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# **COHEN v. COWLES MEDIA AND ITS SIGNIFICANCE FOR FIRST AMENDMENT LAW AND JOURNALISM**

Jerome A. Barron\*

## **I. WHEN THE SOURCE BECOMES THE STORY**

May a source enforce a promise of confidentiality given it by a newspaper reporter? In 1991, the United States Supreme Court considered this issue in the case of *Cohen v. Cowles Media Co.*<sup>1</sup> *Cohen* was a First Amendment version of man bites dog. The source and not the reporter sued to protect reporter-source confidentiality. The defendant was not the state but the press. For the American newspaper press, *Cohen* was a difficult case. In the past, the press had contended that the First Amendment protected a reporter from being forced by the state, or anyone else, to divulge a confidential source. In *Cohen*, however, the newspaper defendants were reduced to arguing that, in essence, the First Amendment was two-faced. The same First Amendment which protected reporters from being required to divulge sources, permitted newspapers to breach the promises their reporters made to their sources. Here indeed was a reverse twist.

A chronicle of the *Cohen* case from the Minnesota state trial court to the United States Supreme Court, this Article highlights some important features of the relationship of the practice of journalism to First Amendment law. First, there is a vital connection between the integrity of journalism and the untrammelled flow of news. Second, there is a First Amendment dimension not only in publishing newsworthy information, but sometimes in withholding it. Third, the First Amendment is not a guarantor or insurance policy for the press, but instead is a guarantor for the information process. Finally, even when a Supreme Court First Amendment decision does not protect the press in the short term, the result may provide greater protection in the long run.

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<sup>1</sup> 501 U.S. 663 (1991).

### A. *How It Began*

The fall of 1983 was the scene of an election campaign in Minnesota. Wheelock Whitney was running as the Independent Republican (IR) candidate for governor.<sup>2</sup> Rudy Perpich and Marlene Johnson were running as the Democratic-Farmer-Labor (DFL) party candidates for governor and lieutenant-governor respectively.<sup>3</sup> Dan Cohen and Gary Flakne were active in the struggle of the Independent Republicans for the governorship.<sup>4</sup> The public relations director of an advertising agency and a long time IR supporter, Dan Cohen was handling the advertising for the Independent Republicans.<sup>5</sup> Gary Flakne, a former IR legislator and county attorney, discovered that Marlene Johnson had been arrested for unlawful assembly in 1969, and in 1970 for petty theft.<sup>6</sup> Flakne scheduled a meeting of IR supporters to discuss what to do with his discovery.<sup>7</sup> Dan Cohen attended the meeting.<sup>8</sup> Cohen, it was agreed, would release this information to the media, but insist on retaining his anonymity as far as the public release of the information was concerned.<sup>9</sup>

Dan Cohen contacted four journalists—Lori Sturdevant of the *Minneapolis Star Tribune* (*Star Tribune*), Bill Salisbury of the *St. Paul Pioneer Press Dispatch* (*Pioneer Press Dispatch*), Gerry Nelson of the Associated Press (AP), and David Nimmer of WCCO Television.<sup>10</sup> Cohen told them he had some information which might relate to the forthcoming election.<sup>11</sup> He said that he would make the information available to the journalists if agreements could be reached on the basis under which the information would be provided.<sup>12</sup>

Later that day, Cohen met with Sturdevant and Salisbury and told them that he would furnish them with documents concerning a candidate running in the election if they each would give him a promise of confidentiality.<sup>13</sup> Cohen wanted to be treated as an anonymous source; he did not want his

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<sup>2</sup> Cohen v. Cowles Media Co., 445 N.W.2d 248, 252 (Minn. Ct. App. 1989), *aff'd in part and rev'd in part*, 457 N.W.2d 199 (Minn. 1990), *rev'd*, 501 U.S. 663 (1991), *aff'd on other grounds*, 479 N.W.2d 387 (Minn. 1992).

<sup>3</sup> *Id.*

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

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

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

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

name used.<sup>14</sup> He also wanted the reporters to agree not to ask him who was *his* source.<sup>15</sup>

From the outset, the responses of the media organizations to the information Cohen offered were the same. Sturdevant for the *Star Tribune* “promptly and unequivocally agreed to Cohen’s proposal.”<sup>16</sup> Salisbury for the *Pioneer Press Dispatch* agreed immediately to Cohen’s request for anonymity.<sup>17</sup> Gerry Nelson of the AP and David Nimmer of WCCO Television also made promises of confidentiality to Cohen. Cohen then delivered the documents to each reporter.<sup>18</sup>

Once the documents had been delivered to their respective reporters, the reaction of the media organizations to the information Cohen presented took sharply divergent directions. Some of the organizations chose not to use the information and some did.<sup>19</sup> At issue was the manner in which the story of Marlene Johnson’s past came to the attention of the Twin Cities media. Dan Cohen, who was handling the advertising for the Independent Republican gubernatorial candidate, was at the same time trying to undermine the reputation of the Democratic-Farmer-Labor candidate for lieutenant-governor. Was the story the arrests in Marlene Johnson’s past, or was the real story the lengths to which one party would go to destroy an opponent’s chances of winning an election? Some editors thought the latter was the bigger story.<sup>20</sup>

The *Star Tribune* responded quickly and assigned a reporter to find the court records.<sup>21</sup> The reporter discovered that Gary Flakne, a Wheelock Whitney supporter, had checked out the records the day before.<sup>22</sup> Justice Simonett for the Supreme Court of Minnesota described what happened next: “[N]o one, before Flakne, had looked at the records for years. The reporter called Flakne and asked why he had checked out the records. Flakne replied, ‘I did it for Dan Cohen.’”<sup>23</sup>

The *Star Tribune* editor whose responsibility it was to decide whether to run the story convened a “huddle” at 3:00 p.m. on the day Cohen had given the documents to reporter Linda Sturdevant.<sup>24</sup> The staff members who gathered in the “huddle” had to bear in mind a number of things. First, the *Star Tribune*, like the *Pioneer Press Dispatch*, had interviewed Marlene Johnson

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

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

<sup>19</sup> *Id.* at 253.

<sup>20</sup> *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 201 (Minn. 1990).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Cohen*, 445 N.W.2d at 253.

on that day.<sup>25</sup> Her reaction to, and explanation of, the arrests took some of the sting out of Cohen's disclosures. Marlene Johnson had a good explanation for each arrest. Ultimately dismissed, the 1969 unlawful assembly arrest was for protesting the city's failure to hire minority workers on construction projects.<sup>26</sup> The petty theft incident involved "leaving a store with \$6 of sewing materials at a time when Johnson was upset because of her father's death."<sup>27</sup>

Another troubling matter was that the *Star Tribune* was a DFL paper.<sup>28</sup> If it did not print Cohen's disclosures about Johnson, they might be accused of trying to protect the DFL. Never in its history had the *Star Tribune* failed to honor a reporter-source agreement.<sup>29</sup> Nonetheless, after considering ways to indicate that the source came from the Whitney camp, the editor in charge decided that it would be simply insufficient to describe the source as a "Whitney supporter."<sup>30</sup> There was no way to indicate that the source of the story came from the Whitney camp without identifying Cohen as the source.

Linda Sturdevant was not a member of the group which made the decision to name Cohen as the informant of the story about Johnson.<sup>31</sup> She vigorously objected to breaching the agreement with Cohen and asked that her name be removed from the story.<sup>32</sup> Nevertheless, the *Star Tribune* asked Sturdevant to call Cohen in an attempt to release the paper from its promise.<sup>33</sup> Despite repeated pleas, Cohen refused.<sup>34</sup> When it was clear that the papers were going to publish the story anyway and name Cohen as its source, Cohen issued a statement saying that the voters were entitled to the information that he had made available.<sup>35</sup> He said Perpich and Johnson "were living a lie" each day that they failed to reveal the information about Johnson to the voters.<sup>36</sup>

On October 28, 1982, the *Star Tribune* and the *Pioneer Press Dispatch* went public with the story and named Dan Cohen as the source. The *Star Tribune* disclosed Johnson's arrests as well as her explanation of the arrests.<sup>37</sup> The article not only named Cohen as the source, but indicated he

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<sup>25</sup> *Cohen*, 457 N.W.2d at 201.

<sup>26</sup> *Id.* at 201 n.2.

<sup>27</sup> *Id.*

<sup>28</sup> *Cohen*, 445 N.W.2d at 253.

<sup>29</sup> *Id.*

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Cohen*, 457 N.W.2d at 201-02.

was employed by an agency doing advertising for the Whitney campaign.<sup>38</sup> The story was almost complete, but did not mention that the *Star Tribune* had breached its promise of anonymity to Cohen, nor did it mention that a *Star Tribune* reporter felt that the breach was so shameful that she refused to have her name on the story.<sup>39</sup> Instead, the story, entitled "Marlene Johnson Arrests Disclosed by Whitney Ally," was attributed to "Staff Writer."<sup>40</sup> The *Star Tribune* was willing to make Cohen look bad, but not itself. The *Pioneer Press Dispatch*, the other Twin Cities daily newspaper, reported that Cohen was the source and indicated that Cohen had not wanted his name to be used.<sup>41</sup> As was the case with the *Star Tribune*, the *Pioneer Press Dispatch* did not say that Cohen had been promised anonymity. Unlike the *Star Tribune*, however, the *Pioneer Press Dispatch* did not name Cohen's employer.<sup>42</sup>

The other media organizations to whom Cohen had made his information available responded in different ways. WCCO-TV kept its word and did not identify Cohen as the source of the story, but also decided not to broadcast the story.<sup>43</sup> The Associated Press reported Johnson's prior arrests without identifying Cohen as the source, but indicated that documents setting forth the arrests and conviction had been passed on to their reporters.<sup>44</sup>

The consequences to Cohen flowing from publication of the stories came swiftly. His insistence on assurances that his name not be used turned out to be justified. On the day of publication, Cohen was fired from his job.<sup>45</sup> To add insult to injury, he was portrayed as a duplicitous trickster by the *Star Tribune*. Over the next two days, the *Star Tribune* published an article and a cartoon criticizing Cohen's role in the Johnson story.<sup>46</sup> Judge Short described the editorial and cartoon in his opinion for the Minnesota Court of Appeals:

On October 29, the Tribune published a column criticizing Cohen for his self-righteousness and unfair campaign tactics. On October 30, the Tribune ran an editorial cartoon depicting a trick-or-treater outfitted as a garbage can knocking on the door of the DFL headquarters. The garbage can was labeled "Last minute campaign smears," and governor

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<sup>38</sup> *Cohen*, 445 N.W.2d at 253.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 254.

Rudy Perpich was opening the door, stating, "It's Dan Cohen."<sup>47</sup>

Sometime after October 31, Gary Flakne, the Independent Republican attorney who had been Cohen's original informant, protested the two papers' treatment of Cohen in a letter which he sent to the *Pioneer Press Dispatch*.<sup>48</sup> The letter criticized the breach of the agreement by the Twin Cities papers, and was published on the editorial page a few days after the election.<sup>49</sup> The *Star Tribune* ran an edited version of the letter and accompanied it with an article explaining why it had overridden the promise that its reporter, Lori Sturdevant, had given to Cohen.<sup>50</sup>

In December 1982, Dan Cohen brought suit against the corporations which published the *Star Tribune* and the *Pioneer Press Dispatch*, charging that the papers had breached their contracts and made fraudulent misrepresentations to him.<sup>51</sup> Pursuant to a jury verdict in Cohen's favor, the trial court awarded \$200,000 in compensatory damages and \$500,000 in punitive damages.<sup>52</sup> This victory was not the end of the matter; instead, it was just the first legal skirmish in a long and fierce legal battle against the two dailies in the Twin Cities.

#### B. *The Trial Court—Does a Reporter's Source Have Rights?*

Media defense lawyer Richard Winfield has captured cogently the position of the newspapers in *Cohen*. The press "want it both ways: constitutional protection from having to reveal [sources]; constitutional protection from having to pay damages if they do."<sup>53</sup>

The First Amendment had long been used as a shield by the press to ward off censors, but whether it could also be used as a sword was uncertain. The two papers brought a pre-trial motion asking the trial court to rule that the First Amendment immunized them from liability "for breach of an otherwise valid contractual commitment to provide anonymity to its sources in return for the provision of information."<sup>54</sup> The Minnesota trial court re-

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

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

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Cohen v. Cowles Media Co.*, 15 Media L. Rep. (BNA) 2288 (Minn. Dist. Ct. 1988).

<sup>53</sup> Richard N. Winfield, *Standing a Privilege On Its Head*, COMM. LAW., Spring 1989, at 3.

<sup>54</sup> *Cohen v. Cowles Media Co.*, 14 Media L. Rep. (BNA) 1460, 1461 (Minn. Dist. Ct. 1987). The trial judge denied the newspapers' motion for summary judgment, but granted their motion to strike plaintiff's claim for damages as to the breach of contract

jected this request,<sup>55</sup> and observed that Minnesota's two largest newspapers were not asking—as the press usually did—to shield the identity of its sources.<sup>56</sup> Rather, the press was asking to be held harmless from any adverse consequences that might flow from the decision of the two newspapers to breach promises of confidentiality made by their reporters to a source.<sup>57</sup> As Judge Knoll noted for the trial court, “[t]he newspapers seek the right, not to shield, but to disclose, in the face of their prior agreement not to disclose.”<sup>58</sup>

### C. *The Minnesota Court of Appeals*

Concluding that misrepresentation had not been proven, the intermediate court of appeals in Minnesota trimmed Cohen's award by setting aside the punitive damages.<sup>59</sup> The court of appeals, however, permitted the award of \$200,000 in compensatory damages based on the breach of contract claim.<sup>60</sup>

The court of appeals did not believe that the First Amendment relieved “the newspapers of the obligation they had to honor the terms of their contract with Cohen.”<sup>61</sup> Newspapers had “no special immunity from the application of general laws” such as the law of contract, and could not shield themselves from liability for breach of contract “simply because the acts giving rise to such liability were taken while in pursuit of newsworthy information.”<sup>62</sup> The newspapers argued that their position was more than an attempt to use the First Amendment as a shield to ward off a contract claim by one of the newspapers' sources.<sup>63</sup> The case concerned the newsgathering process itself.<sup>64</sup>

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claim. *Id.*

<sup>55</sup> *Id.* at 1463-64.

