to sources. One of the most infamous hoaxes was the discovery that the Pulitzer prize-winning Washington Post article by Janet Cooke called "Jimmy's World" had been entirely fabricated by the author. Cooke, \textit{Jimmy's World}, Wash. Post, Sept. 28, 1980, at 1. \textit{See} D. Broder, \textit{supra} note 34, at 309-11; T. Goldstein, \textit{supra} note 34, at 215-18; Friendly, \textit{A Movie on the Press Stirs a Debate}, N.Y. Times, Nov. 15, 1981, at B1, col. 1. The Washington Post editors did not recognize the problem because they permitted the reporter to rely on an allegedly confidential source whose identity they did not require her to divulge, even internally. T. Goldstein, \textit{supra} note 34, at 219. \textit{See} Brown, Bybee, \textit{supra} note 36, at 47 n.11 (noting that 57% of news executives reported policy changes with respect to anonymous sources as a result of the Cooke affair).

Although the issue of confidential sources has been perceived as problematic in the journalistic community for years, some news organizations have abandoned the effort to establish clear rules on the subject of confidentiality. The Washington Post reportedly adhered for a short period of time to what became known as the Bradlee rule "that a maximal effort be made to identify all sources by name in one-on-one interviews and that press briefings be for direct attribution or the Post reporter would leave." S. Klaidman & T. Beauchamp, \textit{supra} note 75, at 16. The rule was quickly abandoned "because it was too confining and because other newspapers did not adopt it." \textit{Id. See also} H. Goodwin, \textit{supra} note 34, at 128-29; D. Wise, \textit{supra} note 39, at 302-03. Similarly, a poll of editors in 1980
of contract liability similar to Daniel Cohen's jury verdict has prompted newspapers to review and restrict their policies on the use of confidential sources.297

These events underscore the journalistic community's recognition of the grave dangers posed by excessive use of confidentiality. Many prominent journalists, editors, and press commentators criticize the practice of granting confidentiality on the grounds that anonymity reduces the credibility of news stories, allows government officials to manipulate the press, and permits sources to lie without accountability.298 Journalists often publicly showed that 38% of the respondents believed that it would be "impossible" and "unfruitful" to create policies for dealing with unidentified sources. Poll Finds Editors Split on Naming of Sources, supra note 179, at 22.


For instance, The Minneapolis Star Tribune, one of the defendants in the Cohen litigation, established formal guidelines shortly after the initial jury verdict. Kramer, Dan Cohen Lawsuit Should Prompt Other Newspapers to Clarify Muddy Policies on Granting Confidentiality, ASNE BULL., Sept./Oct. 1988, at 4; Radolf, Anonymous Sources: Newspaper Issues New Guidelines After Losing Court Case, Editor & Publisher, Aug. 27, 1988, at 17, 19, 33. The guidelines provide that, before using anonymous information or quotes, reporters and editors must be satisfied that the information is of significant news value, reliable, and impossible to get on the record. Radolf, supra, at 19. Reporters must obtain their editors' permission before promising confidentiality to a source when the information is "potentially damaging to others [and] where there is a reasonable chance that the source's identity could become as big a story as the information." Id. at 17, 19. This would include, but would not be limited to, smear tactics in political campaigns. Id. Reporters must also make every effort to determine "what the information is generally about and where it comes from" prior to any promises of confidentiality. Id. at 19. The guidelines cite three circumstances in which confidential source identities might be disclosed: subsequent discovery by the paper that the source lied, life or death situations, and court orders. Id. at 17. Like the policy of the New York Times, the new Star Tribune policy forbids the use of anonymous quotes "to express negative opinions about individuals or organizations." Id. at 19.

In another attempt to provide greater precision, the Wall Street Journal has adopted a new policy, distinguishing between confidential and anonymous sources. Jones, supra, at B8, col. 1. While the paper will pledge to keep secret the identities of confidential sources, anonymous sources for a story could, for example, later be revealed in a libel suit. Id.

298. See supra Section III.A. (on the history of manipulation of the press). As Tom Goldstein puts it: "The problem with the anonymous quote is that it holds no one accountable, and there is great potential for someone with an axe to grind—including a reporter—to malign or ridicule from the safety of anonymity." T. GOLDSTEIN, supra note 34, at 220. Adversarial reporters have ironically made "a significant trade," in that "no longer prisoners of official sources, they become entrapped by those who leak information." C. PRESS & K. VERBURG, supra note 34, at 88. See also E. ABEL, supra note 1, at v ("[I]n one sense, the press today is even more a handmaiden of its news sources than ever before."); N. ISAACS, supra note 3, at 54; Isaacs, Change or Be Changed, in JOURNALISM ETHICS: WHY CHANGE? 9-10 (1986) (remarks by former Chairman, National News Council); D. BRODER, supra note 34, at 317 ("nothing contributes more to the press' credibility problem than the
note that readers find attributed information more credible than unattributed reports. These critics doubtless realize that phrase 'sources said ');

E. LAMBETH, supra note 34, at 108; Practicing Responsible Journalism, supra note 98, at 147-48 (suggesting that the press think about eliminating anonymous sources, particularly those who provide opinions and not facts); H. GOODWIN, supra note 34, at 120-24 (recounting views of editors and reporters); REPORTERS, supra note 36, at 166; B. SWAIN, supra note 36, at 49-50; D. WISE, supra note 39, at 303-04; Friendly, supra note 294, at 71; Foreman, supra note 294; Epstein, supra note 76, at 63; Adler, supra note 294, at 20-23.

A 1980 poll of editors revealed that approximately one-half the respondents were concerned that dependency upon anonymous sources undermined the watchdog role of the press. Poll Finds Editors Split on Naming of Sources, supra note 179, at 22. 87% of the responding editors thought that unnamed sources were less believable. Id. Stephen Hess's study of Washington reporters indicates that more than two thirds of his respondent reporters felt that journalists "make it too easy for sources to go on background."

REPORTERS, supra note 36, at 166. Similarly, Tom Goldstein reports that many respondents to a poll of newspaper editors conducted three years after the Washington Post's "Jimmy's World" debacle "felt that anonymous sources were abused in Washington." T. GOLDSTEIN, supra note 34, at 189. Goldstein himself characterizes the New York Times' policy of forbidding the use of anonymous attacks as "probably as fair a [policy] as can be devised," but expressed the concern that it may hamstring some newspapering activity: "it builds restraints into journalism which make it especially difficult for reporters to assess a public figure currently in a powerful position. In the minuet that passes for political discourse, few public people say on the record what they really think of people with whom they must deal regularly." Id. at 220. The ambivalence expressed by Goldstein appears to find a parallel in Stephen Hess's prior finding that 71% of the Washington journalists he studied thought that the public benefits from backgrounders (although they are thought to be too easily granted), while 16.9% thought that the public loses, and 9.3% stated that it both gains and loses. REPORTERS, supra note 36, at 166.

It is impossible to quantify whether there is a significant difference between editors and journalists on the subject of the use of confidential sources. Many of the reports noted reflect the concern of editors, but it is also evident that responsible journalists are wary of anonymous sources. Moreover, while 81% of editors responding to Stephen Hess's study of Washington journalism stated that unnamed sources were less believable than identified sources, 87% nevertheless thought that the use of leaks was, on balance, a good practice. REPORTERS, supra note 36, at 166. See also supra note 294 (discussing differences between editors and reporters on breaches of confidentiality agreements once they have been made).

299. See, e.g., D. BRODER, supra note 34, at 319.

I know that when many people read that sources said something, they think the reporter has made it up, or someone else has, and the reporter was too naive to question it. Mostly, I think they resent not being told. Using the weasel word "sources" advertises that the reporter knows something, the speaker's identity, that he will not share with the reader. The perfectly human response is, You don't trust me. Why the hell should I trust you?

See also The Commission on Freedom of the Press, A Free and Responsible Press 25 (1947); Blasi, supra note 19, at 244, 248-49; Note, Disclosure of Sources in International Reporting, 60 S. CAL. L. REV. 1631, 1657 (1987) [hereinafter Southern California Note].

Interestingly, the public itself appears to be more evenly split with respect to the use of unnamed sources: 42% of respondents to a poll on investigative reporting techniques approved the use of such sources, while 53% disapproved (with 5% expressing no opinion).
sources court journalists for their own undisclosed and often unsuspected reasons.\textsuperscript{300}

In addition to serving as the messengers of their sources' agendas, reporters who rely on confidential sources also have an incentive not to investigate too closely the activities of their long-term, fruitful contacts.\textsuperscript{301} This can, in turn, allow such sources to avoid the scrutiny of the press for their own wrongdoing. Moreover, the leaking of selected information can forestall scrutiny of the sources by government investigators as well.\textsuperscript{302}

At a deeper level, reliance on confidential sources in news reports is one of the factors\textsuperscript{303} that often undermines the press' ability to explain events to the public in addition to reporting them. News is defined by journalists in collaboration with news-

\textit{See E. LAMBETH, supra note 34, at 120 (reporting survey by the Investigative Reporters and Editors association); see also Wulfemeyer, supra note 36, at 86 (suggesting that "readers are not terribly concerned about anonymous attribution").}

\textsuperscript{300} As press critic Edward Jay Epstein has put it:

When journalists are presented with secret information about issues of great import, they become, in a very real sense, agents for the surreptitious source. Even if the disclosure is supported by authoritative documents, the journalist cannot know whether the information has been altered, edited, or selected out of context. Nor can he be certain what interests he is serving or what will be the eventual outcome of the leak.

Epstein, supra note 76, at 65.

Furthermore, the nature of the journalism business—with its competitiveness and deadline pressures—conspires to lead to the "co-optation" of reporters by sources by making it difficult for reporters to verify leaks. See id. at 64-65. This practical problem is exacerbated by the more intractable facts that even if verification is attempted, reporters often do not have any principled way of distinguishing between conflicting accounts or of establishing that an account is true rather than simply widely believed within the source community. Id. at 65.

\textsuperscript{301} See IMPACT, supra note 4, at 199. For example, commentators claim that reporters neglected to investigate Oliver North's activities for at least three years because he served them as a confidential source. M. EMERY & E. EMERY, supra note 225, at 543; E. ABEL, supra note 2, at 27-28; Alter, \textit{When Sources Get Immunity: Was North Pampered?}, NEWSWEEK, Jan. 19, 1987, at 54. See also J. HULTENG, supra note 6, at 84-85 (on the "you'll scratch my back and I'll scratch yours" attitude); M. GROSSMAN & M. KUMAR, supra note 4, at 6 (on the press' ginger handling of Henry Kissinger's role in the procrastination of the Vietnam war and in Nixon's illegal attempts to ferret out leaks); H. BRAY, supra note 120, at 127-28; Blasi, supra note 19, at 245 (on pressure to write favorably about regular sources).

