

CONFIDENTIALITY AGREEMENTS BETWEEN THE
PRESS AND ITS SOURCES: *COHEN v.*
COWLES MEDIA CO., 111 S. Ct. 2513
(1991)

The First Amendment to the Constitution¹ protects the press against state common law causes of action² that directly burden the publication of truthful information.³ The United States Supreme Court supports an unfettered press⁴ and criticizes any state-imposed sanctions on the exercise of free speech and press rights.⁵ However, this constitutional protection is not absolute.⁶ The First Amendment does not shield the press from laws of general application⁷ even if they burden

1. The First Amendment provides that: "Congress shall make no law abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." U.S. CONST. amend. I.

2. A state private common law cause of action is defined as a body of law that is developed through judicial decisions, as distinguished from legislative enactments. BLACK'S LAW DICTIONARY 276 (6th ed. 1990).

3. It is unlawful for the state to punish a newspaper that legally obtains and publishes truthful information, "absent a need to further a state interest of the highest order." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). A basic purpose of the First Amendment is to limit a state's power to penalize the press for printing the truth. See Michael Dicke, Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553, 1570 (1989).

4. Dicke, *supra* note 3, at 1560-62.

5. *Id.* at 1562. See *infra* note 26 and accompanying text for a discussion of the strict balancing test used by the Supreme Court to restrict limitations on the press' First Amendment rights.

6. Dicke, *supra* note 3, at 1557. The Court's consistent recognition of tort actions against the press indicates that there is no absolute privilege to publish all true information. Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609, 656-57 (1991).

7. A law of general application is one that does not single out or target the press, but rather is applicable to all state citizens' daily transactions. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2515 (1991). Traditionally, the press has been subject to laws of general application, including breach of privacy, trespass and unfair competition as well as federal antitrust and labor laws. See, e.g., *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) (holding that petitioner's business was not immune from regulation under

speech incidentally.⁸ In *Cohen v. Cowles Media Co.*,⁹ the United States Supreme Court held that the First Amendment does not bar a promissory estoppel claim against a newspaper that breached its promise of confidentiality to an informant, even if liability would constrain the newspaper's ability to gather and report the news.¹⁰

In *Cohen v. Cowles Media Co.*, petitioner alleged that respondent newspapers¹¹ breached their confidentiality agreement, causing him to

§ 7 of the National Labor Relations Act simply because it was an agency of the press). See also *Levi*, *supra* note 6, at 657 n.163.

8. *Cohen*, 111 S. Ct. at 2518. For a well-established line of cases holding that general applicability laws do not violate the First Amendment, see *infra* note 28. See also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578-79 (1977) (holding that the press may not publish a performer's entire act without his consent unless state law permits the press to do so under such circumstances); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969) (stating that the First Amendment does not bar the press from violating antitrust laws); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-94 (1946) (stating that the Fair Labor Standards Act, as applied to the business of distributing and publishing newspapers, does not violate First Amendment); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (noting that the First Amendment does not preclude application of antitrust laws).

9. 111 S. Ct. 2513 (1991).

10. *Id.* at 2519. The Court determined that promissory estoppel is a law of general application, rather than one aimed at the contents of a press publication. *Id.* at 2518-19. As of 1990, only six other cases involving breach of reporter's confidentiality agreements had been reported. See *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1298 (D. Minn. 1990) (stating that a confidentiality agreement between reporter and source had to specify the unpublishable information to constitute a waiver of the reporter's First Amendment rights), *aff'd in part*, 939 F.2d 578 (8th Cir. 1991); *Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282, 1292 (N.D. Ill. 1986) (holding that the media breached a contract with a federal penitentiary not to film inmates without their consent); *Cullen v. Grove Press, Inc.*, 276 F. Supp. 727, 729 (S.D.N.Y. 1967) (ruling in favor of film maker who filmed conditions at a state correctional institution because the plaintiff's claim of invasion of privacy was inconsistent with defendant's First Amendment rights); *Doe v. American Broadcasting Cos.*, 543 N.Y.S.2d 455, 455-456 (N.Y. App. Div.) (denying rape victim's claim of negligent and intentional infliction of emotional distress arising from a television interview that assured anonymity, yet resulted in recognition), *appeal dismissed*, 549 N.E.2d 480 (1989); *Virelli v. Goodson-Todman Enterprises*, 536 N.Y.S.2d 571, 575 (N.Y. App. Div. 1989) (noting that despite the reporter breaking a promise of anonymity to his source, the media is not liable for ordinary negligence when reporting a matter of public concern); *Bindrim v. Mitchell*, 155 Cal. Rptr. 29 (Cal. Ct. App.) (holding that a contract between a therapist and patient preventing the patient from writing a story about her therapy was not enforceable), *cert. denied*, 444 U.S. 984 (1979).