<sup>56</sup> *Id.* at 1461.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Cohen*, 445 N.W.2d at 262.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 256.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 257.

<sup>64</sup> In 1972, Justice White declared, somewhat backhandedly, that newsgathering was not without some First Amendment protection. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Indeed, Justice White recognized that without some First Amendment protection for newsgathering, “freedom of the press could be eviscerated.” *Id.* In a later case the Supreme Court declared that there was a presumption that criminal trials should be open to the press and the public. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980). In addition, Chief Justice Burger observed for the Court:

Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through



The newspaper defendants in *Cohen* invited the Minnesota Court of Appeals to leave the problem of breach of the reporter-source confidentiality agreement to ethics and not to the law.<sup>65</sup> The court caustically rejected this invitation. Allowing sources to recover damages, the court declared, was a more effective incentive to honor such agreements than potential ethical criticism of the offending newspaper by its peers in the press.<sup>66</sup>

If the contract between the source and the reporter was not enforceable by the source—a reporter right of action was not considered—then, the court suggested, the newsgathering process could be expected to dry up.<sup>67</sup> The court of appeals refrained from saying that such a consequence gave a First Amendment dimension to the source's lawsuit, perhaps because the court felt boxed in by its position that the enforcement of reporter-source contracts was simply a matter of contract law without First Amendment significance.

The court took an oblique view of the notion that the editors were really asserting a First Amendment right to publish. Concluding that the "newspapers effectively waived any First Amendment rights they may have had to

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the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard.

*Id.*

Particularly relevant to the *Cohen* case, Burger's observations emphasize the role that the media performs as surrogate for the public by acquiring information for the public's benefit. The Minnesota Court of Appeals, however, rejected the newspapers' claim that the journalist and not the source has the right to enforce a confidentiality agreement. In defense of its conclusion, the court noted that not a single case had been adduced which suggested that a source had no right to enforce a "confidentiality agreement." *Cohen*, 445 N.W.2d at 257. On the contrary, there was, the court noted, a breach of contract case which at least suggested that a source could bring an action "against a publisher for breaching a promise of confidentiality." *Id.* (citing *Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282, 1292 n.15 (N.D. Ill. 1986)).

Clearly, acquiring sources and protecting them so that sources will have the courage to talk to the press in the future is a vital part of the newsgathering process. It is in this context that Chief Justice Burger's view of the press as a surrogate for the public should be understood. From this media surrogate for the public perspective, it is argued that it is not wise to permit a source to file suit against a news organization. A strong case can be made that source-media disputes should be left to conscience rather than to law to resolve. The motives of sources are too ambiguous, and the nature of the information they may offer too uncertain, to subject the media to possible manipulation. Yet a right of action accorded to the source might engender just such manipulation. The source may wish to protect his confidentiality for many reasons, some having a connection with the newsgathering process, and some not.

<sup>65</sup> *Cohen*, 445 N.W.2d at 257.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

publish Cohen's name as the source of the documents relating to Johnson,"<sup>68</sup> the court of appeals assumed without discussion that the reporters could waive the papers' rights. The newspapers tried to trump the obligation to honor a confidentiality agreement with a source by emphasizing the newsworthiness of Cohen's identity. The papers said that at the time the reporters made the agreement, they did not realize that the information Cohen would give them "would . . . make Cohen seem petty and unscrupulous for having released it."<sup>69</sup> Judge Short of the Minnesota Court of Appeals, however, responded that the reporters' waivers were "not any less knowing or voluntary merely because they did not know exactly what information they would receive."<sup>70</sup>

The claim for misrepresentation that Cohen won at the trial court was set aside by the Minnesota Court of Appeals.<sup>71</sup> The reporters did not misrepresent themselves when they promised Cohen confidentiality; they fully intended to perform.<sup>72</sup> Cohen contended that misrepresentation was demonstrated because the reporters concealed "the fact that they had no authority to bind the newspapers,"<sup>73</sup> but there was no indication that the reporters who promised confidentiality had "special access to the newspapers' written policy [sic] regarding confidentiality."<sup>74</sup> On the contrary, the "evidence showed that [the reporters] were unaware of [pre-existing written policies]."<sup>75</sup> Cohen also argued that the editors never intended to perform the contracts,<sup>76</sup> but the past practice of the newspapers had been to honor the promises of confidentiality given by the reporters:

In fact, no witness could recall a prior instance when the promise of a reporter was vetoed by an editor. Seasoned reporters believed they had authority to bind the newspapers. Based on past practice, we believe they did have such authority. Because it was the newspapers' practice to honor their reporters' promise of confidentiality, the reporters did not by omission misrepresent their authority.<sup>77</sup>

The court of appeals set aside the \$500,000 punitive damages award

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<sup>68</sup> *Id.* at 258.

<sup>69</sup> *Id.*

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

<sup>71</sup> *Id.* at 260.

<sup>72</sup> *Id.* at 259-60.

<sup>73</sup> *Id.* at 260.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 259.

<sup>77</sup> *Id.* at 260.

because it was based partially on the misrepresentation claim.<sup>78</sup> The court, however, ruled that contracts existed between Cohen and the newspapers, and that the newspapers had breached those contracts.<sup>79</sup> Accordingly, the jury verdict of a damage award for \$200,000 in compensatory damages for breach of the contracts was recoverable.<sup>80</sup> The editors were aware, or should have been aware, that loss of employment could occur “if the confidences [were] revealed.”<sup>81</sup>

Judge Crippen of the Minnesota Court of Appeals wrote a separate opinion in which he agreed in part and dissented in part from the majority opinion.<sup>82</sup> Judge Crippen believed that damages should not be awarded for “publishing political material,” because the imposition of damages infringed on the First Amendment.<sup>83</sup> Cohen was asking the courts to “to enforce an agreement not to publish—a pledge not to exercise press freedom.”<sup>84</sup> The trial court award based on contract constituted, in Judge Crippen’s view, an impermissible intrusion into the editorial process: “It is for editors, not the courts, to decide when promises on content should be made and to decide when publication is important.”<sup>85</sup> Deciding whether identification of a source is necessary for an accurate report of a political matter is an editorial function.<sup>86</sup>

Press discussion of the conduct of a political campaign lies at the very center of that which the First Amendment should protect. Judge Crippen conceded that the press publication claim does not always take primacy in First Amendment law.<sup>87</sup> For example, the law of libel weighs the right to publish against the right to reputation and prefers one right over the other depending on the status of the libeled plaintiff and the content of the alleged defamation. Unlike a libel claim, however, the published information in *Cohen* was true.<sup>88</sup>

There was a manipulative quality to Cohen’s approach to the confidential nature of the reporter-source agreement. Cohen had engineered “a political scheme to broadcast a political attack but at the same time to evade responsibility for the act.”<sup>89</sup> In Judge Crippen’s view, Cohen’s behavior was deceptive: “To accomplish his ends [Cohen] chose not to approach the

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 258-59.

<sup>80</sup> *Id.* at 262.

<sup>81</sup> *Id.* at 260.

<sup>82</sup> *Id.* at 262 (Crippen, J., dissenting in part).

<sup>83</sup> *Id.* (Crippen, J., dissenting in part).

<sup>84</sup> *Id.* at 263 (Crippen, J., dissenting in part).

<sup>85</sup> *Id.* (Crippen, J., dissenting in part).

<sup>86</sup> *Id.* (Crippen, J., dissenting in part).

<sup>87</sup> *Id.* at 265 (Crippen, J., dissenting in part).

<sup>88</sup> *Id.* (Crippen, J., dissenting in part).

<sup>89</sup> *Id.* at 266 (Crippen, J., dissenting in part).

editors who would be expected to make publication decisions.”<sup>90</sup> Notwithstanding Judge Crippen’s perceptions, Cohen did what most sources do—they talk to the reporter on the beat, not the editor in the newsroom. Indeed, people in the position of political operatives like Cohen are more likely to know the political reporters on a newspaper than the editors in the newsroom.

Judge Crippen said the court of appeals did not need to decide whether all reporter-source agreements were enforceable or unenforceable.<sup>91</sup> The issue of whether some such promises would be enforceable in the future could be deferred.<sup>92</sup> Here the First Amendment prevented the enforcement of the contracts.<sup>93</sup> Some contracts are void because they are against public policy.<sup>94</sup> The newspapers’ contracts with Cohen, said Judge Crippen, were void because the public policy they offended was that of the First Amendment.<sup>95</sup>

Judge Crippen objected bitterly to the majority’s view that the reporters waived the First Amendment right of the newspapers by promising Cohen confidentiality. First Amendment rights had not been clearly, compellingly, and knowingly waived.<sup>96</sup> Cohen had not disclosed to the reporters that his real goal was to accomplish “an editorial decision to repudiate the fundamental responsibility to fairly and truthfully inform the public on political campaign conduct.”<sup>97</sup>

There is a rebuttal to Crippen’s analysis. Reporters use sources to provide information that might otherwise not see the light of day. They use these sources even when the source’s motives are ignoble, and even though the source may not have disclosed the whole story. If the state is trying to find out the identity of the source from the reporter, the fact that the source may have acted ignobly or not told all he knows will not prevent the reporter from relying on either a First Amendment-based journalist’s privilege or a state shield law. There does not seem to be any reason why turn-about is not fairplay, and why a source should not be able to insist on confidentiality in such circumstances.

#### D. *The Reaction of the Supreme Court of Minnesota*

Generally speaking, Cohen’s case against the Twin Cities papers met

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<sup>90</sup> *Id.* (Crippen, J., dissenting in part).

<sup>91</sup> *Id.* (Crippen, J., dissenting in part).

<sup>92</sup> *Id.* (Crippen, J., dissenting in part).

<sup>93</sup> *Id.* (Crippen, J., dissenting in part).

<sup>94</sup> *Id.* (Crippen, J., dissenting in part).

<sup>95</sup> *Id.* (Crippen, J., dissenting in part).

<sup>96</sup> *Id.* at 267 (Crippen, J., dissenting in part).

<sup>97</sup> *Id.* (Crippen, J., dissenting in part).

with a sympathetic reception from the two Minnesota lower courts. The Supreme Court of Minnesota, however, rejected Cohen's claim that he should be granted damages as a consequence of the betrayal of confidentiality promised him.<sup>98</sup>

The Supreme Court of Minnesota did not think Cohen had a contract with the two Minnesota papers.<sup>99</sup> The issue was not whether the papers had acted honorably toward Cohen, but whether the promises the reporters had given Cohen were contractually binding.<sup>100</sup> In concluding that there was no enforceable promise or contract, Justice Simonett for the Supreme Court of Minnesota discussed the nature of the promise to protect a source: "[T]hese promises are usually given clandestinely and orally, hence they are often vague, subject to misunderstanding, and a fertile breeding ground for lawsuits."<sup>101</sup>

The Supreme Court of Minnesota opinion in *Cohen* is primarily an essay on Minnesota contract law. The theme of the court's discussion is that the parties to the agreement to protect Cohen's anonymity did not intend a contract. This notwithstanding, Justice Simonett suggested that a source might have a claim in promissory estoppel: "We conclude the promise is not enforceable, neither as a breach of contract claim, *nor, in this case*, under promissory estoppel."<sup>102</sup>

Justice Simonett did not think that the reporter and the source were really engaged in making a contract. Instead, Simonett viewed their agreement as "an 'I'll-scratch-your back-if-you'll scratch mine' accommodation."<sup>103</sup> Contract law was ill suited to describe "the special ethical relationship" between the reporter and the source.<sup>104</sup> Further, contract law would introduce an unwanted "legal rigidity" into that relationship.<sup>105</sup>

Finding that a promise of confidentiality made by the reporter to the source was not a legally enforceable contract, Justice Simonett explored whether the promise was legally enforceable on some other basis, specifically the law of promissory estoppel. "Impl[y]ing a contract in law where none exists in fact,"<sup>106</sup> the law of promissory estoppel applies when a promise was made to induce specific action on the part of the promisee, and injustice can be avoided only by enforcing the promise. In such circumstances, the promisor is precluded, or "estopped," from denying his promise.

In deciding whether promissory estoppel should be applied to Cohen's

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<sup>98</sup> *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 200 (Minn. 1990).

<sup>99</sup> *Id.* at 203.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 200 (emphasis added).

