A REASONABLE WOMAN APPROACH TO HOSTILE ENVIRONMENT SEXUAL HARASSMENT: *ELLISON V. BRADY*, 924 F.2d 872 (9th Cir. 1991)

Title VII of the Civil Rights Act of 1964 proscribes discrimination based upon a person's gender.[1] The United States Supreme Court,[2] numerous other federal courts,[3] and the Equal Employment Opportunity Commission (EEOC)[4] have declared unequivocally that sex discrimination under Title VII encompasses sexual harassment in the

1. Title VII states that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (1988). Likewise, Title VII prohibits discrimination based upon a person's race, color, religion, or natural origin. *Id.*

2. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 73 (1986) (holding that "a claim of 'hostile environment' sex discrimination is actionable under Title VII").

3. Title VII claims for sexual harassment are a judicially created action not expressly addressed by the statute. Lower court cases were the first to find that discrimination under the Civil Rights Act included sexual harassment. The seminal case for finding that sexual harassment was actionable under Title VII was Williams v. Saxbe, 413 F. Supp. 654, 657-58 (D.D.C. 1976) (stating that retaliatory actions of a male supervisor due to resistance of his sexual advances, created an "artificial barrier to employment which was placed before one gender and not the other"), *rev'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978); *see also* Miller v. Bank of America, 600 F.2d 211, 212 n.1 (9th Cir. 1979) (stating in dicta that Title VII applies where a female employee rejects her supervisor's demands for sexual favors); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1048 (3d Cir. 1977) ("Title VII is violated when a supervisor . . . makes sexual advances or demands toward a subordinate employee."); Barnes v. Costle, 561 F.2d 983, 995 (D.C. Cir. 1977) (holding that Title VII is violated when a woman must meet a supervisor's sexual demands in order to hold on to her job); Garber v. Saxon Business Prods., Inc., 552 F.2d 1032, 1032 (4th Cir. 1977) (holding that a cause of action is stated under Title VII when a plaintiff alleges that her discharge was a consequence of her refusing the sexual advances of her supervisor).

4. 29 C.F.R. § 1604.11 (1991). The EEOC guidelines explicitly state that the amendment reaffirms the principle that sexual harassment is an unlawful employment practice. *Id.* "[W]hile not controlling upon the courts by reason of their authority, [the EEOC guidelines] do constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance." General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140

workplace.[5] Two distinct categories of sexual harassment claims have emerged under Title VII:[6] "quid pro quo"[7] and "hostile environment."[8] The standard for judging a hostile environment sexual harassment case has been subject to much dispute. In *Ellison v. Brady*,[9] the Ninth Circuit Court of Appeals held that the appropriate standard for

(1944)). *See infra* note 22 (discussing the details of the EEOC's guidelines on sexual harassment).

5. For a discussion of the early development of sexual harassment doctrine, *see infra* note 21.

6. For a discussion on the categorization of sexual harassment claims, see Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1454-55 (1984).

7. "Quid pro quo" harassment is beyond the scope of this Comment. This type of harassment encompasses conduct that forces an employee to choose between acceding to sexual demands or forfeiting job benefits, continued employment, or promotion. For a discussion of "quid pro quo" harassment, see McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (specifying burdens of proof in "quid pro quo" cases); Bundy v. Jackson, 641 F.2d 934, 953 (D.C. Cir. 1981) (laying out the elements necessary to establish a prima facie case of "quid pro quo" sexual harassment).

8. This type of sexual harassment claim challenges the persistent subjection of an employee to a sexually intimidating, hostile, or offensive working environment. Courts have found a Title VII claim for a hostile work environment to exist when employees can allege and show the following five elements: (1) they belong to a protected group; (2) they are subject to unwelcome sexual harassment; (3) "the harassment complained of was based upon [their] sex"; (4) the alleged harassment affected a "term, condition, or privilege" of employment; and (5) if the employer is not the harassing party, that the harassing party is the agent of the employer. Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982) (finding that plaintiff had sufficiently shown all requisite elements to establish a prima facie case when she was subjected to demeaning sexual inquiries and vulgarities throughout the two years of her employment); *see also* Shrout v. Black Clawson Co., 689 F. Supp. 774, 780-81 (S.D. Ohio 1988) (finding that plaintiff had established all requisite elements when it was shown that she was a victim of her supervisor's sexual remarks and overt sexual behavior).

Courts have recognized that an offensive work environment alone, under appropriate circumstances, can constitute Title VII sexual harassment without the necessity of the harassed employee asserting or proving a tangible job detriment, while the detriment element underlies the "quid pro quo" theory of sexual harassment. *See, e.g.*, Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986) (harassment leading to noneconomic injury can violate Title VII); Henson, 682 F.2d at 901 ("[U]nder certain circumstances the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the complainant suffers tangible job detriment."); Bundy v. Jackson, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (same); *cf.* Jones v. Flagship Int'l, 793 F.2d 714, 720 (5th Cir. 1986) ("[w]hile an employee need not prove tangible job detriment to establish a sexual harassment claim, the absence of such detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment."), *cert. denied*, 479 U.S. 1065 (1987).