11. The respondents are the publishers, not the individual reporters, of the *St. Paul Pioneer Press Dispatch* and the *Minneapolis Star and Tribune*, both Minnesota corporations. *Cohen*, 111 S. Ct. at 2516.

lose his job.¹² Relying on a promise of anonymity,¹³ Cohen gave documents relating to one of the gubernatorial candidates in an upcoming election to reporters from two newspapers.¹⁴ Subsequently, respondents broke their promise by publicly identifying Cohen as the anonymous source.¹⁵ Cohen sued both papers for fraudulent misrepresentation and breach of contract.¹⁶ The trial court ruled that although petitioner alleged sufficient state action to implicate the First Amendment, the Amendment did not bar his claims¹⁷ and the jury awarded Cohen both compensatory and punitive damages.¹⁸ The Minnesota Court of Appeals affirmed in part and reversed in part, concluding that petitioner failed to establish a misrepresentation claim.¹⁹ On appeal, a divided Minnesota Supreme Court reversed the lower court's judgement in favor of Cohen, holding that the parties had not established a legal contract.²⁰ The court further held that the First Amend-

12. Petitioner Dan Cohen was the director of public relations for the advertising agency representing the Independent-Republican gubernatorial candidate in the 1982 Minnesota election. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 252 (Minn. Ct. App. 1989). The advertising agency fired the petitioner the same day respondents published Cohen's name as a source for a story concerning the candidate. *Id.* at 253.

13. Cohen made it explicitly clear to the reporters that he would provide the information only on the condition that his identity remain anonymous. *Id.* at 252. Both reporters agreed to fulfill this promise. *Id.*

14. *Id.* One week before the election, Cohen obtained two public court records concerning Marlene Johnson, the Democratic candidate for Lieutenant Governor. *Id.* The records indicated that Johnson had been charged in 1969 for unlawful assembly and convicted in 1970 for petit theft. Both counts were eventually dismissed. *Id.*

15. *Id.* at 253.

16. 445 N.W.2d at 254.

17. *Id.* The Supreme Court agreed with the trial court that the application of state rules of law to restrict First Amendment freedom constitutes "state action" under the Fourteenth Amendment. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2517 (1991) (citing *New York Times, Co. v. Sullivan*, 376 U.S. 254, 265 (1964)). See also *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) (noting that action of state courts and judicial officers in their official capacities is state action within the meaning of the Fourteenth Amendment).

18. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 254 (Minn. Ct. App. 1989). The jury granted Cohen \$200,000 in compensatory damages and \$500,000 in punitive damages. *Id.*

19. *Id.* at 260, 262. Without a misrepresentation claim, the court could not justify awarding Cohen punitive damages. *Id.* at 260.

20. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990). The court pointed out that although the press had an ethical duty to keep its confidentiality agreement, no legal duty existed. *Id.*

ment barred Cohen from maintaining a promissory estoppel claim.²¹ The United States Supreme Court reversed, declaring that Cohen could maintain a cause of action under Minnesota law on a promissory estoppel theory.²²

Freedom of the press is a fundamental and compelling national interest.²³ State laws which effectively control the content of the media's publications have been overwhelmingly struck down.²⁴ Absent some

21. *Id.* at 203-05. The Minnesota Supreme Court considered whether the petitioner could maintain a promissory estoppel action under general Minnesota law. *Id.*

The three elements of promissory estoppel are: (1) an unambiguous promise; (2) an expectation of induced action or reliance by the promisee; and (3) injustice that can only be avoided by enforcing the promise. *Id.* at 203-04. The court held that although this case satisfied the first two criteria, it was unwilling to conclude that injustice could be avoided only by enforcing the promise. *Id.* at 204. By implementing a balancing test the Court found that the constitutional rights of the free press outweighed the common law interest in protecting a promise of confidentiality. *Id.* at 205. Thus, the court concluded that a promissory estoppel theory would violate the respondent's First Amendment rights. *Id.*

22. *Cohen*, 111 S. Ct. at 2518-20. The Court concluded that the First Amendment does not confer a constitutional right on the press to disregard promises that would otherwise be enforced under state law. *Id.* at 2519.

23. Kurt Hirsch, Note, *Throwing the Book at Revelations: First Amendment Implications of Enforcing Reporters' Promises*, 18 N.Y.U. REV. L. & SOC. CHANGE, 161, 171 (1991).

24. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In *Sullivan*, the Supreme Court "constitutionalized" the law of defamation in order to protect the press' First Amendment rights. *Id.* at 283. *Sullivan* introduced the actual malice standard to libel law. Under the standard, persons requesting damages for libel must prove that the statement was made with actual malice, that is, with knowledge that the statement was false or made with reckless disregard of its truthfulness. *Id.* at 279-80. This landmark case made a drastic impact on tort remedies and expanded First Amendment protections. See Hirsch, *supra* note 23, at 166-67. The case prompted further inquiry by the Court into the category of plaintiffs that are subject to the actual malice standard and the type of showing that is necessary to satisfy the new test. *Id.*

Additionally, the Constitution delimits a state's power to infringe upon the media's "breathing space." *Sullivan*, 376 U.S. at 271-72. The Court explained in a subsequent case that:

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. To that end this Court has extended a measure of strategic protection to defamatory falsehood.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974)(citations omitted). See also *Dicke*, *supra* note 3, at 1560 (noting the Supreme Court's recent sensitivity to "the chilling effect private common-law causes of action can have on the exercise of free speech and press rights").

higher state interest, a common law cause of action regulating the content of speech cannot predominate²⁵ over First Amendment freedoms.²⁶ However, the First Amendment does not always bar state restraints on the media's conduct.²⁷ The press should not be granted special immunity from state laws of general application.²⁸ Because such laws of generality do not single out the press, they do not offend the First Amendment.²⁹

25. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) (holding that absent a legitimate and compelling state interest, the constitutional rights of the press predominate). *See also*, Sally A. Specht, Comment, *The Wavering, Unpredictable Line Between "Speech" and Conduct: The Fate of Expressive Conduct After Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir. 1990), 40 WASH. U. J. URB. & CONTEMP. L., 173, 176 (1991) ("Absent a compelling governmental interest, freedom of expression must predominate.").

26. The Supreme Court has adopted a "compelling state interest" balancing test to determine whether state action that has adverse effects on speech violates the First Amendment. *See, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 536-39 (1989) (noting that the Florida statute which makes it unlawful to print or publish the name of a rape victim violates press' First Amendment rights); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1988) (a burden on First Amendment rights "cannot stand unless the burden is necessary to achieve an overriding governmental interest") *cited with approval in*, *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 256 (Minn. Ct. App. 1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979) (holding that the state may not punish the publication of lawfully obtained information except when it is necessary to further a substantial state interest); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978) (stating that the importance of reporting governmental affairs outweighs a state statute imposing criminal sanctions for breaching confidentiality of proceedings); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (holding that state cannot impose sanctions on press for publishing rape victim's name when information is open to public inspection).