<sup>103</sup> *Id.* at 203.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

situation, Justice Simonett found the truly difficult question to be whether injustice had in fact occurred.<sup>107</sup> Although Cohen lost his job as a result of the publication of the stories by the Twin Cities papers, the facts of the case were, as Justice Simonett noted tactfully, “fraught with moral ambiguity.”<sup>108</sup>

Cohen had tried to blacken Johnson’s name. When the newspapers published the story, they condemned Cohen’s tactics, but kept silent about their own wrongdoing—the breach of their promises to keep Cohen’s identity secret. The question of whether injustice had occurred, said Justice Simonett, required the court to undertake an examination of the same considerations that are weighed to determine “whether the First Amendment has been violated.”<sup>109</sup> Addressing whether Cohen’s name was newsworthy and essential to a balanced and fair account of Marlene Johnson’s prior arrests, Simonett asked whether it would have been enough just to say that the source of the information concerning Johnson’s past was someone close to the Whitney campaign.<sup>110</sup> Justice Simonett noted that the witnesses at trial gave conflicting answers to these questions.<sup>111</sup>

It was also significant that the case involved a “political source . . . in a political campaign,” providing political information that was true.<sup>112</sup> In such circumstances, Justice Simonett declared, “enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants’ First Amendment rights.”<sup>113</sup> “There may be instances,” Justice Simonett observed, “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.”<sup>114</sup>

Certainly, the Supreme Court of Minnesota’s decision in *Cohen* was a victory for the particular newspapers involved, but Justice Simonett’s statement that a source might have a legal right in some future case made it a less than total victory for the press. Counsel for the Cowles Media Company, publisher of the *Star Tribune*, had argued that the relationship between the reporter and the source, or the newspaper and the source, was a relationship which should not be actionable at law.<sup>115</sup> In their view, the function of the First Amendment was to limit subjection of the press-source relation-

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<sup>107</sup> *Id.* at 204.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 205.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

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

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

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

<sup>115</sup> Brief of Appellant Cowles Media Co. at 31, *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990) (Nos. C8-88-2631, C0-88-2672).

ship to legal enforcement.<sup>116</sup>

The suggestion that the source might have a legal remedy in promissory estoppel, was, at the time it was announced, the most explicit recognition in American law that a source might be protected. *Cohen* itself, however, was a poor vehicle for conferring legal rights on the reporter's source. Information about the prior arrest record of a candidate in an election is a matter of great public interest. There is a strong First Amendment interest in seeing that disclosure of that information is not hampered by the state's action. A conclusion, therefore, that the First Amendment precluded recognizing a promissory estoppel claim in these circumstances might have been expected, but the mode of analysis used by the Supreme Court of Minnesota was somewhat unusual. Describing the promissory estoppel issue as raising essentially the same questions presented by the First Amendment issue, the Supreme Court of Minnesota stated:

Under a promissory estoppel analysis there can be no neutrality towards the First Amendment. In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated. The court must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity.<sup>117</sup>

A more conventional approach would have been to say that although *Cohen* might have had a promissory estoppel claim, the state interest in redressing such claims was subordinated to the First Amendment interest in providing truthful information to the public about every aspect of a political campaign.

The practical upshot of the Supreme Court of Minnesota's decision was that a source makes his information available to the press on the strength of a promise of confidentiality that the press can not be required to keep. A source discloses information to the journalist at his peril. Arguably, the supreme court did not go quite so far. It left the door slightly ajar, suggesting that a source might be able to secure legal redress on a promissory estoppel theory in different circumstances.

What circumstances would these be? Could redress be forthcoming even for the publication of truthful information? John Borger, a lawyer for the *Star Tribune* in *Cohen*, suggested a situation where such redress might arguably be obtained.<sup>118</sup> Suppose a news organization was approached by a

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<sup>116</sup> *Id.* at 28 (citing *Cohen*, 445 N.W.2d at 264 (Crippen, J., dissenting in part)).

<sup>117</sup> *Cohen*, 457 N.W.2d at 205.

<sup>118</sup> See Interview with John Borger, Esq., in Minneapolis, Minn. (Oct. 8, 1990) (notes on file with author).

source who offered to identify the local leader of the Mafia, but the source said that it would do so only if the reporter promised to keep the identity of the source confidential. Through some mistake the story naming the local Mafia leader indicates the name of the source. The day after the story identifying the source appears, the source is murdered. The family of the source might have an action against the newspaper on a promissory estoppel theory.<sup>119</sup> In such extreme circumstances, one might conclude that the interests at stake in protecting the anonymity of the source would subordinate free press interests in publication of the source's identity.

The Supreme Court of Minnesota decision in favor of the newspapers in *Cohen* fell just short of a total victory for the two defendant newspapers. The bitter comments filed by the dissenting justices in *Cohen* indicated that such victories run their own risks for the press. In an angry dissent, Justice Yetka declared:

This decision sends out a clear message that if you are wealthy and powerful enough, the law simply does not apply to you; contract law, it now seems, applies only to millions of ordinary people. It is unconscionable to allow the press, on the one hand, to hide behind the shield of confidentiality when it does not want to reveal the source of its information; yet, on the other hand, to violate confidentiality agreements with impunity when it decides that disclosing the source will help make its story more sensational and profitable.<sup>120</sup>

Justice Yetka noted that the contest between the press and the individuals with whom it may quarrel is too unequal.<sup>121</sup> This feeling was not restricted to judges, as evidenced by the willingness of the Minnesota jury to give Cohen \$200,000 in compensatory damages and \$500,000 in punitive damages.

Justice Yetka's dissent also mentioned another point which he did not develop. As a result of the *Cohen* decision, "potential news sources will . . . be reluctant to give information to reporters."<sup>122</sup> Consequently, the public could be denied information of far more significance about political candidates "than the rather trivial infractions disclosed here."<sup>123</sup> It is puzzling that Justice Yetka did not approach this issue in First Amendment terms. After all, in the famous *Branzburg* case, the United States Supreme Court had been urged to protect the newsgathering process by recognizing a

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<sup>119</sup> *Id.*

<sup>120</sup> *Cohen*, 457 N.W.2d at 206 (Yetka, J., dissenting).

<sup>121</sup> *Id.* (Yetka, J., dissenting).

<sup>122</sup> *Id.* (Yetka, J., dissenting).

<sup>123</sup> *Id.* (Yetka, J., dissenting).



reporter's or journalist's privilege.<sup>124</sup> If the reporter could not have a privilege to protect his source, the flow of news would dry up. *Cohen* raised a related issue. If the source does not have a privilege to protect the promise of confidentiality on the strength of which he gave new information, the flow of news can also dry up. In short, the First Amendment interest in the newsgathering process requires protection of the promise of confidentiality whether asserted by the reporter or the source.

Justice Kelley also dissented from the supreme court's majority opinion.<sup>125</sup> He associated himself with the analysis of Judge Short in the Minnesota Court of Appeals and with the views expressed in Justice Yetka's supreme court dissent.<sup>126</sup> Both Yetka and Kelley objected to the newspaper defendants' cynical use of the First Amendment.<sup>127</sup> Praising Justice Yetka's dissent on this point, Justice Kelley excoriated the "perfidy of these defendants," and accused them of seeking to escape liability "by trying to crawl under the aegis of the First Amendment, which, in [his] opinion ha[d] nothing to do with the case."<sup>128</sup> Contradicting himself somewhat, Justice Kelley then went on to note that the Supreme Court of Minnesota's decision refusing to enforce the promise made to Cohen inhibited, rather than promoted, First Amendment objectives since it would lead to the "drying up' [of] potential sources of information on public matters."<sup>129</sup> Justice Kelley's basic point, however, was that enforcement of the right to know and the protection of confidential sources should be the responsibility of the legislature and the courts rather than "executives of the commercial media."<sup>130</sup>

## II. THE *COHEN* CASE IN THE SUPREME COURT

American journalism was troubled when the Supreme Court of the United States decided to hear *Cohen*. The *Washington Post* published an editorial on the matter on December 11, 1990.<sup>131</sup> Admirably, the editorial disclosed that the *Post* had a 26% share in the stock of the *Star Tribune*.<sup>132</sup> The *Post*'s editorial illustrates the ambivalence of American journalism—its desire to be on the side of the angels while at the same time in a crisis to protect its interest.

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<sup>124</sup> *Branzburg v. Hayes*, 408 U.S. 665, 680 (1972).

<sup>125</sup> *Cohen*, 457 N.W.2d at 206 (Kelley, J., dissenting).

<sup>126</sup> *Id.* at 207 (Kelley, J., dissenting).

<sup>127</sup> *See id.* at 205 (Yetka, J., dissenting); *id.* at 207 (Kelley, J. dissenting).

<sup>128</sup> *Id.* at 207 (Kelley, J., dissenting).

<sup>129</sup> *Id.* (Kelley, J., dissenting).

<sup>130</sup> *Id.* at 207 n.1 (Kelley, J., dissenting).

<sup>131</sup> *When the Source Sues*, WASH. POST, Dec. 11, 1990, at A22.

<sup>132</sup> *Id.*

In the real world of journalism, we know that far fewer people would provide information to the press, and thus to the public, without the anonymity that protects jobs, personal relationships and reputations. We believe not only that reporters are morally bound to keep their word in such a case but that the free exchange of information would suffer irreparably if, as a general rule, they did not. It is in journalists' own interest not to undermine their reliability with sources.<sup>133</sup>

The editorial suggested that the reporters breached their moral obligation to protect the confidentiality of the sources who trusted them. In fact, the reporters had remained consistently steadfast to their moral obligation. It was the management of the papers who would not stand behind the promises of the reporters they employed. Lamenting that the case had arisen at all, the editorial expressed concern that "understandings that [were] almost universally accepted about the responsibility of the press to its sources [would] be altered."<sup>134</sup> Did this mean that a decision in favor of the press would frighten sources into believing that journalists cannot be trusted, or did it mean that a decision against the press would encourage sources to believe that if their promises were breached they could sue to enforce them?

The editorial praised the Supreme Court of Minnesota's conclusion that the participants did not believe that they were entering into a binding contract in a commercial sense, and that the participants had entered instead into a nonbinding ethical undertaking.<sup>135</sup> The implication was that the breach of an ethical undertaking by newspaper management should not be punished. The *Post* editorial concluded: "It is troubling that at least four Supreme Court justices have voted to review this decision."<sup>136</sup> In the end, a great newspaper suggested that a source who relied on the promise of the press should have no recourse.

#### A. *The Oral Argument*

During oral argument, Elliot Rothenberg, Cohen's lawyer, noted that *Cohen* implicated two First Amendment values. First, to assure the free flow of information, the news media makes promises to sources. Second, to avoid drying up the flow of information provided by those sources, the promises

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

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* At least four justices must vote for certiorari before it can be granted.

must be kept.<sup>137</sup> Rothenberg did not refer to what Justice Yetka called the “perfidy” of the newspapers towards his client.

Much of the oral argument was devoted to the question of which side had the stronger claim for invocation of First Amendment protection. Justice O’Connor pushed Rothenberg on the strength of the First Amendment interest requiring enforcement of the promise not to disclose Cohen’s identity.<sup>138</sup> She asked whether Cohen could get an injunction to prevent publication of his identity if such publication would be in violation of the promise made to him.<sup>139</sup> Struggling with the question, Rothenberg responded: “That presents the issue of prior restraint, Your Honor, and it would present a different issue than damages.”<sup>140</sup> Justice Scalia observed dryly that Rothenberg seemed worried about the issue of prior restraint.<sup>141</sup> Presumably the implication was that if enjoining the publication of truthful information about the source of a story violated the First Amendment, so too does awarding damages.

Justice Stevens asked a tough question. Suppose that one state enacted a statute making promises not to reveal a source generally unenforceable, and another state enacted a similar statute but with a preamble stating that such contracts would violate the First Amendment—would both statutes “have the same constitutional result?”<sup>142</sup> Rothenberg responded shrewdly that he assumed that “the newspapers themselves would not support [the former] statute.”<sup>143</sup> By this, Rothenberg probably meant that although in *Cohen* the newspapers were arguing that a promise of confidentiality by a reporter to a source should not be honored, he doubted that they would support the position as a general proposition. In this, he was presumably right. If state law does not enforce promises of confidentiality by a reporter to a source, it is unlikely that a source, fearful of exposure, would trust a reporter to honor such a confidence.

Justice Stevens observed that Cohen’s position, as articulated by Rothenberg, was that the First Amendment did not require the Supreme Court of Minnesota to refuse to enforce the agreement between the reporters and Cohen.<sup>144</sup> On the other hand, Stevens noted that one could reach the same result by saying that it was required by the First Amendment.<sup>145</sup>

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<sup>137</sup> See 200 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 638 (Philip B. Kurland & Gerhard Casper eds., 1991) [hereinafter LANDMARK BRIEFS].

<sup>138</sup> *Id.* at 641.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 642.

<sup>142</sup> *Id.* at 644.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 646.

<sup>145</sup> *Id.*

Rothenberg tried to use a waiver argument to dispose of the newspapers' First Amendment justification for breaching the promise made to Cohen. Once the promise of confidentiality is made, he contended, "the newspaper has in effect waived the right to make any First Amendment claim of a right to violate the promise."<sup>146</sup> Rothenberg continued:

You had a similar situation in the *Snepp* case [that] Justice Scalia mentioned where a person promised not to publish any information regarding his employment at the CIA without first getting the approval. He broke the promise. He claimed a First Amendment right to do so. The court ruled that he couldn't do it—in fact—establish a constructive trust on all the profits from the publication in that case.<sup>147</sup>

John French argued the case for the newspapers, noting two essential facts. First, the published statements at issue were entirely true.<sup>148</sup> Second, the statements involved matters of great public interest.<sup>149</sup> French contended that the newspapers had been exposed to the equivalent of prepublication review:

These newspapers have had to live now for nine years with a lawsuit which at the trial stage appeared to be going to cost them \$700 thousand in compensatory and punitive damages. And of course, has over the course of nine years cost them countless thousands in attorneys' fees. That kind of sanction can be just as chilling on free speech as the sanction imposed by prepublication injunction.<sup>150</sup>

When Chief Justice Rehnquist interjected that these were simply consequences that the press should weigh before breaching an agreement they had made, French responded that the press should not have to weigh the consequences.<sup>151</sup> Rehnquist had little patience for this argument. In his view, special solicitude for the press in such circumstances was not warranted: "Mr. French, any number of large concerns which have the potential for doing damage to people . . . have to live with a certain threat of litigation. That's part of doing business in our economy, isn't it?"<sup>152</sup> Whether

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<sup>146</sup> *Id.* at 648.

