THROWING THE BOOK AT REVELATIONS: FIRST AMENDMENT IMPLICATIONS OF ENFORCING REPORTERS' PROMISES

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INTRODUCTION

As recently as three decades ago, courts refused to recognize the first

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amendment implications of defamation actions.[1] Instead, the courts hid behind a veil of neutrality, stating that, in allowing these causes of action, they were merely protecting reputational interests and not infringing in any way on interests protected by the constitutional guarantee of freedom of the press. In *New York Times v. Sullivan*,[2] the Supreme Court recognized for the first time that many libel suits do bring these reputational interests into conflict with first amendment rights. The Court in *Sullivan* resolved the conflict in favor of the first amendment,[3] and subsequent cases have clarified where the point of equilibrium lies between these two sets of interests.[4]

While *Sullivan* and its progeny have involved the conflict between reputational interests and the freedom of speech, a new conflict has arisen in several recent cases between contract law and the first amendment.[5] These first generation cases have arisen in situations where a reporter has given a source a promise of confidentiality in return for the source's information. Although the press is generally quite protective of the identity of confidential sources and will often go to great lengths, including jail, to maintain a source's anonymity,[6] situations have arisen in which media outlets have utilized their editorial discretion to publicize what they believed to be an essential element of a given story — that is, the identity of the source.[7]

Few courts or commentators have yet focused on the constitutional issues involved in construing these promises of confidentiality (and other such alleged agreements which purport to prohibit or penalize the publication of truthful, newsworthy information) as enforceable contracts.[8] The issue of whether these promises implicate first amendment rights has been glossed over

1. "[D]efamation is an invasion of the interest in reputation and good name." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 771 (5th ed. 1984) [hereinafter PROSSER & KEETON]. Libel is a subset of defamation, generally relating to written material. *Id.* Its twin tort, slander, generally relates to oral communciations. *Id.* Because the elements of these torts are substantially similar, *see id.* at 786-88, the terms "defamation" and "libel" will be used interchangeably in this Note.

2. 376 U.S. 254 (1964).

3. *See infra* text accompanying notes 28-35.

4. *See infra* text accompanying notes 36-68.

5. *See infra* note 87 and accompanying text.

6. In 1990, the Texas Court of Criminal Appeals let stand a trial court order sentencing a reporter to jail for refusing to identify confidential sources who helped him arrange a telephone interview with a jailed murder suspect. *Ex parte* Karem, 787 S.W.2d 413 (Texas 1990). A federal district court judge refused to vacate the state court's civil contempt order, Karem v. Priest, 17 Media L. Rep. (BNA) 2113 (W.D. Tex. June 19, 1990), *stay denied by order of the full court*, 110 S. Ct. 3309 (1990), and the reporter remained in jail until the source agreed to be named. *Jailed Reporter Names Woman Who Aided Him, and Is Freed*, N.Y. Times, July 11, 1990, at A13, col. 1.

7. *See infra* notes 93-95 and accompanying text.

8. The two court cases directly addressing this issue are discussed *infra* text accompanying notes 90-155. In addition, only two pieces have appeared in law journals on this subject. Note, *Reporter Privilege: Shield or Sword? Applying a Modified Breach of Contract Standard When a Newsperson "Burns" a Confidential Source*, 42 FED. COMM. L.J. 277 (1990); Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553 (1989) [hereinafter *Promises and the Press*].

in a way not dissimilar to the pre-*Sullivan* treatment of defamation. Several of the courts encountering this issue have regarded it as simply a matter of the common law of contract and have subsumed first amendment issues to the neutral application of the common law. If there is offer, acceptance, and consideration, the argument runs, the court merely engages in the neutral application of the common law when it enforces the contract. Neutral application of these common law principles does not infringe on rights protected by the first amendment because there is no state action to implicate the Constitution, and, even assuming state action, the media outlet has effectively waived its first amendment rights by entering into the contract. The argument further asserts that the state's interest in neutral enforcement of contract law outweighs the media defendant's first amendment rights. The clear parallels between this argument and the courts' pre-*Sullivan* position on libel and defamation have not been explored.

This Note examines the conflict between contract law and the first amendment presented by these cases and argues that protections erected by the Supreme Court shielding the press from defamation actions should be imported to the contract setting. Part I examines how the Supreme Court resolved the conflict between the first amendment and reputational interests. Part II examines recent cases involving the conflict between the first amendment and contract law. Part III attempts to resolve this conflict between first amendment and contract in a way that harmonizes more comfortably with the Court's defamation and libel holdings. Where enforcement of the contract would penalize the media defendant for the publication of truthful, newsworthy information, this Note argues that enforcement should generally be barred by the first amendment. Part IV turns to the policy implications and practical ramifications of such a legal rule, concluding that the proposed rule is both consonant with the courts' holdings in other confidential source cases and is well adapted for the realities of modern newsgathering.

I.
THE CONFLICT BETWEEN REPUTATIONAL INTERESTS AND THE FIRST AMENDMENT

A. Common Law Libel

For centuries, defamation has been treated as a serious offense against the defamed person and society at large.[9] American courts initially maintained

9. A thousand years ago, some communities ensured that a slanderer would never commit that offense again by chopping out his tongue. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1350 (1975). The Normans made the punishment more civilized: one who falsely called another "thief" or "manslayer" was compelled to pay damages and then stand in the middle of the village holding his nose with his fingers chanting, "I'm a liar. I'm a liar. I'm a liar." Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 L.Q. REV. 302, 303 n.8 (1924).

In England, there was no common law remedy for defamation until the sixteenth century.

defamation as a strict liability tort.[10] All that a plaintiff had to show in order to establish liability was that the defendant had published (*i.e.*, communicated to some third person) a statement which would tend to be injurious to one's reputation.[11] No actual injury needed to be shown; the fact that the statement was defamatory and published gave rise to the "galloping presumptions" of damage and falsity.[12] The publisher did have three very narrow defenses: truth, privilege, and fair comment and criticism. Truth was held to be a valid defense because, where the defamatory statement was true, the plaintiff's reputation would have been justifiably damaged.[13] However, this defense was often construed so literally that it was virtually useless.[14] In addition, use of the truth defense was often dangerous because if the newspaper failed to prevail, the jury could find that it had reiterated the defamation and proceed to award the plaintiff increased damages.[15]

J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 364 (2d ed. 1979). Until that time, it was believed to be a spiritual matter more properly heard by the ecclesiastical courts and punished with penance. *Id.* At the beginning of the sixteenth century, however, common law courts began to allow an action on the case for defamation in response to the decline of the church and of local seigniorial courts and in an attempt to get an arm up in their continuing turf war with the Star Chamber. *Id.* at 365-66.

This new action for words became popular very quickly, so popular, in fact, that the judges had to concoct a number of devices to cut back on its perceived overuse. *Id.* at 368-70. These devices included a requirement of proof of special damages for recovery, no recovery at all for words spoken in anger or sport, and invocation of the doctrine of *in mitiori sensu* whereby "ambiguous or doubtful" words would be construed in their "mildest sense." *Id.* Even so, virtually any damage to reputation, even a mere statement of opinion, was actionable. In The Earl of Lincoln v. Roughton, 79 Eng. Rep. 171 (1607), the defendant had stated that, "[m]y lord is a base earl, and a paltry lord, and keepeth none but rogues and rascals like himself." Because they touched the plaintiff "in his honour and dignity," these "general words" would "maintain an action." *Id.* The court noted, however, that an action would not lie where these same words were spoken to a common person. *Id.*

10. Eaton, *supra* note 9, at 1352 ("Historically, the law of defamation has been characterized by a strict liability as severe as anything found in the law."); RESTATEMENT (SECOND) OF TORTS § 580B comment b (1977) (The "common law of defamation has consistently required negligence or other fault" with respect to the publication to a third party, but the question of whether the communication falsely defamed the plaintiff was a matter of strict liability.).

11. PROSSER & KEETON, *supra* note 1, at 773; RESTATEMENT OF TORTS § 559 (1938); Eaton, *supra* note 9, at 1352-53.

12. PROSSER & KEETON, *supra* note 1, at 788-97. In addition, the presumption of injury was irrebuttable. Eaton, *supra* note 9, at 1353.

13. *See, e.g.*, Cochrane v. Wittbold, 359 Mich. 402, 102 N.W.2d 459 (1960); Craig v. Wright, 182 Okla. 68, 76 P.2d 248 (1938); RESTATEMENT (SECOND) OF TORTS § 581A (1977).

14. *See, e.g.*, Haddock v. Naughton, 81 N.Y. Sup. Ct. 390, 26 N.Y.S. 455 (App. Div. 1893) (evidence that plaintiff attempted an outrage on one daughter may not be admitted to show justification in a slander action relating to an outrage on the other daughter); Kilian v. Doubleday & Co., 367 Pa. 117, 79 A.2d 657 (1951) (evidence that the plaintiff, a colonel during World War II, had inflicted punishment on numerous soldiers not admissible to show substantial truth of story about plaintiff's infliction of punishment on other soldiers).

15. *See, e.g.*, Coffin v. Brown, 94 Md. 190, 50 A. 567 (1901) (if defendant pleads truth and fails to prove, the plea is evidence of malice and aggrivates the harm); Will v. Press Publishing Co., 309 Pa. 539, 164 A. 621 (1932) (where plea of truthful privilege is unsustained, damages should be enhanced); Marley v. Providence Journal Co., 86 R.I. 229, 134 A.2d 180 (1957) (a plea of truth constitutes a reaffirmation of the libel which, if not substantiated, warrants an award of punitive damages).

Some states also allowed a defense of privilege whereby the defendant could escape liability because the defamation was communicated in furtherance of some important social interest.[16] This privilege, however, was exceedingly circumscribed so as to include a very small number of situations. In general, the immunity was only available with regard to statements made during government proceedings or communication between a husband and wife.[17]

A third defense, the rule of fair comment and criticism, was so closely tied to the defense of truth as to make them indistinguishable for any practical purposes.[18] Fair comment protected expression of defamatory criticism and opinion on matters of public concern based on facts that were established as true.[19] Unless truth could be proven, the defense was useless.[20]

The effects of this system were harsh on newspaper defendants. In one instance, a professional wrestler was entitled to redress where the editors of the newspaper arranged a picture of him on a page near a picture of a gorilla so as to underscore their similarities.[21] Recovery was even allowed where a statement true of one person was understood to refer to another person of the same name.[22] These are not anomalous instances; courts held media defendants liable in a panoply of odd factual settings.[23]

The strict liability standard left a newspaper defendant in the uncomfortable position of being financially liable whenever it printed an inadvertent falsehood or even a truthful report with a misstated detail.[24] There was no requirement at common law for a showing of intent, recklessness, or negligence on the part of the paper.[25] As Dean Prosser pointed out, this had the odd effect of placing the written word in the same class as the use of explosives or the keeping of dangerous animals.[26] Risk averse publishers, or even those who were risk neutral but realistic, were thus forced to engage in a high level of self-censorship in order to protect themselves from libel actions.[27]

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16. Privilege in the defamation setting is a defense similar to self-defense or protection of property in the assault and battery setting. PROSSER & KEETON, *supra* note 1, at 815.

17. *Id.* at 826-35.

18. RESTATEMENT OF TORTS § 606 comment b (1938).

19. *Id.*; Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 423 (1910).

20. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 877-78 (1949).

21. Zbyszko v. New York Am., Inc., 228 A.D. 277, 239 N.Y.S. 411 (1930).

22. Washington Post Co. v. Kennedy, 3 F.2d 207 (D.C. Cir. 1925).

23. *See, e.g.*, Burton v. Crowell Publishing Co., 82 F.2d 154 (2d Cir. 1936) (Hand, J.) (obscene optical illusion in photograph); Upton v. Times-Democrat Publishing Co., 104 La. 141, 28 So. 970 (1900) (transmission error changed a reference from "cultured gentleman" into "colored gentleman"); McBride v. Ellis, 9 S.C.L. (Rich.) 269, 12 Am. Dec. 665 (1856) (newspaper ordered to pay damages where it negligently gave notice of the death of a living person); Wandt v. Hearst's Chicago Am., 129 Wis. 419, 109 N.W. 70 (1900) (article truthfully stated that plaintiff had attempted suicide).

24. Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 797-98 (1979).

25. *Id.* at 798.

26. W. PROSSER, LAW OF TORTS 792 (3d ed. 1964).

27. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). *Cf.* Anderson, *Libel and*

B. New York Times v. Sullivan *and Its Progeny*

After centuries of little change in the doctrine of defamation, the Supreme Court completely transformed the landscape of libel law when it decided *New York Times v. Sullivan* on March 9, 1964.[28] In this landmark decision, the Court held that rights and remedies in libel law must be constitutionally constrained by the first amendment.[29] L. B. Sullivan, the commissioner of police for Montgomery, Alabama, alleged that he had been libeled in an advertisement taken out by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" in the New York Times. Although the ad did not mention Sullivan by name, he contended that use of the word "police" referred directly to him in his capacity as leader of the department. The ad described incidents of racial conflict which had occurred in Montgomery, including the arrests of Dr. King, the bombing of his home, and protests at the Alabama State Capitol and the Alabama State College. Sullivan showed at trial that even though he had nothing to do with any of these events, Montgomery residents had read some of the ad's statements as referring to him. He did not, however, make any effort to show actual pecuniary loss.[30] Although the text of the ad was substantially true, there were inaccuracies.[31] The Alabama jury awarded Sullivan $500,000 in damages.[32]

The Supreme Court reversed, holding for the first time that common law libel abridged the freedom of speech guarantees of the first amendment.[33] Specifically, the Court found that the "uninhibited, robust, and wide-open" debate on public issues promoted by the first amendment was constrained by the application of a strict liability standard in a libel action brought by a public official.[34] A public official could not recover on a mere showing of defamatory

Press Self-Censorship, 53 TEX. L. REV. 422, 425-58, 479-81 (1975) (arguing that the actual malice standard, while an advancement over common law principles, still allows for an inapproprite level of self-censorship of the press).

28. 376 U.S. 254 (1964). The lawyer who presented Sullivan's case to the Supreme Court later recalled that he "had confidently predicted that the only way the Court could decide against me was to change 100 years or more of libel law. That was precisely what the Court did." Nachman, New York Times v. Sullivan - *A Retrospective*, in NEW YORK TIMES V. SULLIVAN: THE NEXT TWENTY YEARS 117 (1984). Alexander Meiklejohn called the day "an occasion for dancing in the streets." Kalven, *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.25.

29. *Sullivan*, 376 U.S. at 269, 283.

30. *Id.* at 256-60.

31. For example, the advertisement stated that the students who staged a demonstration on the State Capitol steps sang "My Country, 'Tis of Thee." In fact, the students sang "The Star Spangled Banner." In addition, the advertisement stated that Dr. King had been arrested seven times. He had been arrested only four times. Some of the errors were of a greater magnitude. The ad stated that, "[w]hen the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission." Less than the entire student body protested, the students did not refuse to re-register, and the dining hall was not padlocked. However, there had been protests on campus involving most of the student body and a large police presence. *Id.* at 257-59.

32. *Id.* at 256.

33. *Id.* at 283-84.

