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Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement

INTRODUCTION

Journalists frequently promise news sources confidentiality in exchange for information the sources possess. Traditionally, both the press and its sources have regarded these agreements as binding promises. In recent years, however, journalists have shown an increasing tendency to disregard such agreements when they believe the public interest demands publication of the confidential information. Sources have responded by seeking a legal remedy for breach of the confidentiality agreement. Recently, a state court accepted a plaintiff source's argument that a promise of confidentiality given in exchange for information is a legally binding contract.

In Cohen v. Cowles Media Company, a Minnesota district court held that a promise of confidentiality given in exchange for information is a legally binding contract. The case arose in Minnesota in 1982 during the gubernatorial campaign between Republican Wheelock Whitney and Democrat Rudy Perpich. Zuckerman, Breaking the Code of Confidentiality, TIME, Aug. 1, 1988, at 61.

1. A confidentiality agreement consists of a promise by a reporter to a news source that the reporter either will not publish particular information provided by that source or that the reporter will not attribute such information to that source in a published story. See infra note 52.

2. See infra notes 52-57 and accompanying text. Although “sources” may include documents, books, and other objects, this Note uses the word to mean persons supplying information.

3. This Note uses the terms press and media interchangeably.

4. See infra notes 61-65 and accompanying text.

5. See infra notes 74-76 and accompanying text.

6. Some sources have argued, unsuccessfully, that state laws granting a conditional privilege to reporters against forced disclosure in judicial proceedings give sources legal rights. See infra note 72-73 and accompanying text. In at least three other reported suits, sources have alleged breach of contract. See infra notes 7-12, 14 and accompanying text.

court held two newspapers liable for breach of contract because they published a source's name in violation of a confidentiality agreement. The newspapers had breached the agreement because their editors believed the source provided the information in attempting a last-minute campaign smear of a rival political candidate, making the source's identity newsworthy information. The trial judge found that breach of the confidentiality agreement did not present a first amendment issue, and based his jury instructions on the common law. The jury awarded the plaintiff $700,000 in damages.

8. See Cohen v. Cowles Media Co., 14 Media L. Rep. (BNA) 1460, 1464 (Knoll, J., denying defendant's motion for summary judgment) (1987). In addition to breach of contract, Cohen alleged the newspaper reporters had misrepresented their authority to grant confidentiality, and that this was an actionable tort. Id. at 1463. The district court held that the newspapers could be held liable on the misrepresentation claim as well as on the contract claim. Id. at 1461-63. See also infra note 12.

9. The plaintiff successfully established an agency relationship between the newspapers and the reporters. Cohen, 14 Media L. Rep. at 1463. Under general agency principles, an agent's act, if authorized by the principal, constitutes an act of the principal. See Mackenzie v. Ryan, 230 Minn. 378, 41 N.W.2d 878 (1950). The defendant newspapers argued that the reporters did not have authority to make binding confidentiality agreements on behalf of the newspaper, but the jury necessarily rejected that argument in finding the newspapers liable. Cohen, 14 Media L. Rep. at 1463. This Note assumes that normal agency principles govern the relationship between reporters and their employers and that the act of granting confidentiality will be imputed to the reporter's employer.

10. See Defendants' Brief, supra note 7, at 19-30.

11. Before trial, the judge ruled that "[t]his is not a case about free speech, rather it is one about contracts and misrepresentation." Cohen, 14 Media L. Rep. at 1464.

12. The award consisted of $200,000 in actual damages and $500,000 in punitive damages, based on both the contract and misrepresentation causes of action. See Cohen v. Cowles Media Co., 15 Media L. Rep. (BNA) 2288, 2288 (1988) (denying defendant's motion for new trial or J.N.O.V.). A divided panel of the Minnesota Court of Appeals affirmed liability on the contract claim, but
The *Cohen* case garnered national attention as the first case in which a news source successfully sued a media organization for breaching a confidentiality agreement. Commentators noted that this groundbreaking application of contract law could have far-reaching consequences for the way reporters handle confidential information.

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The case received such considerable attention because it raised novel legal and ethical questions. Langley & Levine, *Broken Promises*, COLUM. JOURNALISM REV., July/Aug. 1988, at 21,22. The case presented a direct conflict between the ethical obligation to keep promises and the media's commitment to informing the public.


15. The *Cohen* case involved both a breach of contract claim and a tort claim for misrepresentation. See supra note 8. This Note will not consider the claim for misrepresentation. The gravamen of that claim is that the reporters never intended to honor the promise of confidentiality, and plaintiffs presented the newspapers' breach of the agreement as proof of that claim. See Defendants' Brief, supra note 7, at 19-28 (arguing no evidence existed to support claim that defendants never intended to perform as promised). The misrepresentation claim thus rides piggy-back on the contract claim; without the breach of contract, there would be no damages from any alleged misrepresentation. The heart of the case therefore lies in the court's finding of liability for the contract breach. Nevertheless, because many states, including Minnesota, disallow punitive damages for a contract breach unless it is accompanied by an independent tort, see Bar/Nelson, Inc. v. Tonto's Inc., 336 N.W.2d 46 (Minn. 1985).
ers collect the news and for what the press ultimately publishes and predicted that an increasing number of sources will bring actions for breach of confidentiality contracts. When the press publishes newsworthy information in breach of confidentiality agreements, such actions create an acute tension between the need to redress injury and the first amendment's guarantee of freedom of the press.

16. First amendment expert Floyd Abrams stated: "If not reversed, this decision opens the door for an enormous range of real or imagined sources to claim that, in one way or another, they've been victimized by [the] press." N.Y. Times, July 23, 1988, § 1, at 6, col. 5. Media lawyer Greg Pruitt warned that “[m]aking a reporter-source relationship a simple contract gives those who want to sue the press a new way to circumvent constitutional protections.” N.Y. Times, July 24, 1988, § 1, at 14, col. 4. Also disturbing is the power this cause of action gives to public officials—who frequently act as veiled sources—to punish the press during periods of heightened tension between the government and the press. Langley & Levine, supra note 13, at 24. Officials could use the threat of litigation to extract press concessions, or to persuade reporters to put the “spin” officials desire on stories. See also Newspaper in New Case Over Naming Source, N.Y. Times, July 24, 1988, § 1, at 14, col. 4. A source quoted in a story claimed a reporter had promised her confidentiality. Id. Because editors could not determine immediately whether the source had been promised confidentiality, they decided to destroy 625,000 copies of the Sunday magazine supplement waiting for delivery at distribution centers around the state rather than risk a lawsuit. Id.; Zuckerman, supra note 7, at 61.