<sup>147</sup> *Id.* (citing *Snepp v. United States*, 444 U.S. 507 (1980)).

<sup>148</sup> *Id.* at 649.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 651.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

fear of litigation may intimidate free expression responded directly to a point Rothenberg had made at the beginning of his oral argument. When ordinary people—people who are not journalists—breach promises they have made voluntarily, the law holds them accountable; therefore the newspapers “should be subject to the same law as everyone else.”<sup>153</sup>

In addition to addressing the issue of whether the Minnesota law of promissory estoppel should be treated in this context as a law of general applicability, the Justices’ questions during oral argument directly confronted the question of the newspaper defendants’ integrity. In a rhetorical flourish, French observed that the First Amendment protects the “utterance of honest, accurate speech,”<sup>154</sup> quickly provoking the following colloquy:

- QUESTION: Mr. French, on the word “honest,” did you publish that you promised not to publish that?
- MR. FRENCH: The two reporters gave Mr. Cohen a promise that they wouldn’t—
- QUESTION: Did you publish that the deal was made not to release it?
- MR. FRENCH: They did not, Your Honor.
- QUESTION: Well, now you’re talking about truth. You didn’t publish the truth.
- MR. FRENCH: The entire truth about everything did not get published.
- QUESTION: You did not publish—
- MR. FRENCH: But what this Court has said—
- QUESTION: You didn’t publish all the truth.
- MR. FRENCH: That’s absolutely right, Your Honor. What the Court has said, however, on that score is that is a subject to be left to editorial judgment. This Court has said that editorial judgment is a part of the free press publication process that is entitled to constitutional protection.
- QUESTION: So what you’re asking us to vindicate is publication of the truth as truth is determined by the editors.<sup>155</sup>

The exchange illustrates that the indignation of the dissenting justices on the Supreme Court of Minnesota at defendant newspapers’ behavior in *Co-*

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<sup>153</sup> *Id.* at 638.

<sup>154</sup> *Id.* at 653.

<sup>155</sup> *Id.*

hen had evoked some responsive chords among the Justices of the Supreme Court of the United States. Indeed, later in French's oral argument, Justice Scalia made reference to dissenting Justice Kelley's view that "the First Amendment [was] being misused to avoid liability under the doctrine of promissory estoppel."<sup>156</sup>

### B. *Justice White's Opinion in Cohen*

Nearly twenty years had passed since a case directly involving the journalist's privilege had come to the United States Supreme Court, and once again Justice Byron White was assigned the role of writing the opinion for the Court.<sup>157</sup> As in *Branzburg*, Justice White decided against the press.<sup>158</sup> In the years since *Branzburg*, Justice White's view that the First Amendment did not give absolute protection to the press had intensified rather than diminished.

Rothenberg, in his petition for certiorari to the United States Supreme Court, presented the issue as a "question of whether the First Amendment empowers newspapers to inflict injuries with impunity by deliberately breaking promises of confidentiality given for the purpose of obtaining desired information."<sup>159</sup> This characterization of the issue made it clear that whether the press should keep its promises to sources was not an abstract issue. Injury was inflicted—because of the press's failure to keep its promises, Dan Cohen had lost his job.

Rothenberg noted that the Supreme Court of Minnesota had relied on the United States Supreme Court decision in *Miami Herald Publishing Co. v. Tornillo*,<sup>160</sup> which struck down a Florida statute giving political candidates a right of reply to newspaper charges.<sup>161</sup> The Supreme Court of Minnesota believed that *Miami Herald* had given great protection to editorial autonomy.<sup>162</sup> Rothenberg, however, pointed out that the Supreme Court later stated clearly that the *Miami Herald* case "[n]either expressly or impliedly suggest[ed] that the editorial process is immune from any inquiry whatsoever."<sup>163</sup> Rothenberg's approach to *Miami Herald* was particularly

<sup>156</sup> *Id.* at 660.

<sup>157</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), was the first Supreme Court case directly involving the journalist's privilege since *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>158</sup> *Cohen*, 501 U.S. at 670.

<sup>159</sup> Petition for Writ of Certiorari at 6, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (No. 90-634), reprinted in *LANDMARK BRIEFS*, *supra* note 137, at 364.

<sup>160</sup> 418 U.S. 241 (1974).

<sup>161</sup> Petition for Writ of Certiorari at 13, *Cohen* (No. 90-634), reprinted in *LANDMARK BRIEFS*, *supra* note 137, at 371.

<sup>162</sup> *Id.*, reprinted in *LANDMARK BRIEFS*, *supra* note 137, at 371.

<sup>163</sup> *Id.*, reprinted in *LANDMARK BRIEFS*, *supra* note 137, at 371 (quoting *Herbert v.*

well advised as far as Justice White was concerned. Having concurred in *Miami Herald*, Justice White nonetheless had complained about the imbalance in the communications process between the individual and the press.<sup>164</sup> Furthermore, in *Herbert v. Lando*,<sup>165</sup> Justice White wrote the opinion for the majority in which the Court declined to construe the First Amendment to create a new evidentiary privilege against disclosure of the editorial process.<sup>166</sup>

Justice White was less tormented by the issues raised in *Cohen* than was the press, but there remained an undercurrent of annoyance in his opinion. In his view, the First Amendment was being manipulated in an impermissible manner. Counsel for the newspapers had contended that the Supreme Court of Minnesota's decision rested exclusively on state law, and that the Supreme Court should dismiss the case because it presented no federal law issue.<sup>167</sup> Justice White dismissed these contentions as hardly requiring discussion.<sup>168</sup> The Supreme Court of Minnesota had specifically concluded in its opinion that enforcing the promise of confidentiality under a theory of promissory estoppel would violate the newspapers' First Amendment rights.<sup>169</sup> Indeed, Justice White complained, the newspapers had contended all along that the First Amendment prevented the enforcement of the promises made by the reporters to Cohen.<sup>170</sup> Even if the newspapers now wished to argue that the case presented no First Amendment issue, it was very clear to Justice White that one existed.

The argument that the First Amendment prevented a recovery by Cohen against the two Twin Cities newspapers who had breached their promise to him was quickly rejected. In his characteristically plain and direct manner, Justice White set forth what he saw as the issue in *Cohen*: "The question before us is whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information. We hold that it does not."<sup>171</sup>

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Lando, 441 U.S. 153, 168 (1979)).

<sup>164</sup> *Miami Herald*, 418 U.S. at 259-63 (White, J., concurring).

<sup>165</sup> 441 U.S. 153 (1979).

<sup>166</sup> *Id.* at 175.

<sup>167</sup> *Cohen*, 501 U.S. at 667. Cowles Media stated in its brief that Cohen's legal theory had an "audacious scope." His breach of contract claim "left no room for consideration of free press interests or of the public's interest in obtaining full and accurate information about an upcoming election." Brief of Respondent Cowles Media Company in Opposition to Petition at 12, *Cohen* (No. 90-634), reprinted in LANDMARK BRIEFS, *supra* note 137, at 397.

<sup>168</sup> *Cohen*, 501 U.S. at 667.

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

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 665.

For Justice White, the critical point was that which had been critical in *Branzburg* twenty years before. General legal obligations apply to the press no less than they apply to others.<sup>172</sup> The First Amendment provides no refuge to the press from generally applicable laws.<sup>173</sup> Appropriately, Justice White, in an effort to document this point, started with the *Branzburg* case. Justice White recalled that in *Branzburg* he had spoken similarly of the duty of the press to conform to generally applicable law.<sup>174</sup> It was the journalist's duty to respond to the obligation "shared by all citizens," a grand jury subpoena served pursuant to a criminal investigation.<sup>175</sup>

The interest of the press in publication of truthful information did not exempt them from the copyright laws, the labor laws, the minimum wage laws, or the antitrust laws.<sup>176</sup> In prior cases, the press had sought exemptions from these laws, but the Court had held that there was no warrant in the First Amendment for an exemption from generally applicable laws.<sup>177</sup> It was very clear, Justice White declared, that the Minnesota doctrine of promissory estoppel was also a law of general applicability.<sup>178</sup> The First Amendment did not protect the press against a law which did not target or single out the press.<sup>179</sup> The Minnesota law applied to promises upon which people rely, and was "generally applicable to the daily transactions of all the citizens of Minnesota."<sup>180</sup>

John French, in his argument for the newspapers, contended that the First Amendment protected the publication of truthful information.<sup>181</sup> Did application of the Minnesota promissory estoppel law to the newspapers in *Cohen* constitute a punishment of the press for publishing truthful information? Justice White observed that the newspapers had in fact published the information.<sup>182</sup> Thus, having to pay damages as a consequence of breaching a promise not to publish the information should not be viewed as punishment, but instead as "a cost of acquiring newsworthy material to be published at a profit."<sup>183</sup> Certainly that is how the situation would be analyzed if the reporter and the source had signed an agreement with a liquidated damages provision in the event of breach.<sup>184</sup> Paying damages in these

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<sup>172</sup> *Id.* at 670.

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

<sup>174</sup> *Id.* at 669.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 670.

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

<sup>180</sup> *Id.*

<sup>181</sup> LANDMARK BRIEFS, *supra* note 137, at 649-50.

<sup>182</sup> *Cohen*, 501 U.S. at 670.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*



circumstances, said Justice White, was no different from “a generous bonus paid to a confidential news source.”<sup>185</sup>

Simply put, Justice White believed that the newspapers made a deal. To get certain information, the newspapers agreed to keep other information confidential, but then published what they had promised to keep confidential. The state did not require the press to make the original promise or to publish. In such circumstances, if a newspaper broke its promise, it should pay damages.

It would be hard to understate Justice White’s lack of sympathy for the newspapers’ contention that the press was being punished for the truthful publication of lawfully acquired information. Justice White was not sure that the acquisition of the information was in fact lawful.<sup>186</sup> He did not consider information to be lawful that was acquired only by making promises which were then not honored.<sup>187</sup>

Justice White made another point in *Cohen* which should be emphasized. Dan Cohen was not seeking damages for matters which touch on free expression. He was not suing for damages because he was savagely parodied, or because his reputation was destroyed.<sup>188</sup> He was seeking damages because of the consequences of the breach of the promise made to him—he was fired from his job and his earning capacity was diminished.<sup>189</sup>

One should not conclude from the foregoing, however, that the Court was rooting either for Dan Cohen or for enforcement of reporter-source agreements. Indeed, towards the end of his opinion, Justice White appeared to go to great lengths to advise the Supreme Court of Minnesota about the non-First Amendment grounds available to it on remand which would allow it to reach the same result it had reached earlier.<sup>190</sup> He suggested these non-First Amendment grounds for a decision in support of the newspapers and against Cohen in an effort to respond to a comment in Justice Souter’s dissent.<sup>191</sup>

Justice Souter reasoned that if, the First Amendment notwithstanding, a source can sue a newspaper for disclosing his identity, newspapers will be given a legal incentive to decline to identify a confidential source even when that source’s identity is highly newsworthy.<sup>192</sup> White responded by pointing out that although Cohen had asked the Supreme Court to reinstate the \$200,000 jury verdict in compensatory damages, the Court rejected that

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 671.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 672.

<sup>191</sup> *Id.* at 671.

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

request.<sup>193</sup> Justice White further indicated that it was not clear whether the Minnesota law of promissory estoppel would in fact result in a recovery for Cohen.<sup>194</sup>

In summary, if one reads Justice White's opinion in *Cohen* closely, it appears that he is not saying that Cohen should recover and that the press should lose. Rather, the subtext of the opinion appears to be that the newspapers should not win the case on a First Amendment basis. The American press, on the whole, had long insisted, as their position in *Branzburg* demonstrated, that the First Amendment protected the confidentiality of the reporter-source agreement. Perhaps Justice White thought it was impermissible hypocrisy for the press now to urge that the First Amendment allowed them to publish what they had so long insisted the First Amendment authorized them to withhold—the identity of their confidential sources. Perhaps Justice White did not believe that the First Amendment should be used to achieve a result which would compromise the integrity of journalism in the future.

### C. *The Dissents*

Justice Blackmun, joined by Justices Marshall and Souter, stated that enforcement of Minnesota promissory estoppel law in these circumstances would violate the First Amendment and constitute an impermissible penalization of the publication of truthful information concerning a political campaign.<sup>195</sup> Blackmun did not view the Supreme Court of Minnesota as having created any exemption from generally applicable law for the newspapers of the Twin Cities.<sup>196</sup> For him, it was not the identity of the speaker, i.e., the press, that was important, but the character of the speech.<sup>197</sup> The speech involved public debate arising in the course of a political campaign. There could not be, under a regime ordered by the First Amendment, any state restriction of political speech.<sup>198</sup>

Once again the ambiguous status of a First Amendment basis for the journalist's privilege raised a problem. The First Amendment-based journalist's privilege existed in the living law of the lower courts, whatever its status in the Supreme Court. Justice Blackmun's position, therefore, is somewhat troubling. On the one hand, the First Amendment confers a privilege to withhold information provided by confidential sources. On the other hand, the state may not consistent with the First Amendment restrict the

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<sup>193</sup> *Id.* at 672.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (Blackmun, J., dissenting).

<sup>196</sup> *Id.* at 673 (Blackmun, J., dissenting).

<sup>197</sup> *Id.* (Blackmun, J., dissenting).