The Supreme Court has also held that the First Amendment imposes limitations on other common law causes of action, such as defamation and intentional infliction of emotional distress. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (stating that freedom to publish advertisement parody trumps public figure's interest in reputation when false statement is made without actual malice or reckless disregard); *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-85 (1964) (balancing the interests protected by defamation law against public interest served by a free press); *see also Dicke, supra* note 3, at 1560-62 for further discussion of the Court's focus on the chilling effect on free speech resulting from remedies for false statements.

27. This is true especially when a newspaper voluntarily assumes the restraint or unlawfully obtains the information. *Cohen*, 457 N.W.2d at 204 n.6.

28. *Cohen*, 111 S. Ct. at 2518-19. *See Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972) (First Amendment does not relieve the press from the obligations that all citizens have to respond to a grand jury subpoena); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.").

29. *Dicke, supra* note 3, at 1560.

The Supreme Court first became sensitive to the tension between common law causes of action and the exercise of free speech and press rights in *New York Times Co. v. Sullivan*.³⁰ In *Sullivan*, the Court held that state enforcement of traditional strict liability defamation laws violated the First Amendment rights of the press.³¹ The court strengthened the defamation standard by requiring the plaintiff to prove that the statement was made with actual malice.³² By constitutionalizing defamation law,³³ the Court hoped to give the press the proper "breathing space"³⁴ to investigate news without fear of reprisal from libel suits.³⁵ The Court formulated a balancing test and held that the public interest served by a free press outweighed the interests protected by the law of defamation.³⁶

The Supreme Court applied the *Sullivan* malice standard in *Hustler Magazine v. Falwell*³⁷ by limiting actions for intentional infliction of emotional distress.³⁸ The Court in *Falwell* ruled against a public figure defamed in an advertising parody, holding that damages were unwarranted where the false statement was made without actual malice.³⁹ The Court reasoned that, as long as the speech can be interpreted as

30. 376 U.S. 254 (1964).

31. *Id.* at 283. Under the common law of defamation, one who published false and defamatory material was strictly liable for damages, even without proof of actual harm. RESTATEMENT (SECOND) OF TORTS § 559 (1938).

32. 376 U.S. at 279-80. See *supra* note 24 for a discussion of the new standard.

33. See *supra* note 24 for a discussion of constitutionalizing defamation law.

34. 376 U.S. at 271-72.

35. *Id.* See also Hirsch, *supra* note 23, at 167 (noting that the Supreme Court hoped to give the press space to investigate and report without fear of large damage awards).

36. 376 U.S. at 284-85. Traditional strict liability standard may possibly lead to media self-censorship. See Dicke, *supra* note 3, at 1576; see also Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1516 n.62 (1974) (explaining that a fear of sanctions would discourage the press from acting on constitutional guarantees).

37. 485 U.S. 46 (1988).

38. *Id.* at 56. To recover damages for intentional infliction of emotional distress arising from advertisement parody, the plaintiff had to meet the *Sullivan* actual malice standard. *Id.*

39. 485 U.S. at 56. Respondent, a well-known and outspoken minister, was portrayed in a magazine advertisement as a drunk and unscrupulous individual. *Id.* at 48. Respondent filed a diversity action against the magazine and publisher to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. *Id.* at 48-49. The Supreme Court reversed the lower court's judgment for respondent. *Id.* at 57.

stating actual facts without malice, the state's interest in protecting its citizens from emotional distress does not outweigh the critical First Amendment protection to speech.⁴⁰ Without meeting this requirement, the Court could not justify stifling the free flow of information on matters of public interest and concern.⁴¹

The Supreme Court continues to apply the balancing test enunciated in *Sullivan*.⁴² For example, in *Smith v. Daily Mail Publishing Co.*,⁴³ respondent newspapers revealed the name of a juvenile who allegedly killed another youth.⁴⁴ Publication of a juvenile delinquent's name without written approval of the juvenile court violated state law and triggered punitive action against the news media.⁴⁵ The Court invalidated the West Virginia statute because it punished the press for publishing lawfully obtained, truthful information.⁴⁶ The Court held that the State failed to demonstrate that criminal sanctions were needed to further the state interest.⁴⁷ The Court concluded that the interest in protecting the identity of the juvenile offender does not outweigh the press' right to publish publicly revealed information.⁴⁸