17. Even before the jury had returned its verdict in the Cohen case, the Star and Tribune was threatened with a fresh breach of contract suit over an article it planned to run. See also Johnson, Punishing the Press, Minn. L.J., Sept. 1988, at 20 (interview with attorney Paul Hannah); cf. New Yorker in the Fray On Journalism and Ethics, N.Y. Times, March 21, 1989, § 1, at 7, col. 1 (national edition). First amendment attorney Floyd Abrams noted:

The most powerful people in society would leap to the chance to sue reporters if they did not have to prove falsity and defamation. . . . If all they have to show is that a reporter tried to persuade a source to give him information by suggesting that he felt a certain way and then wrote his story differently, the courthouse will be filled with lawsuits.

Id.; see also infra note 133 (discussing other potential breach-of-contract actions against media).

18. The tension is especially acute because both first amendment freedoms and the freedom to contract are deeply rooted principles in the social and legal fabric of the United States. One court has declared that “[t]he right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint.” Blount v. Smith, 12 Ohio St. 2d 41, 47, 231 N.E.2d 301, 305 (1967); see also infra notes 23-29 and accompanying text (discussing value of free press); cf. Note, The Right of the Public and the Press to Gather Information, 87 Harv. L. Rev. 1505, 1516 n.62 (suggesting that private interest
This Note seeks to reconcile the media's first amendment interests with the interests of sources who claim they are harmed by a media organization's alleged breach of a confidentiality contract. Part I examines the role of the press, the constitutional protection for the press, and the relationship between a reporter and a source. Part I also reviews the operation of contract law. Part II discusses the tension between a breach-of-contract action and the first amendment, and concludes that courts must balance the competing interests involved. In addition, Part II identifies considerations relevant to developing a standard to balance these interests. Part III proposes that courts apply a two-part constitutional standard to resolve a source's claim against a media entity for breach of a confidentiality agreement. Part III also explains how the proposed standard protects the competing interests, how a court might apply the standard to the facts of the Cohen case, and addresses possible criticisms of the proposed standard.

I. THE PRESS, CONTRACT LAW, AND FIRST AMENDMENT CONSIDERATIONS

A. CONSTITUTIONAL PROTECTION OF THE PRESS

The notion that the first amendment occupies a preferred position in the United States constitutional system lies at the core of the Supreme Court's protection of free speech and the press. Any abridgement of speech or press—any substantial chilling effect on activities covered by the first amendment—triggers constitutional protection. That protection, however, is not absolute. The extent of protection for a given activity depends on the strength of the particular first amendment value in protecting information against public disclosure is directly antagonistic to goal of free flow of information).

19. This Note assumes courts will find that a confidentiality agreement in which a reporter promises anonymity or promises not to publish information given as background material in exchange for information is a valid contract. Disclosures of sources by means other than publishing are beyond the scope of this Note. The Note is not directly concerned with press disclosure of sources in judicial proceedings, for example. If courts hold that a reporter's promise of confidentiality given in exchange for information is a valid contract, as this Note assumes they will, then the question of what liability attaches to a media entity that breaches such a contract pursuant to a judicial order will become an important one.

20. See Emerson, First Amendment Doctrine and the Burger Court, 68 Calif. L. Rev. 422, 441 (1980).

21. Id. at 453-54.
at issue and the nature of the competing interests involved.\textsuperscript{22}

1. The Role of the Press

The Supreme Court has identified three principal functions served by the press in the United States constitutional scheme. First, the press serves as a vehicle and conduit for individual expression.\textsuperscript{23} This function involves personal rights and is linked to a reading of the first amendment as protecting individual autonomy.\textsuperscript{24} In addition, the media play a role in informing and educating the public, offering criticism, and providing a forum for debate and discussion.\textsuperscript{25} That function springs from a self-government theory of the first amendment,\textsuperscript{26} according to which the press is protected because it supplies members of the public with the diverse information they need to exercise their democratic sovereignty.\textsuperscript{27} Finally, the

\textsuperscript{22} See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (weighing first amendment values against state interest in protecting reputation to determine extent of constitutional protection).

\textsuperscript{23} Note, supra note 18, at 1507-16.

\textsuperscript{24} The “personal right” theory views freedom of the press as an individual right, and was the dominant doctrine for many years. Lewis, \textit{A Preferred Position for Journalism?}, 7 HOFSTRA L. REV. 595, 626 (1979); see, e.g., Lovell v. Griffin, 303 U.S. 444, 450 (1938) (holding freedom of press is personal right and liberty). The theory was tied closely to a reading of the first amendment’s speech and press clauses as synonymous. See \textit{U.S. Const. amend. I}. Gradually, the Supreme Court began to view the press as serving societal ends apart from the individual’s personal interest in publishing. See infra notes 25-29 and accompanying text. The Court has not abandoned the “personal right” theory of the role of the press, however. See, e.g., Columbia Broadcasting System, Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 145 (1973) (Stewart, J., concurring) (defending newspaper’s complete discretion in selecting subject matter for publication as absolute right); Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (quoting Lovell, 303 U.S. at 450, 452) (stating freedom of press is fundamental personal right not confined to newspapers and periodicals).


\textsuperscript{27} \textit{See Cox Broadcasting v. Cohen}, 420 U.S. 469, 492 (1974) (stating that “without the information provided by the press most of us . . . would be unable to vote intelligently or to register opinions on the administration of govern-
press serves as a check on government power, assuring that the
government is accountable to the people.\textsuperscript{28} This conception of
the press as a check on government also derives from the self-
government theory, but focuses on the structure of the press as
protecting the people's sovereignty, rather than on the content
of the information conveyed.\textsuperscript{29}

2. First Amendment Doctrine and the Press

The first amendment protects media entities' performance
of their constitutionally recognized roles. The Supreme Court
has held that the first amendment protects both newsgather-
ing\textsuperscript{30} and publication activities\textsuperscript{31} of the press. The Court ac-
cords more protection to publication, however, because it

\textsuperscript{28} De Tocqueville long ago recognized the crucial link be-
tween the press and sovereignty: "When the right of every citizen to a share in
the government of society is acknowledged, everyone must be presumed to be
able to choose between ... various opinions ... . The sovereignty of the people
and the liberty of the press may therefore be regarded as correlative ... ." A.
DE TOCQUEVILLE, DEMOCRACY IN AMERICA 1845 quoted in O'Brien, The
First Amendment and the Public's "Right to Know", 7 HASTINGS CONST. L.Q.
579, 590 n.52 (1980).