<sup>198</sup> *Id.* (Blackmun, J., dissenting).

truthful publication of political information, except in the most exigent circumstances.<sup>199</sup> Which is more important—the long-term societal interest in the acquisition of information for the press, or the giving effect to the short-term editorial judgement that something is so newsworthy that it merits immediate publication, despite the promise of confidentiality by which it was acquired?

For Justice Blackmun, the newspapers' ability to publish truthful political information was important for preservation of the First Amendment.<sup>200</sup> It is not clear, however, that he weighed this interest against the societal interest in the long-term preservation of the acquisition of information by the press, nor is it clear that he understood that protecting publication of the source's identity in this context might jeopardize the competing press and societal interest in the acquisition of information. In this respect, *Cohen* represents one of the agonies of contemporary American journalism, because it shows the press pitted against itself. Regardless of who wins in *Cohen*, a press interest suffers.

Justice Blackmun, however, did not see *Cohen* as presenting competing First Amendment interests, nor, indeed, did he see it as a press case at all. Instead, the case involved whether the First Amendment should protect the publication of political speech against state restriction. Justice Blackmun would protect political speech against such restriction whether the defendant seeking to publish was a media defendant or non-media defendant.<sup>201</sup> Blackmun did not acknowledge a press, a societal, or a First Amendment interest in the acquisition of information. He did not see the dilemmas *Cohen's* suit presented for freedom of the press. This is vividly illustrated in the end of Blackmun's opinion, where he noted that truthful speech can never be proscribed by the state unless some compelling state interest of the highest order will be served thereby.<sup>202</sup> The opinion of the Supreme Court of Minnesota, he continued, made clear that enforcing its law of promissory estoppel in these circumstances did not meet this exacting standard.<sup>203</sup> Justice Blackmun, however, neither articulated nor even recognized the First Amendment interest in the untrammelled flow of news, i.e., the vitality of the connection between the publication of truthful information and the acquisition of information. For example, Justice Blackmun wrote that *Branzburg* did not involve the imposition of liability because of the content of what was published.<sup>204</sup> He failed to recognize, however, that five Justices in *Branzburg* were willing to give some First Amendment protection to

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<sup>199</sup> *Id.* at 676 (Blackmun, J., dissenting).

<sup>200</sup> *Id.* at 672 (Blackmun, J., dissenting).

<sup>201</sup> *Id.* (Blackmun, J., dissenting).

<sup>202</sup> *Id.* (Blackmun, J., dissenting).

<sup>203</sup> *Id.* (Blackmun, J., dissenting).

<sup>204</sup> *Id.* at 674 (Blackmun, J., dissenting).

authorize the withholding of certain information on the basis of content, namely the identity of sources.<sup>205</sup>

Citing *Hustler Magazine, Inc. v. Falwell*,<sup>206</sup> Justice Blackmun argued that the law may not “punish the expression of truthful information or opinion.”<sup>207</sup> Justice White distinguished the *Hustler* case because he thought it was not a case in which the plaintiff was trying to use a novel legal theory in order to impose liability on a newspaper defendant for the publication of truthful information.<sup>208</sup> In *Hustler*, refuge was sought in the tort of intentional infliction of emotional distress in order to avoid the law of libel.<sup>209</sup> Blackmun said *Hustler* was precisely on point because the law of intentional infliction of emotional distress was no less a law of general applicability than the law of promissory estoppel.<sup>210</sup> The burden on publication of speech wrought by *Cohen*, in Blackmun’s view, was not an incidental burden on speech, but a burden on “the publication of important political speech.”<sup>211</sup>

Justice Souter, joined by Justices Marshall, Blackmun, and O’Connor, wrote a separate dissent.<sup>212</sup> Souter said that it was not “talismanic” that the law of promissory estoppel was a law of general applicability; it could still “restrict First Amendment rights just as effectively as those [laws] directed specifically at speech itself.”<sup>213</sup> Justice White’s view was that because the burden on publication of truthful information was self-imposed by the newspapers, one could dispense with consideration of constitutional interests that might support publication.<sup>214</sup> Justice Souter did not agree; waiver by the newspapers of their interest in the publication of truthful information by agreeing not to publish in the first place did not exhaust the First Amendment interest involved.<sup>215</sup>

The public has a First Amendment interest in the publication of truthful information. Information that a Republican activist was the source behind an effort to discredit a Democratic-Farmer Labor candidate for state-wide office in Minnesota could be the kind of factor on which an election might turn. Justice Souter insisted that the speaker’s First Amendment rights were not the sole concern; the citizenry also has a First Amendment interest in the

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<sup>205</sup> See *infra* note 246.

<sup>206</sup> 485 U.S. 46 (1988).

<sup>207</sup> *Cohen*, 501 U.S. at 675-76 (Blackmun, J., dissenting).

<sup>208</sup> *Id.* at 671.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 675 (Blackmun, J., dissenting).

<sup>211</sup> *Id.* (Blackmun, J., dissenting).

<sup>212</sup> *Id.* at 676 (Souter, J., dissenting).

<sup>213</sup> *Id.* at 677 (Souter, J., dissenting) (citing *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 901 (1990)).

<sup>214</sup> *Id.* (Souter, J., dissenting).

<sup>215</sup> *Id.* at 677-79 (Souter, J., dissenting).

publication of the information.<sup>216</sup>

As Justice Souter observed, the “universe of information relevant to the choice faced by Minnesota voters” would clearly be expanded by knowing Dan Cohen’s identity.<sup>217</sup> In such circumstances, the interest in “unfettered publication” outweighs the promise of confidentiality.<sup>218</sup> Justice Souter’s dissent rightly eschews an absolutist approach. There were circumstances, he conceded, when a breach of confidentiality by a newspaper might result in liability, but not in this case.<sup>219</sup> In this instance, the First Amendment interest presented was based entirely upon publication. The question of whether there was a First Amendment interest in protecting confidentiality was not considered—but it should have been.

#### D. *Back to the Supreme Court of Minnesota*

Although Justice White reversed the Supreme Court of Minnesota, he refused to reinstate the \$200,000 in compensatory damages that Cohen had been awarded.<sup>220</sup> The Supreme Court of the United States decided only that the First Amendment did not authorize the press to “disregard promises that would otherwise be enforced under state law.”<sup>221</sup> The Minnesota courts could decide that a case in promissory estoppel had not been made under Minnesota law, or, alternatively, they could decide that the Minnesota constitution could be interpreted “to shield the press from a promissory estoppel cause of action such as this one.”<sup>222</sup> In short, Justice White suggested two bases for a decision in the Supreme Court of Minnesota—reliance on the state law of promissory estoppel, or on the state constitution.

Realistically, the very mention of these possibilities suggested that Cohen had won only a pyrrhic victory, and that the Supreme Court of the United States was signalling to the Minnesota courts that there were other ways to preclude Cohen from obtaining any recourse for the breach of the promise made to him. This, however, was not the way the Supreme Court of Minnesota interpreted the United States Supreme Court’s decision.

If the Supreme Court of Minnesota had still been inclined to favor the newspapers and deny or delay a recovery by Cohen, grounds were certainly available for it to have done so, but having given the press the benefit of the doubt the first time around, the Supreme Court of Minnesota was not in-

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<sup>216</sup> *Id.* at 678 (Souter, J., dissenting).

<sup>217</sup> *Id.* (Souter, J., dissenting).

<sup>218</sup> *Id.* at 679 (Souter, J., dissenting).

<sup>219</sup> *Id.* at 678 (Souter, J., dissenting).

<sup>220</sup> *Id.* at 672.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

clined to do so again. It was rather clear that the Supreme Court of Minnesota was tired of the players in *Cohen*. In a short opinion, the Supreme Court of Minnesota quickly reinstated the \$200,000 verdict in favor of Dan Cohen.<sup>223</sup>

When the Supreme Court of Minnesota had previously considered the case, it had held that the \$200,000 award that Dan Cohen had won in the lower court could not be sustained on a theory of breach of contract.<sup>224</sup> On remand, however, the court concluded not only that the verdict could be reinstated on a theory of promissory estoppel, but that it did not need to be sent back to the trial court on the issue of promissory estoppel.<sup>225</sup> Based on the unique circumstances of the case, it would be unfair not to let *Cohen* be decided on a promissory estoppel basis. The issue had been the same throughout—"the legal enforceability of a promise of anonymity."<sup>226</sup> The court observed that "promissory estoppel is essentially a variation of contract theory."<sup>227</sup> The evidence produced at trial was as germane to a theory of promissory estoppel as it was to contract. There was simply no need for a new trial. The case could be decided now in favor of Cohen on a theory of promissory estoppel.

There was yet another option open to the Supreme Court of Minnesota. It could have interpreted its state constitution to afford the newspapers broader protection than that afforded by the First Amendment. Justice White, it will be recalled, had mentioned this alternative.<sup>228</sup> The Supreme Court of Minnesota made it clear that it did not wish to take this course. The issue presented—whether promises of confidentiality given by journalists to a news source were legally enforceable—was a novel one. The First Amendment dimensions of this issue were as yet unclear. Until the impact on freedom of expression caused by allowing sources to sue newspapers was significantly clearer, the Supreme Court of Minnesota was not inclined to exercise the state constitutional law option.<sup>229</sup>

The Supreme Court of Minnesota also considered the newspapers' argument that awarding damages for the publication of Cohen's identity would limit the public's interest in "the free flow of important information."<sup>230</sup> The court was not sure that the newsworthiness of Cohen's identity was so

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<sup>223</sup> *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 388 (Minn. 1992).

<sup>224</sup> *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990).

<sup>225</sup> *Cohen*, 479 N.W.2d at 388. For a discussion of this case from the point of view of the law of contracts, see Gregory F. Monday, *Cohen v. Cowles Media Is Not a Promising Decision*, 1992 WIS. L. REV. 1243.

<sup>226</sup> *Cohen*, 479 N.W.2d at 390.

<sup>227</sup> *Id.*

<sup>228</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

<sup>229</sup> *Cohen*, 479 N.W.2d at 391.

<sup>230</sup> *Id.*

important that it justified invalidation of the promise of anonymity.<sup>231</sup> The complaint of the newspapers was that they should not be punished for wanting to acquaint the electorate of Minnesota with the “whole truth” about a political story.<sup>232</sup> The court responded that the needs of the electorate would have been satisfied by including in the story that the source was someone close to the DFL candidate’s political opponent.<sup>233</sup>

Denying Dan Cohen any relief at all would work an injustice.<sup>234</sup> The Supreme Court of Minnesota summarized the newspapers’ journalistic practice of honoring promises made to sources: “The Pioneer Press Dispatch editor stated nothing like this had happened in her 27 years in journalism. The Star Tribune’s editor testified that protection of sources was ‘extremely important.’”<sup>235</sup> Yet neither newspaper wished to destroy the political career of an opposing candidate without having the source’s partisan political purpose attributed to him. In short, newspapers wanted to be freed from their reporters’ promises because the big story was not the peccadillos of a political candidate. The big story was the identity of the candidate’s accuser.

Neither party was on high moral ground. Each party said that the behavior of the other was unethical.<sup>236</sup> Justice Simonett observed that on the basis of the evidence at trial, the case could be well characterized as a case of the “pot calling the kettle black.”<sup>237</sup> Not surprisingly, the Supreme Court of Minnesota was in no mood to see the litigation continue.

Cohen had won at last! And not just a moral victory—he had won \$200,000.

### III. DRAWING SOME CONCLUSIONS AND NOTING THE SIGNIFICANCE OF *COHEN*

In his brief before the Supreme Court, Elliot Rothenberg said the central question presented to the Court was whether “the First Amendment of the U.S. Constitution grant[ed] newspapers immunity from liability for damages caused by dishonoring promises of confidentiality given in exchange for information on a political candidate.”<sup>238</sup> Although the Supreme Court did not answer this question in quite the all-encompassing way in which it was posed, it came close. The Supreme Court held that, in circumstances such as those found in *Cohen*, the First Amendment did not provide newspapers any

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 392.

<sup>236</sup> *Id.* at 389.

<sup>237</sup> *Id.*

<sup>238</sup> Petition for Writ of Certiorari at i, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (No. 90-634), reprinted in *LANDMARK BRIEFS*, *supra* note 137, at 355.

refuge or escape from the law of promissory estoppel.<sup>239</sup> For American journalism, the message of *Cohen* was clear. To the same extent as other citizens of the state, the press would be responsible for the promises they breached, upon which others had relied to their detriment.<sup>240</sup> The First Amendment provided no escape.

Two general conclusions can be made about *Cohen*. First, *Cohen* held that the First Amendment did not preclude a suit for breach of a reporter-source confidentiality agreement under state law. Second, *Cohen* did not hold that the First Amendment required the allowance of such a suit. In short, Justice White did not regard *Cohen* as a great First Amendment case.

If one compares Justice White's opinion in *Cohen* with his opinion in *Branzburg*, it is clear that Justice White regarded *Branzburg* as presenting a major First Amendment issue.<sup>241</sup> Justice White held in *Branzburg* that a reporter had no First Amendment privilege to decline to give evidence to a grand jury in a criminal matter,<sup>242</sup> but he explained in detail that both law and policy argued against creating a First Amendment-based journalist's privilege.<sup>243</sup> In *Cohen*, on other hand, he appeared to take the position that the case simply presented no First Amendment dimension. Of course, the First Amendment significance of the case can be explained otherwise. For example, one commentator analyzing *Cohen* stated that the Court "upheld a waiver of First Amendment rights."<sup>244</sup> Indeed, this commentator noted that "[t]he Court in *Cohen*, in fact, explicitly sanctioned the waiver of First Amendment rights in order to enforce an *agreement of confidentiality* between two private parties."<sup>245</sup>

After *Cohen*, it is still disturbingly unclear whether the United States Supreme Court recognizes a qualified First Amendment-based journalist's privilege.<sup>246</sup> Certainly, there is no indication from Justice White's opinion

<sup>239</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991).