40. *Id.* at 52. *But see* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-63 (1985) (noting that not all speech is entitled to First Amendment protection); *FCC v. Pacifica Foundation*, 438 U.S. 726, 747-48 (1978) (stating that vulgar, offensive or shocking speech is not entitled to absolute First Amendment protection). The Court in *Falwell*, however, did not believe these exceptions applied to the facts of this case. 485 U.S. at 56.

41. 485 U.S. at 56.

42. *Dicke*, *supra* note 3, at 1577.

43. 443 U.S. 97 (1979).

44. *Id.* at 99. Information from seven different eyewitnesses lead to the arrest of a 14 year old boy who shot and killed his classmate in Junior High School in West Virginia. *Id.* *The Charleston Gazette* published the juvenile's name and picture in an article detailing the shooting. *Id.*

45. W. VA. CODE § 49-7-3 (1976), construed in *Smith*, 443 U.S. at 98. Violators of the West Virginia statute are fined up to one hundred dollars and/or confined to no more than six months in jail. *Id.* § 49-7-20.

46. 443 U.S. at 105-06. Reporters obtained their information through witnesses, the police and an assistant prosecuting attorney. *Id.* at 99.

47. *Id.* at 105-06. The State claims that publication of a juvenile offender's name has an oppressive effect on the rehabilitation process. In the State's view, such exposure stigmatizes the juvenile and leads to damaging consequences, such as anti-social conduct and jeopardizing future employment. *Id.* at 104. The Court rejected this argument, reasoning that criminal sanctions were not proper for this type of publication. *Id.* at 106.

48. *Id.* at 104-06. *See also* *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989) (noting that when the government provides information to the media, a state's right to protect individuals from press intrusion wanes); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469,

The above-referenced cases illustrate the problems that states face when enacting laws that define the content of publications. These decisions, however, do not address the enforcement of general laws against the press. When applying general laws to the press, courts apply a lower level of scrutiny to the balancing test to expand press liability and restrict constitutional protections.⁴⁹

*Branzburg v. Hayes*⁵⁰ illustrates the application of the lower level of scrutiny. In *Branzburg*, a grand jury subpoenaed a news reporter to identify his confidential sources.⁵¹ A state court judge ordered the reporter to answer questions and rejected his First Amendment defense.⁵² The Supreme Court held that journalists do not have an absolute First Amendment right to withhold the identity of confidential sources from a grand jury.⁵³ The Court reasoned that an absolute reporters' privilege⁵⁴ would jeopardize defendants' rights to a fair trial.⁵⁵ The Court refuted the reporter's claim that this decision would have a negative impact on his future ability to obtain news from credible sources.⁵⁶

491 (1975) (holding that states may not sanction the accurate publication of information obtained from public records).

49. See Dicke, *supra* note 3, at 1577 nn.137-39 (requiring a showing of actual malice for plaintiff to recover for defamation or intentional infliction of emotional distress).

50. 408 U.S. 665 (1972).

51. *Id.* at 668.

52. *Id.* The lower court also rejected defenses asserted under §§ 1, 2 and 8 of the Kentucky Constitution and under § 421.100 of the Kentucky reporters' privilege statute which provides in part: "No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury . . . the source of any information procured or obtained by him, and published in a newspaper. . .with which he is connected." KY. REV. STAT. ANN. § 421.100 (Michie/Bobbs-Merrill 1962).

53. 408 U.S. at 708-09.

54. Neither the press nor an individual has a First Amendment privilege to refuse to answer questions during a grand jury investigation. *Id.* at 690. Thus, the court finally sets a place for state laws, which serve a substantial public interest, to be enforced against the press and the public equally. See also Hirsch, *supra* note 23, at 206 (stating that journalists lack the absolute privilege to withhold confidential sources from a grand jury).