\textsuperscript{29} See Mills v. Alabama, 304 U.S. 214 (1966). The Mills Court stated:
"The press serves and was designed to serve as a powerful antidote to any
abuses of power by governmental officials and as a constitutionally chosen
means for keeping officials elected by the people responsible to all the people
... ." Id. at 219; see also New York Times Co. v. United States, 403 U.S. 713,
717 (1971) (Black, J., concurring) (arguing that Constitution protects press so
it can "bare the secrets of government and inform the people"). Justice Stew-
art asserted that this checking function was the role of the press primarily
protected by the constitution. See Stewart, Or of the Press, 26 HASTINGS L.J.
631, 634 (1975) (stating that "[t]he primary purpose of the constitutional guar-
antee of a free press was ... to create a fourth institution outside the Govern-
ment as an additional check on the three official branches"). For a
comprehensive analysis of the checking function of the press, see Blasi, The
Blasi argues that the press checks government through its ability to expose
abuses of government power and to arouse the people to react against those
abuses. Id. at 605.

\textsuperscript{30} See Address by Supreme Court Justice William Brennan, S.I. New-
house Center for Law & Justice (Oct. 17, 1979), reprinted in 32 RUTGERS L.
REV. 175, 176-77 (1980).

\textsuperscript{31} See, e.g., Branzburg v. Hayes, 408 U.S. 665, 681, 707 (1972) (recognizing
that newsgathering is constitutionally protected). The Court stated that
"without some protection for seeking out the news, freedom of the press
would be eviscerated." Id. at 681. Branzburg marked the first time the
Supreme Court recognized a constitutional protection for newsgathering. The
Court found no newsgathering privilege, however, for reporters to withhold
identities of confidential sources from grand juries.

\textsuperscript{32} This Note most directly concerns the press publication function, see
infra note 32, although newsgathering also is implicated.
directly implicates the principal roles of the press in the constitutional scheme.\textsuperscript{32}

Early first amendment decisions focused on direct governmental infringement of first amendment rights, such as preventing a speaker from addressing an audience\textsuperscript{33} or preventing a newspaper from publishing a story.\textsuperscript{34} In recent times, however, the Supreme Court has become sensitive to the chilling effect private common-law causes of action can have on the exercise of free speech and press rights.

In 1964, in \textit{New York Times v. Sullivan},\textsuperscript{35} the Supreme Court held that judicial enforcement of common-law rules imposing strict liability for defamation\textsuperscript{36} violates the first amendment by inhibiting open and robust debate.\textsuperscript{37} The Court thus "constitutionalized" defamation law\textsuperscript{38} to prevent the threat of adverse defamation judgments,\textsuperscript{39} or even the need to defend

\textsuperscript{32} The Court has provided nearly absolute protection against prior restraints on what media entities may publish. \textit{See, e.g.}, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (denying government’s request to enjoin publication of Pentagon Papers). The Court also has provided considerable protection for the press in cases involving punishment after publication of a story. \textit{See, e.g.}, Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) (striking down criminal conviction under statute prohibiting dissemination of names of judges investigated in confidential proceedings of state commission).

\textsuperscript{33} \textit{See, e.g.}, Terminiello v. Chicago, 337 U.S. 1, 6 (1949) (reversing conviction of speaker under state breach-of-peace statute).

\textsuperscript{34} \textit{See} Near v. Minnesota \textit{ex rel.} Olson, 283 U.S. 697, 714 (1931).

\textsuperscript{35} 376 U.S. 254 (1964). In \textit{New York Times}, the city commissioner of Montgomery, Alabama had sued the newspaper and several others over a newspaper advertisement calling attention to racial inequities and violence against blacks in Montgomery. \textit{Id.} at 256-59.

\textsuperscript{36} Under the common law of defamation, an individual incurred liability by publishing written or spoken material tending "so to harm the reputation of another as to lower him in the estimation of the community." \textit{Restatement of Torts} § 559 (1938). One who published material that was both false and defamatory was strictly liable for damages, even without proof of actual harm. \textit{Id.}

\textsuperscript{37} \textit{New York Times}, 376 U.S. at 270.

\textsuperscript{38} For almost two hundred years, the common-law tort of defamation existed independent of any first amendment limitations. \textit{See} Gertz v. Robert Welch, Inc., 418 U.S. 323, 369 (1974) (White, J., dissenting). Indeed, the Supreme Court had held that defamatory speech was "unprotected" by the first amendment. \textit{See} Beauharnais v. Illinois, 343 U.S. 250, 254-57 (1952); Patterson v. Colorado \textit{ex rel.} Attorney Gen., 205 U.S. 454, 462 (1907).

\textsuperscript{39} \textit{See} Anderson, \textit{Libel and Press Self-Censorship}, 53 \textit{Tex. L. Rev.} 422, 425 (1975). The Court wrote that the fear of damage awards from defamation actions may be "markedly more inhibiting [to the free press] than the fear of prosecution under a criminal statute." \textit{New York Times}, 376 U.S. at 277; \textit{see also} Gertz, 418 U.S. at 340-41 (noting that rule of strict liability that compels
against such suits, from producing media self-censorship.\textsuperscript{40}

\textit{New York Times} and its progeny modify the common-law treatment of defamatory falsehoods by requiring that public official and public figure plaintiffs prove publishers made defamatory statements with "actual malice"—that is, with knowledge that the statements were false or in reckless disregard of their truth or falsity.\textsuperscript{41} The real focus of the \textit{Times} rule, however, is not on the issue of truth or falsity, but on the actual effect that remedies against false statements have on truthful speech.\textsuperscript{42} The Court's standard seeks to balance the reputation interest protected by the law of defamation against the public interest served by an unfettered press.\textsuperscript{43} The Court has held in subsequent cases that private figure defamation plaintiffs need not meet such a high standard of proof.\textsuperscript{44}