9. 924 F.2d 872 (9th Cir. 1991).

deciding "hostile environment" sexual harassment cases brought by women is that conduct which a "reasonable woman" would consider sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment.[10]

In *Ellison*, a female Internal Revenue Service (IRS) agent alleged that a hostile working environment was created by a male co-worker who made several lunch propositions and sent several letters stating his deep-felt affection for her.[11] Ellison filed a formal complaint alleging sexual harassment after learning that she would have to continue to work in the same office as the offending party.[12]

After the IRS[13] and EEOC[14] rejected her complaint, Ellison filed suit in federal district court.[15] The district court granted the government's motion for summary judgment on the ground that Ellison failed to state a prima facie case.[16] On appeal, the Ninth Circuit Court of Appeals reversed and remanded the case with instructions that hostile

10. *Id.* at 879. Other courts confronted with this issue have adopted the standard of a "reasonable person." *See infra* note 32.

11. Kerry Ellison's co-worker, Sterling Gray sent her two love letters. The first note read: "I cried over you last night and I'm totally drained today. I have never been in such constant term oil [sic]. Thank you for talking with me. I could not stand to feel your hatred for another day." *Id.* at 874. Gray sent Ellison an even more explicit letter later that month. The letter stated in part, "I know that you are worth knowing with or without sex .... I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away." *Id.* Gray's letter also promised that he would write again "in the near future." *Id.*

12. 924 F.2d at 873-74. Fearful and uncertain of Gray's intentions, Ellison contacted her supervisor. *Id.* at 874. Upon reading the first note, Ellison's supervisor, Bonnie Miller, said "this is sexual harassment." *Id.* When notified of the second letter, Miller instructed Gray that he must leave Ellison alone or one of them must be transferred. Appellee's Brief at 7, Ellison v. Brady, 924 F.2d 875 (9th Cir. 1991) (No. 89-15248). Gray agreed to be transferred to another state office but after only three weeks he sought to return. The IRS decided that Ellison's problem could be solved with a six-month separation, and determined that Gray could return if he agreed to no longer bother Ellison. 924 F.2d at 874.

13. *Id.* at 875. The Treasury Department rejected Ellison's complaint because it believed that Gray's conduct did not constitute a "pattern or practice" of sexual harassment within the EEOC regulations. *Id.*

14. *Id.* The EEOC affirmed the dismissal of the case on the ground that the IRS had taken adequate steps to prevent recurrence. *Id.*

15. 924 F.2d at 875.

16. *Id.* The district court found that Ellison did not demonstrate that the "harassment complained of was sufficiently pervasive as to alter the conditions of employment and create an abusive working environment." Appellee's Brief at 3, Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (No. 89-15248).

environment claims should be determined from the perspective of a "reasonable woman."[17]

The United States Supreme Court has stated that the objective of Title VII is to provide equal employment opportunities.[18] Yet, scant legislative history exists that interprets the Act's prohibition against "sex" discrimination.[19] On its face, Title VII evinces a congressional intent to afford employees the right to work in an environment free from discriminatory intimidation, ridicule or insult.[20]

After several lower court attempts to construe the boundaries of the "sex" category of Title VII,[21] the EEOC issued guidelines in 1980 that

17. 924 F.2d at 883. The government advanced two arguments relating to the harassing party's conduct at the appellate level: (1) that her co-worker's conduct was not sexual in nature, and (2) that his conduct was not so pervasive as to create a hostile environment. Appellee's Brief at 16-17, Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (No. 87-4987). In rejecting the first argument, the court refrained from deciding whether a cause of action for a sexually discriminatory work environment can be stated when "the conduct in question is not sexual." *Id.* at 875 n.5. *Cf.* Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) (conduct need not be overtly sexual in nature); Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (same); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987) (same); McKinney v. Dole, 765 F.2d 1129, 1138-39 (D.C. Cir. 1985) (same).

With respect to the court's analysis of the government's second argument, the appellate court found the district court's determination that Gray's conduct was "isolated and genuinely trivial" unpersuasive. *Ellison*, 924 F.2d at 876. The government also argued that prompt and effective action was taken by the IRS in this matter. Appellee's Brief at 18-20, Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (No. 87-4987). *See infra* notes 60-66 and the accompanying text for further discussion of the court's analysis.

18. Connecticut v. Teal, 457 U.S. 440, 448-49 (1982) (finding that an employer's nondiscriminatorily-administered exam, which was a pass-fail barrier to employment opportunity, created a disparate impact thus establishing a prima facie case of employment discrimination under § 703(a)(2) of Title VII) (citing Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).

19. The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House. 110 CONG. REC. 2,577-84 (1964). The principal argument in opposition to the amendment was that "sex discrimination" does not include problems sufficiently different from those of other types of discrimination such that it ought to receive separate treatment. *Id.* at 2,577 (statement of Rep. Celler quoting a letter from United States Department of Labor). Its proponents included a number of Congressmen opposed to the Act, but hoping that the inclusion of "sex" would highlight the absurdity of the legislation as a whole and contribute to its defeat. *Id.* at 2,577-2,584 (remarks of Reps. Smith, Tuten, Andrews, and Rivers). For a thorough discussion of proposed Civil Rights bills and subsequent debates, see Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1965-66).

20. Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986).

21. Initially, district courts generally rejected the notion that sexual harassment was actionable under Title VII. *See, e.g.*, Miller v. Bank of America, 600 F.2d 211, 212 (9th Cir. 1979) (reversing lower court's finding that employer did not violate Title VII de-

specified "sexual harassment" as a form of sex discrimination prohibited by Title VII.[22] By interpreting these guidelines and analogizing them to cases of racial harassment in the workplace,[23] courts eventually found sexual harassment environment cases to be actionable under Title VII because they affected the conditions of employment.[24]

In 1986, the United States Supreme Court addressed the viability of

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spite the plaintiff being discharged for refusing to engage in sex with supervisor); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1049 (3d Cir. 1977) (reversing lower court's finding that Title VII was not intended to provide a federal remedy for a supervisor's sexually motivated, physical attack upon an employee). *But see* Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976) (finding that the retaliatory actions of a male supervisor, resulting from a female employee's refusal of his sexual advances, constituted sex discrimination within the meaning of Title VII), *rev'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

These cases illustrate the district courts' hesitancy to actually extend Title VII liability. At least one court feared a possible slippery slope where the result would be "a potential federal lawsuit every time any employee made . . . sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual." Corne v. Bausch & Lomb Inc., 390 F. Supp. 161, 163-64 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977) (unpublished opinion). Instead, these courts saw sexual harassment in the workplace as a personal matter, neither employment-related nor sex-based. *See, e.g., Corne*, 390 F. Supp. at 163 (stating that sexual harassment was not actionable because acts complained of were not sufficiently tied to the workplace and the supervisor was acting upon a personal urge, not the employer's policy); Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974) (attributing alleged discrimination not to plaintiff's sex, but to her refusal to have sexual relations with her supervisor, which resulted in an "inharmonious personal relationship"), *rev'd sub nom.*, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

22. 29 C.F.R. § 1604.11(a) (1991). *See supra* note 4 and accompanying text discussing the adoption of the EEOC's guidelines on sexual harassment. The EEOC sexual harassment guidelines state that "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment" when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment. *Id.*

23. The hostile work environment theory was first introduced and accepted in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). The *Rogers* court concluded that the employer's policy of racially segregating patients was actionable under Title VII even though it was not directly aimed at the employee, a member of a minority race. *Id.* at 241.

24. *See, e.g.*, Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983) (holding that a workplace pervaded with sexual innuendos becomes a discriminatory condition of employment); Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982) (same); Bundy v. Jackson, 641 F.2d 934, 944-45 (D.C. Cir. 1981) (stating that sexually stereotyped insults and sexual advances affected condition of employment); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784-85 (E.D. Wis. 1984) (noting that offensive language and sexually-oriented drawings created damaging conditions of employment).

"hostile environment" sexual harassment claims for the first time in *Meritor Savings Bank v. Vinson*.[25] The Court determined that a hostile environment based on discriminatory sexual harassment created a cause of action under Title VII.[26] The Court rejected the notion that all workplace conduct which may be described as harassment constitutes a violation of Title VII.[27] Instead, the Court held that an action for sexual harassment under Title VII requires conduct "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[28] Thus, the *Meritor* Court determined that the supervisor's repeated sexual advances and demands for sexual activity were sufficient to state a claim for "hostile environment" sexual harassment.[29]

Since the *Meritor* Court failed to articulate a standard of assessment to be used,[30] lower courts have determined that the sufficiently perva-

25. 477 U.S. 57 (1986).

26. *Id.* at 65-67. The EEOC Guidelines persuaded the Court in reaching its conclusion. *Id.* at 65. *See supra* notes 4 and 22 and accompanying text for a discussion of the EEOC Guidelines. Moreover, cases recognizing a cause of action under Title VII for harassment based on race also influenced the Court. 477 U.S. at 66. *See also supra* note 23-24 and accompanying text for a discussion of cases that the Court relied on in reaching its decision.

27. 477 U.S. at 67 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)). The courts in *Meritor* and *Rogers* agreed that a mere utterance of an epithet that offends an employee would not sufficiently effect the conditions of employment. *Meritor*, 477 U.S. at 67 and *Rogers*, 454 F.2d at 238.

28. 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

29. *Id.* at 67. The plaintiff initially rejected her employer's advances and demands for sexual activity but later acceded out of fear for her job. *Id.* at 60. The plaintiff alleged that her supervisor made sexual advances towards her during and after work hours, followed her into the ladies' restroom, fondled her in front of other employees, exposed himself to her and had sex with her, including forcible rape, forty or fifty times. *Id.*

30. In *Meritor*, the Court merely stated that the pervasive nature of the harassment, along with the criminal conduct involved, made the allegations sufficient to state a claim of hostile environment sexual harassment. *Id.* at 67. The Court's instructions directed the fact finder to assess whether the advances, either physical gestures or verbal expressions, were "unwelcome." *Id.* at 68. The Court also suggested that the trier of fact base their determination of whether harassment exists "in light of 'the record as a whole' and on 'the totality of circumstances.'" *Id.* at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)).