\textsuperscript{302} See Adler, supra note 294, at 32 (suggesting that the CIA itself used an unwitting Daniel Schorr to leak the Pike Report, a congressional committee report on the agency, in order to undermine the credibility of the oversight committee and to "close off [the] subject of investigation for good"); see also D. SCHORR, supra note 36, at 179-81 (on Pike Report episode).

\textsuperscript{303} See Carey, \textit{The Dark Continent of American Journalism}, in \textit{Reading the News}, supra note 2, at 166-71 (exploring the various factors).
Readers cannot understand the meaning of facts and the selection of news without a contextual explanation. Since sources are in large part the news, attributing stories to faceless officials or to the very ether eliminates precisely those explanatory signals which would situate the reader. Thus, when the press does not attribute the story, it often becomes a medium for coded messages and closed conversations decipherable at most by insiders and government, but impenetrable to the public at large.

When the press does not attribute its sources, it also runs the risk of misleading readers and truncating public debate as to journalists' own roles in the construction of news. The news is never solely a mirror of an independent reality reporters simply observe whole and report. Facts or events are only the raw material with which the news is made. The news is in fact a narrative, a "story" which characterizes, organizes, interprets, and situates the actual events. The press chooses not only the narrative for any individual event, but also the order and organization of all the stories in a given day. Diversity in reporting demonstrates that the press' imposition of order is chosen rather than naturally dictated: there is never only a single story to tell about any factual event. Accordingly, alternative readings of events or em-

304. See Sigal, supra note 239, at 15-16; supra notes 258, 274.
305. Sigal, supra note 239, at 24-26 ("knowing how the news is made is the key to understanding what it means").
306. E. Abel, supra note 1, at 56; Press Connection, supra note 36, at 109; Carey, supra note 303, at 156-58; Adler, supra note 294, at 30-31 (use of non-attribution code words "tease[s] the ordinary good faith reader while they signal only to the cognoscenti in a debased, knowing complicity").
308. Manoff, supra note 307, at 197.
309. Id. at 228. "[A]lthough newswriting operates according to an objective canon that emphasizes the facts, it does so within the requirement that it represent the events it reports in the form of stories." Id.
311. Manoff, supra note 307, at 228 ("No story is the inevitable product of the event it reports; no event dictates its own narrative form.").
phases are inevitably available. When the press relies on confidential sources in published reports, it chooses not to air some of these alternative readings. This can lead to the suppression of the "real" stories or, at least, of the "better" narratives. Examples abound—from leaks of a vice presidential candidate's medical records to the dissemination of a Defense Department memorandum—in which the identity of the leaker would have been an equally good or "better" story than the substantive reports actually filed. By reporting part of the story, journalists can become accomplices in the cover-up of a power struggle within government. In foreclosing important narrative possibilities, the press obscures recognition of its active role in the shaping of news and its involvement in the process of governance.

The phenomenon of leaking can also be counter-productive to open government and the judicial function. Since press coverage

312. Id. at 229.
313. Epstein, supra note 76, at 68 ("By concealing the machinations and politics behind a leak, journalists suppress part of the truth surrounding a story.").
314. Manoff, supra note 307, at 198-210. For example, immediately prior to Ronald Reagan's 1985 arms control summit with Mikhail Gorbachev, a leak provided the New York Times and the Washington Post with a letter from Secretary of Defense Caspar Weinberger to the President, addressing Soviet treaty violations and warning against certain arms control commitments. Journalistic conventions and narrative forms led many of the subsequent reports to characterize the story as one about discord and disarray in the Reagan administration. Yet, Robert Manoff suggests that the letter did not contain any particularly new substantive information; that the timing of the letter was "a peg but not really the news"; and that "the real story in this incident"—the story that was not reported—was the identity and motive of the leaker. Id. at 209. Stories focusing on the leak "would have taken a better measure of the events than those which in fact appeared" and would have "put the real 'who,' the leaker, back in the center of the story were he belonged." Id. at 210. In like vein, media critic Jay Epstein has suggested that Senator Thomas Eagleton's medical records are no more important than the means by which those records were obtained and leaked to the press organization which was granted the 1973 Pulitzer Prize for disclosing their contents, especially since copies of the presumably illegally obtained records were later found in the White House safe of John Ehrlichman. Epstein, supra note 76, at 68. Similarly, Epstein argues that the "motives and circumstances" behind the "well-timed" leaks by Nixon administration officials which forced the resignation of Justice Abe Fortas from the Supreme Court "do not necessarily make a less important part of the story" than the substantive allegations about Fortas. Id. For another example of a story in which the identity of the leak is characterized as far more the "real" story than the information leaked, see Squires, When Confidentiality Itself Is Source of Contention, JOURNALISM ETHICS REP. 7 (1985-86). See also Greenfield, Must Reality Be Off the Record?, Wash. Post, Apr. 11, 1984, at A21.
315. E. Abel, supra note 1, at 68 (quoting media critic Jay Epstein: "if journalists represent news as being accidental when in fact it is deliberate, then they may willy-nilly assist in camouflaging the interest behind the disclosure, and thereby be part on a grander scale of the cover-up of an intra-government power struggle"); supra notes 301-02.
has an effect at least on the process of policymaking, \textsuperscript{316} leaks can lead to rushed and "conspiratorial" decisionmaking designed to limit the number of people with access to information to leak to the press.\textsuperscript{317} In the context of criminal investigations, leaks can raise due process and fair trial issues.\textsuperscript{318}

These undesirable consequences of excessive leaking are particularly ironic because of the uncertain effectiveness of leaking. Studies show that leakers' strategies sometimes backfire\textsuperscript{319} and that the success of leaks in changing substantive policies is unpredictable.\textsuperscript{320}

\begin{itemize}
  \item For example, Stephen Hess has suggested that because leaks are episodic, "because leakers are either so "clever or so inept as to be totally misunderstood," and because "messages get garbled in transmission," leakers' strategies misfire. \textit{Press Connection}, supra note 36, at 92-93. \textit{See also} E. \textit{Abel}, supra note 1, at 21-25.
  \item 320. \textit{Impact}, supra note 4, at 184, 185-87 (substantive impact of leaks, although possible, is difficult to anticipate).
  \item 321. Janet Malcolm, for example, caused a furor in the journalistic community by charging that "[e]very journalist . . . knows that what he does is morally indefensible. He is a kind of confidence man, preying on people's vanity, ignorance, or loneliness, gaining their trust and betraying them without remorse." J. \textit{Malcolm}, supra note 107, at 3. \textit{See also} id. at 158, 162 ("The moral ambiguity of journalism lies not in its texts but in the relationships out of which they arise—relationships that are invariably and inescapably lopsided."). Malcolm's attack was sparked by a breach of contract action against Joe McGinniss, author of "Fatal Vision," brought by Jeffrey MacDonald, a convicted murderer and the subject of McGinniss' book. MacDonald claimed, and Malcolm agreed, that McGinniss had misled his subject into believing that he would write a favorable account. \textit{See supra} note 107.
  \item 322. J. \textit{Malcolm}, supra note 107, at 20.
\end{itemize}
porters sometimes feel toward their sources.

Others take the opposite view of the relationship, suggesting that sources control and manipulate reporters, who submit out of laziness, coziness, and "scoop" mania. In this version, it is reporters who are hoodwinked and held captive. The problem with this view is that it denies the reality of the journalist's power in some relationships with sources.

Still others take an apparently cynical and pragmatic view, noting that both sources and reporters knowingly use one another. This is a vision premised on a market exchange model. In this version, reporters are neither deceivers nor lapdogs, but rather traders whose professional norms and skeptical attitudes permit them to advance newsgathering interests while recognizing sources' desires to promote their own agendas. This is presumably the attitude of the reporters who claim that their sources' motives for leaking are irrelevant so long as their information is true. This vision differs from the others in that it does not admit the significant consequences of disparities and shifts in power between the parties to the reporter-source relationship. Nor does it admit the illusory security of relying on professional newsgathering norms to guarantee independence. Finally, this view is flawed in that it fails to account for the existence of some level of trust in the relationships between reporters and sources. A picture of autonomous individuals with conflicting aspirations is simply too abstract to describe the contradictory tugs on each of the participants in the relationships.

None of these three characterizations of reporter-source relationships is entirely correct in itself, in large part because none captures the complex variety of such relationships as a whole, or

323. See, e.g., N. Isaacs, supra note 3, at 54 ("bait and reel in" game played by politicians); Lukas, The Journalist: A Source's Captive or Betrayer?, WASH. MONTHLY, May 1990, at 44.

324. These press observers warn that oral research makes reporters run the risk of becoming "prisoners" of their sources, REPORTERS, supra note 36, at 17, or the sources' "handmaidens." E. Abel, supra note 1, at v. Using a dance metaphor, they suggest that sources do the leading most of the time because "the dancers are not equal partners." Id. at 1.

325. See, e.g., ETHICAL CONNECTION, supra note 217, at 13 ("Each party to . . . [the complex relationship between reporters and legislators] understands that the other seeks to turn the relationship to his own advantage. Both use the relationship and feel used by it."); W. Rivers, supra note 39, at 224 (quoting Theodore White).

326. See E. Abel, supra note 1, at v; PRESS CONNECTION, supra note 36, at 78.
the ambivalence within them individually. Far from following a single model, the relationships differ depending on the identity, status, and motivations of the source; the importance of the source's information; the prestige and power of the reporter; the duration and character of the relationship; and the institutional setting of the disclosure. The identity of sources and their reasons for requesting confidentiality have a significant impact on the nature of their relationships with reporters. Specifically, reporters often have different, and less guarded, relationships with sources who they perceive as whistleblowers and dissidents than they do with powerful officials at the highest levels of government. Moreover, relationships between reporters and sources are not always fully worked out at the outset. Like other relationships, reporter-source relationships which involve more than single transactions change and evolve over time, both in response to external circumstances and as a consequence of their own dynamics.

The one thing common to all confidential reporter-source relationships is that they pose dangers to both participants. They involve mutual seduction, interdependence, and the possibility of mutual betrayal. Disclosure of the source's identity can harm the source in a variety of ways. Similarly, reporters risk their professional reputations and careers when they pass along false or incomplete information from leakers. Thus, all relationships between reporters and their sources are based on some kind of mutual trust. The reporter must trust the source to have provided a true and complete story and the source must trust that the reporter will not betray him by divulging his identity.