The Supreme Court also has held that the first amendment imposes limitations on other common-law causes of action applied against communicative acts, including actions for invasion of privacy\textsuperscript{45} and intentional infliction of emotional distress.\textsuperscript{46}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{New York Times}, 376 U.S. at 279-80; Saint Amant v. Thompson, 390 U.S. 727 (1968). The Court has altered other features of the common-law defamation rules as well. For instance, the Court has held that the common-law rule under which damages are presumed is unconstitutional, except in cases in which the plaintiff is a private person suing on a matter not of public concern. See Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc, 472 U.S. 749, 757-61 (1985). Many common-law rules of defamation remain intact, however, so that constitutional standards exist alongside with traditional rules. See generally R. Smolla, LAW OF DEFAMATION §§ 1.02[3]-3.36[5], at 1-6 to 3-86, 8.01[2]-8.10[5][6], at 8-3 to 8-37 (1986) (discussing evolution of constitutional standards and common-law rules in area of defamation).
\item Anderson, supra note 39, at 429.
\item Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). The Court affords more weight to the reputation interest when the plaintiff is a private person rather than a public official or public figure. See id.
\item Four separate causes of action make up the general tort of invasion of privacy: "false light" invasion of privacy; intrusion on seclusion; wrongful appropriation; and publicity given to private facts. See \textit{Restatement (Second) of Torts} § 652 (1977).
\item The false light action provides a remedy against the public attribution of false, though not necessarily defamatory, characteristics to a person. \textit{Id}. The Supreme Court has held that plaintiffs must prove "actual malice" within the meaning of \textit{New York Times} to recover. See Time, Inc. v. Hill, 385 U.S. 374, 390-91 (1967).
\item The tort of intrusion is akin to trespass and protects against offensive information-gathering practices. R. Smolla, \textit{supra} note 41, § 10.03[1]. Such ac-
\end{enumerate}
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Those decisions suggest that any common-law rule which operates to infringe first amendment freedoms should be limited by a constitutional standard that reconciles the interests served by the common-law rule with first amendment interests.47

In providing constitutional protection for the press, the Supreme Court has not articulated whether this protection derives from the first amendment's speech clause, from its press clause, or from both clauses read together.48 The Court has implied, however, that the press clause protects either persons or institutions performing the press function.49

[Notes]


47. See Van Alstyne, First Amendment Limitations on Recovery from the Press—An Extended Comment on 'The Anderson Solution', 25 WM. & MARY L. REV. 793, 817-19 (arguing courts must be vigilant in applying heightened constitutional standards to new causes of action that threaten first amendment values); cf. Hustler, 108 S. Ct. at 882 (noting normal common-law rules must give way in area of debate about public figures).

48. See Sack, Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press, 7 HOFSTRA L. REV. 629, 637 (1979). The Supreme Court never has decided directly whether the press clause affords the press special protection not provided by the speech clause and not enjoyed by others in society. Id.

49. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 784 (1985) (Brennan, J., dissenting) (arguing rights of institutional media are same as those of others engaging in same activities).
B. SOURCES AND THE OPERATION OF THE FREE PRESS

Maintaining a free flow of information to the public depends on the ability of members of the press to gather information from their sources. In the words of Justice Douglas, "[a] reporter is no better than his source of information." Journalists regularly rely on confidential sources for a significant amount of the information they obtain. Reliance on confidential sources has increased over the past twenty years; today, studies show that eighty percent of national news magazine articles and fifty percent of national wire service stories rely on confidential sources.

Commentators have criticized the use of confidential sources as denying readers the chance to evaluate the credibility of the information presented. In addition, unnamed

50. Note, supra note 18, at 1524.
52. The term confidential sources refers to sources who supply information to reporters with an understanding that their identity will not be disclosed or linked to the information provided for publication, as well as to sources who provide background information that is not to be published. See Osborne, The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After A Decade of Subpoenas, 17 COLUM. HUM. RTS. L. REV. 57, 71 (1985).
53. The seminal study on the relationship between reporters and their confidential sources, conducted in 1971 by Professor Vincent Blasi, showed that the average newsperson surveyed relied on confidential sources in between 22.2% and 34.4% of stories. Blasi, The Newsman's Privilege: An Empirical Study, 70 MICH. L. REV. 229, 247 (1971). A more recent survey found that reporters relied on confidential sources in 31.5% of their stories. Osborne, supra note 52, at 73.
54. See Note, Disclosure of Sources in International Reporting, 60 S. CAL. L. REV. 1631, 1636 (1987). In addition to obtaining information directly from confidential sources, journalists use such sources to verify information received from "on-the-record" sources, to decide which stories to cover, and to decide what emphasis and context to give printable facts when writing a story. Blasi, supra note 53, at 296.
55. One reason for this increase is the rise of the "new journalism," which emphasizes investigative reporting and heightened scrutiny of government by the press. Osborne, supra note 52, at 60 n.13. The most famous investigative duo of recent times noted that "without [our confidential sources] there would have been no Watergate story told by the Washington Post." C. BERNSTEIN & B. WOODWARD, ALL THE PRESIDENT'S MEN 7 (1974).
58. See Foreman, Confidential Sources: Testing the Readers' Confidence, 10 SOC. RESP.: BUS., JOURNALISM, L., MED. 24, 24 (1984). Some critics suggest that the continued overuse of veiled sources might so strain the public's confi-
sources with their own interests to promote may manipulate and exploit reporters.\textsuperscript{59} Despite these problems, the selected use of veiled sources is an invaluable aid to the press in performing its informing and checking roles.\textsuperscript{60}

Journalists have a long tradition of protecting their confidential sources.\textsuperscript{61} Some reporters have served lengthy jail sentences for contempt of court after refusing to break promises of confidentiality by revealing their sources.\textsuperscript{62} Journalists have gone to these lengths for three principal reasons. They fear that if they become known for breaching confidentiality agreements, existing and potential sources will "dry up," making their jobs difficult to perform.\textsuperscript{63} In addition, reporters feel a strong ethical and moral commitment to keeping their confidence that it could lead to the complete discrediting of the practice of granting confidentiality as a journalistic tool. See Bolbach, The Janet Cooke Affair: Journalism Ethics and Confidential Sources, 98 THE CHRISTIAN CENTURY 826-29 (1981). One survey, however, showed that readers accept the practice of relying on unnamed sources and are not concerned over their increasing use. See Wulfemeyer, supra note 56, at 82.