Other cases that have found the presence of a "hostile environment" actionable as sexual harassment have also involved situations of marked hostility and abuse of a clearly exploitable or humiliating nature. *See, e.g.*, Moylan v. Maries County, 792 F.2d 746, 750 (8th Cir. 1986) (rape); Egger v. Local 276, Plumbers & Pipefitters Union, 644 F. Supp. 795, 797-98 n.3 (D. Mass. 1986) (involving an alleged hostile environment

sive or severe test demands a factual inquiry judged by an objective standard.[31] One line of authority holds that a "reasonable person" test should be employed in hostile environment cases.[32] Another line of authority proffers a "reasonable woman" standard for determining whether a hostile environment has been created.[33] Due to the split in

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where physical contact, threats, demeaning pranks and comments on plaintiff's chest size, comments about her sex life, graphic description of male employees' sex lives in front of her, showing plaintiff pornographic books and asking her to participate in a sexually explicit home video transpired in a two to three week period); Moffett v. Gene B. Glick Co., 621 F. Supp. 244, 270 (N.D. Ind. 1985) ("regular, almost daily exposure to terms such as 'stupid cunt', 'whore', 'bitch' and 'nigger lover' over the course of six or seven months").

31. For an in-depth analysis of the reasonableness standard see Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1218 (1990) (stating that the use of a reasonableness standard "can create a false sense of security, lulling one into believing that a result is inherently fair regardless of its specific content, and reinforcing the idea that legal analysis can be neutral and objective"). *See also* Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 57-58 (suggesting that the application of objective standards have negative mainstreaming effects).

32. *See, e.g.*, Rose v. Figgie Int'l, 919 F.2d 739 (6th Cir. 1990) (unpublished opinion) (affirming the district court's perspective of a reasonable person's reaction to a similar environment); Dabish v. Chrysler Motors Corp., 902 F.2d 32 (6th Cir. 1990) (unpublished opinion) (conduct is to be gauged by how a reasonable person would react, regardless of how the plaintiff herself would react); Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 193 (1st Cir. 1990) (holding that activity must interfere with a reasonable person's work performance or seriously affect a reasonable person's psychological well-being); King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990) (conduct must "adversely affect both a reasonable person and the particular plaintiff bringing an action" (quoting Brooms v. Regal Tube Co., 881 F.2d 412, 419 (7th Cir. 1989))); Paroline v. Unisys Corp., 879 F.2d 100, 105 (4th Cir. 1989) (same); Waltman v. International Paper Co., 875 F.2d 468, 476 (5th Cir. 1989) (stating that court must determine whether a reasonable person would feel that the environment was hostile); Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) (stating that trier of fact must adopt the perspective of a reasonable person's reaction); *cf.* Shrout v. Black Clawson Co., 689 F. Supp. 774, 781 (S.D. Ohio 1988) (stating that trier of fact must adopt the perspective of a reasonable employee).

33. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (holding that a prima facie case of hostile environment exists when plaintiff alleges conduct that a reasonable woman would consider sufficiently severe or pervasive as to change the conditions of employment and create an abusive working atmosphere); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) (noting that a court should consider all elements to see if they produce a sexually hostile environment that would detrimentally affect a woman of reasonable sensibilities); Tindall v. Housing Auth., 762 F. Supp. 259, 262 (W.D. Ark. 1991) (suggesting that, under many circumstances, a reasonable woman would be justified in viewing sexual jokes and cartoons as harassment); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) (holding

the circuits, the applicable legal standard remains indeterminate.

An early Sixth Circuit case, *Rabidue v. Osceola Refining Co.*,[34] illustrates the application of the "reasonable person" standard within the context of sexual harassment claims. In *Rabidue*, a female management employee sued Osceola Refining Company for sexual harassment.[35] She claimed the company refused to halt the display of pornographic posters, as well as the continuous anti-female obscenities directed at her and other women by a co-worker.[36] The court adopted the perspective of "a reasonable person's reaction to a similar environment under essentially like or similar circumstances."[37] In applying this standard, the *Rabidue* court found that the co-worker's conduct was merely de minimis and had not unreasonably interfered with the plaintiff's work environment.[38] The court characterized the conduct

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that the objective standard asks whether a reasonable woman would perceive an abusive working environment); Barbetta v. Chemlawn Servs., 669 F. Supp. 569, 572 (W.D.N.Y. 1987) (stating that a reasonable woman must find the hostile environment intolerable); Vermett v. Hough, 627 F. Supp. 587, 605 (W.D. Mich. 1986) (stating that sexual harassment must "be so significant a factor that the average female employee would find that her overall work performance is substantially and adversely effected by the conduct").