Despite the baseline requirement of some trust, the degree of trust and the reasons for it differ markedly in different sorts of relationships between reporters and sources. Even within a single relationship, the level of trust may be different for the reporter and the source. Sometimes, the source trusts completely in the reporter or from a belief in

327. See, e.g., ETHICAL CONNECTION, supra note 217, at 13 (describing relationships between reporters and legislators as "exceedingly complex").
328. See supra note 86.
329. "If the information turns out to be false or distorted, there is no refuge for the reporter in anonymity." E. Abel, supra note 1, at 39.
330. Id.
331. See W. Rivers, supra note 39, at 128 (quoting columnist Jack Anderson's statement that "[s]ometimes when someone opens up to you . . . , a sort of confessor relation-
the reporter’s loyalty. The assumption of loyalty can in turn be based on the development of a personal relationship between the reporter and the source, as a result of which the source feels the reporter to be sympathetic to him.332 This is most common with unsophisticated sources, whistleblowers, and sources who feel sufficiently socially alienated to view the institutional press as simply another arm of the “Establishment.”333 The assumption of loyalty can also arise from a notion of shared ideology or ethnicity which the source sees as a fundamental common ground with the reporter.334

With more sophisticated sources—Washington insiders and sharp political operatives—both the level of trust and its bases are more varied and complex. In those relationships, loyalty is most often assumed to arise not from personal fealty or shared ideology, but from the instrumental nature of the relationship and the institutionally accepted ethic of confidentiality. Such relationships have many of the hallmarks of business exchanges in

332. Investigative reporter Nicholas Gage has been reported as saying that “[s]ources won’t trust you unless you’re close to them.” Rupp, Investigative Reporters Tell How They Do It, Editor & Publisher, Jan. 11, 1975, p. 12, quoted in B. Swain, supra note 36, at 22. See also W. Rivers, supra note 39, at 70. Instructive in this regard is the recent controversy over Joe McGinniss’ condemnatory book about Jeffrey MacDonald, a physician accused of brutally murdering his family. See supra notes 107, 321. The book was written after an extensive period during which MacDonald claimed to have been induced to believe that McGinniss would write an exculpatory account. McGinniss’ failure to disclose his book plans for fear of losing MacDonald’s cooperation indicates that reporters themselves see the need to obtain sources’ trust, whether in good or bad faith.

333. See N. Hentoff, supra note 36, at 227 (suggesting that members of “tightly knit political group[s] outside the mainstream of society” will only talk to reporters they trust); Blasi, supra note 19, at 241.

334. For example, Jesse Jackson’s references in 1984 to New York as “Hymietown” and Jews as “Hymies” were made to Washington Post journalist Milton Coleman and another black journalist after Jackson suggested that they “talk Black talk.” Coleman, supra note 102, at C8. See also D. Broder, supra note 34, at 347; T. Goldstein, supra note 34, at 187. Coleman later stated in print that he assumed Jackson’s assertion of a racial bond indicated that he wished to speak “on background”—without attribution. Coleman, supra note 102, at C8; D. Broder, supra note 34, at 347; T. Goldstein, supra note 34, at 187; Blasi, supra note 19, at 240.

Similarly, reporters who covered the Black Panther party in the 1960’s indicate that they would not have been privy to the group’s activities if the Panthers had not perceived them as trustworthy and anti-establishment. See N. Hentoff, supra note 36, at 228; D. Wise, supra note 39, at 240-41 (recounting the argument by Earl Caldwell, one of the Branzburg v. Hayes, 408 U.S. 665 (1972), defendants, for resisting a grand jury subpoena).
which people who otherwise have no relationship deal with one another for their own reasons and their own advantage. Yet, even there, a certain level of personal trust, or at least an expectation that reporters will adhere to their promises and ethical norms, will develop in long-term relationships.\footnote{335}

Ironically, these expectations of fidelity on the part of sources—whether they are grounded in a personal connection or instrumentalist expectations—are played out against the reality that secrets are virtually never absolutely sacrosanct. When any secrets are shared, there is a danger of some exposure.\footnote{336} This re-

\footnote{335. The intensely personal—and highly ambivalent—nature of the relationship between reporters and sources may account for the intimate, romantic, and even erotic metaphors with which it is described by journalists and press commentators. Those who write about the relationship often use the notion of seduction in describing it. See, e.g., J. Malcolm, supra note 107, at 3, 5, 59 (characterizing the source as “the credulous widow who wakes up one day to find the charming young man and all her savings gone . . . .”) and the journalist-subject relationship as a “story of seduction and betrayal”); Greider, Reporters and Their Sources: Mutual Assured Seduction, 14 Wash. Monthly, Oct. 1982, at 10. Reporters indicate that they both “court” and “are courted by” sources. They often socialize together, both to meet and to maintain their relationships. See B. Swain, supra note 36, at 21-23. The vulnerability which both experience is to some extent reminiscent of the vulnerability that is a hallmark of intimate relationships. Some descriptions of reporters and sources are reminiscent of marriages in which the parties hate but need one another: “[e]ven though there is no love lost between the partners in the dance, they remain locked in close embrace.” E. Abel, supra note 1, at 2. Other descriptions focus on the meretricious character of relationships based in secrecy. Bill Moyers, for example, has described the rules of background briefings as “permit[ting] the press and government to sleep together, even to procreate, without getting married or having to accept responsibility for any offspring.” Id. at 56 (quoting Moyers); Randolph, supra note 294 (quoting PBS' Mike Sullivan on the relation with confidential sources as sexual barter: “Having got in bed with the source and taken information, the only real choice left was not to publish the story. . . . In the end, a deal’s a deal.”). Finally, while the name “Deep Throat” probably serves as a facetious reference to a then-current pornographic film, the sexual association may well not be coincidental. The metaphors of dancing, marriage, and barter that are used to describe the relationship between reporters and sources also point to the highly ritualized and etiquette-laden character of the relationship. Ballroom dancing has established steps and routines; conventional marriages hew to certain established conventions; those who see the traditional family as the central social unit believe that there are rules governing sexual relationships; and even prostitution has stock understandings.

336. In discussing the Jesse Jackson episode, see supra note 334, journalist Tom Goldstein faulted Jackson for “ignor[ing] a cardinal reality of public life: If you do not want something repeated, do not say it to anyone, especially a reporter, in the first place.” T. Goldstein, supra note 34, at 187. Similarly, David Broder suggested that “realistically, in the heat of a presidential campaign, nothing genuinely significant—nothing truly revealing of character, plans, or policies—can remain secret if the candidate utters it in reporters’ presence.” D. Broder, supra note 34, at 351. Indeed, sometimes reporters will threaten sources with disclosure in order to get additional information. See B. Swain, supra note 36, at 25; see also J. Malcolm, supra note 107, at 8 (“[O]f course, at bottom, no subject is naive. Every hoodwinked widow, every deceived lover, every betrayed friend, every subject
sults not only from the temptation to share secrets as such, but also from the complex set of loyalties experienced by reporters in their relationships with sources. Reporters must be acutely aware of their bilateral obligations: while they have relationships with sources and varying degrees of loyalty to them, they bear responsibilities toward their readers as well.\textsuperscript{337} The strictures of reporters' obligations to the latter thus require that they be somewhat self-conscious with the former.

The distribution of power within reporter-source relationships is also highly variable. When viewed abstractly, there appears to be an equipoise of power in all such relationships. After all, while the source is in control because she has information desired by the reporter, the reporter controls the source's access to the mass public and holds, as the trump card, the possibility of disclosing his source. This apparent balance of power is illusory, however. If the source is a powerful, highly-placed public official with many other news outlets, and if she is a long-term source whose continuing cooperation is necessary to the reporter's career, the reporter cannot afford to exercise his trump card and the source in fact has a significant amount of coercive power.\textsuperscript{338} But if the source is not particularly powerful, if her position and influence have become precarious, if the reporter's career would not be harmed by closing off that source, or if the reporter has access to other sources from whom he can obtain the requisite information\textsuperscript{339} then the balance of power in the relationship tilts in favor of the reporter.

The distribution of power is affected not only by the realities of the status of the parties, but also by the parties' perceptions of power. Journalists, while expressing ambivalence about their relationships with sources and abstractly recognizing the possibility

\footnotesize{of writing knows on some level what is in store for him, and remains in the relationship anyway, impelled by something stronger than his reason.

\textsuperscript{337} See, e.g., Ethical Connection, supra note 217, at 33-34 (describing journalists' views of themselves as representatives of the public). Moreover, reporters also have institutional loyalties to the news organizations for which they work.

\textsuperscript{338} See D. Broder, supra note 34, at 321 (characterizing as "a matter of professional survival" the need to abide by attribution ground rules: "[y]ou live by the conditions you accepted—or forget ever using that source again").

\textsuperscript{339} Institutional characteristics of the government may affect this, of course. For example, reporters are likely to have fewer sources in the higher executive branch because the information generated by the executive can be more tightly controlled than information and sources in Congress. Reporters, supra note 36, at 17. See also supra notes 41, 248.}
of being manipulated, nevertheless share the human trait of denying powerlessness. While they admit to the fact that their relationships with sources have the character of a "high wire act," they nevertheless believe that they can keep their balances on the wire. Similarly, sources must keep reporters interested while still perceiving that they maintain the upper hand in the relationship.

The many different variables in the relationships between reporters and sources create incentives for sources not to reveal more than is absolutely necessary and incentives for reporters to push for as much information in their own interest as they can obtain. Consequently, the relationships are fundamentally ambivalent—simultaneously friendly and adversarial for both the reporter and the source. It is against this complex background that we need to address the validity of legal claims by sources against the press for breaches of anonymity promises.

IV. TOWARD A CONTEXTUALIST ALTERNATIVE

Having described the inadequacies of existing approaches to the resolution of contract claims by sources against the press, and having drawn a realistic picture of the circumstances and consequences of journalists' use of confidential sources, this Article now proposes a historically grounded and context-sensitive analysis of the problem.

A. Setting the Stage: The Contradictory Character of Secrecy

"Terms such as 'confidentiality' . . . are used as code words to create a sense of self-evident legitimacy." Yet, we feel ambivalent about secrecy both at the individual and at the collective level because we recognize that it has a "double-edged" character.

At the individual level, control over information about the self is central to autonomy and individuality. Individuals see themselves as such in part because they control what they reveal to

340. J. HULTENG, supra note 6, at 84.
341. S. BOK, SECRETS 115 (1982) [hereinafter SECRETS] (discussing the limits of confidentiality with regard to the professional secret).
343. Id. at 302.
others and thereby affect how they are perceived. Moreover, the selective revelation of secrets to others fosters the development of solidarity, intimacy, and community.\textsuperscript{344} Human beings define themselves and their social worlds by processes of inclusion and exclusion. They develop feelings of self-worth, self-esteem, and acceptance by being part of a chosen group. Sharing secrets and knowledge unavailable to those outside the selected group reinforces those feelings of acceptance, bonding, and community.

Simultaneously, however, sharing secrets is dangerous. It leads to vulnerability and anxiety by establishing the preconditions for disloyalty. Having imparted a secret to someone gives that person the power to disclose it. Thus, sharing secrets can be destructive when utilized as a form of psychic exchange that fosters neurotic dependence.\textsuperscript{345} Secrecy also creates the risk of manipulation, domination, and exclusion. It permits people to control others' choices by hiding information that they would consider relevant in making decisions.\textsuperscript{346} By keeping them ignorant of that manipulation, "secrecy itself can be used to hide the manipulative uses of secrets."\textsuperscript{347} Thus, the very practice which can lead to feelings of autonomy and empowerment can also lead to experiences of betrayal, disempowerment, and manipulation.\textsuperscript{348}

Secrecy is also double-edged at the collective, societal level. For example, while some level of governmental secrecy is necessary for national security and the efficient operation of the state, it simultaneously impedes monitoring, undermines accountability, allows for corruption, and permits megalomaniacal judgments.\textsuperscript{349}

\textsuperscript{344} Id. at 303-04.