59. See Blasi, supra note 53, at 242; Fredin, Assessing Sources: Interviewing, Self-Monitoring and Attribution Theory, 61 JOURNALISM Q. 866, 873 (1984); Smyser, There are Sources and Then There are "Sourcerers", 5 SOC. RESP.: JOURNALISM, L., MED. 13, 14 (1979).


62. See Note, supra note 54, at 1639. One of the most famous press cases involved John Peter Zenger, who was jailed in New York in 1734 for refusing to reveal his information sources. After remaining imprisoned for nine months, Zenger was tried and acquitted. Marcus, supra note 61, at 817. A more recent case in which a reporter incurred a lengthy jail sentence and gained national attention involved New York Times reporter Myron Farber. See In re Farber, 78 N.J. 259, 281, 394 A.2d 330, 341 (affirming Farber's contempt conviction for his refusal to produce key documents and materials in murder trial), cert. denied, 439 U.S. 997 (1978).

63. Blasi, supra note 53, at 265-67. Blasi found the threat that reporters might be subpoenaed and forced to divulge the identity of their veiled sources resulted primarily in "poisoning the atmosphere" of reporter-source relationships rather than in a complete drying up of sources. \textit{Id}. The Supreme Court has noted that no conclusive evidence shows that sources dry up due to the possibility that a reporter may be forced to divulge sources to members of a grand jury. See Branzburg v. Hayes, 408 U.S. 665, 694-95 (1972).
promises of confidentiality. Finally, journalists fear losing their independence by appearing to be an investigative arm of the government.

Because of this tradition, courts frequently have confronted reporters' refusal to disclose confidential sources in judicial proceedings. In *Branzburg v. Hayes*, however, the Supreme Court refused to create an absolute reporter's privilege from testifying at a grand jury hearing. The Court reasoned that the common law never has recognized such a privilege, and that an absolute privilege would jeopardize a defendant's right to a fair trial.

Since *Branzburg*, however, most lower courts nonetheless have recognized a conditional reporter's privilege in criminal cases. In addition, all federal and nearly all state courts have

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65. See *Branzburg*, 408 U.S. at 731 (Stewart, J., dissenting); see also Blasi, *supra* note 28, at 599-600, 604 (arguing that checking function of press is impaired if its autonomy from government is compromised or if public believes its autonomy is compromised); Blasi, *supra* note 53, at 241, 254 (noting that reporters' feelings have changed drastically since years when journalists considered opportunity to serve as lead witness in official probe "a mark of distinction, the next best thing to a Pulitzer Prize").

66. See Marcus, *supra* note 61, at 818. Marcus noted that litigation over this question has increased sharply in the 1970s and 1980s. *Id.* at 820.


68. *Id.* at 690.

69. *Id.* Whether courts would recognize a qualified privilege was a hotly debated issue immediately following *Branzburg*, due to Justice Powell's opaque concurring opinion that seemed to suggest the possibility. *Id.* at 709-10 (Powell, J., concurring). A number of courts found that, because Powell was the fifth member of a five-member majority, his view controlled the case. *See*, e.g., *United States v. Liddy*, 478 F.2d 586, 586 (D.C. Cir. 1972). Two years later, Justice Powell wrote that *Branzburg* recognized that important first amendment protections were implicated when reporters claimed a privilege not to testify, and that those interests must be balanced against the state interest in an effective grand jury system. *See Saxbe v. Washington Post Co.*, 417 U.S. 843, 859-69 (1974); *see generally* Marcus, *supra* note 61, at 821-39 (describing opinions produced in *Branzburg* in detail).

70. *See*, e.g., *Zelenka v. State*, 83 Wis. 2d. 601, 618, 266 N.W.2d 279, 287 (1978). The privilege is qualified in that other, more important, interests can defeat it; courts must balance the interest in freedom of the press against the interest in the information sought. *See id.* (applying balancing test to reporter's privilege claim in criminal trial).

In both criminal and civil cases, most courts examine three elements in
recognized such a constitutional privilege in civil cases. Finally, many state legislatures have enacted so-called "shield laws" that protect confidential communications between journalists and sources with a qualified privilege. Courts have made clear, however, that the purpose of the privilege is to protect the flow of information, rather than to protect sources.

Notwithstanding judicial and legislative recognition of conditional privileges, reporters do not always choose to protect their confidential sources. Reporters' battles to shield sources have received public and judicial attention, but when sources are revealed, it is usually done with little accompanying fanfare. Media exposure of confidential sources is on the rise. Increasingly, some members of the press are concluding that disclosure of selected information about the identities of sources who were promised confidentiality is in the public interest.

balancing the interest: the relevance of the information to the case, the compelling need for the information, and the unavailability of the information from other sources less chilling to the first amendment. See, e.g., United States v. Blanton, 534 F. Supp 295, 297 (S.D. Fla. 1982). One court characterized this process as the "balancing of two vital considerations: protection of the public by exacting the truth versus protection of the public through maintenance of free press." United States v. Steelhammer, 539 F.2d 373, 375 (4th Cir. 1976).


72. Twenty-six states have enacted shield laws that offer various degrees of protection for journalists. See Marcus, supra note 61, at 859-60 n.323; see, e.g., MICH. STAT. ANN. § 28945(1) (1978); MINN. STAT. §§ 595.021-.025 (1988).


74. Media attorney Rex Heinke aptly remarked that exposure of confidential sources "isn't reported in judicial decisions. It just happens." Remarks of Rex Heinke, quoted in Langley & Levine, supra note 13, at 21.

75. See Langley & Levine, supra note 13, at 21.

76. Id. Two examples illustrate this trend. Shortly after Oliver North testified during the Iran-Contra hearings that "leaks" had led to publication of information about the Achille Lauro hijacking incident, Newsweek broke its pledge of confidentiality to North by revealing that it was North himself who had leaked the information to the press in exchange for anonymity. Id.