55. 408 U.S. at 690. Powell's concurrence stresses balancing the state interest in an effective grand jury system against First Amendment protections. *Id.* at 709-10.

56. *Id.* at 682-84. In his dissent, Justice Stewart emphasized that "news must not be unnecessarily cut off at its source" and that the right to gather news should not be compromised. *Id.* at 728. However, Justice Powell stressed in his concurrence the limited nature of the Court's holding, stating "[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." *Id.* at 709. Justice Powell

In *Zacchini v. Scripps-Howard Broadcasting Co.*,⁵⁷ the Supreme Court again refused to confer on the media immunity from generally applicable laws. The *Zacchini* Court held that a television station was not privileged to film a private performance without the consent of the individuals involved.⁵⁸ The Supreme Court overruled the Ohio Supreme Court's holding that, absent an attempt to harm or injure, the media is constitutionally privileged to report matters of public interest.⁵⁹ The Court explained that the First and Fourteenth Amendments do not privilege the media to violate an individual's right of publicity guaranteed by state law.⁶⁰

Recently, however, the United States District Court for Minnesota extended to the press First Amendment protection against suits for breach of confidentiality. In *Ruzicka v. Conde Nast Publication, Inc.*,⁶¹ the court followed a three-step analysis⁶² to determine whether the

suggested that certain confidentiality agreements may be enforceable depending on the circumstances. *Id.* at 710. For example, if the confidential information is only remotely related to the investigation, Powell stated that the reporter may be able to petition the court for a protective order. *Id.*

Several courts have addressed the concern of whether potential sources would "dry up" if reporter-source agreements were unenforceable. See *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1299 (D. Minn. 1990) ("[S]ources will not be willing to rely on reporters' promises of confidentiality if no remedy exists for breach." (citing *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 257 (Minn. Ct. App. 1989)); see also *Hirsch, supra* note 23, at 208 (questioning whether it would be correct to protect confidential sources from subpoena and yet allow the press to break its promise of confidentiality whenever it chooses).

57. 433 U.S. 562 (1977).

58. *Id.* at 578-79. Petitioner, an entertainer with a human cannonball act, sued a television station for filming his performance without his consent. *Id.* at 562.

59. *Id.* at 578-79. In his dissent, Justice Powell stated that the public will be the "loser" if such harsh restriction is placed on the media. 433 U.S. at 581 (Powell, J., dissenting).

60. *Id.* at 578-79.

61. 733 F. Supp. 1289 (D. Minn. 1990), *aff'd in part*, 939 F.2d 578 (8th Cir. 1991).

62. *Id.* at 1295. The three-step analysis used for breach of confidentiality contracts begins by questioning, first, whether any state action is present to implicate First Amendment scrutiny, and second, whether the media waived its First Amendment rights by entering into the contract. *Id.* If the answer to both questions is affirmative, the contract is enforceable. *Id.* If the contract lacks one or both of the first two criteria, however, the court proceeds to a third step in which it applies a compelling state interest balancing test to weigh competing interests of the state and the press. *Id.* The Minnesota Court of Appeals, in *Cohen v. Cowles Media Co.*, 445 N.W.2d 257 (Minn. Ct. App. 1989), applied the *Ruzicka* balancing test. The Supreme Court declined, however, to follow the balancing test in *Cohen*, relying instead on the doctrine of promissory estoppel. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2517 (1991).

First Amendment protects the media from breach of contract actions.⁶³ The court concluded that due to the particular facts of the case,⁶⁴ the confidentiality agreement between the reporter and source was too vague to be enforceable.⁶⁵ Moreover, the court stated that oral contracts raise serious problems of proof⁶⁶ and create the potential for expensive and vexatious litigation.⁶⁷ Consequently, the Supreme Court will not abridge constitutional rights of the press unless there is unambiguous proof that a contract was formed and that the infringement is incidental in nature.⁶⁸

*Cohen v. Cowles Media Co.*⁶⁹ presented the Supreme Court with the opportunity to balance the First Amendment against contract law.⁷⁰ In *Cohen*, the Court held that the plaintiff could enforce a newspaper's breach of a confidentiality agreement through promissory estoppel.⁷¹ The Court determined that recovery under the promissory estoppel

63. 733 F. Supp. at 1295.