<sup>240</sup> *Id.*

<sup>241</sup> *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

<sup>242</sup> Justice White, writing for the Court, specifically refused to create a First Amendment-based privilege for journalists:

Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.

*Id.* at 689.

<sup>243</sup> *Id.* at 693-708.

<sup>244</sup> G. Michael Harvey, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2455 (1992).

<sup>245</sup> *Id.*

<sup>246</sup> Although there was a majority for the judgment in *Branzburg*, 408 U.S. 665 (1972), there was no one opinion which commanded the support of a majority of the Justices. The plurality opinion for the Court was written by Justice White, and joined by



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Chief Justice Burger and Justices Blackmun and Rehnquist. *Id.* Justice Powell wrote a concurring opinion. *Id.* at 709 (Powell, J., concurring). These opinions produced the much publicized holding that there was no general First Amendment journalist's privilege. Justice Stewart's dissenting opinion, which was joined by Justices Brennan and Marshall, recognized a qualified First Amendment-based privilege. *Id.* at 725 (Stewart, J., dissenting). Finally, Justice Douglas's dissenting opinion purported to recognize an absolute journalist's privilege. *Id.* at 711 (Douglas, J., dissenting).

In the long run, Justice Stewart's opinion, although a dissent, may have had more impact than any other opinion in *Branzburg*. Rare is the situation when a dissent is more influential than the opinion for the Court. Justice Stewart set forth a framework for the judicial recognition of a qualified First Amendment-based privilege. *Id.* at 743 (Stewart, J., dissenting). In the years following *Branzburg*, Stewart's analysis met with considerable acceptance in the lower courts, particularly in civil cases involving a journalist's privilege. *See infra* note 247.

Justice Stewart said he would require the government to show three things before a journalist could be required to testify before a grand jury. First, the government would have to show that there is probable cause to believe that a journalist has "information that is clearly relevant to a specific probable violation of law." *Branzburg*, 408 U.S. at 743 (Stewart, J., dissenting). Second, the government would have to show that the information sought could not be obtained by other means less destructive of First Amendment rights. *Id.* (Stewart, J., dissenting). Third, the government would have to show a compelling and overriding interest in the information sought. *Id.* (Stewart, J., dissenting).

Justice Stewart carefully characterized Justice White's plurality opinion for the Court as holding "that a newsman has no First Amendment right to protect his sources when called before a grand jury." *Id.* at 725. (Stewart, J., dissenting). Note that Justice Stewart did not describe the holding as constituting a complete rejection of a First Amendment basis for a journalist's privilege. Thus described, Justice White's opinion in *Branzburg* did not govern the whole field of civil litigation.

Justice Stewart was aware that his position might have more support than appeared at first blush. He was also aware that the battle for a qualified First Amendment-based privilege for journalists was not over. Justice Stewart observed that Powell's "enigmatic concurring opinion" gave hope "of a more flexible view in the future." *Id.* at 725 (Stewart, J., dissenting). Justice Powell had indicated that in other situations the First Amendment might provide more protection to journalists than was warranted in *Branzburg*. *Id.* at 709-10 (Powell, J. concurring). Moreover, Justice Douglas's separate dissent contended that the First Amendment conferred an absolute privilege on journalists seeking protection from having to divulge their sources to grand juries. *Id.* at 712-13 (Douglas, J., dissenting).

The Powell concurrence and Douglas and Stewart dissents in *Branzburg* indicate that five Justices on the Court might have supported the First Amendment claims of journalists to protect sources in a non-grand jury context. As noted, the theory of the Stewart dissent has had a successful run in the lower courts. *See infra* note 247.

Nonetheless, the Supreme Court has been unwilling to reconsider its rejection of a First Amendment-based journalist's privilege. In *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), a Title VII case before the Equal Employment Opportunity Commission, the Court did not accept the contention that, in the interest of academic freedom, confidential peer review information acquired in a tenure review case should be

in *Cohen* that he thought that there was such a privilege. Yet it is clear that the lower federal courts have recognized a qualified First Amendment-based journalist's privilege.<sup>247</sup> If there is such a privilege, then it becomes very important to establish its scope. Is it a privilege which only the reporter may raise, or may it be invoked by either the reporter or the source?

If there is no First Amendment-based journalist's privilege, then the press's position that it may decline to honor a reporter-source agreement is less self-serving. In this view, an editorial judgment that existing newsworthiness should trump a future and speculative need for sources becomes a more defensible position.

Insofar as Justice White acknowledged any of the foregoing matters, it was in connection with his rebuttal to the view espoused by Justice Blackmun that the First Amendment protected the press against any law which limited its right to publish truthful information. In reality, said Justice White, this amounted to a view that the press should be exempt from generally applicable law.<sup>248</sup> "The First Amendment," declared Justice White, "does not grant the press such limitless protection."<sup>249</sup>

The question of whether the First Amendment precluded Cohen's suit against the *Pioneer Press Dispatch* and the *Star Tribune* deceptively masks the complexities involved. First Amendment jurisprudence often disguises the conflicts and the antagonisms that lie behind the word "press" and the phrase "freedom of the press." There are three fundamental issues of law and journalism raised by *Cohen*. First, what is the press? Second, what will be the long term effect on journalism of enforcing reporter-source agreements? Third, what First Amendment values are served by non-disclosure?

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protected under the First Amendment. *Id.* at 201. The Court remarked: "We were unwilling [in *Branzburg*], as we are today, 'to embark the judiciary on a long and difficult journey to . . . an uncertain destination.'" *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972)).

<sup>247</sup> Many cases in the federal circuit courts have recognized a qualified First Amendment-based journalist's privilege. See *Clyburn v. New World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990); *Zerrilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); see also *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126, *on remand*, 511 F. Supp. 375 (D. N.J.), *rev'd*, 651 F.2d 189 (3d Cir.), *cert. denied*, 454 U.S. 1056 (1981); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

Not all the circuits have been so accommodating. The Sixth Circuit, for example, has rejected a qualified First Amendment-based journalist's privilege. See *Storer Communications, Inc. v. Giovan (In re Grand Jury Proceedings)*, 810 F.2d 580 (6th Cir. 1987).

<sup>248</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991).

<sup>249</sup> *Id.* at 671.

A. *What Is the Press?—Reporters? Editors? Owners?*

Reporters promised Dan Cohen that if he would be their source, they would protect his anonymity. The reporters' editors, however, decided that the news value of Cohen's identity was more important than the promises the reporters had made to him.<sup>250</sup> The newspapers in *Cohen* contended that the journalist's privilege belongs to the media and not the source, and that the decision to honor the privilege belongs to the editor and not to the reporter.<sup>251</sup> What is the media? Is it the reporter or the editor? Or is it the ownership of a particular news organization?

Typically, the reporter will want to adhere to the confidentiality agreement made with the source in order to protect the integrity of the newsgathering process. To protect the process, the source should have the right to enforce a reporter-source agreement. If the reporter's news organization breaches the promise the reporter has made to the source, the reporter's relationship with that source clearly is compromised for the future in a matter vital to the newsgathering process. Absent the promise of confidentiality, some information simply is going to be unavailable. *Cohen* represents a conflict between the desire of the editors to publish and the desire of the reporters to protect confidentiality. The reporters' concern is with the newsgathering process; the editors' concern is with newsworthiness.

The *Star Tribune's* lawyer, John Borger, believes that from a reporter's perspective, giving legal rights to the source empowers the reporter.<sup>252</sup> A reporter's promise under such circumstances means something; it has a sanction behind it. Borger thinks editors see these issues from a public inter-

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<sup>250</sup> Some prestigious voices in American journalism were deeply disturbed that editors would overrule the promises of anonymity and confidentiality made by their reporters to a source. In an editorial, *Editor & Publisher* declined to support the action of the editors in *Cohen*:

We believe that an editor who feels a reporter has not been justified in promising anonymity has an obligation both to the reporter and the news source to work out some compromise with both. Leaving a reporter out on a limb after such a promise has been reversed doesn't do the reputation of the reporter or the newspaper any good.

*Confidentiality*, EDITOR & PUBLISHER, Aug. 6, 1988, at 6.

<sup>251</sup> *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 257 (Minn. Ct. App. 1989). In answering the question—what is the media?—in the context of the journalist's privilege, Justice White's statement of the claim for privilege in *Branzburg* merits reflection: "We note first that the privilege claimed is that of the reporter, not the informant." *Branzburg v. Hayes*, 408 U.S. 665, 695 (1972).

<sup>252</sup> See Interview with John Borger, Esq., in Minneapolis, Minn. (Oct. 8, 1990) (notes on file with author).

est perspective.<sup>253</sup> The editor uses judgment and discretion to determine when a promise to a source should be kept and when it should not.<sup>254</sup>

Clearly, a decision to enforce a reporter-source agreement affects the editorial process because it diminishes the editors' authority while increasing the reporters' authority; reporters are given the apparent power to make promises to sources with respect to confidentiality. Enforcement of reporter-source agreements subordinates newsworthiness and the right to publish to confidentiality and the integrity of the newsgathering process. Yet historically, the right to publish has long been held to have greater First Amendment status than the right to gather information.<sup>255</sup>

The reporters for the two dailies in the Twin Cities did not intend to betray Dan Cohen.<sup>256</sup> They gave him a pledge of confidentiality as a condition of receiving the information about Marlene Johnson's criminal record with the intention of keeping that pledge. For at least one of the reporters, *Star Tribune* reporter Lori Sturdevant, Cohen's trust was essential because he might be a continuing and valuable source. Indeed, when Cohen gave her the documents, Sturdevant said, "This is the sort of thing that I'd like to have you bring by again if you ever have anything like it."<sup>257</sup>

At issue was whether Cohen's motives justified the editors' decision to overrule their reporters.<sup>258</sup> John Borger argued in his brief to the Supreme Court of Minnesota that the real interest which Cohen wanted the courts to protect was "not the sanctity of any contract, but his interest in protecting his reputation."<sup>259</sup> Cohen, however, would not have succeeded in a libel suit because the facts the papers printed about Cohen were true.<sup>260</sup> Even assuming Borger's contentions were true, they were not relevant to the issue of whether Cohen's agreement with the reporters should be enforced. The editors decided that the fact Cohen made the information available was more newsworthy than the information Cohen had provided. The relevant issue is not whether Cohen would have won if he had brought a libel suit, but whether newsworthiness should trump a confidentiality agreement made by a reporter to a source. Editors have to be careful in answering whether newsworthiness is always the transcendent value. Publish and be damned is always a tempting response, but in his brief for Cohen in the Supreme Court

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> See *Branzburg v. Hayes*, 408 U.S. 606, 684-85 (1971).

<sup>256</sup> *Cohen*, 445 N.W.2d at 259.

<sup>257</sup> *Id.* at 252.

<sup>258</sup> For a powerful and well documented argument that the source's motives *should* matter, see Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609, 714-16 (1991).

<sup>259</sup> Brief of Appellant Cowles Media Company at 43, *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990) (Nos. C8-88-2631, C0-88-2672).

<sup>260</sup> *Id.* at 11.

of Minnesota, Rothenberg made the telling point that “[t]he identity of virtually every confidential whistleblower is newsworthy.”<sup>261</sup>

The press is not a monolith and is no less perplexed than the judiciary, the legislature, and the public by what should be disclosed and what should not. Journalism educator Ted Glasser saw *Cohen* not so much as a trial between the plaintiff and the defendant as a trial between reporters and editors.<sup>262</sup> Glasser challenged the positions that the newspapers’ counsel took in *Cohen*, disputing their contention that a reporter did not have the authority to promise sources to keep their identities confidential. “What in the world,” he asked, “is a professional journalist if not somebody who can go out and represent the newsroom?”<sup>263</sup>

*Cohen* held that the First Amendment did not preclude a source from suing the newspapers. If, however, the reporters in *Cohen* had sued their editors for breach of a contract that they believed to be in force between them and their editors, the reporters would contend that their understanding was that if they promised a source confidentiality, it was because their editors had impliedly promised the reporters that they would honor that promise. If the reporter then sued the editor for breach of this implied understanding, would the First Amendment interest lie in enforcing the reporter’s promise? The editor would argue that allowing such a suit would interfere with editorial autonomy, but it is debatable whether this is more important than allowing a reporter to insist on the integrity of her promises.

At the center of *Cohen* is the troubling question of what is meant by the term “press.” Rarely has a Supreme Court case underscored the import of that question to the same degree as *Cohen*. Was the press in *Cohen* the reporters who wished to honor the promise they had made to Dan Cohen, or was it the editors who did not wish to do so? Professor Ed Baker, a First Amendment scholar, has noted a distinction between press personnel and press owners, and has observed that their interests may sometimes be in conflict. “Protection of press personnel may best promote diversity and be most central to the press’s obviously vital fourth-estate role—checking abuse by government. . . . Protecting these press personnel from censorship by owners when their stories and exposes are contrary to the owners’ perceived interest could promote fourth-estate values.”<sup>264</sup> Professor Baker discusses the problem of owners versus journalists. In *Cohen*, the clash was between reporters and editors, all of whom are journalists.

The novelty of *Cohen* is underscored by an example Professor Baker provides, in which he cites the reporter’s privilege of confidential sources as

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<sup>261</sup> Brief of Respondent Dan Cohen at 33, *Cohen* (Nos. C8-88-2631, C0-88-2672).

<sup>262</sup> See Eleanor Randolph, *Editors, Reporters at Odds Over Confidential Sources*, WASH. POST, June 13, 1988, at A4.