In 1977, a reporter promised Presidential Press Secretary Jody Powell confidentiality in exchange for damaging information concerning Senator Charles Percy. The reporter checked the information, found it to be absolutely false, and then broke his promise by writing a story about how Powell had passed along erroneous information to smear Senator Percy. Smyser, supra note 59, at 17-18.
C. CONTRACT PRINCIPLES AND CONFIDENTIAL SOURCES

When a reporter promises a source confidentiality in exchange for information, the elements of a legally enforceable contract usually are present. Contract law is premised on strict liability; courts give remedies without regard to fault. To prevail on a contract claim, an aggrieved party normally must show only that the elements of a contract existed and that the other party breached the agreement. Absent any legally recognized defenses, the defendant is liable for breaching the terms of the agreement.

Contract theory vindicates individual interests, allowing parties to exercise personal autonomy in making enforceable agreements. Contract theory also promotes society's interests in encouraging socially useful agreements, while discouraging agreements that are not socially useful by not enforcing them.

Before Cohen, only one other court had considered whether a confidentiality agreement between a reporter and a

77. The three elements of a valid contract are offer, acceptance, and consideration. See J. Murray, Murray on Contracts §§ 16, 18 (2d rev. ed. 1974). A fourth element is implied; the parties must have intended legal consequences to attach to their agreement, and courts use an objective test to determine whether the manifestations made by the parties would demonstrate the requisite intention to a reasonable person. Id. § 20.

A source's request for confidentiality constitutes an offer. A reporter's acceptance of this condition constitutes acceptance. The consideration flowing from the reporter is the reporter's promise of confidentiality, and the consideration flowing from the source is the information imparted to the reporter.


80. Such defenses include lack of capacity to contract, duress, mistake, failure to comply with the statute of frauds, illegality, failure of a condition, impossibility or impracticability of performance, and unconscionability. See J. Calamari & J. Perillo, The Law of Contracts §§ 8-1 to 8-17, 9-2 to 9-8, 9.25 to 9-30, 9-37 to 9-40, 11-16 to 11-26, 13-1 to 13-28, 19-1 to 19-39, 22-1 to 22-9 (3d ed. 1987).

81. The purpose of remedies for breach of contract conventionally is characterized as compensation of the victim for the injury resulting from the breach. Cooter & Eisenberg, Damages for Breach of Contract, 73 Calif. L. Rev. 1434, 1434 (1985). Because specific performance is disfavored, the remedy almost always will be money damages. See H. Hunter, supra note 79, §§ 7-2, 7-3.

82. See H. Hunter, supra note 79, § 1-01.

83. Cf. Prince, Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?, 70 Minn. L. Rev. 163, 164-65 n.6 (1985) (arguing that state preserves right to regulate private agreements to protect interests of all citizens).

84. See supra note 7.
source was a valid contract. Both reporters and sources have assumed that such agreements are 'ethically binding based on mutual trust, although they may not be legally binding contracts. Because of the important and sometimes conflicting interests at stake between reporters and their sources, however, disputes between them inevitably arise, and sources have begun to call on courts to enforce their agreements. Such actions require courts to balance the competing free press interests of reporters against the sources' interests in keeping their identities shielded.

II. THE BASIC TENSION BETWEEN BREACH OF CONTRACT ACTIONS BY SOURCES AND THE INTERESTS OF A FREE PRESS: DEVELOPING A STANDARD

A. THE NEED TO BALANCE INTERESTS

The functions of the press are to gather information from news sources, to analyze and interpret that information, and to publish it for the benefit of the public. Confidentiality agreements generally assist the press in performing those func-

86. *Cf.* *Sitomer, supra* note 13, at 17.
87. Langley & Levine, *supra* note 13, at 23. Courts recently have become receptive to actions alleging breach of a confidential relationship involving a wrongful disclosure of information. *See generally* Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982). Courts have found liability mostly in doctor-patient and bank-customer relationships in which the doctor or the bank wrongfully disclosed sensitive information supplied by the patient or customer. *Id.* at 1431. These courts have based liability in such cases on three theories: invasion of privacy; implied contract; and tortious breach of confidence. *Id.* at 1437. *See also* Comment, *Breach of Confidence—The Need for a New Tort*—Watts v. Cumberland County Hospital Syst., 8 CAMPBELL L. REV. 145 (1985) (arguing for development of separate breach-of-contract tort in North Carolina).

None of these cases involved reporter-source confidentiality agreements, however, and at least one commentator has argued that the breach-of-confidence theory would not be an appropriate basis for resolution of cases involving breaches of such agreements. Note, *supra*, at 1462. The commentator noted that the tort of breach-of-confidence would involve a "potentially 'chilling' factual determination of exactly what assurances the journalist gave." *Id.* Furthermore, the breach-of-confidence cases to date recognize a privilege for disclosures in the public interest, which could encompass disclosures made in the interests of the public's right to know information, thus precluding recovery by sources. *Id.*
88. *See supra* notes 23-29 and accompanying text.
Reporter-source agreements also allow sources to convey newsworthy information with some assurance either that their identities will not become public, or that information intended only as background for journalists will not be published. Sources legitimately expect that journalists will honor their agreements, and reporters are subject to both ethical and practical pressures to keep their promises of confidentiality.

Confidentiality agreements, however, also restrain the editorial freedom of media entities to publish what they have learned, by limiting their discretion to disclose either the identity of sources or the information given to reporters on condition it not be published. This restraint is self-imposed to the extent that members of the press voluntarily promise not to disclose certain information.

From the source's perspective, courts ought to enforce a confidentiality agreement that satisfies all the elements of a contract as they would any other contract. A source's breach-of-contract action merely asks a court to assess damages against a media entity for injuring the source by breaking a voluntary

89. See supra note 60 and accompanying text. Because confidentiality agreements assist the press in gathering news and because courts consider reporter's privilege cases to be newsgathering cases, it may be tempting to view breach of reporter-source agreements as a newsgathering problem. The gravamen of the action, however, is injury through publication, not through newsgathering. The defamation analogy is useful. A defamation claim is not a newsgathering case merely because the plaintiff alleges that the defendant was careless in gathering news, causing the subsequent published report to be false; the focus of the action is on publication. Similarly, the wrong that a confidential source in a breach of contract case alleges is publication, not gathering of confidential information. In contrast, the wrong alleged in a claim for intrusion of privacy is tortious newsgathering activity. See supra note 45. Indeed, the intrusion tort itself is committed exclusively during newsgathering, even though publication may follow. See Hill, Defamation and Privacy Under the First Amendment, 76 COLUM. L. REV. 1205, 1279 (1976). Some courts allow intrusion plaintiffs to recover additional damages flowing from the incidental publication, but make clear that the intrusion tort itself is a newsgathering claim. See, e.g., Dietemann v. Time, Inc., 449 F.2d 244, 250 (9th Cir. 1971).