64. Plaintiff was interviewed by a reporter for an article about sexual abuse by therapists. *Id.* at 1290. Plaintiff consented to the interview subject to the condition that she would not be identified or identifiable and the reporter agreed to this condition. *Id.* at 1291. The Court held that since plaintiff did not specify what particular facts would threaten her anonymity, the contract was too ambiguous to be enforced. *Id.* at 1300-01.

65. "[T]he Constitution requires plaintiffs in contract actions to enforce a reporter-source agreement to prove specific, unambiguous terms and to provide clear and convincing proof that the agreement was breached." *Id.* at 1300.

66. *Id.* See also, Dicke, *supra* note 3, at 1570 ("[I]mprecision and the oral nature of many confidentiality agreements raise serious problems of proof.").

67. 733 F. Supp. at 1300. See also Dicke, *supra* note 3, at 1571 n.102 (stating that examples of vexatious litigation include suits which look to punish, intimidate and harass the media instead of looking to "seek compensation for actual injury").

68. Dicke, *supra* note 3, at 1573 & n.116. Ruzicka did not raise a promissory estoppel claim at the district court trial; however, she did invoke an estoppel claim on appeal. *Ruzicka v. Conde Nast Publications, Inc.*, 939 F.2d 578, 582 (8th Cir. 1991). On review, the Eighth Circuit Court of Appeals held that promises of confidentiality between journalists and sources do not constitute a legal contract under Minnesota law. *Id.* at 582. Relying on the Supreme Court's holding in *Cohen*, however, the Eighth Circuit allowed Ruzicka to raise a promissory estoppel claim. *Id.* at 583. The court remanded the case to the District Court to consider whether a promissory estoppel claim is a viable theory of recovery under Minnesota law. *Id.*

69. 111 S. Ct. 2513 (1991).

70. For an in-depth discussion of balancing the First Amendment and contract law, see Hirsch, *supra* note 23, at 193-202.

71. 111 S. Ct. at 2516. This conclusion ignores the Minnesota Supreme Court's finding that the newspapers' promises to keep Cohen's identity confidential were not enforceable under the promissory estoppel doctrine. 457 N.W.2d at 205.

theory constituted state action,⁷² triggering First Amendment protection.⁷³ The Court also noted that the doctrine of promissory estoppel is a generally applicable law which does not offend the First Amendment right to freedom of the press.⁷⁴ The Court concluded that the Minnesota Supreme Court should readdress petitioner's promissory estoppel claim as a viable theory for recovery.⁷⁵

The *Cohen* Court also determined that applying the state promissory estoppel doctrine does not inhibit truthful reporting.⁷⁶ The Court reasoned that respondents obtained petitioner's name by breaching its promise, thereby making the acquisition unlawful.⁷⁷ Thus, while the purpose of the First Amendment is to protect and encourage journalists to report news of public interest, it does not confer a constitutional right to disregard contractual promises.⁷⁸

In dissent, Justice Blackmun urged that the majority's reliance on the line of cases addressing enforcement of generally applicable laws was misplaced.⁷⁹ Concluding that the *Sullivan* line of decisions controlled,⁸⁰ Blackmun emphasized that whenever state law attempts to penalize free expression, the state interest must be compelling to withstand the strictures of the First Amendment.⁸¹ In a separate dissenting opinion, Justice Souter reiterated the argument that laws of general

72. *Id.* at 2517-18. See *supra* note 17 for a description of "state action."

73. 111 S. Ct. at 2517-18. The Supreme Court rejected the *Ruzicka* court's balancing test, emphasizing that the press voluntarily entered into the confidentiality agreement. *Id.* at 2519. See *supra* notes 62-63 and accompanying text for a discussion of the *Ruzicka* court's balancing approach.