\textsuperscript{345} See id. at 305 ("That another knows one's secrets can be a distressing situation indeed and may make it near impossible to reestablish one's independence. While the initial sharing of secrets may have been an expression of autonomy, the bonds that secrets create may enslave. The extreme case of blackmail illustrates the point.").

\textsuperscript{346} Id. at 304. By manipulation in this context, I refer to the exercise of power by one party over another through the strategic withholding of information which impedes the ability of the manipulated person to make the most informed, rational, and independent decisions she can.

\textsuperscript{347} Id. at 305.

\textsuperscript{348} See id. at 304 ("Secrecy, at the individual level, is a social form that possesses the power to destroy what it generates.").

\textsuperscript{349} While few would contest the value of national security in the abstract, it is the claimed scope of the interest that gives rise to controversy. With respect to governmental operations, many have argued that organizations cannot function effectively without some significant level of secrecy or confidentiality as to the proposals and deliberations preceding ultimate decisions. See, e.g., A. SCHLESINGER, supra note 47, at 340-41; H. KISSINGER, YEARS OF UPHEAVAL 115 (1982). In the area of foreign affairs, for example, government
Moreover, secrecy plays potentially contradictory roles in social control and social structure. Those practices of secrecy which are subject to criticism when employed by government and other powerful elites can have empowering effects in different contexts. For example, while secrecy and the monopoly of information can lead to systemic inequality, they can also serve as weapons by which the disempowered can claim power. It can also help citizens and groups to resist social control. Finally, while shared knowledge enables the creation of a social structure, it also serves as the basis for alternative, competing social structures as well.

Because secrecy is not a uni-dimensional social form, but rather one that can have radically different uses and consequences, "all the interesting information about secrets consists in how they are being used by whom for what purposes under what set of constraints in what contexts." It is in particularized contexts that we make determinations about the moral value and social worth of different practices of secrecy. In turn, our normative standards determine not only our evaluations of the worth of particularized contexts of secrecy, but also our descriptions of those contexts. 

Officials often argue that totally open treaty negotiations can reify early positions and commit the parties to undesirable courses, at least partly because of negative publicity that might result from perceived retreats. Similarly, governmental investigations are said to require secrecy in order to be effective. See, e.g., Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A) (1988) (exempting from disclosure records or information compiled for federal law enforcement purposes to the extent that their release "could reasonably be expected to interfere with enforcement proceedings").

See supra note 342, at 306-08.
See infra notes 360-69 and accompanying text.

This view supposes that there is a fundamental interdependence between normative and positive questions. See K.L. Scheppelle, supra note 342, at 319 (taking the same position and adopting a "model of mutual construction of rules and facts"). In other words, our view of facts is profoundly influenced by our moral principles. The ways in which we describe facts and situations in our world—what we deem relevant and how we choose one out of any number of possibly conflicting characterizations—imply particular
B. Sources, "Sourcerers," and the Social Values Implicated in Press-Source Confidentiality

Promises of confidentiality are given by journalists to sources in a variety of situations. Like secrets in other circumstances, we deem only some of these practices of confidentiality worthy of protection. Reflecting our ambivalence about secrets and their disclosure in the journalistic context, we pass legislation protecting whistleblowers while publicly deploring anonymous disseminators of government disinformation campaigns and political "smear tactics." This dichotomy yields two polar prototypes

sets of values and cultural norms we bring to the task of description. Conversely, I believe that facts do—and should—affect our moral sense. Wholly abstract categorical imperatives are highly problematic. Our normative principles do—and should—take account of the consequences that follow from their particularized applications.

358. See Smyser, supra note 33, at 13.

359. This account does not seek to justify the social values underlying social reactions to the prototypical models described in text. It merely seeks to identify them as cultural norms. Assuming their legitimacy, it seeks to use them as guideposts for the attempt to make normative claims about the social worth of promises of confidentiality to sources in different circumstances.


361. For example, disclosure of the plaintiff's identity as a confidential source in Cohen led to journalistic charges of unsavory political tactics. See supra notes 119 and 121 and accompanying text.

362. As prototypes, these are artificial and idealized constructs. Moreover, people will often differ when they actually have to decide which prototype is implicated by any given anonymous disclosure. For example, it is probable that many people see Deep Throat as a prototypical whistleblowing hero. Others, on the other hand, might focus on his disloyalty to the regime or wonder about the purity of his motivations for leaking. See, e.g., J.W. Dean, supra note 103, at 33-34 (challenging Deep Throat's status as "noble"). Nevertheless, the fact that such prototypes exist and have some significant cultural resonance as abstract paradigms is useful in the attempt to develop a method for resolving contract disputes between the press and its confidential sources.
of individuals seeking anonymity: the sympathetic “source” or whistleblower on the one hand, and the manipulative “sourcerer” or strategic policy leaker on the other.\textsuperscript{363}

The culturally sympathetic prototype of the whistleblower is often described as having a number of idealized characteristics. He imparts true and important information to oversight bodies or to the press, serving to enhance government accountability and enlarge and enrich public discourse by revealing hidden abuse.\textsuperscript{365}

\textsuperscript{363} This characterization of whistleblowers as sympathetic characters derives not only from legislative materials (see, e.g., \textit{SENATE COMM. ON GOVERNMENTAL AFFAIRS, THE WHISTLEBLOWERS: A REPORT ON FEDERAL EMPLOYEES WHO DISCLOSE ACTS OF GOVERNMENT WASTE, ABUSE AND CORRUPTION}, 95th Cong., 2d Sess. 1-5 (Comm. Print 1978) [hereinafter \textit{LEAHY REPORT}, after the principal testimony of Senator Patrick Leahy]), but from popular culture as well. \textit{See}, e.g., M. GLAZER \& P. GLAZER, supra note 59, at 239 (“The courage of whistleblowers is . . . coming to be more widely appreciated and publicly acknowledged.”); Safran, \textit{Women Who Blew the Whistle}, \textit{GOOD HOUSEKEEPING}, Apr. 1985, at 25. Whistleblowers have often come to be regarded as cultural heroes. Despite his ostracism from the Police Department, for example, Frank Serpico became a folk hero and the subject of a Hollywood film as a result of his exposure of corruption in law enforcement in New York. \textit{Serpico} (Paramount 1973). M. GLAZER \& P. GLAZER, supra note 59, at 55 (noting that Serpico was cast as “the quintessential American hero” in the popular book and movie about him and that “his name became nationally identified with integrity and courage”).

This is not to say that the scholarly literature on whistleblowing has been entirely sympathetic to the practice or has depicted an unambiguous public approval of all whistleblowing activities. Some commentators have described the whistleblowing decision as involving “a hard moral issue,” entailing an activity in conflict with established values of organizational loyalty. F. ELLISTON, J. KEEGAN, P. LOCKHART \& J. VAN SCHAICK, supra note 59, at 3; Fisher, supra note 59, at 358-63 (describing social attitudes about whistleblowers as ambivalent); M. GLAZER \& P. GLAZER, supra note 59, at 262; \textit{SECRETS}, supra note 341, at 210-16; Rongine, \textit{Toward a Coherent Legal Response to the Public Policy Dilemma Posed by Whistleblowing}, 23 \textit{AM. BUS. L.J.} 281, 284-86 (1985) (discussing the loyalty argument against whistleblowing); supra note 85 (citing to scholars who discuss loyalty as the focal point of the whistleblowing dilemma). \textit{See also} Elliston, \textit{Anonymity and Whistleblowing}, 1 \textit{J. BUS. ETHICS} 167, 170-73 (1982) (arguing that whistleblowers should identify themselves publicly if their charges are to be taken seriously).

Nevertheless, whistleblowing to expose abuse in the public sector has been described as an ethical duty, see \textit{LEAHY REPORT}, supra, at 5, and “a sincere commitment to make this Government more responsive to people's needs and more worthy of their trust,” id. at 4-5. \textit{See also} M. GLAZER \& P. GLAZER, supra note 59, at 11, 38, 239 (describing whistleblowers as “ethical resisters” and whistleblowing as a “nascent social movement tied together by a common ideology of accountability . . .”). \textit{Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings Before the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 859-869 (1978) (testimony of Senator Patrick Leahy). See generally R. NADER, P. PETKAS \& K. BLACKWELL, \textit{WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY} (1972) [hereinafter R. NADER].

\textsuperscript{364} \textit{See} Smyser, supra note 33, at 13-15.

\textsuperscript{365} \textit{See}, e.g., \textit{LEAHY REPORT}, supra note 363, at 1-2, 4-5 (on whistleblowing to the authorities); D. SCHORR, supra note 36, at 179 (noting that anonymous sources became re-
Like David taking on Goliath, he is a disempowered dissenter acting altruistically in the public interest. The whistleblower takes tremendous personal risks in order to benefit the public at large. Her cooperation enables the press to function as an independent and critical watchdog of government and other powerful groups. She seeks anonymity solely for self-protective reasons. Not being a sophisticated political player, she relies entirely on the press’ discretion to keep the secret of her identity and trusts in the journalists to whom she confides.

The counter-prototype to the sympathetic whistleblower is the “sourcerer” or strategically manipulative leaker. What is deemed specifically unsympathetic or despicable about that sort of source depends on the particular circumstances, but again, public distaste appears to be based on some idealized conceptions. Unlike the pure whistleblower, these anonymous sources are thought to be politically savvy. They act with selfish motives in order to promote their own agendas rather than the public interest. Even if they believe they are acting to promote public aims, their purpose in talking to the press “is not so much to pass information along to the public . . . [but rather] to use the press, and ultimately the
public, as a means to an end." Thus, they manipulate the press and public discourse. They often lie or mislead. They hide behind anonymity in order to conduct "dirty tricks" or engage in "smear tactics" for their own self-interest and without accountability.

The ways in which we describe the models—the particular set of characteristics we attribute to each opposing prototype—suggest the cultural values which underlie public sympathy for the "source" and public disdain for the "sourcerer." Specifically, the prototypes reflect a commitment to the following ideals: fully-informed, truthful\(^{371}\) public discourse; open, clean, efficient and accountable government;\(^{372}\) conformity to law in industry and government; and a powerful and independent press capable of informing the public and policing the state.\(^{373}\) Consistent with our

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369. Smyser, supra note 33, at 14.