One reason for the differing approaches taken by the courts has been the realization that men and women have different perceptions on what constitutes offensive behavior. For a discussion on this point, see Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 52 n.56 (1990). *See also* BARBARA A. GUTEK, SEX AND THE WORKPLACE 95-104 (1985) (discussing the differing attitudes of men and women about sex at work).

34. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

35. *Id.* at 615.

36. *Id.* The conduct of which Rabidue complained was harsh and explicit. One of the posters displayed at the plant depicted a prone woman with a golf ball on her breasts, straddled by a man holding a golf club and yelling "fore." *Id.* at 624 (Keith, J., dissenting). The comments that her co-worker directed at her and her fellow female workers included such epithets as "whores," "cunt," and "pussy." *Id.*

37. *Id.* at 620. The Sixth Circuit actually introduced a dual standard which requires a combination of objective and subjective inquiries. *Id.* The first part of the adopted test requires plaintiffs to prove "that the defendant's conduct would have interfered with a reasonable individual's work performance and would have affected seriously the psychological well-being of a reasonable employee." *Id.* The second prong requires the plaintiff "to demonstrate that she was actually offended by the defendant's conduct and that she suffered some degree of injury as a result of the abusive and hostile work environment." *Id.* Therefore, the presence of actionable sexual harassment depends upon the personality of the plaintiff within the prevailing work environment, and must be analyzed on an ad hoc basis. *Id.*

38. *Id.* at 622. *But see infra* notes 54-59 for a discussion of Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991) (holding that sexually explicit pinups and sexual remarks create a sexually hostile environment). *See also* Bennett v. Corroon

as a legitimate expression of the cultural norms of workers at the plant and suggested that the prevailing depictions of women in the media indicated that such conduct was not unreasonably offensive.[39]

Several other circuits have followed the *Rabidue* decision and have applied the "reasonable person" standard in hostile environment sexual harassment cases.[40] For instance, in *Brooms v. Regal Tube Co.*,[41] an industrial nurse filed suit for sexual harassment under Title VII.[42] The Seventh Circuit adopted *Rabidue's* "reasonable person" test.[43] After analyzing how a reasonable person would have reacted under similar circumstances, the *Brooms* court found that the supervisor's repeated instances of sexual innuendos and advances would have interfered with and effected a reasonable individual's work performance and psychological well-being.[44]

& Black Corp., 845 F.2d 104, 106 (5th Cir. 1988) (posting of pornographic cartoons serve as evidence of a hostile environment).

In dissent, Judge Keith advocated the use of a reasonable woman (or reasonable victim) standard. 805 F.2d at 627 (Keith, J., dissenting). Keith felt the majority's approach enforced an essentially male viewpoint which fails to recognize women's differing views of appropriate sexual conduct. *Id.* at 626.

39. 805 F.2d at 622. The court appeared to rely on two arguments in concluding that the conduct had not been unreasonably offensive. First, that the court should not interpret Title VII to enforce changes in the working class culture, and should not interfere with that environment. *Id.* at 620-22. Second, that the working environment could not be unreasonably offensive because it did not differ from the rest of society. *Id.* at 622. *See* Ehrenreich, *supra* note 31, at 1196-1210 (discussing these arguments and how each ignores or minimizes the conflict between men's and women's viewpoints and thus only "solves" the problem presented by avoiding it).

40. The First, Fourth, Fifth, Sixth and Seventh Circuits have adopted the "reasonable person" standard. *See supra* note 32 for illustrative cases.

41. 881 F.2d 412 (7th Cir. 1989).

42. *Id.* at 417. The alleged harassment included numerous racial and sexual remarks as well as sexual advances. *Id.* at 416. One incident included a supervisor showing her a pornographic photo depicting an interracial act of sodomy and telling her that the photo showed the "talent" of a black woman. *Id.* at 417.

43. *Id.* at 419. Like the *Rabidue* court, the Seventh Circuit adopted a dual standard, which would account for the likely effect of a defendant's conduct upon a reasonable person's ability to perform his or her work and upon his or her well-being, as well as the actual effect upon the particular plaintiff. *Id. See also* Dockter v. Rudolf Wolff Futures Inc., 913 F.2d 456, 459-60 (7th Cir. 1990) (using the *Brooms* court's dual standard approach to conclude that, regardless of the court's view that a hostile work environment was created, the plaintiff could not recover because she failed to prove an injury resulting from the conduct); *cf.* Daniels v. Essex Group, Inc., 937 F.2d 1264, 1271-72 (7th Cir. 1991) (applying the *Brooms* court's dual standard approach to a racial harassment claim).