74. 111 S. Ct. at 2518-19. See also *supra* note 7 for an explanation of a law of general application.

75. 111 S. Ct. at 2519-20.

76. *Id.* at 2519.

77. *Id.* The Court distinguished this case from *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) where a rape victim's name was lawfully obtained through public records. *Id.*

78. *Id.*

79. 111 S. Ct. at 2520-22 (Blackmun, J., dissenting). In the dissent's view, the Minnesota Supreme Court's decision was premised "not on the identity of the speaker, but on the speech itself." *Id.* at 2520. Accordingly, under Justice Blackmun's reasoning, state law did not afford special immunity to the press and, consequently, reliance on the general law cases was inappropriate. *Id.* See *supra* notes 49-67 and accompanying text for a discussion of the line of cases interpreting application of the general laws.

80. *Id.* at 2521. The dissent regarded the *Falwell* decision as directly on point. *Id.* See *supra* notes 37-41 and accompanying text for a discussion of the *Falwell* decision.

81. *Id.* at 2522.

applicability were not dispositive in the case.⁸² Justice Souter stated that the proper approach was to balance the State's interest in enforcing the newspaper's promise of confidentiality against the press' First Amendment rights.⁸³ The dissenting opinions concluded that the State's interest was not compelling, and could therefore not survive First Amendment scrutiny.⁸⁴

The *Cohen* majority correctly reversed the Minnesota Supreme Court's holding⁸⁵ and properly applied the line of cases that refuse to grant reporters a special privilege denied to other citizens.⁸⁶ The Court has consistently prohibited states from enacting laws that directly infringe upon the rights and privileges of the press.⁸⁷ The *Cohen* decision, however, involves a state law that was not intended to single out news reporters' conduct.⁸⁸ Application of such a general law must be applied with an even hand.⁸⁹ To allow the press to hide behind a shield of confidentiality when they have broken the law would be unconscionable.⁹⁰

Moreover, the *Cohen* decision does not take away any established legal right of the press.⁹¹ Confidentiality agreements inherently restrain editorial freedom to publish what media institutions have

82. 111 S. Ct. at 2522 (Souter, J., dissenting). Like Justice Blackmun, Justice Souter concluded that the *Sullivan* line of cases controlled. *Id.*

83. *Id.* at 2522-23. Justice Souter's dissent rejected the majority's position that balancing was improper because the newspapers voluntarily entered into the confidentiality agreements. *Id.*

84. *Id.* at 2522-23.

85. Unlike the Minnesota Supreme Court, the United States Supreme Court concluded that the rationale which justifies protecting the media in defamation actions is not applicable to breach of confidentiality agreements. 111 S. Ct. at 2519.

86. *See supra* notes 50-60 and accompanying text discussing cases in which the court held that general laws apply to the press.

87. *See supra* notes 30-47 and accompanying text discussing cases in which the court held that state interests did not outweigh freedoms of the press.

88. *See supra* notes 50-68 and accompanying text illustrating the conflicts between general applicable laws and the press' First Amendment rights.

89. *Id.*

90. *Id.*

91. 111 S. Ct. at 2518. The Court stated that:

Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and reports the news . . . Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena

Id.

learned.⁹² The agreements represent self-imposed restraints that members of the press have voluntarily promised not to breach.⁹³ Accordingly, legal enforcement of the promissory estoppel theory is in the best interest of both the public and the press.

As a matter of general welfare, if the constitutional guarantee of freedom of the press continues to grow without restrictions, certain individual rights will suffer. The privilege to form a contract and expect it to be upheld should be appreciated by every person and institution in society. Accordingly, the *Cohen* decision should not be viewed as a limitation on First Amendment privileges but as a necessary step to ensure the protection and enforcement of every individual's legal and fundamental rights.

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92. Dicke, *supra* note 3, at 1569.

93. *Id.* See *supra* note 27.

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