90. See supra notes 1, 61-65 and accompanying text.

91. The American Newspaper Guild's Code of Ethics states: "Newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before judicial or investigative bodies." AMERICAN NEWSPAPER GUILD, CODE OF ETHICS, quoted in Comment, supra note 64, at 418 n.7. See also supra note 63 and accompanying text (discussing reasons journalists protect their confidential sources).

92. See supra note 63 and accompanying text.

93. See supra note 77 and accompanying text.
agreement. Nevertheless, many members of the press believe that such actions violate the first amendment because they penalize the media for providing truthful and newsworthy information to the public. When a media entity chooses to elevate the value of publishing newsworthy information above the need to shield its sources, the first amendment should at least limit absolute enforcement of pure contract principles.

In addition, because many reporter-source agreements are indefinite and vague, a contract action for sources potentially conflicts with the Supreme Court's admonition that uncertainty about potential liability be kept to a minimum in the first amendment area. Uncertainty gives rise to self-censorship and inhibits the exercise of first amendment freedoms. Moreover, imprecision and the oral nature of many confidentiality agreements raise serious problems of proof. The evidence in


95. A strong journalistic ethic militates against suppression of newsworthy information. See Culbertson, Leaks—A Dilemma for Editors as Well as Officials, 57 JOURNALISM Q. 402, 403 (1980); American Society of Newspaper Editors, Statement of Principles, quoted in Simon, Libel as Malpractice: News Media Ethics and the Standard of Care, 53 FORDHAM L. REV. 449, 473-74 n.121 (1984) (stating that the primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people); see also supra notes 20-29 and accompanying text (discussing rationale for Constitution's protection of press).

96. See supra note 63 and accompanying text.

97. Ronald Dworkin has noted that the first amendment may restrict contracts giving up the right to speak, especially if the press is involved, because speakers may be acting not just for their own, but for the public's, benefit. See R. DWORKIN, A MATTER OF PRINCIPLE 395-97 (1985).

98. See Blasi, supra note 53, at 284. Blasi noted that some confidentiality agreements involving sophisticated sources are more explicit, but these are the exception rather than the rule. Id. at 243. Two factors may account for the imprecise nature of confidentiality agreements. First, sources and reporters have based these agreements on trust, deeming a reporter's promise sufficient to ensure confidentiality. See supra notes 61-64 and accompanying text. Second, journalists often work under time constraints that make it impracticable for them to define agreements with sources precisely.


100. The development of constitutional rules in the defamation field is based partly on this concern. See supra notes 35-40 and accompanying text.

101. A related problem posed by the oral nature of many such agreements is the statute of frauds. In many states, a statute of frauds provision requires contracts that cannot be performed within one year to be written. A. MUELLER, A. ROSETT & G. LOPEZ, CONTRACT LAW AND ITS APPLICATIONS 224 (3d ed. 1983). The trial judge in Cohen held that the confidentiality contract at issue there satisfied the statute of frauds because it could be performed in less than a year, and because one side, the source, already had fully performed. Cohen
a suit alleging a violation of such an agreement often could consist of the source's word against the reporter's. The potential for expensive and sometimes vexatious litigation\textsuperscript{102} about the existence and terms of such agreements could chill editorial decision-making and lead to the kind of self-censorship that is inconsistent with the first amendment.\textsuperscript{103}

One solution to these tensions would be for the press never to promise confidentiality. This solution would eliminate the problem of definiteness in the terms of such agreements. It also assures that editors would not be forced to choose between publishing newsworthy information and honoring reporters' agreements. Such a solution, however, would hinder the press in performing its core functions of informing the public and checking the government.\textsuperscript{104} Journalists now depend heavily on confidential informants to gather news,\textsuperscript{105} and the information obtained often forms the basis for major news pieces that enable members of the public to exercise their sovereignty rights as citizens.\textsuperscript{106}

Another solution to the tensions created by sources contract actions would be for courts to hold that the first amendment shields the press from any liability. Because the function of the media is to publish information, sources arguably assume the risk that journalists will disclose more information than sources intend.\textsuperscript{107} This solution fails to recognize the important role that legally enforceable agreements play in allowing indi-

\textsuperscript{102} An example of vexatious litigation directed against the media is a new breed of libel action intended to harass, punish, and intimidate the media rather than to seek compensation for actual injury. \textit{See} Kirtley, \textit{Discovery in Libel Cases Involving Confidential Sources and Non-Confidential Information}, \textbf{90} \textit{DICK. L. REV.} 641, 643 (1985); \textit{R. Bezanson, G. Cranberg & J. Soloski, Libel and the Press: Setting the Record Straight, Silha Lecture at the University of Minnesota, May 15, 1985, reprinted in Silha Center for the Study of Media Ethics and Law, Univ. of Minn., Publication No. 85061 (1985). A source contract action could raise similar problems; cf. \textit{supra} note 98 (discussing imprecise nature of most confidentiality agreements).

\textsuperscript{103} In the field of defamation, for example, the potential cost of even defending libel suits has caused some publishers to stop investigating certain high-risk stories or to decline to publish them. \textit{Picard, Litigation Costs and Self-Censorship, L.A. Daily}, June 19, 1981, at s18.

\textsuperscript{104} \textit{See supra} notes 25-29 and accompanying text.

\textsuperscript{105} \textit{See supra} notes 52-57 and accompanying text.

\textsuperscript{106} \textit{See Zerilli v. Smith, 656 F.2d 705, 711 (1981).}

\textsuperscript{107} \textit{See Note, Reporters and Their Sources: the Constitutional Right to a Confidential Relationship, \textbf{80} YALE L. REV. 317, 342 (1970).}
iduals to rely on the promises of others.\textsuperscript{108} Moreover, the Supreme Court has rejected an absolutist position in protecting first amendment values,\textsuperscript{109} choosing instead to balance the interests protected by common-law causes of action against first amendment interests.\textsuperscript{110} Giving the press unlimited power to abrogate legitimate agreements, without regard to the harm such abrogation may cause sources, leaves important interests unprotected and tips the balance too far in favor of free press interests.\textsuperscript{111}

When new causes of action or new fact situations involving traditional causes of action chill the exercise of first amendment functions, courts must respond with a standard that reconciles the competing interests.\textsuperscript{112} Normally, requiring members of society to keep their promises is unobjectionable. Similarly, requiring the press to honor its contractual under-

\textsuperscript{108} This solution also ignores the media's heavy reliance on confidential agreements in gathering news. See \textit{supra} notes 53-57 and accompanying text.