370. Just as the description of the whistleblower and the strategically manipulative leaker in text are mere prototypes, the abstract values which underlie social sympathy for one prototype and social opprobrium for the other are themselves simply ideals. These norms do not necessarily represent the world as it "really is" and, indeed, may sometimes be instrumental in masking a less-than-ideal reality. See infra note 376. See generally, e.g., M. Tushnet, Red, White and Blue: A Critical Analysis of Constitutional Law (1988).

371. One of the reasons for which truthfulness is valued is its contribution to public discourse in a democracy. As the Supreme Court has pointed out in the defamation context, false statements of fact are not perceived as properly adding to public debate. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). Norms of truthfulness also promote autonomy and self-determination—both for individuals and the collective public. Indeed, one of the reasons that lies are thought to be reprehensible is that they involve the deliberate abuse of power over persons in weaker informational positions and undermine people's prospects for self-determination. See, e.g., S. Bok, Lying: Moral Choice in Public and Private Life 18-20, 30-31 (2d ed. 1989) [hereinafter Lying]; Sweetser, The Definition of Lie: An Examination of the Folk Models Underlying a Semantic Prototype, in Cultural Models in Language and Thought 43, 59 (D. Holland & N. Quinn eds. 1987).

372. Government practices of confidentiality and secrecy are often thought to be suspect because they undermine accountability. See Lying, supra note 371, at 18-20, 30-31. See generally A. Schlesinger, supra note 47, at 332-76 (describing the early distaste for secret government and overuse of government secrecy); Note, Keeping Secrets: Congress, the Courts, and National Security Information, 103 Harv. L. Rev. 906, 906-14 (1990) [hereinafter Harvard Note]; Lewis, National Security: Muting the "Vital Criticism," 34 UCLA L. Rev. 1687 (1987); Marro, When the Government Tells Lies, 23 Colum. Journalism Rev. 29 (1985); Diamond, Morality in Government: The Federal Bureau of Investigation in the McCarthy Period, in VII History of Political Thought 167 (1986) (describing the FBI's Dissemination Policy in the 1950's, pursuant to which the Bureau would secretly make its files on suspected subversives available to state governors, while publicly insisting on the complete confidentiality of its information). While they are subject to numerous exceptions, statutes like the federal Freedom of Information Act, 5 U.S.C. § 552 (1988), and state "sunshine" laws suggest a recognition of the value of open government. See also Leahy Report, supra note 363.

373. See M. Glazer & P. Glazer, supra note 59, at 167 ("[W]ithout the attention of
vision of ourselves as a democratic society, the prototypes point to a belief that the election process should be conducted not with lies, omissions, and misleading statements, but in such a way as to promote independent and well-informed exercise of the franchise. Most generally, adverse reactions to "dirty" politics and politically-motivated leaking reflect some abstract sense that there should be norms of decency and fair play adhered to in public life.

Independent reporters, many resisters would be forced to end their protest after the initial reprisals. The willingness of journalists to listen, evaluate, and publicize allegations of wrongdoing is often a central component in facilitating whistleblowing.


375. The negative public response to negative campaigning, see supra notes 85, 120-21, and increasing public distrust of government evidence a commitment to this ideal. For examples of adverse reactions to political smear campaigns and the political backlash to the discovery of being engaged in "dirty politics," see generally B. Felknor, supra note 85, at 122. Of course, this ideal assumes a vision of democracy in which electoral choice is based on reasoned discourse and selection.

376. Of course, such norms are not universally regarded as being equally implicated in every revelation of politically-motivated leaking. Some would narrowly define "dirty" politics as the dissemination of completely untrue or misleading information about political opponents. See, e.g., Rosenthal, The Tape: What Sin?, N.Y. Times, Oct. 2, 1987, at A16, col. 1. Others would additionally focus on the manner in which the information was obtained, limiting disapproval to that obtained illegally or in violation of privacy. Id.

Moreover, such norms of decency change over time. The American press, for example, had a history of turning a blind eye to the amorous adventures of presidents from Roosevelt to Kennedy. As is evident from the Miami Herald's exposure of presidential candidate Gary Hart's extramarital affair, however, the press is now far less reluctant to report on the private lives of officials and candidates for office. Dickenson & Taylor, Newspaper Stakeout Infuriates Hart, Wash. Post, May 4, 1987, at A1. Although the press' reporting of such personal matters has been controversial, there does not seem to be a public consensus on its inappropriateness. Hays, The Sex Scandal Stages a Comeback, Wash. Times, Aug. 15, 1989, at E1. Accordingly, while we can discern an abstract commitment to decency and fair play in public life, the precise contours of the norms cannot be defined concretely.

Most generally, all of the social norms described above, see supra notes 371-75, only achieve consensus at an abstract level and are subject to limitation by other beliefs. Most would agree, for example, that truthfulness in discourse cannot be an absolute value. In addition, there is a large area involving statements not subject to empirical verification where truth is impossible to establish and may be irrelevant altogether. Similarly, the value of a free and independent press may also lead to a countervailing fear of the power of the press itself and its incursions into private life. The political value of an open government may be counterbalanced, for many, by the perceived values in leadership, efficiency of decision-making, and national security. See supra note 349. The values of self-determination and autonomy, which are necessarily implicated by secrecy, may theoretically be countered by values in community. The value in resisting manipulation is subject to the
Obviously, the source prototypes are unrealistic. Virtually no actual sources will conform perfectly to all the idealized characteristics of either prototype. In reality, we can visualize relationships of confidentiality between the press and its sources as ranging over a spectrum between the two poles. Yet, by representing unambiguous antinomies, the models serve to frame more particularized assessments of the value of secret-keeping.

C. Considerations Relevant to a Contextual Analysis of Source Confidentiality Claims

Schematically put, in order to determine whether to enforce particular press promises of confidentiality to sources, courts have to develop richly textured pictures of the circumstances of confidentiality and where they fall on the imaginary spectrum between the whistleblower and the strategic manipulator. Naturally, although 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 criticism that we often cannot profitably distinguish between manipulative and non-manipulative conduct. The value in an informed electorate is subject to limitations on the ability to process information and the countervailing value of efficiency in government. Practical problems with norms of full information abound: no individual can ever truly have it; no two parties agree on what it is; and at a certain point, too much knowledge may be paralyzing and dysfunctional.

Despite the abstract conflicts within our social values and our own ambivalence about the extent of our commitment to them, some of the difficulties will be mitigated by rich contextualization. The norms will not always be equally compelling when addressed in particular contexts and situations. For example, although most people would not take issue with the necessity of some level of secrecy in government dealings, they may well be suspicious of blanket claims based on government secrecy and national security. History has demonstrated that governments tend to overclassify their documents and unduly hide behind the cloak of national security in seeking secrecy. See, e.g., A. Schlesinger, supra note 47, at 342-45; Harvard Note, supra note 372, at 906-14. There is no reason to suppose that other bureaucratic organizations do not share the same tendency. Essays in Sociology, supra note 247, at 233-34. With respect to norms about information, we generally believe that more information is better because it permits us to behave as citizens, even though it does not guarantee that we will not make mistakes. In other words, given the power of government and other quasi-public interests, we should promote those practices of source confidentiality which will lead to the dissemination of information countering existing disempowerment, even if they do not provide all possible information and even if we cannot wisely or rationally absorb all of it.

377. See Lewis, Trading News for Anonymity: Washington Reporters Bargain Daily With Sources Over Who May Be Identified, ASNE Bull., Apr. 1988, at 3, 6 (suggesting that “[t]he gamut of objectionable obscurity runs between these extremes,” referring to whistleblowers on the one hand, and political sources who have the “desire to escape public accountability for their statements” on the other).
the realities of the press' relationship with government.

Therefore, this Article suggests that the following five considerations be addressed by courts seeking to envision the contexts of breach of contract actions by confidential sources: (1) the character of the source's substantive information;\(^\text{378}\) (2) the source's reasons for leaking; (3) the relevance of the source's identity;\(^\text{379}\) (4) the press' reasons for disclosure; and (5) the nature of the relationship between the reporter and the source.\(^\text{380}\)

Any proposal that appears to invoke a variety of contextual factors within the frame of some kind of analogical process inevitably raises questions about identifying methodology. Is this an interest balancing test? If so, to say only that the different considerations must be balanced is to beg the question.\(^\text{381}\) How exactly is a court to balance the relevant factors in making its decision? How is the court to decide what evidence is relevant in the first place for that task?

Instead of a conventional interest balancing test, this Article proposes a historically and democratically grounded contextualist method. In fact, it seeks less to promote a formal test than to foster an attitude and direct a sensibility.

The approach, at base, relies on the 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.\(^\text{382}\) In turn, experience suggests the following characteriza-

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378. This would, in turn, involve inquiry into the truth of the information; whether it was a plant; its nature and relative importance; and whether its original disclosure was a crime. See Fed. Comm. Comment, supra note 19, at 312-13 (agreeing, although in the context of a different analysis, with the usefulness of some of these considerations).

379. The inquiry with respect to this factor would require an examination of why the source sought anonymity and whether, how, and to what extent the identity of the source was relevant to the story. See infra note 393 on the use of the term "relevance" in this context.

380. This consideration would require an assessment of the power position of the source in her own hierarchy, her sophistication in dealing with the press, the particular characteristics of the relationship at issue, and the specificity of the promise of confidentiality.

381. For a history and critique of balancing in the constitutional context, see Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943 (1987).

382. This Article 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. Rather, it is intended both to suggest and to represent a useful, common-sensical way of structuring and guiding judicial inquiries. Nevertheless, it should be obvious that my thinking has been influenced by the Realist tradition, and shares elements in common with current feminist legal methods, applications of cognitive theory to law, and recent work on the role of empathy in judicial decision-making. See K. Llewellyn, supra note 215; Bartlett, Feminist Legal Methods,
tion of that decisional process. First, decisions are not made abstractly. Analytically, they are preceded by a descriptive or characterological moment, in which we attempt to develop a complete, coherent picture of the decisional stakes and circumstances. Second, it is at least in part that picture which determines which decisional factors we will consider relevant in the circumstances. The character of the picture influences how we think about it. Third, a number of such pictures are often rationally possible in any given context and the selection of one rather than another may have significant normative consequences.

By richly describing the complex institutional history of the American press and by rejecting abstract and uni-dimensional characterizations of particular press-source relationships, this Article proposes a reality-based framework for the judicial descriptive moment. In other words, it cautions judges to eschew comforting platitudes about the press either as a fierce guardian of freedom or as an unprincipled seeker after fortune. Rather, it explicitly requires them to focus on the actual democratic values at stake in the interactions between the press and its confidential sources.


383. I use the visual metaphor for reasons of convenience and not to take a position on whether, and to what extent, cognition is in fact conducted largely by visualization. Moreover, I do not mean to suggest that the descriptive moment is necessarily conscious, intellectual, or solitary and self-generative. In the judicial context, for example, it is the parties who provide the decision-maker with the choice of contextual descriptions or stories with which they hope to persuade her.