34. *Id.* at 270-71.

content or factual error, as was allowed at common law. Rather, the Court demanded a showing of "actual malice" — knowledge that statements are false or made with reckless disregard of their truthfulness — in order to recover. Thus, the Court hoped to give the press the necessary "breathing space" to find and report news vigorously without living in fear of large damage awards.[35]

In the quarter-century that has passed since this landmark decision was handed down, the Supreme Court has refined and clarified the *Sullivan* doctrine. The two most significant issues addressed in this area have been what category of plaintiffs are subject to the actual malice standard and precisely what showing must be made to satisfy the actual malice test. The Court gave the term "public official" a fairly expansive meaning, holding that the designation "applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[36] In 1967, the Court enlarged the *Sullivan* rule to cover "public figures" as well as officials.[37] The case involved the alleged libel of a university football coach by the *Saturday Evening Post*. The plurality held that public figures — those who "command[] a substantial amount of independent public interest at the time of the publications"[38] — like public officials, would be required to carry the higher burden of proving actual malice to recover in a libel action.[39] The Court justified this expansion because a public figure engages in "purposeful activity amounting to a thrusting of his personality into the 'vortex' " of public discussion.[40] In addition, the Court noted that a public figure commands "sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements."[41]

Not until 1968 was it apparent just how high a hurdle the actual malice standard would be for the public official or public figure libel plaintiff. In *St. Amant v. Thompson*,[42] the Supreme Court stated clearly for the first time what had to be shown for a court to find "actual malice." The Court held that recklessness on the part of the media defendant would have to be proven, but the reasonable person standard was an inappropriate measure for this determination.[43] Instead, the standard required a showing that the media defendant had actually "entertained serious doubts as to the truth of his publication."[44] Thus the plaintiff's burden of proving fault shifted to the opposite end of the

35. *Id.* at 271-72, 279-80.
36. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).
37. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
38. *Id.* at 154.
39. *Id.* at 164 (Warren, J., concurring).
40. *Id.* at 155.
41. *Id.* (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).
42. 390 U.S. 727 (1968).
43. *Id.* at 731.
44. *Id.*

tort law spectrum in just a few years. Five scant years earlier, a court could hold a media defendant to a strict liability standard in a defamation action. Now, the actual malice standard required a showing of intent. The intermediate levels of fault, negligence and recklessness, were bypassed almost entirely.[45]

The first major post-*Sullivan* libel case, *Rosenbloom v. Metromedia*,[46] not only represented the high-water mark of the Court's protection of the press but also illustrated the confusion and disagreement among the justices concerning the emerging doctrine's application in actions brought by private individuals. The plaintiff, George Rosenbloom, a distributor of nudist magazines, was arrested twice over the course of three days on charges of selling obscene material. The defendant's radio station, WIP, broadcast stories after the second raid referring to the confiscation of "obscene books." The wording was changed later that day to "reportedly obscene books." Two weeks later, WIP referred to Rosenbloom as a "girlie book peddler" and his business as a "smut literature racket."[47] Rosenbloom was later acquitted in his criminal trial for obscenity after the judge directed the jury that, as a matter of law, the magazines distributed by Rosenbloom were not obscene.[48] On the basis of this decision, the plaintiff filed suit against the radio station for libel.[49]

The Supreme Court split five ways in its decision. The plurality decision changed the focus of the constitutional inquiry from the status of the allegedly libeled plaintiff to the content of the allegedly defamatory publication. In other words, the inquiry which became the focus of increased scrutiny in a libel claim shifted from an inquiry into whether the person libeled was a public figure to an inquiry about the public's interest in the information.[50] This inquiry is more protective of media defendants. It still holds public figures to the actual malice standard, since the activities of public figures would always be a matter of public interest. In addition, the public interest inquiry places matters concerning private figures under the actual malice standard where the private figure engages in activity in which the public would be interested.

45. Although courts sometimes use the term "recklessness" as the standard in defamation cases, New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964), such a high showing is required that it is effectively an intent standard, defined as the actor's desire to cause the consequences substantially certain to result from the act. RESTATEMENT (SECOND) OF TORTS § 8A (1977). The Court defined actual malice as "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 280. In order to prove this "reckless disregard," it is necessary to make a showing very close to that which is required to prove intent. In Garrison v. Louisiana, 379 U.S. 64 (1964), the Court explained that "only those false statements made with the *high degree of awareness* of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." *Id.* at 74 (emphasis added). This "high degree of awareness" requirement moves well beyond the traditional recklessness requirement to something much closer to an intent standard.

46. 403 U.S. 29 (1971).

47. *Id.* at 32-35.

48. *Id.* at 36.

49. *Id.*

50. The decision stated that "[d]rawing a distinction between 'public' and 'private' figures makes no sense in terms of the First Amendment guarantees." *Id.* at 46-47.

Applying the new standard, the plurality found that the story was a matter of general interest, and therefore Rosenbloom would have to show actual malice, that is knowing or reckless falsity, on the part of the defendant to prevail in his libel claim.[51] The swing vote was that of Justice White, who concurred in the judgment, but on more limited grounds. He reasoned that because *Rosenbloom* concerned a radio station's reporting of the official actions of public servants, specifically law enforcement officers, WIP's conduct should be governed by the constitutional standard of actual malice.[52]

A few years later, the Supreme Court retreated slightly in *Gertz v. Robert Welch, Inc.*[53] Elmer Gertz was a prominent Chicago attorney who was retained by the family of a young man who had allegedly been shot and killed by a police officer. *American Opinion* magazine, a John Birch Society publication, ran an article about the murder trial of the police officer. The article contended that testimony against the officer had been falsified and that the entire prosecution was part of a Communist conspiracy against the police. Although Gertz had no involvement in the criminal prosecution, the article, which was riddled with factual inaccuracies, named him as a major player in the elaborate conspiracy.[54] Gertz brought a libel action and was awarded $50,000 in damages by the jury. The trial judge, however, granted the defendant's motion for a judgment notwithstanding the verdict. The judge found that since the article involved a matter of public interest, there could be no finding of actual malice. The Court of Appeals for the Seventh Circuit affirmed, finding that the *Rosenbloom* test mandated a showing of knowing falsity or reckless disregard of the truth where the statement at issue in the libel action was of significant public interest.[55]

The Supreme Court backed away from the plurality's test in *Rosenbloom*, shifting its analysis from the public interest inquiry back to the public figure inquiry. Once again the majority tried to accomodate the conflicting demands of the law of defamation and the first amendment.[56] It determined that the public/private individual distinction was of constitutional significance because public figures have greater access to channels of effective communication with which to counteract false statements than do private individuals.[57] Moreover, public figures, by entering public life, voluntarily run the risk of closer public scrutiny and the concurrent increased risk of injury from defamatory falsehoods.[58] Private individuals who do not run such risks are thus "more deserving of recovery."[59]

51. *Id.* at 52.
52. *Id.* at 59-62.
53. 418 U.S. 323 (1974).
54. *Id.* at 325-26.
55. *Id.* at 328-31.
56. *Id.* at 342-44.
57. *Id.* at 344.
58. *Id.* at 344-45.
59. *Id.* at 345.

The Court then determined that the individual states should be left to define for themselves the appropriate standard of liability in libel actions involving private individuals.[60] The Court did hold, however, that states could not return to a strict liability standard.[61] Justice Powell noted for the majority that "this approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation."[62] The Court also rejected the common law presumption that injury could be inferred from mere publication of a libelous statement by holding that a defamation plaintiff who fails to prove actual malice can only recover for actual injury.[63]

The Supreme Court has not handed down any ground-breaking libel cases since *Gertz*. In the last fifteen years, the Court's decisions in this area have refined incrementally the *Sullivan/Gertz* doctrine. Specifically, there has been some erosion within the category of what constitutes a "public figure."[64] This narrowing of the definition makes media defendants more vulnerable to attack through libel actions.

The Court's most recent venture into libel law, *Milkovich v. Lorain Journal Co.*,[65] addressed the question of whether all expressions of opinion must be exempted from defamation laws under the first amendment. Although the Court's holding that there is no absolute opinion privilege as such[66] could be seen as a defeat for the press, a careful reading of the opinion shows the contrary. Although the Court rejected a straight fact/opinion dichotomy, it stated unambiguously that only statements which are provably false may be actionable.[67] This leaves ample protection for the press. In addition, the Court reaffirmed the *Sullivan/Gertz* line of cases which have served to keep debate on public issues " 'uninhibited, robust and wide-open.' "[68]

To summarize, absent actual malice (*i.e.*, clear and convincing proof of

60. *Id.* at 347.

61. *Id.*

62. *Id.* at 347-48.

63. *Id.* at 349.

64. The Supreme Court held in Time, Inc. v. Firestone, 424 U.S. 448 (1976), that a socially prominent individual was not a public figure for purposes of a report on her divorce proceedings, because "she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it." *Id.* at 453. The Court continued to narrow the application of the public figure standard in two 1979 cases. Neither a scientist who received government funding to conduct his research, Hutchinson v. Proxmire, 443 U.S. 111 (1979), nor a person who received a contempt citation more than a decade earlier in an investigation of his participation in Soviet espionage, Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979), was considered a public figure by the Court.

65. 110 S. Ct. 2695 (1990).

66. *Id.* at 2707.

67. *Id.* at 2706. The Court seemed most concerned with the possibility that placing the words "in my opinion" before any phrase would render the assertion unactionable. *Id.*

68. *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

actual knowledge of falsity or reckless disregard of probable falsity), the media are immune from liability for libel of public officials and public figures. The media may be held liable for the libel of a private individual only where, with fault, the publication contains a false statement of fact which on its face poses a substantial danger to the individual's reputation.

C. *The Dominance of the First Amendment*

No one would argue that the state does not have a legitimate interest in protecting its citizens' property from theft or destruction. Certainly reputation is often more valuable to the individual than her property and, therefore, as deserving of protection. A professional's livelihood may rest on her reputation, and damage to it could have extreme pecuniary consequences. Allegations that a restaurant has been cited for numerous health code violations, that a surgeon is a drug user, or that a popular bar waters down its drinks might significantly diminish their patronage. Reputation, in many respects, orders the social interactions of every individual with other members of society. An assertion that a person is a tax evader, axe murderer, or dirty poker player could drastically affect the desire of others to associate with or befriend her.

It is a universally accepted tenet in our system of governance that protection of the free press is also a legitimate and compelling national interest. Indeed, the Supreme Court has stated that the first amendment enjoys a "preferred position" in the galaxy of rights granted by the Constitution.[69] Because this interest is protected by the Constitution, it will often trump non-constitutionally protected interests through the force of the supremacy clause.[70]

These sets of competing interests must be balanced in order to reach a proper accommodation. Unfortunately for the sake of this analysis, courts perform balancing tests in purely relative terms. A holding will generally state something to the effect of "A outweighs B in situation X." While that is often an efficient and satisfying way to deal with a given case, it can be difficult to apply the holding in any other setting. Suppose the interests (A & B) are the same as in the court's earlier holding, but the factual situation (X) changes. Is the same outcome warranted? Or suppose the factual situation is identical, but one of the interests in question (A) must be balanced against a different interest (C). What does a lower court do now? If courts were able to give absolute weights to the interests being balanced (for example, the right to bear arms

69. Marsh v. Alabama, 326 U.S. 501, 509 (1946).

70. The force of this "trump" is obviously not as great in the modern age of rights balancing. Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945-47 (1987). In the nineteenth and early twentieth centuries, courts did not employ balancing as a method of constitutional adjudication. *Id.* at 949. Balancing began appearing in Supreme Court majority opinions in the late 1930's and early 1940's. *Id.* at 948. Today, constitutional rights are often balanced, and outweighed, by rights not explicitly guaranteed by the Constitution. *Id.* at 965-72.

weighs 15 utils), the analysis would be quite simple. Such a fixed weight system, however, is clearly not feasible.

What, then, can be learned about the absolute weight of the first amendment right to freedom of the press from the Supreme Court's balancing in the libel setting? An initial observation is that the Court has rejected both polar extremes. It is apparent that first amendment freedoms are subject to more limitations than the absolutists, among them Justices Black and Douglas, would have countenanced.[71] In *Sullivan*, for example, Black and Douglas stated that they would "not merely 'delimit' a State's power to award damages to 'public officials' . . . but *completely prohibit* a State from exercising such a power."[72] The loss of the absolutists' position, however, obviously does not render *Sullivan* a Pyrrhic victory for the press. A legal regime in which a party could not recover damages for any remark, no matter how defamatory, false, or maliciously made, could turn a free press into a dictatorial press with little external incentive to be fair or accurate. Similarly, a strict liability standard for defamatory statements would cripple the media's ability to report any unfavorable news by constantly subjecting it to damage awards, thereby making reporting financially infeasible.

There are a number of possible resolutions which lie between these two extremes. The balance that the Court has struck between the competing interests provides at least a hint about the first amendment's absolute weight. The Court's apparent determination to make defamation suits difficult for public figures reflects two important policy considerations. First, the media needs some insulation from defamation suits in order to promote the vigorous discussion of public issues.[73] Second, public figures are less needy of protection from defamation laws because they have greater access to the media and thus have greater opportunity to rebut negative statements.[74] Alternatively, the Court's decision not to require a "public interest" standard in a defamation action[75] reflects a view that the first amendment does not protect the media from every tort suit simply on the grounds that the subject of the reporting was newsworthy.

Another area which can be examined to assess the weight of the first amendment is the legal consequences of publishing falsehoods. At common law, if a defamatory statement was not entirely true in every respect, the media defendant generally had no chance of avoiding liability.[76] In cases involving public figures, *Sullivan* and its progeny have shifted this rule almost 180 degrees: unless the falsehood is published with actual malice, a level of fault

71. *See infra* note 284.

72. *Sullivan*, 376 U.S. at 293 (Black, J., concurring) (emphasis added).

73. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (The first amendment embodies the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.").

74. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974).

75. *Id.* at 346-47.

76. *See supra* text accompanying notes 11-15.

approaching intent, the media defendant will not be held liable.[77] The intent of this rule is not to promote or condone the printing of falsehoods.[78] However, such publication, according to the Court's analysis, is a necessary evil associated with promoting the free and robust exchange of ideas envisioned under the first amendment.[79] Falsehoods, most would agree, do not have significant value in the public debate.[80] The Court has found, however, that the threat to free expression associated with holding media defendants liable for any and all such mistakes is too great. If publishers were forced to question every decision to publish an article on a public figure out of fear that some inadvertent or minor error will subject the paper to liability, this could result in their exercising too high a degree of caution. This subtle and silent self-censorship undermines the press' ability to report news vigorously.[81]

The Court in *Sullivan* was highly concerned about the liability of newspapers for the printing of defamatory falsehoods. No Justice, litigant, or amicus curiae[82] argued that the government has any substantive interest in protecting the publication of falsehoods. Yet the first amendment interests weighed enough to tip the scales in favor of protecting most falsehoods[83] in cases where a public figure's reputational interest was at stake because of the "chilling" effect such liability would have on the press' ability to print the truth.[84] Subse-

77. *See supra* note 45 and accompanying text.

78. As the Court stated in *Gertz*, 418 U.S. at 340, "there is no constitutional value in false statements of fact." The Court recognized, however, that "although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . The First Amendment[, therefore,] requires that we protect some falsehood in order to protect speech that matters." *Id.* at 340-41.

79. "[E]rroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

80. The Court in *Sullivan* took a position strongly protective of the first amendment in noting that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about " 'the clearer perception and livelier impression of truth, produced by its collision with error.' " *Id.* at 279 n.19 (quoting J.S. MILL, ON LIBERTY 15 (1947)).

Since *Sullivan*, however, the Court appears to have retreated from its acceptance of falsehoods as inevitable and thus protected, and instead has stated that there is no constitutional value in false statements. *See Gertz*, 418 U.S. at 340; Keeton v. Hustler, 465 U.S. 770 (1984).

81. *See supra* text accompanying notes 33-35; *infra* note 255 and accompanying text.

82. Brief for the Petitioner, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39); Brief of *amici curiae* by the Washington Post Co. and the Tribune Co., New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39); Brief of *amici curiae* by the American Civil Liberties Union and the New York Civil Liberties Union, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39).

83. Except where there is a positive showing of actual malice. *Sullivan*, 376 U.S. at 283.

84. The Court stated that

> Under . . . a rule [protecting only the truth], would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' The rule thus dampens the vigor and limits the variety of public debate.

Id. at 279 (citation omitted).

quent modifications in libel law have not changed this principle.

Even in the private figure setting, where reputational interests have been found to be in greater need of protection (*i.e.*, they weigh more in the balancing analysis), the Court has still found the first amendment interests heavy enough to impose significant limits on states' ability to award damages against a media defendant. Although in *Gertz* the Court rejected a public interest standard to protect the press and thereby exposed the media to increased liability for the defamation of private individuals, it prohibited the imposition of the common law rule of strict liability even in private figure cases.[85] It also limited recovery for negligent defamation of a private individual to compensation for actual injury, thus barring punitive damage awards in such instances.[86] The Court found that the first amendment interests were not as compelling in the private setting, but were still strong enough to circumscribe closely the standard of fault and the potential remedies in the event liability was demonstrated.

The Supreme Court has carefully struck the balance demanded by the Constitution when weighing first amendment interests against reputational interests. In spite of the deep common law roots of libel actions and the significant reputational interests at stake, the Court has been extremely deferential to good faith journalistic efforts to report the news. Lower courts attempting to balance the first amendment against other interests protected by law must take notice of how heavily the press' freedom to gather and report truthful, newsworthy information weighs in this setting.

II.
CASES PRESENTING THE CONFLICT BETWEEN THE FIRST AMENDMENT AND CONTRACT LAW

In only two cases have courts squarely addressed the issue of the enforceability of a reporter's promise of confidentiality to a source.[87] The cases share

85. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-49 (1974).