44. 881 F.2d at 420 (quoting *Rabidue*, 805 F.2d at 620). Although the lower court

While some courts adhere to the "reasonable person" standard, other courts have found the perspective of a "reasonable woman" more accurate.[45] The Third Circuit articulated such a view in *Andrews v. City of Philadelphia*.[46] In *Andrews*, two female employees of the city police department alleged sexual harassment by their co-workers and supervisors.[47] The court held that one of the elements of a successful hostile environment sexual harassment claim is a determination that the discrimination would detrimentally affect a reasonable victim of the same sex.[48] The court believed that employing a reasonable woman standard better suited the aim of eradicating the stereotypes and degradation that undermine equal employment opportunity.[49] The *Andrews* court remanded the case but attempted to clarify the factors to be considered by the lower court.[50] To constitute impermissible discrimination, the offensive conduct need not include sexual overtones in every instance, nor does each incident need to be sufficiently severe harassment that detrimentally affects female employees.[51] Yet, the consistent use of negative and insulting terms relating to women, along with the posting of pornographic pictures, may evince a hostile environment.[52]

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did not explicitly address the objective component of the *Rabidue* test, the court of appeals believed that the answer to the objective inquiry was implicit in the district court's holding. *Id.* at 419.

45. *See supra* note 33 for cases that have applied a "reasonable woman" standard. *See also* Note, *supra* note 6, at 1459 (arguing that courts should examine claims from the perspective of the reasonable victim).

46. 895 F.2d 1469 (3d Cir. 1990).

47. *Id.* at 1471. The harassing conditions complained of included abusive language, demeaning pornographic photos, destruction of property and work product, and anonymous phone calls. *Id.* at 1472-75.

48. *Id.* at 1482. The court pointed out that analysis of a claim included both a subjective and an objective standard. *Id.* at 1483. The former focuses on whether the alleged discrimination injured the particular plaintiff. *Id.* While the more critical latter standard determines whether a sexually hostile work environment exists. *Id.*

49. *Id.* (citing Note, *supra* note 6, at 1455).

50. 895 F.2d at 1485-86. The court also noted that the lower court should view the totality of the circumstances when making its decision. *Id.* at 1484. In so doing, the fact finder should look not only to the frequency of the incidents, but also to their gravity as well. *Id.*

51. *Id.* at 1485. *See supra* note 17 for cases where conduct toward women which was not sexually explicit still resulted in a hostile environment.

52. 895 F.2d at 1485. The court realized the impracticality of holding an employer accountable for every sexist incident, but found that requiring employers to take adequate measures to prevent an atmosphere of sexism would not be unreasonable. *Id.* at 1486. *See also* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1531 (M.D. Fla. 1991) ("An employer escapes liability for isolated and infrequent slurs and misogy-

Although men may believe that these actions are innocent, a reasonable woman exposed to that type of environment might feel otherwise.[53]

More recently, the district court in *Robinson v. Jacksonville Shipyards*[54] employed the "reasonable woman" standard.[55] In *Robinson*, a female shipyard employee brought an action alleging that defendants created and encouraged a sexually hostile work environment by permitting the presence of sexually explicit pinups of women, as well as sexual jokes and remarks.[56] The court stated that the proper inquiry addresses whether a reasonable person of plaintiff's sex, a reasonable woman, would perceive her workplace as an abusive environment.[57] The court rejected the defendant's reliance on *Rabidue* and reiterated the need to examine the totality of circumstances.[58] In this context, pornography in the workplace communicates a negative message to

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nist behaviors because even a reasonably prudent employer cannot exercise sufficient control over the workplace to put an end to such conduct, [yet] an employer incurs liability when harassing behavior happens frequently enough that the employer can take steps to halt it."); *cf.* Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1421 (7th Cir. 1986) (stating that it is difficult "to see how an isolated racial slur could . . . be significant enough . . . to count as employment discrimination," but that an employer may be liable for failing to "take reasonable steps to prevent a barrage of racist acts, epithets, and threats").

53. *Andrews*, 895 F.2d at 1486.

54. 760 F. Supp. 1486 (M.D. Fla. 1991).

55. *Id.* at 1524-27.

56. *Id.* at 1493-1502. Sexist propaganda and conduct were rampant at the shipyard. *Id.* Pictures of nude women appeared throughout the workplace in the form of magazines, plaques, and photographs torn from magazines and affixed to the wall. *Id.* In fact, these pictures were so pervasive that plaintiff herself could not recount every example. *Id.* at 1495.

57. *Id.* at 1524. This test, according to the court, involves looking at the severity and pervasiveness of the misconduct. *Id. See, e.g.*, King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990) (finding that repeated verbal assaults, touchings, and unwelcome advances adversely affected plaintiff); Carrero v. New York City Hous. Auth., 890 F.2d 569, 578 (2d Cir. 1989) (noting that even though period of sexual harassment was not extensive, where supervisor made constant propositions to employee during two week period, such activity created a hostile work environment); Vermett v. Hough, 627 F. Supp. 587, 605-06 (W.D. Mich. 1986) (noting that "[o]rdinarily more than one isolated incident of sexually offensive conduct must have occurred," yet "the requirement for repeated exposure will vary inversely with the severity of the offensiveness of the incidents").