384. Professor Schauer, for example, has criticized proposals for contextualized understandings of the Constitution because “the call to context and the idea of decision according to rule are fundamentally in conflict.” Schauer, Context and Constitutionalism, 12 Hamline L. Rev. 59, 66 (1988). In his view, the effect of constitutional rules is to dictate choices among contextually relevant factors—“to remove from the context of decision certain factors that are part of the context of the event.” Id. at 67.

Whatever the ultimate merits of Professor Schauer’s position, his critique of contextualism is not inconsistent with the sense of context-specificity proposed here. The description in text relates to a common-sensical observation about relevance determinations: that different rules of decision will be called forth by different characterizations of a set of facts. Cf. Tribe & Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1065 (1990) (on the outcome-determinative character of differences in levels of generality at which constitutional rights are described): Moreover, it is a thesis of this Article that the first amendment and existing social norms can provide the guideposts for shaping the descriptive, contextualizing moment. Thus, rules may be less constraining, and context more so, than Professor Schauer suggests.
1. The Character of the Information

a. Falsity

In theory, neither contract doctrine nor cultural norms about when to respect promises of confidentiality would support enforcement of such promises when the information provided by the source is false. The prime example of such a situation would be a blatant and empirically verifiable lie, such as a government disinformation campaign. Both norms of truthfulness and dictates of the democratic vision entail that high government officials who intentionally lie to the public should not then be able to sue the press for uncovering the lie and reporting on the circumstances in which it was disseminated. It would fundamentally hamper the press' roles as informer, interpreter, and watchdog to allow the Secretary of Defense a cause of action against the press for having revealed his role in disseminating an outright lie.385

Nevertheless, falsity is a problematic notion to use as a threshold exclusion in all but a small set of very clear-cut situations. First, there is often a time period between the disclosure of information by the source and the press' ability to confirm its truth. Second, and more importantly, the truth about a piece of information consists not only of its narrow empirical verifiability, but also of its broader context. Often, then, while a source's disclosure will be true in a narrow sense, it will not disclose the entire story. Therefore, a narrowly interpreted notion of truthfulness will often inaccurately assess a particular source's disclosure. Finally, a focus on falsity alone will not address the knowledge and culpability of the source in transmitting the information.

b. Whether the disclosure was a plant

The classic example of press manipulation is the plant. Because by and large the press is the only mass conduit of most information, manipulating or misleading the press necessarily disempowers the public as well.386 Even if the planted information is

385. Another simple situation in which truth should be dispositive is the case of a source passing a fraudulent document to a reporter. For example, during the 1980 Presidential election, a source known to columnist Jack Anderson only as "Lloyd" leaked an alleged CIA document which predicted a 60% loss of the Iran hostages in the event of a rescue attempt. Anderson printed the story after the election and it was subsequently discovered that the memorandum had been forged. See E. Abel, supra note 1, at 38.
386. The fact that the press also manipulates the public, though important, does not
in a narrow sense true, the device of the plant is a potent weapon in the hands of official authority to manage the press and preclude more searching inquiry. Plants allow journalists to think that they are crafting the vision of reality being disseminated to the public, while they are, in reality, simply serving as tools of those in authority. The danger of this is, of course, that it relaxes the press’ vigilance, further entrenches the power of government officials, and undermines the separation between the press and government by turning journalists into unwitting propagandists.

While plants are disempowering by definition, it is often very difficult to distinguish a plant from an unauthorized leak. Moreover, there will presumably be situations in which journalists knew that they were simply passing on planted information and nevertheless agreed to confidentiality for the source. Finally, the nature of the information, the degree and source of authorization, and the relevance of the particular planter’s identity to a full understanding of the status and character of the plant itself may all affect our assessment of the level of public disempowerment entailed by anonymity for the source. All this suggests that the question of whether the information was planted should not alone be determinative of whether a particular promise of confidentiality to a source should be enforced.

c. The nature and importance of the information

The 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. For example, this factor might become central when considered with other factors, such as the relevance of the source’s identity to the story. Suppose, for example, that the disclosure concerned personal information about a minority political leader, which was collected and confidentially leaked by the FBI in order to undermine his political support. Thus, the nature and importance of the source’s information will often be a critical guidepost in determining the “real” story in a source disclosure situation.

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387. See supra Section I.A.3. (on the difficulties of distinguishing leaks and plants).
388. See supra note 314.
d. Criminality of the original disclosure

The 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. The press defendant might make this argument, for example, if the source had leaked classified information or documents. This Article suggests that the criminality of the source's disclosure simply be one consideration used in the determination of whether a particular agreement is to be deemed binding, rather than a threshold factor that voids the agreement. In most instances, the reporter is fully aware of the potentially criminal nature of the source's activity and should be subject to the "unclean hands" defense. It would be particularly counter-intuitive to prevent recovery by prototypical whistleblowers under these circumstances, while enabling strategically manipulative high public officials—who have the authority to reveal or declassify information at their own discretion—to sue the press on its promises.

2. The Source's Reasons for Leaking

An attempt to characterize the reasons for a source's original leak will be useful in developing the context of the confidentiality transaction. Sometimes, 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 a policy leak. Conversely, the fact that the exposed information had little relevance to the leaker's position and occupation might suggest that

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389. Such an argument would rest on the doctrinal proposition that courts do not enforce illegal bargains. See supra note 142.


391. See, e.g., A. Schlesinger, supra note 47, at 355 (on high level of leaks of classified information by government itself); D. Minor, supra note 267, at 13-15; Harvard Note, supra note 372, at 910-16 (on selective declassification).
the information was revealed for ego, goodwill, or animus reasons. However, this consideration in itself cannot serve to determine whether promises of confidentiality should be enforced in any given circumstance. In large part, this is because there is no consensus that, at the abstract level, any of these categories of reasons for leaking should be disapproved per se. Furthermore, reasons for leaking will often tend to be mixed or unclear.

3. The Relevance of the Source’s Identity

An inquiry into why the source sought anonymity and whether, and to what extent, his identity was relevant to the story is

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392. While this may not be the case with respect to animus leaks, they often cannot be distinguished or separated from other politically-motivated leaks.

393. Relevance here simply refers to the pertinence of the source’s identity to the story—whether there is a “close logical relationship” between the identity of the source and the substance of the story. Webster's New World Dictionary (2d College ed. 1972). See also infra text accompanying note 398. I use the concept of relevance of the source’s identity to the story rather than the more common notion of “newsworthiness” because of the tautological meaning of newsworthiness—what is newsworthy is what the press thinks is fit to print or broadcast. One way of trying to attach some independent meaning to the notion is to define newsworthy information as information that relates to a matter of public concern. Of course, even that attempt is subject to criticism at least at an abstract level. How do we establish what information is a matter of public or general concern? Nevertheless, despite the potentially large penumbral areas in which the distinction between private and public concerns may be hard to draw on a consistent and principled basis, it seems relatively uncontestable that at least narrowly political matters fit into the core of newsworthy information of public concern. See H.L.A. Hart, The Concept of Law 121-32 (1961) (on core applications of rules); BeVier, The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle, 30 Stan. L. Rev. 299, 300 (1978) (contending that while the scope of first amendment protection is narrow, it clearly encompasses political speech); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 20 (1971) (asserting that constitutional protection should only be extended to speech that is expressly political). Even if what the public is in fact interested in discussing does not include these matters, we ought to consider them fundamentally newsworthy in light of the appropriate role of the press in a democracy.

In fact, the concept of “public concern” as a test for press rights has had a checkered history in the Supreme Court. In the defamation context, a plurality of the Court in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 45-49 (1971), agreed upon a subject matter rather than a status-based test for application of the New York Times standard. Fearing that this inquiry left the door open for judicial content control, the Court rejected the subject matter approach in Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974), and returned to the plaintiff's status as the trigger for constitutional privilege. Nevertheless, a focus on “public concern” has reappeared in the guise of a speech-defining test. See, e.g., Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (establishing that private figure plaintiff bears burden of proving falsity when defamatory statement involves speech of public concern); Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 761-63 (1985) (allowing the imposition of presumed and punitive damages for defamatory speech about a private figure when the statements do not involve matters of public
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. Bacon's adage that knowledge is power is particularly apt in this context.

As noted above, there are a number of situations in which a source might seek anonymity in order to avoid public attention. If anonymity is critical to the accomplishment of the source's substantive aims, then this strategic reason may be substantively relevant. An assessment of whether the reasons for the source's desire to avoid publicity should justify enforcing the promise of confidentiality in any given case will depend on substantive judgments about the social harm of hiding the source's identity and about the relevance of the identity to the full story. For example, the publication of a trial balloon does not in itself necessarily truncate or discourage public debate. In any given case, the court will have to decide how much it matters to public discourse and the substantive desirability of the proposal that a particular source is attempting to float a particular trial balloon. Similarly, sources may seek anonymity because they feel that their identities will somehow overshadow the substantive merit of their policy proposal. In those circumstances, the relevance of the identity of the source to the story is a much more complex matter. By contrast, courts might decide that a story has a fundamentally misleading impact on public debate if, for example, the source sought anonymity in order to present a false appearance of neutrality.

Whether a particular source's identity would be relevant and whether its non-disclosure would undermine public discourse cannot be categorically predicted in advance. First, relevance is a re-

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394. Of course, that itself will hinge on a determination of what the “full” or “real” story is—which will involve an assessment of the nature and importance of the source's information. See supra Section IV.C.1.c.; supra note 314 and accompanying text.

395. For example, most people would agree as to the relative importance for public debate of whether a trial balloon concerning a planned cease fire in the Persian Gulf War originated in the office of the Chairman of the Joint Chiefs of Staff or in that of a state legislator.

396. This refers to a situation, for example, in which a policy proponent's fame, notoriety, or previously espoused ideological positions may undermine substantive discussion of her proposal.

397. Here, for example, we might include the classic case of the anonymous dissemination of false statements about opponents in political campaigns.
lative concept. It requires an assessment of the nature and importance of the substantive information and exactly how the identity of the source is pertinent to it.\textsuperscript{398} Second, while the identity of the whistleblower, the ego leaker, or the goodwill leaker often may not be particularly relevant to the substantive story being told, that will not necessarily always be the case.\textsuperscript{399}

The question of the relevance of the source's identity need not rest solely on the court's probabilistic assessments, however. Since the issue will necessarily arise in the context of a lawsuit by the source subsequent to disclosure, some sense of the public's actual reaction to the identity of the source may be available through press accounts.

4. The Press' Reasons for Disclosure

The issue of why the press divulged the identity of the source is also fraught with difficulties and cannot be considered independently of the other factors. Although circumstantial evidence may be useful for establishing reasons for particular disclosures, there may be multiple motivations for a particular breach of a promise of confidentiality.

The media could have exposed a source primarily for economic or reputational self-interest.\textsuperscript{400} The source could also have been

\textsuperscript{398} See supra note 393. For example, it could be argued that Daniel Cohen's actions in leaking the information would pale in relevance if the substantive information he delivered were earth-shattering. See supra note 114.