86. *Id.* at 350.

87. Cohen v. Cowles Media Co., 14 Media L. Rep. (BNA) 1460 (Minn. Dist. Ct. 1987) (defendants' motion for summary judgment on contract claim denied), 15 Media L. Rep. (BNA) 2288 (Minn. Dist. Ct. 1988) (following jury verdict for plaintiff, defendants' motion for judgment notwithstanding the verdict denied), *aff'd in part, rev'd in part*, 445 N.W.2d 248 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199 (Minn.), *cert. granted*, 111 S. Ct. 578 (1990); Ruzicka v. Conde Nast Publications, Inc., 733 F. Supp. 1289 (D. Minn. 1990), *appeal pending* (argued Feb. 11, 1991).

In addition to this pair of cases, only three cases raising the issue of a breach of a reporter's confidentiality agreement have been reported, but none of these addressed the first amendment issues in any depth.

Two rape victims in Doe v. American Broadcasting Cos., 152 A.D.2d 482, 543 N.Y.S.2d 455 (App. Div.), *appeal dismissed*, 74 N.Y.2d 945, 549 N.E.2d 480, 550 N.Y.S.2d 278 (1989), sued for breach of contract, inter alia, where a television station which had interviewed them and promised to make them unidentifiable, failed to do so. The trial court denied defendants'

the characteristic that they both arose in Minnesota,[88] one having been brought in state court and the other in federal court. Beyond this similarity, however, the cases pose quite different factual situations and are illustrative of the different approaches courts could take regarding contract actions to enforce a confidentiality agreement. This Section will discuss each of these cases and summarize the courts' differing analyses. The Section will conclude with a discussion of a third case which, although not involving a promise of confidentiality between a reporter and her source, highlights other ways in which the contract cause of action can be used to circumvent constitutional protections for the press.

A. Cohen v. Cowles Media Co.[89]

Dan Cohen was a long-time and well-known Independent-Republican [hereinafter IR][90] supporter employed as the director of public relations at an advertising agency working for the campaign of the IR gubernatorial candidate. On October 27, 1983, one week before the election, Gary Flanke, a former IR legislator and county attorney, unearthed documents which indicated that the Democratic-Farmer-Labor [hereinafter DFL] candidate for lieutenant governor had been arrested in 1969 for unlawful assembly (that charge was

motion for summary judgment on this claim and the appellate court affirmed. Neither court issued an opinion discussing the breach of contract claim.

In Virelli v. Goodson-Todman Enters., 142 A.D.2d 479, 536 N.Y.S.2d 571 (App. Div. 1989), a reporter broke an alleged promise to allow plaintiffs to review an article about them prior to publication. Plaintiffs fashioned their claim as one for "tortious breach of confidence." The court held that the same rationale justifying protection of media defendants in defamation actions applied to this cause of action and thus dismissed the claim for failure to allege a sufficient level of culpability. *Id.* at 485-87, 536 N.Y.S.2d at 575-77.

Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), arose when the defendant, a writer who before attending a nude group therapy workshop, had signed an agreement not to write articles or in any way disclose what happened at the workshop, wrote a novel shortly after the encounter session depicting such a workshop. The psychologist who led the group sued for breach of contract, among other claims. The court of appeals struck down a verdict in favor of the plaintiff on the contract claim, holding that, despite the parties' agreement, the writer was free to report on what happened in the course of her therapy and was bound only by the limits of libel law. *Id.* at 81, 155 Cal. Rptr. at 41.

See also Cullen v. Grove Press, Inc., 276 F. Supp. 727 (S.D.N.Y. 1967) (rejecting, without elaboration, the argument that a claim based on an alleged breach of contract was inconsistent with the first amendment where plaintiffs asserted that a film distribution agreement had been violated).

88. This is possibly not a mere coincidence. Although the two cases have nothing to do with one another, beyond the cause of action, both plaintiffs were represented by the same attorney, Elliot Rothenberg.

89. Cohen v. Cowles Media Co., 14 Media L. Rep. (BNA) 1460 (Minn. Dist. Ct. 1987) (defendants' motion for summary judgment on contract claim denied), 15 Media L. Rep. (BNA) 2288 (Minn. Dist. Ct. 1988) (following jury verdict for plaintiff, defendants' motion for judgment notwithstanding the verdict denied), *aff'd in part, rev'd in part*, 445 N.W.2d 248 (Minn. Ct. App. 1989), *aff'd in part, rev'd in part*, 457 N.W.2d 199 (Minn.), *cert. granted*, 111 S. Ct. 578 (1990).

90. Minnesota's Independent-Republican party is affiliated with the national Republican party. Similarly, the state's Democratic-Farmer-Labor Party is affiliated with the national Democratic party.

later dropped) and arrested and convicted of petty theft in 1970 (that conviction was vacated in 1971).[91]

A meeting of several IR supporters was immediately convened at which it was agreed that Cohen should release the documents to the local media and retain anonymity in the process. Cohen divulged the information to reporters for Minneapolis' two largest newspapers, the *Minneapolis Star and Tribune* and the *St. Paul Pioneer Press Dispatch*, to the Associated Press, and to WCCO, a local television station. He met separately with the newspeople and gave them copies of the documents after procuring promises from each that he would be treated as an anonymous source.[92]

Both the *Tribune* and the *Dispatch* published stories the next day disclosing the arrests.[93] In addition, both papers identified Cohen as the source of the information[94] despite the objections of the respective reporters.[95] Later that day, as a result of having been identified in the stories, Cohen was forced to resign from his position at the advertising agency.[96] Several more items appeared in the media about Cohen in the ensuing days, including a column criticizing him for his self-righteousness and an editorial cartoon decrying his "last minute campaign smears."[97]

Cohen brought suit against the two papers claiming breach of contract and misrepresentation. The jury ruled for Cohen on both counts and awarded him $200,000 in compensatory damages and $500,000 in punitive damages.[98] The Court of Appeals of Minnesota had little trouble reversing the trial judge's decision not to grant a judgment notwithstanding the verdict on the misrepresentation claim and setting aside the punitive damages, because it found that neither party misrepresented any facts to Cohen.[99]

The court, however, in an unprecedented ruling, upheld the breach of contract claim. The court conceptualized the conflict as a classic breach of contract case. As the court interpreted it, Cohen made the papers an offer: I'll give you this juicy news item if I can remain anonymous. The papers

91. *Cohen*, 445 N.W.2d at 252.

92. *Id.*

93. The political context of the papers' decisions to run with this story cannot be ignored. Editors considered that failure to publish the arrest story, regardless of its questionable newsworthiness, could leave them open to accusations of favoritism toward the candidate they had endorsed. *Id.* at 253. In addition, the decision to give the story to numerous reporters certainly created a heightened sense of competition to publish the story because failure to do so would be highlighted by the other outlets' decisions to print the story.

94. This was the first occasion for both papers in which a promise of anonymity to a source was not kept. *Id.* Of the other two news organizations to whom Cohen gave the story, the Associated Press ran the arrest story without naming its source and WCCO did not broadcast the story at all. *Id.*

95. Because she disagreed with the decision to name the source, one of the reporters went so far as to have her by-line removed from the article. *Id.*

96. *Id.*

97. *Id.* at 253-54.

98. *Id.* at 254.

99. *Id.* at 259-60 ("Simply because a party in the future fails to perform does not mean that there was any misrepresentation at the time the contract was made.").

accepted this offer: We promise not to reveal your identity if you give us the juicy news item. An oral contract was formed. This contract was supported by valuable consideration on both sides: Cohen gave the newspapers valuable information and in return the newspapers promised him confidentiality.[100] The contract was not rendered unenforceable by the statute of frauds because it was to be fully performed within one year.[101] Finally, the contract was breached when the two newspapers broke their respective promises and, thus, failed to perform once performance by the other party was complete.[102]

Because the newspapers' disclosure was both truthful and newsworthy, the court of appeals inquired as to whether the first amendment barred the breach of contract claim.[103] It determined that the first amendment did not bar the claim because: (1) there was no state action to trigger first amendment scrutiny; (2) the alleged first amendment rights in the case did not outweigh the governmental interest in allowing civil damages where a contractual obligation is breached; and, (3) the newspapers waived their first amendment rights.[104]

The court handled the issue of state action in a cursory manner. Since "[t]he first amendment bars only government action that restricts free speech or press freedom,"[105] and "the neutral application of state laws is not state action,"[106] it follows that the first amendment is not implicated when a court is merely applying neutral contract principles, regardless of the factual context in which the contract arose. While noting that the United States Supreme Court has explicitly held that a court's application of defamation law to a newspaper is state action,[107] the court stated that this holding had little relevance to this case because of fundamental differences between defamation and contract law.[108] Defamation law, according to the court, "inherently limits the content of speech" by sanctioning the speech itself.[109] In forming a contract, on the other hand, "[t]he parties themselves [choose] the speech or conduct they wish[] to be the subject matter of the contract."[110] What is sanctioned, therefore, is the breach of contract, not the words themselves. This case, according to the court, is thus distinguishable from *Sullivan*.

Next, the court performed a balancing test to determine whether the source's interest in receiving damages for the alleged breach of confidentiality outweighed the newspaper's first amendment rights. After citing a series of cases each standing for the proposition that, in general, news organizations

100. *Id.* at 258-59.
101. *Id.* at 259.
102. *Id.*
103. *Id.* at 254-58.
104. *Id.*
105. *Id.* at 254.
106. *Id.*
107. *Id.* at 255 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).
108. *Id.*
109. *Id.*
110. *Id.* at 256.

have to follow the law,[111] the court held that the contract interest prevailed in this case. The state's protection of contractual rights was found to be a "compelling" interest, whereas the newspapers' interest in publishing Cohen's identity, which was admittedly newsworthy information, was given little weight.[112]

Last, the court concluded that although a constitutional right can only be waived in clear and compelling circumstances,[113] the newspapers had indeed waived their first amendment right to publish Cohen's name as the source of the documents. The reporters knowingly and voluntarily pledged confidentiality, thereby waiving any constitutional right to disclose the confidential information.[114]

The Minnesota Supreme Court's decision could not have been more different.[115] The court held that a cause of action for breach of contract would not, in this case, lie against the media defendants and reversed the lower court's judgment in favor of Cohen.[116] The high court's reasoning was particularly surprising. The court acknowledged that the transaction between Cohen and the reporters involved an exchange of promises, action that generally forms the basis of an enforceable contract.[117] The court even stated that the three elements of a contract — offer, acceptance, and consideration — were "seemingly" present.[118]

The court pointed out, however, that an ethical duty to keep the identity of a source secret was not necessarily a legal duty.[119] The court presented two theories which, it said, would justify not enforcing the promise. First, the law does not create a contract in situations in which the parties do not intend one.[120] Second, the court analogized to other special relationship settings (such as contracts to marry or to impair family relations) in which courts will refuse to enforce contracts as against public policy.[121] Thus, this arrangement was not a contract at all, but, as the court put it, an " 'I'll-scratch-your-back-if-you'll-scratch-mine' accommodation."[122]

The court's reasoning here is unpersuasive. To say that the law will not create a contract because the parties did not intend one is disingenuous. The parties *did* intend to exchange a promise for a promise; even the court admitted this fact. Such an exchange of promises is the essence of a contract. In

111. *Id.* (citing Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Branzburg v. Hayes, 408 U.S. 665 (1972); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Associated Press v. NLRB, 301 U.S. 103 (1937); Grosjean v. American Press Co., 297 U.S. 233 (1936)).
112. *Id.* at 256-58.
113. *Id.* at 258.
114. *Id.*
115. Cohen v. Cowles Media Co., 457 N.W.2d 199 (Minn. 1990).
116. *Id.* at 203-05.
117. *Id.* at 202.
118. *Id.*
119. *Id.* at 203.
120. *Id.*
121. *Id.*
122. *Id.*

fact, the court did not have to perform these verbal gymnastics to hold in the media defendants' favor. To label the result of this transaction a contract is not to say that the contract must be enforced. The court muddled its analysis by refusing to acknowledge that the transaction was informed by first amendment concerns.

The court's attempt to analogize the reporter/source relationship to "special relationships" fails as well. The reporter/source relationship is easily distinguishable from the familial relationships referred to by the court to support its special relationship holding. Familial relationships generally are characterized by a high degree of trust and sharing of private information, both lacking in the reporter/source context. In addition, in other special relationship privilege settings (*i.e.*, doctor/patient or husband/wife), the law protects the communication, not the communicator. In the reporter/source setting, however, the communication is known, but the identity of the communicator is not.[123]

The court, having refused to find a contract, proceeded to determine whether the doctrine of promissory estoppel should be applied to make the promise enforceable. While the court found two of the three requirements for promissory estoppel present — reasonable expectation that a promise will induce definite action and actual action taken by the promisee[124] — it held that the third requirement, resulting injustice which can only be avoided by enforcing the promise, was not satisfied.[125] Again, it is difficult to discern the precise basis for the court's determination. The court stated that the "moral ambiguity" of the transaction between the reporter and source made it difficult to figure out whether injustice would be avoided by enforcing or not enforcing the promise.[126]

At this point, the court, for the first time in the decision, considered the first amendment implications of the promise. "In deciding whether it would be unjust not to enforce the promise," the court stated, it is necessary to "weigh the same considerations that are weighed for whether the first amendment has been violated."[127] The court, therefore, stated that it would engage in a balancing test between the "constitutional rights of a free press and the common law interest in protecting a promise of anonymity."[128] The court, though, never administered the test. It merely asserted that, because the promise arose "in the classic first amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign . . . it seems to us that the law best leaves the parties here to their trust in each other."[129] The court thus reversed the lower panel's

123. This argument is expanded upon in Rusher, *The Press Rampant*, COLUM. JOURNALISM REV., Nov./Dec., 1979, at 19.

124. *Cohen*, 457 N.W.2d at 203-04.

125. *Id.* at 204.

126. *Id.*

127. *Id.* at 205.

128. *Id.*

129. *Id.*

holding as to the contract claim and found for the newspapers.

In conclusion, it is worth noting that although the courts here have used the language of contract law, Cohen's suit bears more than a passing resemblance to a defamation action. Cohen's injuries were characterized as "[a] kick in the face," "embarrass[ing]," "humiliat[ing]," "[an] assault," and a variety of other personal harms.[130] In addition, Cohen's counsel asked the jury to "restore . . . [Cohen's] good name."[131] Breach of contract actions do not regularly seek this kind of relief. Casting Cohen's claim as a contract action may have been a strategic decision aimed at avoiding the burdensome constitutional requirements imposed upon plaintiffs asserting tort claims against media defendants.[132] No such constitutional requirements have been developed in contract law.

B. Ruzicka v. Conde Nast Publications, Inc.[133]

In 1981, Jill Ruzicka and her daughter sued their psychiatrist, alleging that he engaged in improper sexual conduct during therapy sessions.[134] A year later, they settled the case and the Board of Medical Examiners suspended the psychiatrist's license.[135] The malpractice suit was covered in the press, and published articles revealed Ruzicka's name, place of employment, as well as allegations of specific conduct by the psychiatrist.[136] In addition, Ms. Ruzicka was appointed to a state task force on sexual exploitation by counselors and therapists and spoke publicly about her experience on several occasions.[137]

In 1987, Claudia Dreifus conducted extensive interviews with Ruzicka for an article she was writing for *Glamour* magazine on sexual relations between patients and their therapists.[138] Ruzicka claims that upon being introduced to Dreifus, she told the author that she was willing to be interviewed "only if I not be identified or identifiable," and that Dreifus agreed to this

130. Brief of Appellant Cowles Media Co. at 10, Cohen v. Cowles Media Co., 457 N.W.2d 199 (Minn. 1990) (Nos. C8-88-2631, C0-88-2672).

131. *Id.* at 10-11.

132. In a tort suit, it is likely that Cohen would have had to show that the paper acted with actual malice because his background almost certainly qualified him as a public figure. He had previously served as a public official (including a term as President of the Minneapolis City Council) and continued to thrust himself into the public eye as a public relations representative of the Whitney gubernatorial campaign. *See* Brief of Appellant Northwest Publications, Inc. at 4-6, Cohen v. Cowles Media Co., 457 N.W.2d 199 (Minn. 1990) (Nos. C8-88-2631, C0-88-2672). Even as a private figure, however, the media defendants here would likely be insulated from liability in a tort suit because their statements about Cohen were true, and under the constitutionalized libel standards, truth is a total defense. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

133. 733 F. Supp. 1289 (D. Minn. 1990), *appeal pending* (argued Feb. 11, 1991).