58. 760 F. Supp. at 1526-27. The court concluded that the "social context" argument authorizes a pre-existing work situation that deters women, conflicting with the aims of Title VII. *Id.* at 1526. See *supra* note 39 and accompanying text for the *Rabidue* court's "social context" view.

women which men are less likely to perceive, thus undermining workplace equality and creating a hostile environment.[59]

Ellison v. Brady[60] presented the Ninth Circuit with an opportunity to determine what standard to apply in a hostile environment sexual harassment claim under Title VII. The *Ellison* court rejected the "reasonable person" standard and concluded instead that the presence of a hostile environment should be judged from the perspective of the victim.[61] Under the court's analysis, a woman states a prima facie case of hostile environment sexual harassment by alleging conduct that a reasonable woman would consider "sufficiently severe or pervasive" as to create a hostile work environment.[62]

The court determined that a "reasonable person" standard was erroneous because it does not permit analysis of the differing perspectives

59. *Id.* at 1526 (citing Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1212 n.118 (1989)). Pornographic material in the workplace "may communicate that women should be the objects of sexual aggression, that they are submissive slaves to male desires, or that their most salient and desirable attributes are sexual." *Id.* These views detract from the image most women would like to project. *Id. See also* Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) (noting that obscene language and pornography could be regarded as offensive to women who seek to deal with fellow employees with professional dignity) (quoting Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988)); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 15 (1990) ("[S]exist speech reflects and reinforces a belief that women are sex objects, rather than productive and equal co-workers."). *But see* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 622 (6th Cir. 1986) (suggesting that sexually oriented posters have only a de minimis effect).

60. 924 F.2d 872 (9th Cir. 1991).

61. *Id.* at 878. The court did not explicitly repudiate the *Rabidue* court's reasonable person standard. Rather, it relied on the EEOC Compliance Manual for support. *Id.* (courts "should consider the victim's perspective and not stereotyped notions of acceptable behavior") (quoting EEOC Compliance Manual (CCH) § 615, ¶ 3112, C at 3242 (1988)). However, the opinion inaccurately cites to King v. Board of Regents, 898 F.2d 533 (7th Cir. 1990). *King* applied the *Brooms* test of using both objective and subjective queries. 898 F.2d at 537. *King* held that "in order to find discrimination, the court must conclude that the conduct would adversely affect both a reasonable person and the . . . [plaintiff herself]." *Id.* at 537. *See generally* Marlisa Vinciguerra, Note, *The Aftermath of* Meritor*: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717, 1737-38 (1989) ("[T]he standards for assessing women's psychological harm due to harassment must begin to reflect women's sensitivity to behavior once condoned as acceptable.").

62. 924 F.2d at 879. The court also realized that when a claim is brought by a male employee, the standard to be applied would be that of a "reasonable man." *Id.* at 879 n.11.

of men and women.[63] Because the "reasonable person" standard tends to favor a male perspective and systematically ignore the experiences of women, the court found the standard inappropriate.[64] The court concluded that a "reasonable person" standard risked reinforcing the prevailing level of discrimination, which would undermine the objectives of Title VII.[65] By acknowledging the effects of sexual harassment on a reasonable woman, women are able to participate in the workplace "on an equal footing with men."[66]

In dissent, Judge Stephens found the term "reasonable woman," as used by the majority, to be ambiguous and therefore inadequate.[67] First, Stephens argued that Congress intended Title VII to provide for equal treatment in the area of civil rights.[68] Stephens believed that a gender-based standard would undermine the Act's goal of creating a gender-neutral workplace.[69] Second, if the courts were to adopt a "reasonable woman" standard, Stephens concluded that it would alienate claims brought by men, who are also targets of harassment.[70] Finally, Judge Stephens found the majority's premise that men and women perceive their environments differently to be unsubstantiated.[71] Accordingly, the dissent would disregard the "reasonable woman"

63. *Id.* at 878. The court stated, "[c]onduct that many men consider unobjectionable may offend many women." *Id.*

64. *Id.* at 879. The court acknowledged that women have a stronger incentive to be concerned with hostile sexual behavior because they are disproportionately the victims of rape and sexual assault. *Id.* Moreover, the court stated that "[m]en . . . may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive." *Id.*

65. *Id.* at 880-81. The court noted that "Congress did not enact Title VII to codify prevailing sexist prejudices." *Id.* at 881.

66. 924 F.2d at 879. The court rejected the notion that its newly adopted standard would provide a higher level of protection for women than men. *Id.* In addition, the court considered the concerns of employers, reasoning that the application of the "reasonable woman" standard would "shield employers from having to accommodate the idiosyncratic concerns of the rare hypersensitive employee." *Id.*

67. *Id.* at 884 (Stephens, J., dissenting).

68. *Id.* (Stephens, J., dissenting).

69. *Id.* The dissent also pointed out that "the Supreme Court has shown a preference against systems that are not gender or race neutral." *Id.* (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)).