<sup>263</sup> *Id.*

<sup>264</sup> C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 254 (1989).

an instance in which owners' interests and reporters' interests are the same.<sup>265</sup> As we have seen, *Cohen* introduced the interests of editors into the equation as well. Of course, in *Cohen*, the owners obviously supported the editors because the owners financed the lawsuit defending their editors' positions.

The brief for the *Pioneer Press Dispatch* did not mention the internal conflict between reporters and editors. Instead, counsel for the paper contended that the newspapers' decision to publish Cohen's identity despite their promise to the contrary was "entirely consistent with ethical standards."<sup>266</sup> They argued that "an absolutist view ignores the danger that confidential sources may seek to manipulate the press and mislead the public by cloaking their identity in anonymity."<sup>267</sup>

Justice White did not respond to arguments based on the character flaws of either the source or the newspaper personnel in *Cohen*. The damages that a newspaper might pay for breaching a promise to keep material confidential were the sanction the law imposed.<sup>268</sup> The law did not prevent the material from being published. In fact, the newspaper got everything it wanted. It got both the confidential information and the opportunity to break the confidence and expose the source if the newspaper thought such exposure was sufficiently newsworthy. Damages for breach were simply a cost of doing business.<sup>269</sup>

What is the best way to handle reporter-media management conflicts arising from breach of the reporter's promise to the source by the reporter's media superiors? One approach would be to weigh the injury to newsgathering against the strength of the newsworthiness of the identity of the source. The trouble, however, with such a fact specific approach is that it eats away at the integrity of journalism. Certainly, as far as sources are concerned, the integrity of the reporter-source confidential relationship would be totally lost. Presumably an editor, or some other third party, would judge *ex post facto* whether an agreement would be honored.

The difficulty of the problems presented by *Cohen* demonstrates how unhelpful it is for newspapers to insist that "only the journalist and not the source, has a right to enforce a confidentiality agreement."<sup>270</sup> When counsel for newspapers make such arguments, as they did in *Cohen*, it is the views of media management and not the views of the reporter that are being represented. The courts, of course, must resolve these conflicts. A simple

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<sup>265</sup> *Id.* at 255.

<sup>266</sup> Brief of Respondent Northwest Publications, Inc. at 37, *Cohen v. Cowles Media*, 501 U.S. 663 (1991) (No. 90-634), reprinted in *LANDMARK BRIEFS*, *supra* note 137, at 560.

<sup>267</sup> *Id.* at 38, reprinted in *LANDMARK BRIEFS*, *supra* note 137, at 561.

<sup>268</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

<sup>269</sup> *Id.*

<sup>270</sup> *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 257 (Minn. Ct. App. 1989).

solution that would support the information flow and benefit the integrity of journalism would be to allow only the reporter or the source to enforce or breach the agreement.

### B. *Cohen and Its Impact on Journalism*

What are the consequences of the *Cohen* case for journalism? One happy result is that sources will no longer need to fear being forthcoming with reporters. It was a proud claim of the *Star Tribune* in *Cohen* that it had never before breached the confidence of a source. That tradition, despite the *Star Tribune's* lapse in the case of Dan Cohen, can be expected to continue. On the downside, a potential but nervous source may approach a reporter in the future with a contract and demand the reporter's signature. If the problem in *Cohen* was, as the Supreme Court of Minnesota said, that the parties did not really intend a contract, then one remedy is for the source and the reporter to make a contract with the approval of the newspaper. Furthermore, the contract may set forth a sum for damages in the event that the newspaper breaches the promise.

Another reaction that may be expected to flow from *Cohen* is the use of guidelines by newspapers. Guidelines can furnish a missing governance to the area of reporter-source agreements. On August 11, 1988, the *Star Tribune* published a message to its readers, signed by Executive Editor Joel Kramer.<sup>271</sup> With considerable understatement, the *Star Tribune* opined that recent flaps over reporter-source agreements had "created confusion among reporters, editors and the community over how" such agreements would be handled in the future.<sup>272</sup> As a consequence, the paper said it was now publishing a set of written guidelines to "replace the mostly unwritten guidelines and standards" on which it had relied in the past.<sup>273</sup>

The *Star Tribune* made three observations in its summary of the guidelines. First, frequent reliance on anonymous sources "increases the risk of inaccurate or unfair journalism."<sup>274</sup> Second, quotes and anonymous statements should be used only where both a "reporter and editor are satisfied that [the paper is] meeting [its] standards for accuracy and fairness."<sup>275</sup> Lest it be thought, however, that this statement placed editors and reporters on the same plane of equality, the Guidelines also admonish reporters: "If practical, consult with an editor before making any promises to sources. If in doubt about the propriety of making a promise, always con-

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<sup>271</sup> Joel Kramer, *To Our Readers: Guidelines on Anonymous Sources*, MINNEAPOLIS STAR TRIB., Aug. 11, 1988, at 1A.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 16A.

<sup>275</sup> *Id.*

sult."<sup>276</sup>

The Guidelines' third observation was a model of ambiguity. Published after the *Cohen* controversy, it fell short of providing either sources, reporters, or the community with absolute certainty as to what the *Star Tribune's* policy would be if a situation like the *Cohen* case should arise again: "We will avoid making promises of confidentiality to sources that are not in the newspaper's or the readers' best interest, but we will honor the promises we make except in the most extraordinary circumstances."<sup>277</sup>

It is debatable whether the Guidelines, if they had been in effect prior to the *Cohen* case, would have required the *Star Tribune* reporter to obtain an editor's consent before promising Cohen confidentiality. The Guidelines waffle on this question, and discuss "satisfying" both editors and reporters at one point and "consulting" with editors at another point.<sup>278</sup>

Many newspapers have unwritten policies requiring prior approval of editors before confidentiality is promised to sources, perhaps because written policies are "eminently discoverable."<sup>279</sup> Written documents can be obtained by opposing counsel in pre-trial discovery if a dispute with a source heats up to a lawsuit.<sup>280</sup> Furthermore, such written statements can be damaging. If the paper's standards are absolutely precise and a reporter or an editor violated them, the paper is going to be in a worse position than if its guidelines were unwritten or non-existent.

Another alternative is for a newspaper to have general guidelines, but not make them too specific. This may explain why the Guidelines equivocate on the critical issue of whether the *Star Tribune* promises to honor agreements with sources in the future. Reporters dispute that there was an unwritten policy, pre-dating *Cohen*, which required the approval of an editor before a reporter was authorized to promise a source confidentiality.<sup>281</sup> *Star Tribune* reporters were dismayed when their editors published Cohen's name—so dismayed that reporter Lori Sturdevant refused to have her name on the story disclosing Cohen's identity.<sup>282</sup>

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<sup>276</sup> *Guidelines On Anonymous Sources and Confidentiality*, MINNEAPOLIS STAR TRIB., Aug. 11, 1988, at 16A [hereinafter *Guidelines*].

<sup>277</sup> Kramer, *supra* note 271, at 1A.

<sup>278</sup> *Guidelines*, *supra* note 276, at 16A.

<sup>279</sup> Winfield, *supra* note 53, at 4.

<sup>280</sup> See, e.g., FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.").

<sup>281</sup> See *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 260 (Minn. Ct. App. 1989) (noting that "evidence showed that [the reporters] were unaware of [pre-existing written policies]"). But see Kramer, *supra* note 271, at 1A (citing "the mostly unwritten guidelines and standards" that the *Star Tribune* relied on before *Cohen*).

<sup>282</sup> *Cohen*, 445 N.W.2d at 253.



If the *Star Tribune* always had a policy of prior approval, why was reporter Lori Sturdevant so angry when the paper published Cohen's name? After all, she had not obtained prior approval. Sturdevant should have expected to be countermanded if she had disobeyed existing policy. It seems clear that reporters were angry because they did not believe any approval by editors was necessary to promise confidentiality to a source in the context of *Cohen*.

In light of the foregoing, it seems likely that when a source gives information at his peril, risking his job, for example, *Cohen* may make resorting to written agreements between reporter and sources more common than they have been in the past. Several months before the decision of the Supreme Court of Minnesota in *Cohen*, a federal district court in Minnesota decided a similar case, *Ruzicka v. The Conde Nast Publications Inc.*<sup>283</sup> The court in

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<sup>283</sup> 733 F. Supp. 1289 (D. Minn. 1990), *aff'd in part and remanded in part*, 939 F.2d 578 (8th Cir. 1991).

In *Ruzicka*, Jill Ruzicka was interviewed by Claudia Dreifus of *Glamour* magazine for an article about sexual abuse of patients by therapists. *Id.* at 1290-91. Ruzicka had brought a malpractice suit against a psychiatrist for improper sexual conduct during therapy sessions, and she consented to be interviewed only on the condition that she would neither be identified nor identifiable. *Id.* at 1291.

Having just started a new job, Ruzicka was anxious that her new colleagues not be able to identify her from the article. *Id.* Other than specifying one particular matter, Ruzicka did not indicate what kind of information would threaten her anonymity. *Id.* at 1291-92. The one matter specified was a detailed account of Ruzicka's own personal experience of sexual abuse at the hands of her therapist. *Id.* at 1292.

When Claudia Dreifus went back to write the article, she decided she would like to use Ruzicka's experience as one of two case histories. *Id.* She asked Ruzicka for permission to use her name. *Id.* Jill Ruzicka turned down Dreifus's request and reminded her that they had agreed that Ruzicka should neither be identified nor identifiable from the story. *Id.* After editing and a second draft, *Glamour* published a story by Dreifus in its September 1988 issue. *Id.* Dreifus gave Jill Ruzicka the pseudonym "Jill Lundquist." Lundquist is described as someone who went to law school after a malpractice suit was settled, who served on a state task force while a practicing lawyer in Minneapolis, and who had worked to criminalize sexual activity between therapist and patient. *Id.* Jill Ruzicka had served on the Minnesota Task Force on Sexual Exploitation by Counselors and Therapists. *Id.*

Ruzicka sued Conde Nast Publications, publishers of *Glamour*, on a number of theories, including breach of contract. *Id.* Several questions intrigued the federal court. By entering into the agreement with Ruzicka, had *Glamour*, through its writer, Dreifus, waived its First Amendment rights? Even if *Glamour* had not waived its First Amendment rights, how should the competing interests presented be balanced in light of the First Amendment?

Dreifus kept her promise not to identify Ruzicka. The article did not mention Jill Ruzicka by name. This notwithstanding, had Dreifus broken her promise that Ruzicka would not be identifiable? Judge MacLaughlin, the federal judge in *Ruzicka*, thought the terms of the waiver in *Cohen* were clear, but he thought things were much less clear in

*Ruzicka* concluded that if an agreement between a reporter and a source specifies that the source should not be made identifiable, the agreement must clearly indicate what type of information would make the source identifiable.<sup>284</sup> The reporter must pledge not to publish that specific information; otherwise, the agreement is too imprecise to warrant enforcement. Accordingly, insistence on this kind of specificity calls for a written agreement.

In *Ruzicka*, the federal district court suggested that some agreements may have sufficient specificity to permit enforcement by the source.<sup>285</sup> Yet resort to written agreements is hardly a panacea. After all, a written agreement is the adversary of the spontaneity, informality, and trust that gives life to reporter-source agreements in the first place.

In summary, the impact of *Cohen* on journalistic practice with respect to reporter-source agreements is likely to be threefold. First, the confidential relationship between reporters and sources can be expected to continue. Second, while the relationship continues, it is now more fragile than before.

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*Ruzicka's* case. *Id.* at 1298. A reporter cannot know what information in a story will blow a source's "cover." *See id.* In *Ruzicka's* case, she had only referred to one specific matter that might indicate who she was and asked the author not to refer to it. The agreement not to make *Ruzicka* identifiable was held to be too vague to amount to a waiver of the magazine's First Amendment rights. *Id.* at 1298. Contract actions, no less than defamation actions, the court feared, might have a "chilling effect" on editorial decision-making. *Id.* at 1300. This was particularly true of vague and indefinite oral agreements to protect a source. "[A]t a minimum the Constitution requires plaintiffs in contract actions to enforce a reporter-source agreement to prove specific, unambiguous terms and to provide clear and convincing proof that the agreement was breached." *Id.*

On appeal in *Ruzicka*, the Eighth Circuit held that, although Minnesota law precluded a claim for breach of contract, a remand was warranted in light of the Supreme Court's decision in *Cohen*; promissory estoppel could be a viable theory of recovery. *Ruzicka v. Conde Nast Publications, Inc.*, 939 F.2d 578 (8th Cir. 1991). On remand, Judge MacLaughlin granted defendants' motion for summary judgment. *Ruzicka v. Conde Nast Publications, Inc.*, 794 F. Supp. 303 (D. Minn. 1992). The plaintiff had failed to show a clear and definite promise sufficient to support recovery on a theory of promissory estoppel. *Id.* at 312. On review, however, the Eighth Circuit noted that a reporter-source agreement had been enforced on a promissory estoppel theory by the Minnesota Supreme Court in *Cohen*. *Ruzicka v. Conde Nast Publications, Inc.*, 999 F.2d 1319, 1320 (8th Cir. 1993). Concluding that summary judgment should not have been granted, the Eighth Circuit remanded the matter to the district court once again—this time for trial. *Id.*

In summary, looking at *Ruzicka* retroactively through the lens of *Cohen*, what conclusions can be made about the impact of *Cohen* on the future? Clearly, as far as promissory estoppel claims by sources are concerned, the ultimate result in *Ruzicka* illustrates that *Cohen* has provided and will continue to provide new legal protection for sources.

<sup>284</sup> *Ruzicka*, 733 F. Supp. at 1298.