134. *Id.* at 1291.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

condition.[139] According to Dreifus, Ruzicka "wanted some kind of masking," but "was very casual about it."[140] Ruzicka had recently started a new job and Dreifus understood her principal concern to be that her new colleagues not be able to identify her from the article.[141] Dreifus later asked Ruzicka if her name could be used in the article.[142] Ruzicka said no and reminded Dreifus that she did not want to be identified or identifiable.[143]

The article appeared in the September 1988 issue of the magazine. In the article, Ruzicka was given the name "Jill Lundquist," a pseudonym that uses her real first name.[144] The article described Ruzicka's experience of abuse and subsequent suit against her therapist. Other facts of her life were changed in accordance with the masking agreement.[145] Ruzicka, however, became aware of two individuals who were able to identify her from the article, both former therapists of hers.[146] Ruzicka sued Dreifus and *Glamour*'s publishers on several theories, including breach of contract.[147] Defendants moved for summary judgment, and the motion was granted.[148]

The district court began its analysis by reviewing the constitutionalization of defamation, from the application of a common law rule of strict liability, to the imposition of a higher standard of proof which is more protective of first amendment rights.[149] The court then posed the key question: are similar protections to those which have been erected in tort law to be accorded media defendants in contract claims?[150] The court followed the three-step analysis used by the Minnesota Court of Appeals in *Cohen* but came to different conclusions on each issue. First, the court held that state action is present in a case between two private parties where one seeks damages from the other for statements made in the press.[151] Second, the court stated that the media defendant did not waive its first amendment rights because, to the extent that an agreement existed, it was not specific enough for a waiver of constitutional rights to be effective.[152] Third, and most importantly, the court found that the first amendment affords at least some protection to media defendants from contract actions brought to enforce a reporter-source confidentiality agree-

139. *Id.* (quoting deposition of Jill Ruzicka at 36).

140. *Id.* (quoting deposition of Claudia Dreifus at 24).

141. *Id.*

142. *Id.* at 1292.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* Ruzicka also alleged fraudulent misrepresntation, invasion of privacy, false light, intentional inflication of emotional distress, and unjust enrichment. *Id.* These claims were "disposed of quickly." *Id.* at 1301.

148. *Id.* at 1290.

149. *Id.* at 1292-93; *see also supra* text accompanying notes 28-35 (discussion of *Sullivan*).

150. *Ruzicka*, 733 F. Supp. at 1295.

151. *Id.* at 1295-96.

152. *Id.* at 1296-98.

ment.[153] Specifically, the court concluded that "*at 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."[154] The court held that the agreement in this action was too ambiguous to be enforced, because it merely stipulated that the source "not be made identifiable, with no further particulars or specific facts about what information would identify the source to the relevant audience."[155] It thus found for the media defendant on the contract claim.

The district court's ruling is narrowly tailored to the facts of the case. The ambiguous nature of the alleged contract in question gave the court the option of deciding the case on narrow factual grounds without resolving the larger issue of whether a more specific contract, which arguably existed in the *Cohen* litigation, would be otherwise enforceable.

C. *The* Fatal Vision *Case*

Both *Cohen* and *Ruzicka* focused on the conflict between the first amendment and contract law as it has been played out in the confidential source setting. However, it is not difficult to surmise how creative lawyers will add on causes of action for breach of contract to future defamation or invasion of privacy suits against media defendants. Another recent case demonstrates how attaching a contract claim could turn a losing case into a winning one.

On February 17, 1970, Colette MacDonald, who was pregnant at the time, and her two young daughters were bludgeoned and stabbed to death at their family's apartment in Fort Bragg, North Carolina.[156] Her husband, Jeffrey, a doctor in a Green Beret unit, claimed that a band of Mansonesque drug-crazed hippies had burst into his home, stabbed him, left him unconscious, and then killed his family.[157] He was charged with the murders and cleared by a military tribunal.[158] At the behest of Colette's stepfather, the Justice Department revived the investigation of the murders and almost five years later brought an indictment against MacDonald.[159] Another five years elapsed before the trial began.[160]

On the eve of his murder trial, MacDonald met Joe McGinniss. McGinniss was the author of the bestseller *The Selling of the President, 1968* and other less successful books. MacDonald asked McGinniss whether he was interested in traveling to North Carolina for the trial and writing a book about the case, and McGinniss said yes. MacDonald later agreed in a written con-

153. *Id.* at 1298-1301.
154. *Id.* at 1300 (emphasis added).
155. *Id.* at 1300-01.
156. J. MCGINNISS, FATAL VISION 31-32 (1983).
157. *Id.* at 43-46.
158. *Id.* at 175, 208-09.
159. *Id.* at 282, 303-05, 352.
160. *Id.* at 482-83.

tract to give McGinniss "exclusive story rights" in return for a twenty-six and one-half percent share of the advance and thirty-three percent of the royalties and other proceeds from the book.[161] MacDonald also signed a release which stated that he agreed, "not [to] make or assert . . . any claim or demand whatsoever based on the ground that anything contained in the book defames me."[162] MacDonald's lawyer made one handwritten revision just before his client signed the release: he changed the period to a comma and added the words, "provided that the essential integrity of my life story is maintained."[163]

McGinniss lived with MacDonald and his defense team throughout the trial. After MacDonald's conviction, McGinniss maintained a correspondence with him for four years while researching and writing the book that became *Fatal Vision*.[164] By all accounts, the two became friends, and MacDonald believed that he "could count on" McGinniss to portray his innocence.[165] In 1983, *Fatal Vision* was released and quickly ascended the best seller lists. McGinniss portrayed MacDonald as an individual suffering from a "narcissistic personality disorder" who killed his family in an amphetamine-induced psychotic rage.[166]

One year later, MacDonald sued McGinniss for fraud, breach of contract, breach of covenant of good faith and fair dealing, intentional infliction of emotional distress, and an accounting of proceeds.[167] MacDonald's lawyer, Gary Bostwick, strategically did not claim libel. He recognized that such an action would be "problematical" because it would be difficult to show injury to the reputation of a convicted murderer.[168]

The case was complex and involved several judges and magistrates at various stages in the process. Some recognized that this was not a garden-variety contract action, but a case with significant first amendment implications. Magistrate James McMahon, who was charged with handling the pre-trial phases of the case, observed that, "it's quite clear the reason it is a strange fraud case is it's a hidden libel case."[169] In a separate action that grew out of this case, a New York federal district court judge, Robert Sweet, ruled that MacDonald's claim was "based upon, and at times indistinguishable from, an allegation of libel."[170]

The trial judge, however, conceived of the case differently. William Rea,

161. Judge, Fatal Vision: *Truth and Betrayal*, AM. LAW., November, 1987, at 77; J. MALCOLM, THE JOURNALIST AND THE MURDERER 19 (1990).

162. J. MALCOLM, *supra* note 161, at 21.

163. *Id.*

164. J. MCGINNISS, *supra* note 156, at 652-53, 657.

165. Judge, *supra* note 161, at 80; *see also* J. MALCOLM, *supra* note 161, at 33-41 (excerpting extensive correspondence between McGinniss and MacDonald), 69 (describing McGinniss as MacDonald's " 'best friend' for five years").

166. J. MCGINNISS, *supra* note 156, at 604, 610-17.

167. Judge, *supra* note 161, at 78.

168. *Id.*

169. *Id.*

170. *Id.*

the Los Angeles federal district court judge who presided over the six-week trial, stated early in the proceedings that he disagreed with McMahon and Sweet and questioned whether first amendment considerations were even relevant in this action.[171] McGinniss' motion for summary judgment was thus denied, and the trial proceeded. Bostwick's strategy was to portray McGinniss as a calculating liar who had intentionally deceived his client and feigned friendship in order to get himself a best seller.[172] McGinniss' lawyer, Daniel Kornstein, presented what amounted to a libel defense. He called such literary figures as William Buckley, Jr. and Joseph Wambaugh to testify that MacDonald's claim impinged on the author's first amendment rights.[173] The attorney also examined several witnesses in an attempt to prove the substantial truth of McGinniss' book.[174]

Judge Rea's instructions to the jury, however, referred solely to the law of contract and made no mention of an author's first amendment interests or defenses.[175] Accordingly, most of the jury proceeded into deliberations with the issue framed as a pure contract claim. Only one juror, Lucille Dillon, a fifty-nine-year-old homemaker, conceived of the case differently. "It's a free speech issue," Dillon announced near the start of deliberations. "An author must have total freedom to write the truth."[176] Dillon would not budge, and the jury became hopelessly deadlocked five to one against McGinniss.[177] A mistrial was declared. McGinniss and MacDonald subsequently settled out of court. MacDonald received $325,000 from an unnamed party (presumably the publishing house's insurance company).[178] A provision of the settlement stipulated that McGinniss admitted no wrongdoing.[179]

MacDonald's claim, as well as Cohen's or Ruzicka's, could have been analyzed as a defamation action. All three plaintiffs were allegedly defamed by the reportage in question. MacDonald would have had a difficult time proving his case if framed as a defamation action. Even though the courts have held that convicted felons have reputational interests,[180] proving injury would require showing that the book caused a convicted family killer to be lowered in the esteem of his community. Had the attorney not conceived of the contract claim, the ordinary approach to these facts would have been to frame the cause of action in tort, stating that McGinniss' portrayal falsely and

171. *Id.* at 78-79.

172. *Id.* at 79-81.

173. *Id.* at 81-82.

174. *Id.* at 82. Substantial truth is a defense to a libel action. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

175. Judge, *supra* note 161, at 82.

176. *Id.* at 83.

177. *Id.*

178. Abrams, *'Fatal' Author Claims Victory in Settlement*, L. A. Times, Nov. 25, 1987, part 5, at 2, col. 5.

179. *Id.* For a criticism of the case's outcome, see Garbus, *A Travesty of Libel*, COMM. LAW., Winter 1990, at 12.

180. *See, e.g.*, Huskey v. National Broadcasting Co., 632 F. Supp. 1282 (N.D. Ill. 1986) (stating that prisoners have legitimate privacy and reputational interests).

maliciously held MacDonald up to ridicule and that compensation should be awarded. MacDonald, Cohen, and Ruzicka, however, consciously and carefully avoided stating a claim of defamation, presumably because of the rigorous proof requirements which have been required of plaintiffs since the constitutionalization of defamation in twenty-five years ago.[181] For example, Cohen and Ruzicka would have had difficulty prevailing on possible libel claims because the information printed about them was true, and under the constitutionalized libel standards, truth is a total defense.[182] Instead they sought redress and compensation for the defamation through the backdoor — an action in contract — and they succeeded.

III.
RESOLVING THE CONFLICT BETWEEN THE FIRST AMENDMENT AND CONTRACT LAW

The court of appeals in *Cohen v. Cowles Media Co.*[183] adopted a sensible framework for determining whether the enforcement of a confidentiality agreement between a reporter and her source should be barred by the first amendment.[184] It identified the three relevant legal questions as being: (1) Is there state action such that first amendment scrutiny should be triggered? (2) Has the media defendant waived its right to publish the information? (3) Do the first amendment interests in publication outweigh the common law contract interests?[185] Each of these issues will be discussed in turn.

A. State Action

The first amendment is not usually implicated in contracts between private parties.[186] It is axiomatic that most of the protections of individual rights and liberties contained in the Constitution apply only to the acts of the federal government, or, through the power of the fourteenth amendment, state governments.[187] A contract between private parties does not, in and of itself, in-

181. *See supra* text accompanying notes 28-68.

182. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

183. 445 N.W.2d 248 (Minn. Ct. App. 1989).

184. The district court in Ruzicka v. Conde Nast Publications, Inc., 733 F. Supp. 1289 (D. Minn. 1990), also adopted this mode of analysis. *See supra* text accompanying notes 151-55. The Supreme Court of Minnesota inexplicably bypassed any substantive analysis of the contract issues involved in *Cohen*, finding instead that no contract existed. *See supra* text accompanying notes 117-22. Because this Note is concerned with the conflict between first amendment and contract interests, the high court's analysis in *Cohen* on this point is inapposite.

185. *Cohen*, 445 N.W.2d at 254; *see supra* text accompanying notes 103-14. While the court posed these three questions, it chose to deal with the balancing issue before the waiver issue. The order of the questions as stated above is preferable because the court should only proceed to the constitutional balancing if there is no waiver. *See Ruzicka*, 733 F. Supp. at 1295 (adopting the revised order of inquiry).

186. The first amendment states that "*Congress* shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I (emphasis added).

187. Only the thirteenth amendment, which abolishes the institution of slavery, is specifically directed at controlling the actions of private individuals. U.S. CONST. amend. XIII.

volve any state action. If there is a suit on the contract, therefore, the party asserting a constitutional claim or defense must show that enforcement (or non-enforcement) of the contract would constitute state action of a type regulated by the appropriate constitutional provision.[188] Without state action, any constitutional claims which might theoretically be implicated in the suit would fall away because the dispute is between private individuals against whom the first amendment is not directed.

The state action question has not, however, posed a substantial barrier to the consideration of first amendment issues since *New York Times v. Sullivan*.[189] An argument could be made that a libel suit is merely a dispute between two private parties seeking to invoke neutral common law rules and that, therefore, there is no state action in a court's enforcement of these laws. However, the Supreme Court held in *Sullivan* that although the libel suit involved only private litigants, the application by the state court of a rule of law which one of the parties claims imposes invalid restrictions on her constitutional freedoms of speech and press constituted state action.[190] This rule has been followed in each of the subsequent libel cases to reach the high court.[191]

Another example of the ease with which the state action question is dealt with in first amendment cases is the well known retaliatory eviction case of *Edwards v. Habib*.[192] Judge Skelly Wright stated that "[a] state court judgment . . . even by adjudicating private lawsuits, may unconstitutionally abridge the right of free speech."[193] The adjudication itself, according to Wright, constitutes the state action.[194] Once the state action question is disposed of, the court must then perform a balancing test to determine which interests predominate, those of the party trying to restrict first amendment freedoms or those of the party allegedly engaging in protected speech.[195]

It is, thus, clear that even where the state does not initiate an action or encourage the private parties involved to do so, courts can find state action where the state's only involvement is in providing the courts and laws to settle otherwise private disputes and in attempting to use coercive power to enforce the court's judgment. This has been especially true where the rights vindicated are protected by the first amendment.

While regulation of private citizens was originally thought not to be authorized by the fourteenth amendment, Civil Rights Cases, 109 U.S. 3 (1883), subsequent decisions have made it clear that Congress has authority to reach private conduct under this amendment. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966); District of Columbia v. Carter, 409 U.S. 418, 423, 424 n.8 (1973).

188. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

189. 376 U.S. 254 (1964).

190. *Id.* at 265.

191. The presence of state action in defamation actions has not been analyzed by the Court in any of its post-*Sullivan* decisions. Instead, state action has been accepted in these cases on the strength of *Sullivan*.

192. 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

193. *Id.* at 694.

194. *Id.* at 695.

195. *Id.*

In *Cohen*, the court of appeals found that there was no state action present in a suit to enforce a contract which restricted a party's exercise of her first amendment rights.[196] The court made two errors in reaching this conclusion. First, it misstated the Supreme Court's holding in the seminal case of *Shelley v. Kraemer*.[197] Second, it limited the state action rule in *Sullivan* in an unprincipled manner.