70. 924 F.2d at 884 (Stephens, J., dissenting). The dissent realized that cases are more frequently brought by women, but men are also entitled to relief under Title VII. *Id.*

71. *Id.* The dissent questioned the majority's rationale since they cited no evidence that a man cannot see what a woman sees through her eyes. *Id.*

standard and propose a gender-neutral standard.[72]

The Ninth Circuit's decision in *Ellison* properly declined to follow the "reasonable person" approach and correctly advocated a "reasonable woman" standard. A work environment free from discriminatory conduct, harassment, and the perpetuation of stereotypes accomplishes the objective of Title VII.[73] The first step toward fulfilling this objective is recognizing that men and women hold differing perspectives on what constitutes sexual harassment.[74] The *Ellison* court realized this lack of social consensus and, as a result, set forth a standard that attempts to protect women from the offensiveness resulting from the diverse perceptions of males and females on what is appropriate conduct.[75]

Courts have been reluctant to penalize conduct of less than an egregious nature.[76] Nevertheless, a vast grey area of potentially offensive, nonegregious conduct remains. Meanwhile, relations in the workplace may become strained because men fear that their behavior might offend a sensitive woman and result in a lawsuit. To remedy these concerns the "reasonable woman" standard would provide guidance to the courts, extending the range of unacceptable conduct while also protecting an employer from the "hypersensitive" employee.[77]

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72. *Id.* at 884-85. The dissent suggested gender neutral terms like "victim," "target," or "person." *Id.* at 884. *But see* Pollack, *supra* note 33, at 53 (suggesting that "[t]here may be no gender-neutral norms or ways to interpret those norms").

73. *See supra* notes 18-20 and accompanying text explaining the goal of Title VII.

74. One study found that the biggest discrepancy between men and women in their attitudes toward workplace sex was on the question whether the respondent would feel "flattered" if asked to have sex: 67.2% of the men, as compared to 16.8% of the women, responded that they would be flattered, while 15% of the men, and 62.8% of the women, reported that they would be insulted. GUTEK, *supra* note 33, at 96. *See also* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 163 (1979) ("Men who sexually harass women are commonly dumbfounded that the women resent it. . . ."); Pollack, *supra* note 33, at 52 ("[M]uch of the behavior that women find offensive is behavior that is accepted as normal heterosexual behavior by men."). The dissent in *Rabidue* also supported this proposition, see *supra* note 38 and accompanying text.

75. *See supra* notes 63-64 and accompanying text explaining the court's reasoning. See also Note, *supra* note 6, at 1459 for discussion in support of this analysis.

76. *See supra* note 30 for illustrative cases.

77. *See supra* note 66 discussing the "hypersensitive employee" problem. *Cf.* Note, *supra* note 6, at 1459 ("By adopting the woman's point of view as the norm, the courts might heighten male sensitivity to the effects of sexually offensive conduct in the workplace").

Sexual harassment in the workplace remains a pervasive problem.[78] By adopting a victim-oriented approach, perhaps males will become more conscious of the possible effects of unwelcome sexual harassment, and change their conduct accordingly.[79] The *Ellison* court presents a thorough analysis in support of a victim's perspective approach[80] and, fortunately, numerous other courts have adopted this standard as well.[81]

Work places across the country may have to undergo serious reform as a result of *Ellison* and the other "reasonable victim" cases. Certain long-standing and common workplace conduct may have to change if the "reasonable woman" standard receives uniform acceptance. Conduct that once seemed harmless and purely in jest from the male perspective now may be susceptible to court action. Accordingly, the *Ellison* court's "reasonable woman" standard better comports with the objectives of Title VII and moves toward eliminating sexual harassment in the workplace.[82]

*Lynne A. Reinders**

78. In one government study, 42% of the women respondents reported being subjected to some form of "sexual harassment" between May of 1978 and May of 1980 at an estimated cost to the federal government of $189 million (cost includes males who have been sexually harassed). UNITED STATES MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 36 (1981). The figures were roughly the same in a 1987 survey, but the costs over a two-year period rose to $267 million. UNITED STATES MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 39 (1988). Other surveys found that anywhere from 36 to 53 percent of the women questioned thought of themselves as victims. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 822 n.28 (1991).

79. For discussion on the effects of sexual harassment, see Fran Sepler, *Sexual Harassment: From Protective Response To Proactive Prevention*, 11 HAMLINE J. PUB. L. & POL'Y 61, 66-68 (1990).

80. *But cf.* Ehrenreich, *supra* note 31, at 1218 (by failing to address issues of race and class, the reasonable woman standard "may perpetuate existing inequities based on those factors in the same way that the reasonable person standard does when it fails to consider the women's point of view"); Finley, *supra* note 31, at 63-64 (concluding that the reasonable woman standard merely replaces one stereotype with another).

81. *See supra* notes 33, 45-59 and accompanying text for a discussion of other cases which follow this approach.

82. Ellison v. Brady, 924 F.2d 872, 878-81 (9th Cir. 1991). See *supra* notes 61-66 and accompanying text discussing the court's rationale.

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

The First Amendment to the Constitution[1] protects the press against state common law causes of action[2] that directly burden the publication of truthful information.[3] The United States Supreme Court supports an unfettered press[4] 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 application[7] 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 newspapers[11] breached their confidentiality agreement, causing him to

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§ 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 claims[17] 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 predominate[25] 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]

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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]

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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' privilege[54] 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]

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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 analysis[62] to determine whether the

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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 proof[66] 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 holding[85] 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

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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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