<sup>285</sup> *Id.*

As a result, newspapers can now be expected to use guidelines to govern more closely their reporters and the promises they make to their sources. Third, in cases involving particularly sensitive information, it may be more common for nervous sources to demand that newspapers or reporters enter into written contracts not to disclose their identities.

C. *The First Amendment Interest in the Enforcement of Reporter-Source Agreements*

The defendant newspapers argued throughout the *Cohen* litigation that the press had a First Amendment right to publish truthful information that had been lawfully acquired.<sup>286</sup> Consistent with this position, counsel for the *Pioneer Press Dispatch* asserted that sometimes it was in the public interest for reporters to break promises to sources.<sup>287</sup> Counsel gave some examples in which that had been done. For example, during the Iran-Contra hearings, Colonel Oliver North accused Congress of leaking classified intelligence information about the hijacking of the *Achille Lauro*. At that point *Newsweek* magazine revealed that "details of the interception" which *Newsweek* had published in a cover story had been leaked by "none other than North himself."<sup>288</sup>

Counsel for *Pioneer Press Dispatch* cited another publicized example of breach of a reporter source agreement, which involved Democratic presidential aspirant Jesse Jackson. A *Washington Post* reporter had interviewed Jackson for a story on the condition that Jackson not be identified.<sup>289</sup> Despite the promise of confidentiality, the reporter wrote that "[i]n private conversations with reporters, Jackson had referred to Jews as 'Hymie' and to New York as 'Hymietown.'"<sup>290</sup> The reporter defended the breaking of his promise to Jackson on the ground that Jackson's denigration or stereotyping of a group within the electorate should be "brought to the public's attention" because Jackson was running for President of the United States.<sup>291</sup>

Clearly, newsworthy information can flow from breaching reporter-source agreements as well as from enforcing them. Nevertheless, with com-

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<sup>286</sup> See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

<sup>287</sup> Brief of Respondent Northwest Publications, Inc. at 39, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (No. 90-634), reprinted in LANDMARK BRIEFS, *supra* note 137, at 562.

<sup>288</sup> *Id.*, reprinted in LANDMARK BRIEFS, *supra* note 137, at 562 (quoting *Two Leaks, But by Whom*, NEWSWEEK, July 27, 1987, at 16).

<sup>289</sup> *Id.*, reprinted in LANDMARK BRIEFS, *supra* note 137, at 562.

<sup>290</sup> *Id.*, reprinted in LANDMARK BRIEFS, *supra* note 137, at 562 (quoting H. EUGENE GOODWIN, GROPING FOR ETHICS IN JOURNALISM 126-27 (2d ed. 1987)).

<sup>291</sup> *Id.*, reprinted in LANDMARK BRIEFS, *supra* note 137, at 562 (quoting GOODWIN, *supra* note 290, at 126-27).

mendable candor, counsel for the *Pioneer Press Dispatch* acknowledged that damage to the information flow *could* flow from breaking promises to sources. “[J]ournalists have a critical interest in the continued availability of confidential sources, which could be jeopardized if promises routinely are broken and prospective sources come to doubt the integrity and good faith of the press.”<sup>292</sup>

The media position on the First Amendment significance of refusing to honor the promise of the reporters to Cohen was explained in an amicus brief filed in the Supreme Court on behalf of many major media organizations and companies. The brief asserted that there was no First Amendment interest in enforcement of the promises, and vigorously rejected the argument that enforcement was necessary to prevent “sources from drying up.”<sup>293</sup> The brief went on to rely on a federal district court case which observed that confidential sources would continue to have an interest in making their information public, despite the fact that they would have no remedy if a promise of confidentiality was in fact breached.<sup>294</sup>

For historians of American press law, a fascinating irony was that nearly twenty years earlier, Professor Alexander Bickel had filed an amicus brief for the *New York Times* and other media organizations taking exactly the opposite position from that espoused by the *New York Times* and its allied amici in *Cohen*. The 1971 amicus brief contended that enforcement of reporter-source agreements was essential; otherwise news sources would dry up.<sup>295</sup> Professor Bickel took particular aim at the contention that sources would still undertake to give confidential sources information to reporters even if First Amendment protection were not given to such undertakings.<sup>296</sup> Conceding that it was true that those who wished to propagandize through the public would continue to use the media even if journalists were forced to disclose their identity, Professor Bickel noted that this did not mean that the untrammelled flow of news would continue.<sup>297</sup> “The public’s right to know is not satisfied by news media which act as conveyor belts for handouts and releases, and as stationary eye-witnesses. It is satisfied only if reporters can undertake independent, objective investigations.”<sup>298</sup>

The media amicus brief in *Cohen* contended that it was “not the prov-

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<sup>292</sup> *Id.* at 41, reprinted in LANDMARK BRIEFS, *supra* note 137, at 564.

<sup>293</sup> Brief of *Amici Curiae* Advance Publications, Inc. at 22, *Cohen* (No. 90-634), reprinted in LANDMARK BRIEFS, *supra* note 137, at 622.

<sup>294</sup> *Id.*, reprinted in LANDMARK BRIEFS, *supra* note 137, at 622 (citing Ruzicka v. Conde Nast Publications, Inc., 733 F. Supp. 1289 (D. Minn. 1990), *aff’d in part and remanded in part*, 939 F.2d 578 (8th Cir. 1991)).

<sup>295</sup> Brief of *Amici Curiae* New York Times Co. at 7, *United States v. Caldwell*, 408 U.S. 665 (1972) (No. 70-57).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 24.

<sup>298</sup> *Id.*

ince of the courts to 'improve' the relationship between sources and reporters, any more than it [was] the province of the courts to 'improve' editorial judgments."<sup>299</sup> This argument appears to leave the reporter and the source to work out their relationships without resort to law. Again, Professor Bickel memorably anticipated and responded to this argument in his 1971 amicus brief: "The First Amendment standard of protection which these cases call for and for which we contend turns, not on the whim of a given news source, but on the *integrity* of the confidential relationship maintained by reporters with all manner of news sources."<sup>300</sup>

In 1971, Professor Bickel linked journalistic integrity to First Amendment protection.<sup>301</sup> The implications of this connection are fundamental to an understanding of that which was at stake in *Cohen*. Granting constitutional permission to newspapers to breach promises to their sources would place an impermissible burden on the information flow. In sum, First Amendment values were served, rather than denied, by enforcing the reporters' promises to Cohen for two reasons—protection of the flow of information and protection of the integrity of journalism.

#### IV. CONCLUSION

The press is not protected as an institution for its own sake, but for the sake of society. "[F]reedom of the press is ultimately founded on the value of enhancing such discourse for the sake of a citizenry better informed and thus more prudently self-governed."<sup>302</sup> The public interest in information relevant to the citizenry's choices as voters is not limited to a short-term need for information about a particular story, even though the story itself may be eminently newsworthy. There is also a long-term public interest in securing access to such information for the future.

It is one thing to say that the First Amendment does not exempt the press from honoring promises to sources. It is a different, more important point to appreciate that there is a First Amendment interest in *enforcing* the promises that reporters make to sources, even if it is the source who insists on honoring the promise. There was a First Amendment interest in enforcing the agreement that Cohen, the source, had with the reporters for the *Star Tribune* and the *Pioneer Press Dispatch*.

Neither Justice Blackmun nor Justice Souter, the dissenters in *Cohen*, recognized that protection of the information flow is itself a First Amend-

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<sup>299</sup> Brief of *Amici Curiae* Advance Publications, Inc. at 22, *Cohen* (No. 90-634), reprinted in LANDMARK BRIEFS, *supra* note 137, at 622.

<sup>300</sup> Brief of *Amici Curiae* New York Times Co. at 26, *Caldwell*, (No. 70-57) (emphasis added).

<sup>301</sup> *See id.*

<sup>302</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 678 (1991) (Souter, J., dissenting).

ment interest. Yet acquisition of information is critically bound up with the capacity of the press to continue to be able to publish truthful information about the political process. Justice White saw *Cohen* as a case which presented no First Amendment issue at all. Justices Souter and Blackmun saw *Cohen* as a case where First Amendment rights were totally with the newspapers. In fact, *Cohen* was a press case where First Amendment rights were in conflict. An acknowledgement by the Supreme Court of the multifaceted nature of the First Amendment issue in *Cohen* would have been valuable.

Recognition that enforcement of reporter-source agreements has First Amendment significance would have highlighted that which First Amendment jurisprudence had previously ignored. There are First Amendment interests in protecting both confidentiality and publication. *Cohen* represents a collision between these two First Amendment interests. In the event of such collisions, the courts have the difficult task of weighing, in the light of the unique circumstances of each case, the strength of the First Amendment interest in the truthful publication against the First Amendment interest in the integrity of reporter-source agreements. Unhappily, there is a common thread in the three opinions in *Cohen*. None of the opinions acknowledged that the First Amendment interest in securing an unclogged information flow may be hampered by refusing to enforce promises to sources to keep their identities confidential.

What does this say for the future of Supreme Court recognition of a qualified First Amendment-based journalist's privilege? Once again the Supreme Court has declined to declare directly that there is a First Amendment basis for the establishment of a journalist's privilege. Silence on this point in *Cohen* may mean that the Court views the interest in protecting sources as negligible or unproven. From this, one might draw the larger conclusion that the Supreme Court is still unwilling, as it has been in the past, to grant the relationship between reporters and their sources a First Amendment dimension.

From the perspective of advocates of a First Amendment-based journalist's privilege, there is an alternate and more satisfactory analysis. Perhaps, *Cohen* was simply an occasion in which there was no need for the Supreme Court to pass on whether First Amendment status should be accorded to the journalist's privilege. For those interested in protecting sources in the hope of acquiring information vital to society, this is certainly the acceptable construction.

In his brief for Dan Cohen in the Supreme Court, Elliot Rothenberg referred to the media's dependence upon confidential sources for news:

In order to preserve the free flow of information, Minnesota and many other states have adopted shield laws to protect journalists from compelled exposure of confidential sources. Conferring upon newspapers a constitutional right to

unilaterally violate promises of confidentiality would discourage potential sources and deny the public access to important information.<sup>303</sup>

Aside from the practical dependence of the media on sources for news, no fewer than three First Amendment-related arguments support the general contention that protecting the confidentiality of sources is a precondition for much of the important news disseminated by the media. First, the public interest in the acquisition of information by the press for the benefit of society justifies recognition of a First Amendment basis for respecting the confidentiality of reporter-source agreements. Second, in the lower courts a First Amendment-based journalist's privilege conferring a large measure of protection on reporter-source agreements has already been recognized.<sup>304</sup> Third, this judicial recognition was prompted by the fact that four dissenting justices and one concurring justice in the *Branzburg* decision indicated their willingness to protect reporter-source agreements from forced disclosure in the name of the First Amendment.<sup>305</sup>

There is a continuing interest in making and honoring promises not to disclose sources not only for journalism, but for the First Amendment as well. Leaving sources without a remedy can limit severely the willingness of sources to enter into agreements with reporters to provide information on a confidential basis.

Whether reporter-source agreements should or should not be enforced cannot be based on the facts of a particular situation. This is true whether the situation involves sources as famous as Oliver North and Jesse Jackson or as obscure as Dan Cohen. The overall question is larger than whether sources can or should be able to require reporters to honor the basis on which information is given to them. The larger issue is society's estimate of the integrity of journalism.

In *Masson v. New Yorker Magazine, Inc.*,<sup>306</sup> a libel case, the Supreme Court confronted the issue of how much latitude the First Amendment accorded journalists in dealing with quotations.<sup>307</sup> The Court gave journalists some latitude, but denied them First Amendment carte blanche to deal with quotations as they chose.<sup>308</sup> Justice Kennedy gave two instructive reasons for declining to leave the treatment of quotations entirely to the discretion of journalists. The values served by the First Amendment would be jeopardized

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<sup>303</sup> Brief of Petitioner at 13, *Cohen* (No. 90-634), reprinted in LANDMARK BRIEFS, *supra* note 137, at 443.

<sup>304</sup> See *supra* note 247.

<sup>305</sup> See *Branzburg v. Hayes*, 408 U.S. 665 (1972); *supra* note 246.

<sup>306</sup> 501 U.S. 496 (1991).

<sup>307</sup> *Id.*

<sup>308</sup> See *id.* at 517-18.

by such a doctrine. Those who are newsworthy in our society should not fear and distrust journalists.<sup>309</sup>

In *Masson*, the Court saw the connection between serving First Amendment values and the preservation of public confidence in the press. If newsworthy people felt that they could not trust journalists to fairly attribute to them what they had said, their availability to journalists might quickly diminish or even vanish. Such a consequence would benefit neither the public figures, the journalists, nor the free flow of information which the First Amendment should assure.<sup>310</sup> In *Cohen*, the Court was less sensitive to the intimate connection between First Amendment values and the integrity of reporter-sources agreements. Nonetheless, the result in *Cohen*, like the result in *Masson*, upheld the integrity of journalism because it honored the expectations of those with whom journalists deal.

Why is it that neither of the Twin City newspapers disclosed to their readers that they had breached their promise to Cohen when they published Cohen's identity? Perhaps the newspapers realized that their influence in the world is limited by the extent to which they can be trusted. If the press forfeits that trust, then the rationale for a free press also crumbles. In short, what is involved in *Cohen* is more than assuring the free flow of information. It is the integrity of journalism.

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<sup>309</sup> Justice Kennedy made the following observation in this regard in *Masson*:

Not only public figures but the press doubtless would suffer under such a rule. Newsworthy figures might become more wary of journalists, knowing that any comment could be transmuted and attributed to the subject, so long as some bounds of rational interpretation were not exceeded. We would ill serve the values of the First Amendment if we were to grant near absolute, constitutional protection for such a practice.

*Id.* at 520.

<sup>310</sup> *Id.*