While state action is traditionally conceptualized as the execution of legislative or executive edicts, judicial orders can also be considered state action. When a judge commands a private individual to take specific actions which would violate the Constitution if done by the State, state action will be present in the resulting harm to constitutionally protected rights. The facts of *Shelley* present a classic example of such a situation. Plaintiffs were white homeowners living in a district subject to a racially restrictive covenant, an agreement among property owners to exclude persons of designated races. They brought suit in Missouri state court to enforce the covenant in order to restrain defendants, a black family who had recently bought a parcel in the district despite the covenant, from taking possession of the property.[198] The Supreme Court noted that restrictions on the right of occupancy of the sort created by this private agreement would not be valid under the fourteenth amendment if they were imposed by state statute or local ordinance.[199] However, the restrictive agreement standing alone could not be regarded as violative of any constitutional rights provided the purposes of the covenant were effectuated by voluntary adherence to their terms by private parties. Under these circumstances, there would be no state action to implicate any constitutional rights or privileges.[200]

In *Shelley*, though, there was no voluntary adherence to the terms of the agreement; the purposes of the covenant were secured only by the judicial enforcement of the restrictive terms of the agreement by the Supreme Court of Missouri.[201] The court's enforcement of the covenant constituted state action in that it denied the buyers their fourteenth amendment rights.[202] A private contract that would not otherwise be subject to constitutional scrutiny thus can be so examined where court intervention is required to secure its enforcement. Judicial action gives the imprimatur of the state as surely as does legislative or executive action.[203]

The Court later expanded upon *Shelley*, holding that an action to recover monetary damages for the breach of a racially restrictive covenant is barred by

196. Cohen v. Cowles Media Co., 445 N.W.2d 248, 254-56 (Minn. Ct. App. 1989).
197. 334 U.S. 1 (1948).
198. *Id.* at 4-6.
199. *Id.* at 11.
200. *Id.* at 12-13.
201. *Id.* at 6, 13-14.
202. *Id.* at 19-20.
203. *Id.* at 20.

the fourteenth amendment.[204] Although a subtle step, this decision constituted a significant expansion of the state action doctrine.[205] The damage suit in this case would not require a formal judicial order to discriminate on the basis of race (as did the Missouri court's order in *Shelley*). The state action itself, an award of damages against a party who refused to discriminate, would not, on its face, violate the fourteenth amendment. However, the Court held that such a state imposed penalty constituted the functional equivalent of a command to refuse to sell the property to blacks.[206] Here, judicial encouragement of racial discrimination is the state action which violates the Equal Protection Clause. State action, thus, need not be a judicial order to engage in a constitutional violation, but may be found where a court imposes a penalty for engaging in protected activity.

Given its broadest reading, *Shelley* would all but obliterate the state action doctrine. Given the entanglement of private choices with the law, such a broad application of *Shelley* might leave no private choices immune from constitutional restraints.[207] Subsequent cases, however, have clarified somewhat the contours of *Shelley* and revealed that the state-private distinction has been retained.[208] Although *Shelley* remains a controversial decision,[209] it would appear that *Shelley* is still good law where the court intervenes to enforce an agreement which has a possible constitutional infirmity against a party unwill-

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204. Barrows v. Jackson, 346 U.S. 249 (1953).

205. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 434 (3d ed. 1986).

206. *Barrows*, 346 U.S. at 254.

207. *See* Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 474 (1962) ("it was not possible to tell how far the Court would go in the next case").

208. In Evans v. Abney, 396 U.S. 435 (1970), the Supreme Court upheld a state court ruling enforcing a racial restriction in a will. The donor had conveyed property in a trust for use as a park for whites only. The Court held that this case was

> easily distinguishable from [*Shelley*], where we held unconstitutional state judicial action which had affirmatively enforced a private scheme of discrimination against Negroes. Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon.

Id. at 445.

In addition, the Court's approach to the so-called "sit-in cases," which grew out of the civil rights demonstrations of the late 1950s and early 1960s, reveals the limits of *Shelley*. If *Shelley* were given its broadest reading, it would easily cover cases involving a state's enforcement of trespass laws against persons excluded from private property on racial grounds. The failure of the Court to rely on *Shelley* in overturning the convictions suggested that more state involvement was needed than mere even-handed enforcement of private biases. *See* Peterson v. Greenville, 373 U.S. 244 (1963) (finding official segregation policies in background of private action and refusing to inquire whether the restaurant manager would have excluded the demonstrators had the state been wholly silent).

209. Numerous scholars have leveled persuasive attacks against the Court's logic in *Shelley*. *See, e.g.*, Henkin, *supra* note 207; Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

ing to abide by its terms.[210]

The Minnesota Court of Appeals distinguished *Cohen v. Cowles Media* from *Shelley* on the grounds that in *Shelley*, the Court engaged in active intervention at the request of third parties, whereas in *Cohen*, the party suing was one of the principals to the contract.[211] This, however, is a grudging reading of *Shelley*. The operative issue in *Shelley* was not the identity of the party filing suit, but that judicial enforcement is state action where it violates one of the parties' constitutional rights.[212]

In addition, the lower court in *Cohen* distinguished the broad state action rule in *Sullivan* by stating that, "[d]efamation law *inherently* limits the content of speech . . . [whereas t]he rules of contract law do not sanction any particular speech."[213] This line drawing misses the main point. The comparison which a court should be making under *Shelley* and *Sullivan* is not which body of law it is applying, but what the effect of the sanction in question will be. The contract action had the clear effect of limiting the content of speech in the exact same way that a defamation action does — through the award of damages. Having two different state action tests for two causes of action that involve the exact same type of state action makes no sense.

Fair readings of *Shelley* and *Sullivan* reveal that a court's attempt to enforce a contract penalizing the media for the publication of truthful, newsworthy information falls well within the ambit of state action. The Minnesota Court of Appeals' holding to the contrary was grounded in neither precedent nor valid policy concerns.

B. Waiver

Once the element of state action in the enforcement of this genus of contract is established, the defendant must show that she has a valid first amendment interest. This showing is a predicate to a court's consideration of whether that interest is superior to the opposing party's interest in enforcement of the contract. If the media defendant has waived her first amendment rights, such a balancing is unnecessary because the defendant has no constitutional right against which the contract interest can be balanced.

Courts will not imply waivers of constitutional rights. A constitutional right may only be waived under particular circumstances, that is where the waiver is voluntary, knowing, and intelligent.[214] In addition, existence of the

210. Kolinske v. Lubbers, 712 F.2d 471, 480 (D.C. Cir. 1983) (stating that "*Shelley* is still good law [when a] state court . . . intervene[s] to enforce [an] agreement against a party unwilling to abide by its terms.").

211. Cohen v. Cowles Media Co., 445 N.W.2d 248, 255 (Minn. Ct. App. 1989).

212. *See supra* text accompanying notes 197-203.

213. *Cohen*, 445 N.W.2d at 255-56 (emphasis added).

214. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 94-95 (1972) (waiver must be voluntary, knowing, and intelligent); Moser v. United States, 341 U.S. 41, 47 (1951) (waiver must be intentional, knowing, and intelligent).

waiver must be established by clear and compelling evidence.[215]

The leading case on the waiver of first amendment rights is *Curtis Publishing Co. v. Butts*.[216] That decision was handed down three years after *New York Times v. Sullivan* and concerned the scope of the "public figure" rule in libel actions.[217] Before reaching the merits of the constitutional issue, the Court addressed the plaintiff's contention that the defendant had waived his right to interpose a first amendment defense because he had failed to assert such arguments before trial.[218] The Court held that because the constitutional protection in question "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom,' "[219] waiver would not be found "in circumstances which fall short of being clear and compelling."[220] The circumstances in that case did not warrant a holding that these rights had been waived.[221]

Clearly, though, first amendment rights may be waived under certain circumstances. In *Erie Telecommunications, Inc. v. City of Erie, Pennsylvania*,[222] a cable television franchisor challenged the validity of its franchise agreement with the city, claiming that the agreement violated its first amendment right of free expression.[223] This argument was not very successful; the court noted at the outset that "it is evident that the injury to [plaintiff] is not an injury to its ability to express itself."[224] The plaintiff's complaint was that the city had exacted a greater proportion of its revenue than the plaintiff believed it should pay.[225] The plaintiff's first amendment claim was thus of a lesser magnitude than a claim that its ability to express itself had been more directly inhibited. This facet of the case is noteworthy because under the "circumstances" test laid out by the Court in *Curtis Publishing*,[226] these circumstances clearly do not implicate the core values of the first amendment. The court of appeals in *Erie Telecommunications* did not reach the merits of the plaintiff's constitutional claim because it found that the plaintiff's first amendment rights had been waived as part of a settlement agreement in prior litigation.[227]

While the Supreme Court has not addressed whether a waiver of the right to publish newsworthy information is possible, it has implied that such a contractual waiver, absent additional compelling state interests, will not be en-

215. Sambo's Restaurants, Inc. v. Ann Arbor, 663 F.2d 686, 690 (6th Cir. 1981); Rodgers v. United States Steel Corp., 536 F.2d 1001, 1007 n.14 (3d Cir. 1976).

216. 388 U.S. 130 (1967).

217. This aspect of *Curtis Publishing* is discussed *supra* text accompanying notes 37-41.

218. *Curtis Publishing*, 388 U.S. at 142.

219. *Id.* at 145 (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937)).

220. *Id.*

221. *Id.*

222. 853 F.2d 1084 (3d Cir. 1988).

223. *Id.* at 1085.

224. *Id.* at 1089.

225. *Id.*

226. *See supra* text accompanying notes 219-21.

227. *Erie Telecommunications*, 853 F.2d at 1094-1101.

forceable. In *Snepp v. United States*,[228] the government brought suit seeking to enforce an employment agreement which the defendant, a former Central Intelligence Agency [hereinafter CIA] agent, allegedly had breached.[229] The agreement stated that Snepp would "not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the agency."[230] Snepp, however, published a book about certain CIA activities in South Vietnam without submitting it to the Agency for prepublication review.[231]

While the Court found for the government, it also held that Snepp's waiver of his first amendment right to publish stemmed not from the secrecy agreement, but instead from his employment with a government agency responsible for national security.[232] CIA employees are fiduciaries[233] and have frequent access to classified information.[234] Therefore, former employees have a special duty not to divulge state secrets either during or after employment,[235] and the CIA has a statutory mandate to " 'protec[t] intelligence sources and methods from unauthorized disclosure.' "[236]

The Court reached its decision against the backdrop of the circuit court's holding that "the first amendment would not permit the CIA to withhold consent to publication except with respect to classified information not in the public domain."[237] A prepublication agreement is enforceable "*only to the extent* that [it] required" an author to submit material to the government, and no further.[238] The circuit court did not find a contractual waiver of first amendment rights; to the contrary, the court held that Snepp's obligation to submit to prepublication review flowed from his fiduciary duty and not the terms of an agreement.

In light of the special circumstances, here the fiduciary duty, the Supreme Court held that Snepp had waived his first amendment right to publish without prepublication review. The waiver, however, was merely the result of Snepp's special, fiduciary relationship with the government, not of the contract. The Court specifically noted that "even in the absence of an express agreement the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that *in other contexts might be protected by the First Amendment.*"[239] The decision makes

228. 444 U.S. 507 (1980) (per curiam).
229. *Id.* at 507-08.
230. *Id.* at 508 (omissions in original).
231. *Id.* at 507.
232. *Id.* at 509.
233. *Id.* at 510-11 n.6.
234. *Id.* at 511.
235. *Id.* at 510-12.
236. *Id.* at 509 n.3 (quoting 50 U.S.C. § 403(d)(3) (1976)).
237. United States v. Snepp, 595 F.2d 926, 932 (4th Cir. 1979), *rev'd*, 444 U.S. 507 (1980).
238. *Id.* (emphasis added).
239. *Snepp*, 444 U.S. at 509 n.3 (emphasis added) (citations omitted).

it clear that, for constitutional purposes, signing the agreement effected no more of a waiver of first amendment rights than would have applied to Snepp absent an express agreement.

Snepp, therefore, implies that courts should not consider valid a waiver of first amendment rights to publish truthful, newsworthy information. Such a rule of law harmonizes comfortably with the Court's libel holdings. As the Court has stated, the first amendment protects an "uninhibited, robust and wide-open" debate on public issues.[240] No decision since *Sullivan* has held the press liable for the publication of truthful, newsworthy information. Finding a waiver valid under these circumstances would conflict with the fundamental goal of debate which lies at the core of the first amendment.[241] Given these policy concerns and the Court's reasoning in *Snepp*, reporter/source confidentiality agreements, such as those at issue in *Cohen* and *Ruzicka*, should not function as effective waivers of first amendment rights.

The contract law doctrine holding certain agreements void as against public policy presents another basis upon which a court could find that the reporter/source confidentiality agreement did not constitute a valid waiver.[242] Courts have found a wide variety of terms to be against public policy. Exculpatory clauses have been voided on this basis,[243] as have terms of a contract barring the awarding of attorney fees in litigation.[244] In neither of these instances did the contract violate either a specific constitutional or statutory provision. Instead, the courts use such terms as "injurious to the public interest" or "gravely violate paramount requirements of public interest" to justify voiding those sections. One court went as far as not enforcing a contract merely because it violated the rules of the National Collegiate Athletic Association, a group not normally considered to make laws which bind the federal courts.[245] Certainly, a provision of the Constitution presents a more significant source of policy than is found in these cases. The public policy doctrine has been construed quite broadly as indicated by a wide range of examples in which courts have found contracts void under this theory.[246]

240. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

241. Kalven, *supra* note 28, at 208-09.

242. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1979) states that "[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."

243. Northwest Airlines, Inc. v. Alaska Airlines, Inc., 351 F.2d 253 (9th Cir. 1965).

244. Shadis v. Beal, 685 F.2d 824 (3d Cir. 1982).

245. Walters v. Fullwood, 675 F. Supp. 155 (S.D.N.Y. 1987) (agreement between student athlete and agent not enforcible because exacuted in violation of NCAA rules).

246. *See, e.g.*, Sage v. Hampe, 235 U.S. 99 (1914) (a contract tending to bear improper influence upon an officer of the state and to induce attempts to mislead him is contrary to public policy and unenforceable); Beasley v. Texas & Pacific Ry. Co., 191 U.S. 492 (1903) (court refuses to enforce clause of land sale contract not allowing the establishment of a railroad depot because enforcement is not in the public interest); United States v. King, 840 F.2d 1276, 1283 (6th Cir. 1988) (a parent's contract allowing a third person to burn, assault, or torture her child is void); Kashfi v. Phibro-Salomon, Inc., 628 F. Supp. 727, 736-40 (S.D.N.Y. 1986) (contract to

The issue for a court faced with a public policy challenge to a contract or its terms is to determine what policy might be implicated by the contract or term, and whether there is an actual conflict between the provision and the policy. If there is, the court should not lend its authority to enforcement of the contract or term.[247] In the reporter/source setting, construing the promise of confidentiality as a waiver of constitutional rights implicates and is in conflict with the first amendment, because a finding for the plaintiff would hold the media liable for damages as a result of the publication of truthful, newsworthy information.

C. Balancing the First Amendment and Contract Law

The issue of whether or not a court should enforce a contract prohibiting the publication of newsworthy information creates a classic conflict between two significant interests: the first amendment right to freedom of the press and the freedom to contract. Enforcement of the contract or the awarding of damages for a breach would interfere with the media's right to disseminate truthful, newsworthy information. Yet failing to enforce the contract, or failing to award damages (should any exist), would contravene the fundamental rationale for contract law, the realization of reasonable expectations that have been induced by the making of a promise.[248]

Causes of action in tort did not succeed in *Ruzicka* and could not have succeeded in *Cohen*, in part because of the constitutional restrictions on suits against the media. In *Ruzicka*, plaintiff's claims for fraudulent misrepresentation, invasion of privacy, false light, and intentional infliction of emotional distress were, in the court's own words, "disposed of quickly."[249] In *Cohen*, any tort claim (defamation or intentional infliction of emotional distress, for example) would have failed because of Cohen's status as a public figure and

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arrange meetings to facilitate a corporation's obtaining a foreign government's business is void as against public policy manifested by the "Procurement Statute" (41 U.S.C. § 254(a) (1982)).

247. Driessen v. Freborg, 431 F.Supp. 1191 (D.N.D. 1977), demonstrates this method of analysis. In addition, the reasoning is applicable to the instant discussion because the court found that the case involved a conflict between the policies expressed by the Constitution and a term of a contract. A teacher brought an action against the school board claiming that she was wrongfully discharged. The contract entered into with all of the teachers in the system stated that a pregnant teacher would be required to take an unpaid leave of absence after the seventh month of pregnancy and not return to teaching until one month after birth. The plaintiff asked to teach 19 days longer, but her request was denied. The court noted that the Supreme Court had held in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), that a school board maternity rule similar to the one being litigated here, but not included in an employment contract, was violative of the fourteenth amendment in that it sought to impose, arbitrarily and without a factual basis, an irrebuttable presumption that teachers could not teach effectively beyond a specified point in pregnancy. The term of the contract forcing maternity leave at an arbitrary point thus implicated the due process clause of the Constitution. In *Driessen* an actual conflict existed because enforcement of the contract would violate her due process rights. Therefore, the court refused to enforce the clause.