\textsuperscript{399} Suppose, for example, that the Department of Defense has commissioned three studies on the effects of radiation from nuclear testing, and has only chosen to make public the studies which minimize those effects. If a leaker provides the press with the third study, which contradicts the findings of the others, the justification for its publication would be that it results in a readjustment of power in the relationship between the governors and the governed: it gives the governed the opportunity for self-determination. Suppose, furthermore, that the leaker authored the study; had had less access to relevant data than the other authors; and was an unduly alarmist personality who had been fired because he jumped to conclusions too quickly on the basis of available data. Under those facts, his identity would be relevant to the story in that it would cause the public to reevaluate the information and place it in a larger context. Then the revelation of the leaker's identity would also lead to an empowering readjustment.

\textsuperscript{400} Litigation presents one prototypical instance in which self-interest has prompted some news organizations to contemplate the disclosure of their sources. A few news organizations enter into explicit agreements with their sources which stipulate that the sources' identities may be disclosed in the litigation context. See E. LAMBETH, supra note 34, at 143. The Chicago Tribune and the Wall Street Journal, for example, distinguish between anonymity and confidentiality, and advise their anonymous sources that although their names will not appear in published stories, they may be disclosed in litigation or "other unusual circumstances." Jones, supra note 160, at 12; Jones, supra note 297, at B8.
disclosed through inadvertence.\footnote{401} If the source were disclosed by

See supra note 297.

For those news organizations without disclosure agreements with sources, the defamation action presents a paradigmatic instance of economic incentives to disclose source identities. One publicized instance involved the order by the management of the Daily News in Los Angeles to two of its reporters to disclose the identities of their confidential sources in a libel action brought by one of the former Iran hostages on a story about him. Lindsey, supra note 294, at A8, discussed in Berger, The "No-Source" Presumption: The Harshest Remedy, 36 Am. U.L. Rev. 603, 603-07 (1987). Although the issue became moot when the reporters persuaded the sources to allow themselves to be identified, the incident demonstrates the economic incentives for disclosure in defamation actions.

Courts have imposed a variety of sanctions, including judgments in plaintiffs' favor and jury instructions that the source did not exist, on news organizations which seek to rely on confidential sources in defending against defamation claims while refusing to divulge the identities of the sources. See Berger, supra, at 613-24; Southern California Note, supra note 299, at 1641-43; Kirtley, Discovery in Libel Cases Involving Confidential Sources and Non-Confidential Information, 90 Dick. L. Rev. 641, 662-63 (1986); Note, Source Protection in Libel Suits After Herbert v. Lando, 81 Colum. L. Rev. 338, 339 (1981); Note, supra note 177, at 363, 371. Although many state shield laws protect journalists from having to disclose their confidential sources in defamation actions, some states explicitly exempt defamation defendants from protection. Kirtley, supra, at 644 n.30. Even without the specific imposition of such sanctions, juries may well be uncomfortable with the press' reliance on confidential sources and may discount the credibility of the defendant's testimony as to the existence and reliability of unknown sources. In view of the currency of multi-million dollar verdicts against the press in defamation actions in the past decade, economic self-interest will often counsel breach of promises of confidentiality in these circumstances. See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987) (award of $3.05 million in defamation action); see also Report Says Media Faring Better in Libel Suits, Broadcasting, Sept. 11, 1989, at 133 (describing libel judgment statistics for media companies compiled by Libel Defense Resource Center).

A media organization might also disclose a source's identity in order to vindicate its own reputation. This would occur, for example, when the press organization attracts bad publicity as a result of its reliance on a confidential source. See E. Lambeth, supra note 34, at 143 ("public ill will often generated by a refusal to testify"). An analogous situation which has been the topic of much public controversy is the legitimacy of press promises—extracted in return for interviews—to refuse to reveal the location of terrorists and other fugitives. In May, 1986, for example, NBC broadcast an exclusive interview with Mohammad Abu Abbas, the mastermind of the Achille Lauro hijacking in October, 1985. M. Emery & E. Emery, supra note 225, at 531. The network obtained the interview after promising that Abbas' whereabouts would not be publicly disclosed. Id. See A Question of Ethics, Maclean's, May 19, 1986, at 25. This is, of course, only an analogy because the negative public response was due not only to the public's lack of knowledge per se, but to their disapproval of practices which make the media complicitous with those who commit crimes. See, e.g., Parachini, AMA Journal Death Essay Triggers Flood of Controversy, Los Angeles Times, Feb. 19, 1988, part 5, at 1, col. 2 (describing controversy over medical magazine's refusal to identify author of article confessing to euthanasia); Nagel, How to Stop Libel Suits and Still Protect Individual Reputation, 17 Wash. Monthly 12, 15 (1985) (criticizing Phil Donohue and Bob Greene for "harboring" criminals by keeping interviewees secret). Nevertheless, the example is useful to demonstrate the existence of a current debate on press confidentiality in more general terms.

401. For example, such mistaken disclosure can occur because of technical problems, for example. Particularly in the broadcast context, existing technology may sometimes fail to
the press in a defamation suit, and if the identity of the source
were not particularly relevant to the story, then a court could
conclude that disclosure by the press would not be justified as
promoting democratic values. The analysis would be different if
the media were to claim that they disclosed the source's identity
because it was already known to large segments of the commu-
nity, or because of what they perceived to be the public interest.
This might occur as a consequence of changes in the circumstances
subsequent to the moment of agreement. In one such type of case,
press disclosure might hinge on a change of circumstances precip-
titated by the source which provides a new reason for regarding
his identity as germane to the story. Suppose, for example, that a
source confidentially tells a journalist of his involvement with a
public official in some illegal, unethical, or morally questionable
activity and thereafter runs for public office himself. Or suppose
that a source, particularly a governmental source, publicly lies
about his communications with the press for reasons other than
merely protecting his identity. Newsweek offered this justification
when it reported in 1987 that Lieutenant Colonel Oliver North
had been the magazine's anonymous source for its 1985 cover
story on the Achille Lauro hijacking. Disclosure in those situa-

disguise a source completely while on the air. Because both visual images and the subjects' voices have to be distorted and disguised, technological failure can affect confidentiality at a number of points in the process. Even when technology does not fail, the complexity and bureaucracy of modern broadcast and print news operations increase the possibility that sources' identities will be disclosed by mistake. Since many news organizations today require their reporters to share the identities of their sources internally—with their editors, for example—many people in the news organization have the opportunity to err by disclosure. See supra note 293.

402. See supra notes 102 & 294. The problem with North's actions was not only that he had himself put in issue his status as a leaker. He had also sought to make Newsweek an accomplice in his lie to Congress. Moreover, if his falsehood had not been unveiled by the magazine, his substantive charge that Congress' "leakiness" justified lying might have been legitimated.

An analogous disclosure occurred during the Eisenhower administration, when Admiral Robert Carney, who had been quoted as predicting war in the Formosa Strait during a deep background meeting, testified before a Senate committee that he had been misquoted. Although a reporter who was present at the briefing had taken verbatim notes that confirmed the original reports, he felt that he could not use them because of his agreement not to quote or attribute the information gained at the meeting. Instead of simply keeping silent, however, he gave his notes to a fellow newsmen who had not been at the meeting and thus did not feel bound by the background rules. He apparently did so because of his "outrage" that the Chief of Naval Operations could predict war without attribution. D. Wise, supra note 39, at 289-90.
tions would “set the record straight.”

In the second type of case, disclosure would not be predicated on external events affecting the newsworthiness of the source’s identity. Rather, after granting confidentiality, the reporter might realize something which makes the source’s identity a subject of public concern. This can happen in a variety of ways, the most obvious of which is the reporter’s realization that the source’s information is a plant, misleading, false or incomplete, or that the identity of the source is otherwise material to the story.

5. The Nature of the Relationship

a. The particular dynamics of the interaction

An inquiry into the power position of the source in his own hierarchy, his sophistication, and the particular dynamics of the relationship between the reporter and the source can help in addressing the fairness of enforcing the press’ promise under the circumstances. It can also illuminate the extent to which we should worry about the institutional disempowerment of the press in a particular case. If, for example, the relationship is one close to pure seduction and betrayal by the press—in which the journalist has pursued the source, earned his trust, and lied to him to ensure his cooperation—then it is unlikely that the promise of confidentiality was unwillingly extorted from the journalist by a powerful, strategically manipulative source. If, on the other hand, the relationship is more ambivalent and complex, then a much more searching inquiry is warranted into the effects of enforcing the promise.

403. Responding to the North disclosure, for example, the Editor of the Louisville Courier-Journal stated that it would be incumbent on the press to set the record straight “where the source publicly accuses someone else of leaking a story for devious purposes.” Zuckerman, supra note 89, at 61.

404. The simplest example occurs when the reporter promises confidentiality on the basis of the source’s information and discovers the source’s identity only after making the promise. Suppose, for example, that an unidentified source reveals his personal knowledge—from having been involved himself—that a nominee for a high government post was involved in atrocities in Vietnam and only after a promise of confidentiality admits his identity as a member of Congress himself.

A similar scenario arises when the source requests confidentiality without first providing sufficient information for the reporter to understand the potential newsworthiness of the conjunction of the source’s identity with the information ultimately provided. This is one way of characterizing what happened in Cohen. See supra note 114 (quoting the actual language of Cohen’s offer of information to the reporters).
b. Specificity of the non-disclosure agreement

In addition to the apparent dynamics of the relationship between the reporter and the source, the particulars of the agreement of confidentiality may suggest whether the parties initially understood one another's assurances and expectations. Most agreements of confidentiality in the press context are oral. Many are implicit or are sought part-way through the process of disclosure rather than at the beginning.\(^4\) In addition, since many source-reporter relationships are of long duration, they involve, over time, the exchange of information at different levels of sensitivity. There may not be discrete agreements as to the level of confidentiality accorded to each piece of information. Moreover, reporters often bargain with long-term sources for changes in the ground rules of confidentiality.\(^5\) Finally, sources and reporters may assign different meanings to the language that has become conventional in these situations.\(^6\) The identity of the source and

\(^4\) In addition, changes in ground rules at government briefings can become very confusing to all parties involved. J. Deakin, supra note 36, at 71.

\(^5\) See Blasi, supra note 19, at 243. The revelation by then-Washington Post editor William Greider of David Stockman's serious reservations about Reagan's 1981 budget policies, while Stockman was still director of the Office of Management and Budget, provides an excellent example. See generally W. Greider, supra note 55; Greider, supra note 335, at 10; see also supra note 102. Despite an original agreement that their interviews would be off the record, Greider persuaded Stockman to permit him to use some of the interviews on a background basis for his stories in the Post. Finally, Greider contended that he received Stockman's permission to use the material in a magazine piece in September, 1981. The revelations were explosive and sensationalized by the rest of the media, although neither Greider nor Stockman thought they would be. In the resulting flap, Stockman claimed that he and Greider had a misunderstanding as to the ground rules of their meetings. See D. Broder, supra note 34, at 343-47; W. Greider, supra note 55. Negotiations on attribution rules also characterize government briefings for reporters. J. Deakin, supra note 36, at 71.