248. A. CORBIN, CORBIN ON CONTRACTS 2 (1950).

249. Ruzicka v. Conde Nast Publications, Inc., 733 F. Supp. 1289, 1301-02 (D. Minn. 1990).

the fact that the assertions put forward by the media defendants about him were true.[250]

Suits in contract should not enjoy talismanic immunity from constitutional strictures any more than suits in tort. Resolving whether similar restrictions should be placed upon analogous suits brought under a contract theory requires a balancing of the interests underlying the state law of contracts and the interests protected by the free speech and press clauses of the first amendment.[251] This endeavor, however, is not commenced on a clean slate. As discussed earlier, a significant body of case law has already been developed on the proper accommodation between state tort law and the requirements of the first amendment.[252] A useful starting point in performing this balancing test would be to identify the relevant similarities and differences between tort and contract as they relate to suits such as those brought in *Cohen* and *Ruzicka*.

The most obvious similarity between actions for defamation and those for breach of a reporter/source confidentiality agreement is that an award of compensatory damages for an alleged breach of a promise of confidentiality, like an award of damages in a defamation action, restrains the exercise of editorial discretion and judgment. As the Supreme Court stated in *Miami Herald Publishing Co. v. Tornillo*,[253] "[t]he choice of material to go into a newspaper, and the decisions made as to [the] . . . treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment," and this control and judgment is protected by the first amendment.[254] Whether the limitation on press discretion stems from tort or contract law, its effect is identical — either newsworthy information is not published or the press is left liable for large damage awards. *New York Times v. Sullivan* states clearly that the core basis for first amendment restrictions on tort law is the "chilling effect" that damage awards have on the editorial process.[255]

On the other side of the equation, there is a relevant difference between tort and contract law: volition. No one asks that a tort be committed against her; by definition, a tort is non-consensual.[256] By contrast, a contract requires the consent of both parties, without which the necessary "meeting of the minds" cannot occur.[257]

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250. *See supra* note 132.

251. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757-58 (1985) (court performs balancing test between reputational interests and first amendment); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974) (same).

252. *See supra* text accompanying notes 28-68.

253. 418 U.S. 241 (1974).

254. *Id.* at 258.

255. 376 U.S. 254, 270-72, 279 (1964). For a discussion of the unwarranted self-censorship which results from the fear of libel suits and large damage awards, see R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY (1987).

256. PROSSER & KEETON, *supra* note 1, at 112.

257. J. CALAMARI & J. PERILLO, CONTRACTS 25 (3d ed. 1987).

It is still necessary, however, to give independent consideration to the specific interests affected by the conflict between enforcement of a confidentiality promise and the first amendment right to publish newsworthy information and to balance those competing interests. In so doing, a court must keep in mind that a burden on first amendment rights is justified only if necessary to achieve an *overriding* governmental interest.[258]

An arguably rational way to resolve the conflict would be to recognize that the party's rights under the first amendment are of a constitutional dimension[259] whereas the other party's contract interests are merely founded in a common law background.[260] This analysis, however, is too simplistic to be satisfying. Constitutionally protected rights carry considerable weight when balanced against other interests simply through the force of the supremacy of the Constitution.[261] But constitutional protection is not always a trump card. Even constitutionally protected rights must be balanced against other interests in order "to satisfy, to reconcile, to harmonize, [and] to adjust . . . overlapping and often conflicting claims and demands . . . so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole."[262]

Traditionally, the state has an interest in protecting the expectations of a person who freely enters into a contract. Commentators have identified several policies underlying contract law: recognition of the primacy of will,[263] reliance,[264] efficiency,[265] and fairness.[266] Protection of the "sanctity" of contract allows an individual to order her affairs, knowing that if she maintains her side of the bargain, the other party will either reciprocate with performance or be liable for damages in court.

It does not follow, however, that any exception to this sanctity will un-

258. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 582 (1983).

259. Not all speech, of course, is constitutionally protected. There are actually two balancing tests a court should engage in when looking at a first amendment issue. The first is a test for the quality or content of the speech; the question here is whether or not there is a social interest in the speech which is at issue. The second balancing test occurs after the court has determined that the speech is protected; the question then becomes whether circumstances warrant an invasion of free speech. M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 84-85 (1966). This Note does not involve the first question because the speech in question here is of a genus which is always protected — truthful speech. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

260. J. CALAMARI & J. PERILLO, *supra* note 257, at 13.

261. U.S. CONST. art. VI, § 2.

262. Pound, *A Survey of Social Interests*, 57 HARV. L. REV 1, 39 (1943); *see also* 3 R. POUND, JURISPRUDENCE 15-16 (1959); Aleinikoff, *supra* note 70.

263. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 575 (1933).

264. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979); G. GILMORE, THE DEATH OF CONTRACT 60-61 (1974).

265. R. POSNER, ECONOMIC ANALYSIS OF LAW 12, 79-81 (3d ed. 1986); A. KRONMAN & R. POSNER, THE ECONOMICS OF CONTRACT LAW 5-7 (1979).

266. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Jones v. Star Credit Corp., 59 Misc.2d 189, 298 N.Y.S.2d 264 (1969); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

dermine the entire principle. Indeed, courts refuse to enforce contracts for a variety of reasons. In the nineteenth century, individuals were permitted to recover for damages arising from a broken promise to marry.[267] Eventually, judges turned these suits away, letting the damage, as it were, lie where it fell.[268] Courts regularly turn away suits to enforce otherwise legally binding contracts which are against public policy.[269]

While some have argued that these confidentiality agreements are promises, which create only ethical obligations, and not contracts, which potentially create legal obligations,[270] such a distinction is inappropriate here. The *Cohen* case is a textbook example of contract formation. Notwithstanding the Minnesota Supreme Court's odd analysis of the contract issues implicated,[271] there was clearly offer, acceptance, and consideration in the *Cohen* agreement.[272] In the absence of an appropriate defense, such as duress, mistake, or misrepresentation, the agreement should be considered an enforceable contract.

Even a traditional business contract, however, should not be enforced in the face of superior social interests. No common or statutory law can enjoy immunity from constitutional limitations.[273] If enforcement of the contract will interfere with the media defendant's constitutionally protected rights, enforcement of this small category of contracts can hardly constitute an interest sufficiently strong to override the first amendment. Non-enforcement of a rarely encountered set of contracts does not inflict any appreciable damage on the citadel of contract.

Constitutional protection of freedom of speech and the press is not absolute. At times, this right must be balanced against other significant interests of the state and yield if the other interest is found to be more significant or compelling. For example, the first amendment does not protect obscenity,[274] fighting words,[275] or child pornography.[276] Before the balancing test can be attempted, one must first consider what interests the first amendment is meant to protect.

One widely accepted proposition is that "the central meaning of the

267. Smith, *Tuxedos Aren't the Only Wedding Suit: What Happens When the Nuptials Turn Into Injurious Parties*, STUDENT LAW., Feb. 1990, at 49.

268. *Id.* Today, most such suits are not only barred at common law, but by statutes which are popularly known as "Heart Balm Acts." *Id.*

269. *See supra* text accompanying notes 242-47.

270. Jones, *Ruling on Newspaper Is Overturned*, N.Y. Times, July 21, 1990, at A6, col. 4 ("journalists and First Amendment lawyers generally agreed that confidentiality was an ethical matter, rather than a legal or contractual one"); Langley & Levine, *Broken Promises*, COLUM. JOURNALISM REV., July/Aug., 1988 at 24 ("Ethical, not legal, considerations should determine whether a journalist, once having promised confidentiality, should go back on his word.").

271. *See supra* text accompanying notes 115-29.

272. *See supra* text accompanying note 100.

273. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1963).

274. Roth v. United States, 354 U.S. 476 (1957).

275. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

276. New York v. Ferber, 458 U.S. 747 (1982).

Amendment is that seditious libel cannot be made the subject of government sanction."[277] This does not mean that the first amendment only protects conduct or language which is critical of the state. Although the theory recognizes that other freedoms are also embodied within the amendment,[278] the understanding that speech on public issues is most worthy of protection lies at its core.[279] Even one of the original and most significant proponents of the application of balancing in first amendment adjudication, Zechariah Chafee Jr., noted that when debate focuses on affairs of state, it must be "absolutely unlimited."[280] One of the leading first amendment scholars of this century, Alexander Meiklejohn, also stated that the first amendment gives absolute protection to debate over public policy.[281] According to Meiklejohn, the first amendment "declares that with respect to political belief, political discussion, political advocacy, political planning, our citizens are sovereign, and the [agencies of government are] their subordinate agent."[282] Although Meiklejohn acknowledged that the state could regulate the process of the debate, he contended that it could only do so in a way that was content-neutral.[283]

Few have supported the proposition that the first amendment permits no restraints on speech whatsoever.[284] But there is wide consensus that it permits no restraint on the discussion of public affairs. The Supreme Court has never agreed that selected categories of speech should be granted *absolute* protec-

277. Kalven, *supra* note 28, at 209; *see also* Green, *Political Freedom of the Press and the Libel Problem*, 56 TEX. L. REV. 341, 353 n.47 (1978) ("[P]olitical discussions are not controlled by the law of slander and libel. The matter is not one of privilege but is one of those inalienable rights given to all citizens.") (emphasis deleted).

278. *Kalven*, *supra* note 28, at 208.

279. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270-76 (1964).

280. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 31 (1941); *see also* Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1285-87 (1983) (discussing Chafee's interpretation of the first amendment).

281. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (arguing for absolute protection of political speech).

282. A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 107 (1960).

283. *Id.* at 24-28.

284. Two Supreme Court justices are known for their absolutist views on the first amendment: William O. Douglas and Hugo L. Black. Douglas' point of view is well summed up in his opinion in Beauharnis v. Illinois, 343 U.S. 250 (1951): "The First Amendment is couched in absolute terms - freedom of speech shall not be abridged." *Id.* at 285 n.28 (Douglas, J., dissenting). He stated that there could be no governmental regulation or control of the press whatsoever, Poulos v. New Hampshire, 345 U.S. 395, 423 (1953) (Douglas, J., dissenting), and even denounced the widely accepted "clear and present danger" test because it tended to inappropriately limit speech. Brandenburg v. Ohio, 395 U.S. 444, 454 (1969) (Douglas, J., concurring).

Even among the absolutists, there are gradations. Justice Black's philosophy, for example, was not highly protective of symbolic expression. *See* Tinker v. Des Moines Community School Dist., 393 U.S. 503, 521-24 (1969) (Black, J., dissenting).

See also T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) (taking exception with the application of any balancing test as advocated by Chafee). But even Meiklejohn noted that "[t]he First Amendment . . . is not the guardian of unregulated talkativeness." A. MEIKLEJOHN, *supra* note 282, at 26.

tion, but the *Sullivan* decision is compelling evidence that Meiklejohn's philosophy generally has been adopted.[285] In addition, the Court has consistently recognized that speech relating to public affairs should receive the highest level of protection. For example, while the Court has continually refused to hold that truthful publication is absolutely immune from prosecution,[286] it has noted that truth would always be a total defense in the discussion of public officials and their conducting of public business.[287]

The latter holding is also representative of a second powerful strain of first amendment jurisprudence: that the promotion of unbridled expression is a necessary condition for the discovery of truth. First expressed by nineteenth century liberal philosophers such as John Stuart Mill,[288] this belief is reiterated in recent Supreme Court decisions. One of the clearest formulations was put forward by Justice White in *Red Lion Broadcasting Co. v. FCC*.[289] He wrote that "the purpose of the first amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[290]

Recent history illustrates that the identity of a confidential source or comments made "off the record" can be newsworthy. For example, in 1984, Democratic presidential candidate Jesse Jackson referred to Jews as "Hymies" and New York as "Hymietown" during a conversation which both he and the reporter to whom he was speaking clearly understood to be not for direct attribution.[291] This widely covered story certainly qualifies as newsworthy because it presented information to the American people that could be utilized in assessing the character and credibility of a candidate for the nation's highest office. It bears noting that although the issue of whether the reporter was justified in breaking an implicit, but nonetheless acknowledged promise of confidentiality was widely debated in the media,[292] no one, including Jackson himself, raised the specter of suing the journalist or his newspaper for breaching the agreement.

The identity of the confidential source in *Cohen* was also newsworthy.

285. *See* Kalven, *supra* note 28; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). Indeed, the Supreme Court has cited to Meiklejohn's writings on numerous occassions. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 867 n.20 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980); Consolidated Edison Co. v. Public Serv. Comm., 447 U.S. 530, 534 n.3 (1980); Herbert v. Lando, 441 U.S. 153, 186 (1979) (Marshall, J., dissenting).

286. *See* Florida Star v. B.J.F., 109 S.Ct. 2603, 2608 (1989) (explicitly rejecting contention "that truthful publication may never be punished consistent with the First Amendment").

287. Garrison v. Louisiana, 379 U.S. 64, 72-73 (1964).

288. J. MILL, ON LIBERTY 17-54 (A. Castell ed. 1947).

289. 395 U.S. 367 (1969).

290. *Id.* at 390.

291. S. KLAIDMAN & T. BEAUCHAMP, THE VIRTUOUS JOURNALIST, 167 (1987). The journalist, Milton Coleman of *The Washington Post*, understood Jackson to go off the record when Jackson said, "Let's talk black talk." Coleman evinced his acceptance of Jackson's offer to go off the record for the conversation by signaling for the candidate to continue. *Id.*

292. *See* Greenfield, *Must Reality Be Off the Record*, Wash. Post, Apr. 11, 1984, § A, at 21; Rowan, *A Threat to a Reporter — And to All Blacks*, Wash. Post, Apr. 4, 1984, § A, at 23.

The plaintiff, a prominant figure in the Minneapolis community, and a former president of the City Council, was part of a team of political operatives who had decided that leaking information about an opponent's personal history would benefit their candidate. It can hardly be disputed that such a campaign technique is in itself newsworthy. One only need look to the 1972 presidential campaign of Richard M. Nixon to realize that how a campaign is conducted can be as significant as the issues the candidate raises.[293] That the source in *Cohen* was both a high-level confidant in an opponent's camp, and a prominent politician in his own right, made his identity a newsworthy fact.

Clearly, the media is not obliged to report every newsworthy shard of information which comes to its attention. The reasons a publication chooses to "run" with certain stories or facts and not others are diverse, and journalistic rules are constantly in flux.[294] But the selection of which pieces of news the media will report is the essence of editorial discretion.[295]

The Supreme Court case which initially appears to be most directly on point for the balancing of first amendment interests against an individual's interest in the enforcement of a contract is *Snepp v. United States*.[296] As discussed earlier,[297] the United States brought suit against a former CIA agent who had breached a clause of his employment agreement which stated that he would not publish any material about the Agency without prepublication clearance.[298] The Supreme Court, holding that the former agent had breached a fiduciary obligation, placed the proceeds of his breach in a constructive trust.[299]

The court of appeals in *Cohen* stated that the Supreme Court had "*implicitly* found the protection of contractual rights to be a sufficient governmental interest to outweigh first amendment rights" in *Snepp*.[300] This, however, is a gross misreading of the *Snepp* Court's holding and logic. The Court did not approach *Snepp* as a breach of contract case, but as a national security case. The Court even stated explicitly that the contract was not dispositive of the case in any way because "even in the absence of an express agreement the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that *in other contexts might be pro-*

293. Nixon's infamous "dirty tricks," which included the break-in at the Democratic National Committee office in the Watergate complex, eventually overshadowed his substantive domestic and foreign policies. *See* B. WOODWARD & C. BERNSTEIN, ALL THE PRESIDENT'S MEN 112-47 (1974).

294. The revelations in the press leading to Gary Hart's withdrawal from the 1988 presidential race illustrate changing journalistic mores. *See* Sitomer, *Privacy and the Press*, Christian Sci. Monitor, May 17, 1990, at 13 (exploring issues surrounding coverage of the private lives of prominent individuals).

295. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974).

296. 444 U.S. 507 (1980).

297. *See supra* text accompanying notes 228-40.

298. *Snepp*, 444 U.S. at 508.

299. *Id.* at 510.

300. Cohen v. Cowles Media Co., 445 N.W.2d 248, 257 (Minn. Ct. App. 1989) (emphasis added).

tected by the First Amendment."[301]

The Court decided *Snepp* as it did in deference to the special relationship that the CIA must have with its employees to protect the national security.[302] Viewed in this context, *Snepp* is essentially another in a long line of cases which stand for the proposition that where the national security is implicated, carefully tailored limitations on first amendment rights may be permissible.[303] *Snepp* is only applicable to the enforcement of reporter/source confidentiality agreements insofar as the Court's discussion of the waiver of first amendment rights is illuminating for the resolution of that issue.[304] The balancing discussion of *Snepp*, however, is inapplicable here because the Court was concerned with balancing the first amendment against national security interests, not contract interests.

Miami Herald Publishing Co. v. Tornillo[305] provides a useful guidepost as to where the proper balance is found. The media defendant in *Tornillo* had published several editorials critical of the plaintiff's candidacy for the Florida legislature.[306] The plaintiff then demanded that the newspaper print his rebuttal verbatim,[307] and, upon rejection of his demand, sued under the Florida "right of reply" statute.[308] The Court found this statute an unconstitutional infringement on the editorial process.[309] As Chief Justice Burger, writing for the Court, stated:

> A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[310]

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301. *Snepp*, 444 U.S. at 509 n.3 (emphasis added).

302. "The government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Id*; *see also id.* at 510-13 (detailing the nature of that trust relationship and consequences of its breach).

303. *See e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (stating that speech which might be protected in peacetime may be restricted if used in circumstances as to create a clear and present danger); Dennis v. United States, 341 U.S. 494 (1951) (upholding convictions of defendants for speech acts where harm was unlikely and not imminent).

304. For a discussion of this facet of *Snepp*, see *supra* text accompanying notes 228-40.

305. 418 U.S. 241 (1974).

306. *Id.* at 243.

307. *Id.* at 244.

308. *Id.* (citing FLA. STAT. § 104.38 (1973) (imposing a misdemeanor on a newspaper which refuses to publish free of charge any reply by an electoral candidate to attacks on her official record printed by a newspaper)).

309. *Id.* at 258.

310. *Id.*

The "right to reply" statute may be analogized to a contract in which the source conditions divulging information on a promise to publish the story (the reverse of the setting in *Cohen* and *Ruzicka*). Since the Court in *Tornillo* refused to enforce a legislative mandate to publish a story, it follows that a contract having the same effect would be similarly unenforceable. If a contract to publish offends the first amendment, it is a small step to the holding that a contract not to publish must similarly be vulnerable to attack.

The first amendment interests implicated in the reporter/source confidentiality context are actually more compelling than those present in many tort cases. As we have seen, the first amendment insulates media defendants from liability to public figures for the publication of untrue information where the mistake was merely an act of negligence.[311] Where the issue is the breach of a confidentiality agreement, media defendants are seeking to protect the publication of true and newsworthy information. The Supreme Court has recognized that publication of truthful information may not be prohibited consistent with the Constitution "absent a need to further a state interest of the highest order."[312]

A court performing this balancing test must consider the heightened significance of the first amendment. The Supreme Court has recognized on many occasions that the first amendment is fundamental to the structure of American society and its mode of governance.[313] In recognition of this, only a compelling interest of the highest order will be able to trump speech which is protected by the first amendment.[314]

Ultimately, there is no rationale consistent with the case law on the proper accomodation between the first amendment and tort law for finding that the state's interest in enforcing a confidentiality agreement outweighs the media's interest in publishing newsworthy information. The first amendment interests are as strong in the contract setting as in the tort setting, if not stronger.[315] The state's interest in enforcing contracts is a significant one, just as is the state's interest in enforcing defamation laws. But just as tort princi-

311. *See supra* text accompanying note 43.

312. Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979).

313. *See* Schneider v. State, 308 U.S. 147, 161 (1939) (The right to exercise the liberties safeguarded by the first amendment "lies at the foundation of free government by free men.").

314. As Chafee points out, where courts use a balancing test because speech threatens to interfere with other rights, speech "ought to weigh very heavy on the scale." Z. CHAFEE, *supra* note 280, at 35. It should be punished "only when the interest in public safety is really impaired." *Id.*

In *Marsh v. State of Alabama*, 326 U.S. 501 (1946), the Court was faced with an appeal of a conviction for trespass where the defendant had been distributing religious literature on the sidewalk of a company town. *Id.* at 502-04. This put the company's property interest in direct conflict with the defendant's first amendment interest in free speech. The Court noted, before performing a balancing test, that the first amendment rights occupy a "preferred position" in the constitutional hierarchy. *Id.* at 509. Even though the company owned the sidewalk in question, its property interest was not sufficient to justify such a restriction of people's fundamental liberties. *Id.*

315. See *supra* text accompanying notes 253-57, 311-12.

ples must be subordinate to the constitution's protection of the media, so must contract principles.

In sum, when balancing the sets of policies embodied by contract law and the first amendment, it appears certain that the first amendment should predominate. The four policies identified earlier as forming the foundation for the rules of contract law, recognition of the primacy of will, reliance, efficiency, and fairness, are certainly important policy objectives of the state. A burden on the first amendment, however, is justified only if necessary to achieve an overriding governmental interest.[316]

The policies underlying contract law cannot be characterized as overriding the freedom of the press to report truthful and newsworthy information, a right which lies at the core of our system of governance. The fallacy of the overarching primacy of contract is rooted in the natural law concept that the right to contract predated the Constitution.[317] This notion, of course, was adopted by the Court in *Lochner v. New York*.[318] Although *Lochner* has been rejected,[319] it is rooted in a fundamental understanding of the ordering of our political and social relationships which still exists. However, this notion of a fundamental right of contract has been discredited, whereas the first amendment right to publish truthful and newsworthy information is fundamental and remains vibrant. The opposing weights in this balance are not even close; the first amendment interest is substantially heavier.

D. Proposed Standard

As the previous section has shown, the appropriate balance between first amendment and contract interests should be achieved in a manner similar to that struck by the Supreme Court in cases involving a conflict between first amendment and tort interests.[320] A common law contract claim by a confidential source against a media defendant for breach of a promise of anonymity can be scrutinized under the same general rubric the Supreme Court has utilized in common law tort cases since *New York Times v. Sullivan*. The twin pillars of the Court's approach to limiting recovery in libel actions are the public/private plaintiff distinction,[321] and the requirement of actual malice where the plaintiff is a public official or figure.[322] Application of these princi-

316. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 582-83 (1983).

317. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 571 (2d ed. 1988) (observing that decisions in the *Lochner* era were animated by the notion of "natural rights of property and contract"); Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV 737, 804 (1989) (noting that "the rights protected by the *Lochner* doctrine were pre-political").

318. 198 U.S. 45 (1905).

319. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

320. *See supra* text accompanying notes 248-319.

321. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). *See supra* text accompanying notes 36-62.

322. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); St. Amant v. Thompson, 390 U.S. 727 (1968). *See supra* text accompanying notes 33-35, 42-63.

ples in the contract setting is both workable and adequately accounts for the competing interests. This section will discuss the application of these doctrines in the reporter-source confidentiality agreement context and suggest standards for a court to apply when confronted with such a case. These standards will then be applied to the *Cohen* and *Ruzicka* fact patterns to illustrate the differences between the proposed standard and the various courts' approaches to this type of case.

1. Public/Private Distinction

Under the constitutionalized standards, all plaintiffs, public or private, must show some degree of fault on the part of the media defendant to recover in a libel action.[323] Private individuals, however, may recover under a mere negligence standard,[324] whereas public officials or figures must meet the much higher burden of showing actual malice.[325] This public/private distinction is obviously not mentioned in the Constitution itself; rather, it is justified because public figures voluntarily assume the risk of close scrutiny and they have greater access to channels of communication to counteract false statements.[326]

The rationale for the public/private distinction is even more compelling in the contract setting than in the tort setting. The public figure anonymous source generally assumed that position in a voluntary manner and has greater access to other media outlets to give her "side of the story" in the event of a breach than does a private individual. The identity of a private figure anonymous source is arguably never newsworthy. Because the private individual has not previously thrust herself into the vortex of public discussion, her identity communicates little, if any, useful information to the general public. The identity of a public figure anonymous source, however, may often be newsworthy, as was true in the *Cohen* case.

Permitting a private individual damage action where a promise of confidentiality has allegedly been breached would not unduly burden first amendment concerns. In order to prevail in a contract action, a private figure anonymous source (like her public figure counterpart) would still have to prove: (1) by clear and convincing evidence[327] that a confidentiality agreement existed, (2) that the media entity breached this agreement by publishing the information in question, and (3) that damages flowed from the breach.[328] These rigorous requirements sufficiently protect first amendment values. As in the tort context, however, a more demanding standard is appropriate where the plaintiff is a public figure.

323. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

324. *Id.*

325. *See supra* text accompanying notes 33-35.

326. *See supra* text accompanying notes 39-41.

327. The rationale for demanding a heightened burden of proof here is well laid out in *Promises and the Press*, *supra* note 8, at 1579-80.

328. 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 1290, 1338 (3d ed. 1968).

2. Fraud: The Actual Malice of Contract

In tort suits brought by public figures, first amendment considerations are protected by the absolute malice standard which prohibits recovery except in cases where the plaintiff proves that the media defendant made the defamatory statement with knowledge of its falsity or in reckless disregard of its truth.[329] The direct importation of this standard into contract proves troublesome. First, the information in question, usually the identity of the source, will always be true unless the reporter is lying to the editor or the source has claimed to be someone she is not. Focusing on the truth of the published information would thus be futile. Second, in most circumstances an editor will know that she is breaking a promise which the reporter gave to a source, thus an inquiry into the editor's state of mind is basically redundant once the breach has been established.

One author has suggested that the test for actual malice in this setting should be whether or not the editor published the confidential information "without giving due deference to the source's rights."[330] The author further states that "[s]o long as a journalist knows why the source seeks confidentiality, and understands the likely harm to the source from the breach, a court is likely to impose liability for such a breach."[331] This standard is not sufficiently protective of the first amendment interests at stake. If a reporter agrees to anonymity, it is highly unlikely that she does not know (or could not reasonably surmise) why the source seeks this promise and what damage could flow from a breach. This test is too simple for a plaintiff to satisfy to adequately protect the competing interests.

The difficulty presented by this test is that it imports the doctrine of actual malice from tort too literally: in tort, actual malice means reckless disregard for the truth; therefore in contract, actual malice must mean reckless disregard for the agreement. Such careful parallelism breaks down because there is no workable standard for assessing reckless disregard of the contract. A contract doctrine which more closely resembles the tort doctrine of reckless disregard must be identified in order to properly transfer the absolute malice concept to a contract setting.

As noted, the standard which courts have used in defamation cases to measure reckless disregard so closely borders specific intent that the two are virtually indistinguishable.[332] The contract analog to the tort concept of intent to print a false statement would thus be intent to fraudulently induce another into an agreement, or misrepresentation.[333] Fraud closely harmonizes with actual malice because actual malice is, at core, a type of fraud, passing off as true that which the media defendant knows either definitively or with a

329. *See supra* text accompanying notes 33-35, 42-63.
330. *Promises and the Press, supra* note 8, at 1581.
331. *Id.* at 1582-83.
332. *See supra* note 45 and accompanying text.
333. 12 S. WILLISTON, *supra* note 328, at § 1487.

high degree of probability is false. Therefore, when a reporter induces a public figure source to reveal information with a promise of anonymity which she has no intent of honoring, she has met the contract analog of actual malice.

3. Application of the Proposed Standard

One of the advantages of the proposed standard is that it establishes a series of bright line rules, thereby giving lower courts adequate guidance, while also taking account of the valid contract and first amendment interests at stake. This is illustrated by applying the standard to the facts of the *Cohen* and *Ruzicka* cases.

The Minnesota Supreme Court in *Cohen* reached the proper result under the proposed standard, but for the wrong reasons. Contrary to that court's manipulation of contract doctrine when it stated that no agreement existed,[334] this standard recognizes that the exchange of promise for promise in *Cohen* established a contract. Nonetheless, a court still would not enforce this contract under the proposed standard. Because Cohen, a prominent political figure in the state, would qualify as a public figure for constitutional purposes,[335] he would have to show fraud to obtain damages for the breach. The trial, however, established that the reporters did not attempt to induce Cohen fraudulently to divulge the information. They intended to honor their respective promises.[336] The editorial boards' decisions to do otherwise does not negative the promisees' intent. Stated differently, the doctrine of *respondeat superior* cannot be invoked to transform the reporters' good faith at the time the agreement was made into bad faith; it is the initial good faith that is the focus of the standard.[337] Because Cohen was not fraudulently induced to reveal his information, the contract analog of actual malice has not been established. Since this essential element is lacking, Cohen's claim should be dismissed.

Since Ruzicka is a private figure, such thorny actual malice questions are not at issue. Under the constitutionalized standards, however, she must establish by clear and convincing evidence that a contract was created and breached. This is the precise standard which the District Court stated that Ruzicka failed to meet.[338] The court, therefore, correctly dismissed the claim.

334. Cohen v. Cowles Media Co., 457 N.W.2d 199, 203 (Minn. 1990).

335. *See supra* text accompanying notes 38-39.

336. Cohen v. Cowles Media Co., 445 N.W.2d 248, 252-53 (Minn. Ct. App. 1989).

337. A misrepresentation must misrepresent a present or past fact. Simply because a party in the future fails to perform does not mean that there was fraud at the time the contract was made. J. JACKSON & L. BOLLINGER, CONTRACT LAW IN MODERN SOCIETY 464 (1980).

338. Ruzicka v. Conde Nast Publications, Inc., 733 F. Supp. 1289, 1300-01 (D. Minn. 1990).

IV.
POLICY IMPLICATIONS AND PRACTICAL RAMIFICATIONS OF THE PROPOSED RULE

This Note proposes that courts import constitutionally based restrictions on libel actions from tort law when asked to enforce agreements between reporters and their sources regarding the non-publication of truthful and newsworthy information. The proposed rule could be attacked on a number of grounds. One argument is that the proposed rule runs contrary to the policies underlying other court decisions which protect the qualified right of journalists not to divulge the identity of confidential sources. Another possible attack on the rule is that, as a practical matter, it gives far too much power and discretion to the press and that a different rule is needed as a check against arguably unethical or unfair tactics which could be utilized with impunity under the proposed rule. This Section will address each of these criticisms. It concludes that the proposed rule in fact protects the same interests as the other confidential source cases and that it does not give the press undue power in the reporter/source relationship.

A. Branzburg v. Hayes *and the Protection of Confidential Sources*

The issue addressed by this Note is the mirror image of that normally encountered in cases involving the press and their confidential sources. Usually such cases arise when a court subpoenas a journalist and orders her to divulge the identity of a confidential source, notes from her conversations with this source, or other information obtained through a promise of confidentiality or selective disclosure.[339]

Advocates for the press have long argued that such communication should be privileged and, thus, beyond the subpoena power.[340] The Supreme Court, however, stated in *Branzburg v. Hayes*[341] that journalists do not have an absolute first amendment right to withhold the identity of confidential sources from a grand jury. Justice White, writing for a four-person plurality, asserted that "we perceive no basis for holding that the public interest in law enforcement . . . is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters . . . respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."[342]

339. *See generally* M. VAN GERPEN, PRIVILEGED COMMUNICATION AND THE PRESS 6-28 (1979) (documenting journalists' attempts to protect confidential sources and information from legislative and judicial subpoena).

340. One of the first advocates of press freedom in the United States, John Peter Zenger is believed to also be the first journalist to refuse an official order to divulge his confidential source. *Id.* at 5-6; *see also* Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970) (arguing for constitutional protection of the reporter/source relationship).

341. 408 U.S. 665 (1972).

342. *Id.* at 690-91.

Justice Powell supplied the fifth vote against the journalists' claim to constitutional protection from grand jury subpoenas. In a brief concurring opinion, Powell stressed the "limited nature" of the Court's holding, stating that "[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."[343] Powell suggested a "case-by-case" approach to appropriately balance the press' first amendment interests against the state's interest in compelling testimony relating to criminal conduct.[344]

Most reporters today are protected from invasive subpoenas. There have been numerous state supreme court decisions recognizing a qualified privilege against disclosure, some of which used Powell's opinion as a starting point for their analysis.[345] In addition, of the eight circuits which have considered the issue, only the Sixth Circuit has failed to accept such a qualified privilege.[346] Reporters are also protected in twenty-eight states by so-called "shield laws" which legislatively create a privilege, sometimes even an absolute one.[347]

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343. *Id.* at 709 (Powell, J., concurring).

344. *Id.* at 710.