\(^6\) As discussed above, a sophisticated set of terms of art has developed in the disclosure context, particularly among government sources and the Washington press corps. See supra note 39. However, there is no single definition unchangingly adhered to by all players. The terms are ambiguous and are often interpreted to mean different things by those who use them. See T. Goldstein, supra note 34, at 189-90; Jones, supra note 297, at B8; Rosenfeld, supra note 39, at 7-9.

Uncertainty as to the particular meaning intended is most probable when sources are uninitiated in the etiquette of talking to the press. This is a particularly thorny problem for unsophisticated sources. See, e.g., D. Broder, supra note 34, at 341 (recounting unsophisticated source's surprise that journalist friend would report statements he assumed were made in confidence). Many government bureaucrats as well do not know the rules of the press-politician relationship and will ask for confidentiality after they have spoken. Press Connection, supra note 36, at 36. Even sophisticated sources like David Stockman may feel—or at least claim—that their ground rules of confidentiality may have been mis-
the particular dynamics of the reporter-source relationship should influence a court’s assessment of who should bear the risk of such misunderstandings.

In sum, the approach suggested in this Article requires courts to determine where a particular source plaintiff fits in the continuum between the prototypical whistleblower and the prototypical “sourcerer.” That determination in turn requires that courts be sensitive to issues of power, position, motivation, and effects in any given disclosure action by sources against the press. A context-sensitive assessment in any such lawsuit should enable courts to discover and reveal what is truly at stake for the culturally valued norms of well-informed public discourse, democratic government, and an independent press.

D. The Approach Applied

Because the approach suggested here is a context-sensitive model, it cannot abstractly be used to predict the results of particular contract actions by sources. However, it does suggest that there will be some easy cases. If classic whistleblowers Karen Silkwood and Ernest Fitzgerald were to sue the press for a breach of promise of confidentiality, the various factors listed above would make it easy for courts to find their agreements enforceable. If Henry Kissinger were to have sued the press for breaching the anonymity ground rules of a backgrounder in which he lied about United States military intervention in Cambodia, however, the social policy considerations underlying the decisional guidelines would clearly dictate that he lose. Those are the easy cases, in which real life closely parallels the idealized prototypes of the sympathetic whistleblower and the despicable manipulator.

What about Joseph Fries and Daniel Cohen, who both sought legal redress for their injuries and whose contract actions frame
this Article? Officer Fries would probably recover in his contract action under this Article's proposed approach, if any misunderstanding as to the scope of the promise of confidentiality were resolved in his favor. After all, according to the available facts, Fries was a classic whistleblower, taking the risk of retaliation to provide potentially important information about the operation of a fundamental governmental service.

Dan Cohen's story is more ambiguous. My sense is that, all things considered, the approach suggested in this Article should not lead to a victory for Daniel Cohen. A fact-sensitive look at Cohen shows a close-to-prototypical "sourceristic" situation. Confidentiality was sought strategically and misleadingly by a sophisticated source whose political partisanship was critical to the story. The source's identity was already known in the community. Keeping the promise of confidentiality would have resulted in skewed public debate and would have misled voters as to the tactics and character of the Republican candidates on the eve of the election. Yet a court might wonder whether actual

409. See supra Section I.D., in which the Fries and Cohen cases are first discussed.
410. See supra note 111.
411. This is far clearer under the proposed approach than under the alternative of applying a version of the constitutional privilege in defamation. See Minnesota Note, supra note 16, at 1584-85.
412. Oberdorfer, supra note 11, at 8.
413. While the substantive information provided by Cohen was true, Cohen's leak was a conspiratorial attempt by Republican supporters to harm the Democratic campaign at a time close to the election, making it difficult for them to recover from the negative public image. Confidentiality was necessary to achieve the objective sought, lest the tactic backfire and subject the Republicans to charges of unfairness.

Why did the reporters promise confidentiality? The facts indicate that Cohen gave the reporters only a vague reference to "documents about a candidate for statewide election" before extracting a promise of confidentiality from them. He did not tell them to which candidate his information pertained. He did not tell them that the information could be found in public records. On the basis of his initial approach, each of the reporters could well have expected to receive critical information that could sway the vote. It could well have been the stuff of which Pulitzer Prizes are made. In addition, Cohen did not disseminate the information on an exclusive basis. This is precisely an example of the type of situation in which, because of the media's own competitive concerns, the journalists were at a disadvantage in contrast to Cohen.

What about the information itself? It seems clear that publicity about an arrest for unlawful assembly in the course of a peaceful civil rights demonstration to promote minority hiring by the city would not be seen by the voting public as a major blot on the candidate's record. At most, that information would make her position clear with respect to minority hiring issues. It might even have had a positive impact on her candidacy, at least for like-minded voters who would see her as having the courage of her convictions.

Thus, the more substantively important element of Cohen's information was the vacated
disclosure of the source's name was necessary or whether sufficient positional identification might have adequately protected the public interest. It might be swayed by the suggestion that Cohen did not specifically know the full circumstances of the criminal record he disclosed. Nevertheless, because the specific identification of Cohen lent needed credibility to the report and diverted suspicion from other possible leakers, because disclosure gave the voting public the "full" story, and because Cohen's interest in seeking anonymity for an authorized "dirty trick" was not particularly worthy of protection, I would suggest that the Cohen situation is closer to that of Kissinger than that of Silkwood.

There will presumably be much harder cases than Cohen. In those cases, various of the identified considerations and underlying policies will clash in more direct ways. The resolutions reached by courts will require their overt admission that some substantive value was highlighted for reasons not somehow compelled by the logic of the case. The requirement that courts articulate these substantive visions as a precondition to making decisions in these cases is not particularly novel; in fact, it is descriptive of judicial decision-making. Courts always have substantive visions as background rules whenever they choose between one set of potentially applicable legal rules and another. Moreover, given the malleability and interpretability of facts, courts will differ in the ways in which they choose to interpret and characterize the factual context of any given source-confiden-

conviction for shoplifting. The story in the newspapers made clear that the arrest and conviction were for shoplifting $6.00 worth of sewing supplies shortly after her father's death, when she was in a distraught state and forgot to pay for the supplies. The potential effect of this information on the voting public is obviously hard to assess. It does seem unlikely that given her consistent community involvement and service thereafter, the public would decide that a 12-year-old, vacated conviction for a petty misdemeanor would ipso facto make her unfit to hold office as Lieutenant Governor. Even Justice Yetka of the Minnesota Supreme Court in dissent characterized the revelations as "rather trivial infractions." Cohen IV, 457 N.W.2d at 206.

Cohen himself seemed to recognize that the information itself did not appear to be substantively fatal to the Democratic candidacy. In an argument similar to that used to justify the press' interest in Gary Hart's adulterous love life during his bid for the Presidency, Cohen claimed that the importance of his information lay in the fact that the candidate did not disclose it herself and that the non-disclosure called into question her integrity and judgment.

Yet, in view of the marginal importance of the substance of the information, what made the stories really newsworthy was that the indirect attack on the Democratic candidate's integrity and judgment was being made by the Republican camp practically on the eve of the election—without attribution and responsibility.
tiality case.

A discretionary standard, which requires courts to articulate ideological presuppositions and deal with particular cases in a contextual fashion, is subject to two sorts of criticism with respect to judicial application. First, given the manipulability of facts and the predictable availability of a number of characterization scenarios, a discretionary standard may lead to significant uncertainty in application. Second, an explicitly discretionary standard may run the risk of being applied in a fashion contrary to that proposed in this Article. In other words, those who have a different vision of the power of the press and government, or a different expectation of the process of politics, might well apply the standard in a press-suppressive fashion.

These are indeed dangers. With respect to the first, some greater level of certainty may develop over time, as the common law in this area develops. With respect to the second, the response is that it cannot be avoided by less discretionary rules. The purely doctrinal approaches are no less ideologically-laden characterizations of the facts at issue in these cases than the undertaking proposed by this Article. A doctrinal rule enforcing all press promises of confidentiality to sources harkens to a particular political vision while disguising its substantive character. A rule barring all contract actions by sources against the press for disclosures in political contexts leaves to the haphazard process of self-regulation an institution motivated in no mean part by its own business interests. Neither result is more inherently justifiable than an approach which attempts to alert courts to the social policies implicated in promises of confidentiality to sources and to require that they consider those policies in a self-conscious fashion.

CONCLUSION

The issue as to which the United States Supreme Court has

414. See, e.g., Unger, supra note 210, at 616; see also Z. Chafee, Government and Mass Communications 709 (1947). Chafee warned, while discussing government content regulation of broadcasting,

It is very easy to assume that splendid fellows in our crowd will be exercising the large powers over the flow of facts and opinions which seem to us essential to save society, but that is an iridescent dream. We must be prepared to take our chances with the kind of politicians we particularly dislike, because that is what we may get.
granted certiorari in *Cohen* is whether the first amendment grants the press "immunity from liability for damages caused by dishonoring promises of confidentiality given in exchange for information on a political candidate."*416* This Article has suggested that such formal "immunity" is neither mandated by existing first amendment precedent, nor compelled by the policies underlying the constitutional freedoms of speech and press.*416* This Article has also suggested that the confidential source lawsuit is not fertile ground for the simple transplantation of the existing first amendment-based defamation privilege.*417*

Courts must initially realize that conflicts over confidentiality constitute struggles for power. Specifically, the new trend of contract actions by disclosed sources raises important questions about whether, and to what extent, to alter the balance of power between sources and journalists individually, and between government and the press institutionally. Easy absolutes do not properly answer that inquiry. After all, if all promises of confidentiality are generally upheld as ordinary contracts, courts will tilt the balance of power in favor of press manipulation by enhancing the security of those who plant government information. If, on the other hand, they are never upheld, then the balance will tip too powerfully in favor of the press, leaving prototypical whistleblowers at the mercy of malicious, careless, or purely self-interested news organizations. Instead, courts must adopt a method which adequately takes into account the complex ways in which press power is affected by different circumstances of confidentiality.

This does not mean, however, that the first amendment does not play an important role in the analysis proposed here. Common law language and modes of analysis are far from strangers to constitutional interpretation. This Article seeks to mine the most nuanced aspects of the common law method in order to create a reality-focused, contextualist approach to first amendment-based privilege.*418* In other words, what I propose is a sensibility which would require triers of fact to ascertain and describe the circumstances of any particular breach of confidentiality by the press.

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416. See Section II.B.1.
417. See Section II.B.2.
418. I mean to contrast this suggestion to the apparently much more mechanical, status-triggered defamation privilege.
with sensitivity to the particulars of the relationship, the institutional role of the press, and the democratic ideals underlying the first amendment.