345. *See, e.g.*, Mitchell v. Marin County Super. Ct., 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984) (recognizing qualified privilege); Morgan v. State, 337 So. 2d 951 (Fla. 1976) (accepting Powell's position that privilege should be recognized in some instances); O'Neill v. Oakgrove Constr., 71 N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S.2d 1 (1988) (affirming broad reporter's privilege); State v. St. Peter, 132 Vt. 226, 215 A.2d 254 (1974) (recognizing qualified privilege); Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974) (recognizing qualified privilege). *But see* Lexington Herald-Leader v. Beard, 11 Media L. Rep. (BNA) 1376 (Ky. Sup. Ct. 1984) (rejecting reporter's claim of privilege under the first amendment).

346. United States v. LaRouche, 841 F.2d 1176 (1st Cir. 1988) (recognizing a qualified privilege); McGraw Hill v. Arizona, 680 F.2d 5 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982) (extending the qualified privilege which the court had previously recognized); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) (recognizing a qualified privilege); United States v. Steelhammer, 561 F.2d 539 (4th Cir. 1977) (recognizing a qualified privilege); Miller v. Transamerican Press, 621 F.2d 721 (5th Cir.) (1980), *cert. denied*, 450 U.S. 1041 (1981) (recognizing a qualified privilege); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) (recognizing a qualified privilege); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974) (rejecting claim of absolute privilege, but applying a balancing test in determining whether to order disclosure). *Contra* Storer Communications v. Giovan, 13 Media L. Rep. 2049 (6th Cir. 1987) (rejecting the availabilty of a qualified privilege).

347. ALA. CODE § 12-21-142 (Cumm. Supp. 1978); ALASKA STAT. §§ 09.25.150-.220 (Cumm. Supp. 1978); ARIZ. REV. STAT. ANN. §§ 12-2214, 12-2237 (1982 & Supp.); ARK. STAT. ANN. § 43-917 (1977); CAL. EVID. CODE § 1070 (Deering Supp. 1978); COLO. REV. STAT. §§ 13-90-119, 27-72.5-101 (1990); DEL. CODE ANN. tit. 10, §§ 4320-26 (1974); GA. CODE ANN. § 24-9-30 (1990); ILL. ANN. STAT. ch. 110, para. 8-901—909 (Smith-Hurd 1983); IND. CODE § 34-3-5-1 (Supp. 1978); KY. REV. STAT. ANN. § 421.100 (Baldwin 1969); LA. REV. STAT. ANN. §§ 45:1451-54 (West Supp. 1978); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (Cumm. Supp. 1978); MICH. COMP. LAWS § 767.5a (1967); MINN. STAT. ANN. §§ 595.021-.025 (West Supp. 1978); MONT. CODE ANN. §§ 26-1-901—903 (1979); NEB. REV. STAT. §§ 20-144—147 (1977); NEV. REV. STAT. § 49.275 (1977); N.J. STAT. ANN. §§ 2A:84A-21, 21.1-21.8, 21a, 29 (West 1976, West Supp. 1977 & 1980 session laws); N.M. STAT. ANN. § 38-6-7 (1978 & Supp. 1982); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1981); N.D. CENT. CODE § 31-01-06.2 (1978); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (Baldwin 1954 & Supp. 1977); OKLA. STAT. ANN. tit. 12, § 2506 (West Supp. 1978); OR. REV. STAT. §§ 44.510-.540

Is it inconsistent as a matter of constitutional policy to protect confidential sources and information from subpoena and yet allow the press to break a promise of confidentiality whenever it chooses? A member of the Minnesota Supreme Court who dissented in the *Cohen* decision believed so. Justice Kelley asserted that the state's shield law "when combined with [the *Cohen*] decision, . . . leaves the public's right to know and protection of confidential sources, not with the peoples' representatives — the legislature and the courts — but rather with the executives of the commercial media."[348]

Ironically, Justice Kelley's analysis is correct, but his conclusion does not flow from his comment on the decision. *Cohen* and the state shield law, when considered together, do indeed leave some of the most significant editorial decisions in the hands of the press rather than the government. Kelley, however, does not identify why that is a constitutionally unsound state of affairs. The Supreme Court has stated on numerous occasions that significant editorial decisions are best left in the hands of the press and that editorial discretion is protected by the first amendment.[349] That *Cohen* leaves these decisions to the press and not to the government is a positive attribute, not a shortcoming, of the decision.[350]

As *Branzburg* and its progeny show, journalists have sufficient incentive to preserve the confidentiality of their sources — the desire to get information in the competitive marketplace. Yet it cannot be true, as the lower court in *Cohen* found, and Justice Kelley implicitly agreed, that protecting confidential sources rises to the level of a compelling public interest and must be done in all circumstances. The protection of media sources is a means, not an end. The constitutional policy is not to protect confidentiality per se, but to protect the news gathering process from governmental interference.

B. Journalists, Confidential Sources, and the Balance of Power

Confidential sources play an integral role in the news reporting process.

(1977); R.I. GEN. LAWS §§ 9-19.1-1—3 (Supp. 1977); TENN. CODE ANN. § 24-1-208 (Supp. 1977).

348. Cohen v. Cowles Media Co., 457 N.W.2d 199, 207 n.1 (Minn. 1990) (Kelley, J., dissenting).

349. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974); Florida Star v. B.J.F., 109 S. Ct. 2603, 2609 (1989) (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)).

350. Kelley also predicts that *Cohen* will inhibit rather than promote the objectives of the first amendment by leading to a "drying up" of potential sources. *Cohen*, 457 N.W.2d at 207 (Kelley, J. dissenting). In the overwhelming majority of circumstances, however, editors will choose not to name the source so as to protect the publisher's reputation. *See infra* text accompanying notes 362-66. In the unusual sitiuation, though, where editors feel that the identity of the source is a central facet of the news story, they should be allowed to bring this information to the public's attention without fear of an award of damages. A contrary rule would not allow the press "the 'breathing space' that they 'need . . . to survive.' " New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). The Constitution protects news gathering and publication through whatever legal means the publisher chooses to utilize. *See supra* note 349. The first amendment does not protect confidential sources for their own sake, only as a means to the end of editorial discretion.

The leading study on the use of confidential sources found that the average newsperson relies on "regular" confidential sources in almost one-quarter of her stories and first-time confidential sources in over twelve percent of her stories.[351] A more recent follow-up study found that reporters continue to rely heavily upon information passed along by confidential sources in "uncovering, developing, and confirming news stories."[352] The most celebrated press event of this century, the Watergate cover-up and expose by *The Washington Post*'s Bob Woodward and Carl Bernstein, would in all likelihood not have occurred without the utilization of a confidential source.[353]

The reporter-confidential source relationship is complex at times and can be both adversarial and incestuous.[354] Examination of the two most simplistic models of this relationship, which will be called the "dominant reporter" and the "dominant source" models, underscores why it is not possible to conclude which of these two parties has greater power in the relationship.

Under the dominant reporter model, it is the reporter who makes all of the significant decisions in the relationship. It is the reporter who holds the power position. She decides whether to agree to confidentiality at the outset, whether to use the information once it has been furnished to her, and whether to honor her promise of confidentiality.[355]

The dominant source model posits that power in this setting arises out of access to information and the ability to manipulate that information. Thus the source holds the ultimate position of power. It is the source who chooses whether to reveal the information, how much information is to be passed along, and how the information is to be framed.[356] Both of these models have

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351. Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 246-47 (1971).

352. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 77 (1985); *see also* H. CULBERTSON, VEILED NEWS SOURCES — WHO AND WHAT ARE THEY? 8-9 (1975) (54% of the "straight news" stories in *The Washington Post* and *The New York Times* contain at least one unnamed personal source).

353. J. HULTENG, THE MESSENGER'S MOTIVES 89-90 (1985).

354. The characteristics are both apparent in the example of Oliver North and *Newsweek* which is discussed *infra* text accompanying notes 358-59.

355. Essayist Janet Malcolm caused a stir in the journalistic community by taking this position in a recent series of articles which was subsequently adapted into book form. Malcolm, *The Journalist and the Murderer*, The New Yorker, March 13, 1989, at 38, and March 20, 1989, at 49; J. MALCOLM, *supra* note 161. The most contentious of Malcolm's assertions was that "[e]very journalist . . . is a kind of confidence man, preying on people's vanity, ignorance, or loneliness, gaining their trust and betraying them without remorse." *Id.* at 3. Malcolm's critique generated a large volume of responses in the media. *See Journalists - And Con Artists*, N.Y. Times, March 19, 1989, § 4, at 26, col. 1 (editorial); Gottlieb, *Dangerous Liaisons: Journalists and their sources*, COLUM. JOURNALISM REV., July/Aug. 1989, at 21. Ironically, she is the defendant in a libel suit before the Supreme Court in the 1990 term involving journalistic ethics and the reporter/source relationship. Masson v. New Yorker, Inc., 686 F. Supp. 1396 (N.D. Cal. 1987), *aff'd*, 881 F.2d 1452 (9th Cir. 1989), *cert. granted*, 111 S. Ct. 39 (1990).

356. As the Pulitzer Prize winning writer J. Anthony Lukas stated, "[i]t is . . . more likely to be the man in power who is manipulating the reporter" than vice versa. Gottlieb, *supra* note 355, at 23. Nonfiction author Joseph Wambaugh expressed similar sentiments. *Id.* at 24-25; *see*

flaws. Both players wield significant power in the relationship and have substantial opportunity to manipulate the other party. For example, an unscrupulous reporter could promise her source confidentiality knowing all the while that once she gets the information, she will submit a story which identifies and scorns the source. A source could attempt to manipulate the media by passing along false information with the knowledge that the reporter might feel bound by her promise of anonymity to withold the origins of the story.[357] Two recent examples highlight the essential problems of oversimplifying the power relationship at work in the reporter/source setting.

Lieutenant Colonel Oliver North was widely known among the Washington press corps as a useful anonymous source. During the Iran-Contra hearings, however, North testified that "leaks" had compromised United States intelligence activities during the *Achille Lauro* incident. North failed to mention that he had been the source of the leaks in question. *Newsweek* broke its promise of anonymity to reveal North's duplicity.[358] Some commentators have speculated that North's readiness to talk with reporters about a wide range of sensitive matters gave him a degree of immunity from probing questions and investigation which might have led to earlier exposure of the Iran-Contra fiasco.[359]

During the 1980s, Bob Woodward of *The Washington Post* wrote many exclusive articles detailing United States intelligence operations. He often attributed the information to "senior administration officials," a common method of masking a confidential source. Woodward's book, *Veil: The Secret Wars of the CIA, 1981-1987* revealed that CIA Director William Casey was a significant source for much of this information. It has been suggested that once Casey became a source for Woodward, "the tone of Woodward's CIA stories was thereafter transformed from the doubting to the celebratory."[360]

These examples highlight the fact that the reporter/source relationship is rife with opportunity for manipulation on both sides. The relationship of con-

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also C. PRESS & K. VERBURG, AMERICAN POLITICIANS AND JOURNALISTS 66 (1988) ("[Sources] can . . . pick and choose whom to favor, playing some journalist off against others."); J. HULTENG, *supra* note 353, at 88-89 (setting forth anecdotes where sources were able "to manipulate journalists and news institutions for their own ends"); S. KLAIDMAN & T. BEAUCHAMP, *supra* note 291, at 180 (stating that "[t]he national media . . . are targets of manipulation by every party to every issue, the objects of guile and deception, the victims of conflicting pressures, . . . both the collaborators and adversaries of government").

357. Jimmy Carter's Press Secretary, Jody Powell, attempted such manipulation when he passed false information about Senator Charles Percy along to a reporter in exchange for a promise of confidentiality. The reporter, upon discovering that the information was untrue, broke his promise to Powell and published an article about Powell's attempt to smear Percy. *Promises and the Press, supra* note 8, at 1566 n.76 (citing Smyser, *There are Sources and Then There are "Sourcerers,"* 5 SOC. RESP.: JOURNALISM, L., MED. 13, 17-18 (1979)).

358. Langley & Levine, *supra* note 270, at 21.

359. Hitt, *Nothing New - A Founding Father Used the Strategy*, NIEMAN REP., Spring 1988, at 28, 29.

360. Kempton, *Casey and Woodward: Who Used Whom?*, N. Y. REV. OF BOOKS, Nov. 5, 1987, at 61.

fidentiality between a reporter and a source is fundamentally different from those found in other professional settings such as between doctor and patient, lawyer and client, or priest and penitent.[361] Confidentiality is a necessary facet of these latter relationships in that it fosters the atmosphere of trust needed to guarantee the full benefit of the professional's services and to protect the privacy of the individual being served by the relationship. The reporter/source relationship is an altogether different animal. There is often little trust between the parties, only mutual convenience. In addition, the goals of the parties may often directly conflict. The reporter may try to get the source to reveal more than she wants to, while the source tries to shape the reporter's story to achieve a particular end. Neither party is primarily concerned with the other party's interests: the source is concerned with revealing the information for her ideological or personal gain and the reporter is concerned with getting the best story she can.

A rule which states that courts will not enforce certain reporter/source confidentiality agreements will not, as a practical matter, give too much discretion to the press. The reporter/source relationship has its own internal equilibrium. Several extra-judicial factors would normally protect against press disclosures of confidential sources. Reporters cultivate sources and attempt to curry favor with them in order to secure "scoops."[362] If a reporter were to name a confidential source, she, and her paper, could become blackballed and find sources generally uncooperative. Media outlets, therefore, have substantial incentive not to name anonymous sources.

At the same time, sources have numerous reasons to continue utilizing press contacts. Giving information to a reporter on "background"[363] or "leaking"[364] it to her can be an effective means of shaping public opinion.[365] In addition, some sources try to manipulate the timing or tone of a story through anonymous communication with a reporter.[366]

361. *See supra* text accompanying note 123; *but see* T. CARTER, M. FRANKLIN & J. WRIGHT, THE FIRST AMENDMENT AND THE FOURTH ESTATE 377 (3d ed. 1985) (suggesting the analogy between the doctor/patient, lawyer/client, priest/penitent, and reporter/source relationships).

362. " 'Scoop' is an old-fashioned word for beating the competition." H. GOODWIN, GROPING FOR ETHICS IN JOURNALISM 286 (1983). Sources often have a monopoly on the raw data of reporting: information. C. PRESS & K. VERBURG, *supra* note 356, at 66. If a source likes a reporter, she can easily give the reporter information not available to others in the media, thereby securing that reporter a scoop. H. GOODWIN, *supra*, at 114-17; E. LAMBERTH, COMMITTED JOURNALISM: AN ETHIC FOR THE PROFESSION 110-15 (1986).

363. Giving information on background describes the arrangement when a source briefs a reporter on some subject of public interest on a not-for-attribution basis. H. GOODWIN, *supra* note 362, at 127.

364. Leaking occurs when information is given to a journalist that is not available to her through ordinary channels. *Id.* at 127-28.

365. D. NIMMO & M. MANSFIELD, GOVERNMENT AND THE NEWS MEDIA: COMPARATIVE DIMENSIONS 203 (1982) ("[P]ublic officials often use the media . . . to generate support among citizens or specific publics for given program ideas or proposals.").

366. H. KRIEGHBAUM, PRESSURES ON THE PRESS 85 (1973) ("The very way a news source releases information may fix what impact it will have on the public.").

The press needs its sources, and sources need the press. The system is self-regulating without substantial judicial intervention. Enforcing a confidentiality agreement could shift the equilibrium in favor of the source by allowing her recourse against the press but witholding from the press any recourse against her for passing along incomplete, misleading, or downright false information. Non-enforcement would not leave a vacuum; the self-regulating system that currently exists effectively balances the competing interests.

CONCLUSION

The few courts that have considered the issue of the enforceability of reporters' promises thus far have been unwilling to recognize the analogy between a libel action and a claim for breach of contract where a media defendant breaches a promise to a source. Without constitutional protections, however, the effect of both of these causes of action would be similar. The press could be held liable for damages caused by the publication of truthful, newsworthy information. Since *New York Times v. Sullivan*, the Supreme Court has recognized that significant first amendment interests are implicated by such libel suits and has protected the media through both the public/private plaintiff distinction and the actual malice requirement. This type of protection is as appropriate in the contract setting as it is when the suit is brought under a tort theory.

The Court should adopt the standard proposed by this Note for determining whether a media defendant should be held liable when it is sued by a source for breach of an agreement. Private figure sources would be able to recover only if the agreement is established by a higher standard than that normally applied in contract actions. Public figure sources would carry both that burden and the burden of proving the contract analog of actual malice: fraud. It is appropriate to require standards higher than those utilized in garden variety contract suits because of the significant first amendment interests implicated in damage actions arising out of the publication of truthful, newsworthy information.