\textsuperscript{110} See, \textit{e.g.}, Barenblatt v. United States, 360 U.S. 107, 126 (1959) (stating that "[w]here First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown"); \textit{cf.} Gertz, 418 U.S. at 342 (finding that tension necessarily exists between need for vigorous press and legitimate interest in redressing wrongful injury, which must be resolved by reconciling of interests).

\textsuperscript{111} Professor Alfred Hill considered the closely analogous problem of contracts restricting an author's ability to publish confidential information and concluded that courts must balance the interests protected by such contracts against first amendment considerations. \textit{See} Hill, \textit{supra} note 89, at 1294, 1298-99. Professor Hill did not examine how courts should resolve the competing interests, noting that "[t]he extent to which otherwise valid obligations of secrecy may be enforced consistently with the first amendment is a major issue that will not be examined in this Article." \textit{Id.} at 1294. Hill seemed to lean toward a standard similar to that proposed in this Note, however, remarking that liability may depend on whether "the breach by the author is a particularly egregious one." \textit{Id.} at 1299.

\textsuperscript{112} \textit{Cf.} Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (stating that nontraditional restraints on publishing can be subject to constitutional standards); Kerby v. Hal Roach Studios, Inc., 53 Cal. App. 2d 207, 210, 127 P.2d 577, 579 (1942) (stating that "[n]ew sets of facts are continually arising to which accepted legal principles must be applied, and the novelty of the factual situation is not an unscaleable barrier to such application of the law"); Van Alstyne, \textit{supra} note 47, at 817-19 (arguing courts must be vigilant in applying heightened constitutional standards to new causes of action that threaten first amendment values).
takings, or to follow generally applicable laws such as those regulating labor or antitrust practices, is rarely thought to present a first amendment problem. But when enforcement of contracts abridges core press functions—such as informing the public and acting as a check on the government—the first amendment should impose some limitations.

Modern defamation law provides a useful analogy. There is nothing inherently objectionable about punishing speakers for uttering defamatory falsehoods that injure the reputation of others. But because the punishment of false defamatory speech may threaten to chill publication of truthful, newsworthy information, the first amendment limits application of defamation law. As in other first amendment areas, the Supreme Court has adopted standards that balance the interests protected by defamation law and the first amendment interest in robust debate.

Similarly, to resolve the tension between sources' expectations of confidentiality and the interests of the press in freedom from litigation caused by indefinite agreements and in the ability to publish newsworthy information, courts should balance the conflicting interests.

As in the area of defamation, courts


115. Justice Harlan has illustrated this point by noting that if a reporter racing to cover a story negligently runs down a pedestrian, his employer cannot escape tort liability by invoking the first amendment. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 67 (1971) (Harlan, J., dissenting); see also Associated Press, 301 U.S. at 132 (stating that "the publisher of a newspaper has no special immunity from the application of the general laws").

116. The distinction between regulations impinging on core press functions and those imposing merely incidental burdens is an important one. Requiring that the media adhere to fair labor practices or honor their contractual obligations to pay their light bills is unobjectionable because these requirements do not directly affect the media's checking and publication functions; they are merely incidental burdens. In contrast, courts have abrogated common-law tort principles in the defamation and privacy areas because such causes of action threaten the core first amendment functions of the press. See supra notes 23-29 and accompanying text. Similarly, members of the press claim a qualified exemption from standard evidentiary rules when protecting confidential sources because a nexus exists between newsgathering and the core publication function of the press. See supra notes 70-73 and accompanying text.

117. See supra notes 35-44 and accompanying text.

118. Neither pure application of common-law contract rules nor shielding the press from all liability under the first amendment achieves an adequate
should graft a constitutional standard onto common-law contract rules for cases in which confidential sources sue the media. To develop such a standard, courts must consider the interests served by a such a cause of action, and how that action threatens first amendment values.

**B. CONSIDERATIONS IN DEVELOPING A PROPER STANDARD**

Any helpful standard for balancing interests in source contract cases must define the conditions under which plaintiffs will recover and the conditions under which media defendants should be exempt from liability. In developing a standard, courts must balance a state's interest in enforcing its common-law contract rules for the benefit of news sources against the potential abridgment of interests protected by the free press clause of the first amendment. Because a constitutional dimension is involved, courts should tilt the balance towards protection of first amendment interests.

Apart from any contractual rights, sources legitimately expect that the press will honor promises of confidentiality. Fortunately, institutional pressures on the press to keep their promises provide a good deal of assurance that the press will uphold these agreements. These pressures, however, are not enough fully to protect sources. Under some circumstances in which press entities abrogate legitimate agreements, sources should be able to recover damages for their resulting injuries.

Government enforcement of contract law promotes soci-
ety's interest in achieving stable relationships by allowing individuals to rely on others' promises and by compensating parties when agreements are breached. In the newsgathering context, a source may rely more readily on a reporter's promise of confidentiality if the source knows that a remedy for breach exists, and that in the event the press entity breaches the agreement, a contract action will provide damages for injury flowing from the breach. The harm to a source from breach will vary greatly, but likely will depend on the reason the source sought confidentiality in the first place. The greater the interest the source sought to protect by requesting confidentiality, the larger is the likely harm from breach.

(1st Cir. 1988), cert. denied, 109 S. Ct. 889 (1989). This freedom lies at the heart of personal autonomy, allowing individuals to order business and personal affairs and to protect interests they deem important. See H. HUNTER, supra note 79, at §§ 1-1, 1-2.

123. Roscoe Pound wrote that it is "a jural postulate of civilized society" that people "be able to assume that those with whom they deal... will carry out their undertakings..." R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 133 (1954).

124. Although it is impossible to generalize about why sources choose to disclose information, it is fair to say that at least some sources may be more willing to disclose information on a confidential basis knowing that they have a legal remedy if a press entity breaks its promise. Johnson, "Punishing the Press," Minn. L. J., Sept. 1988, at 20, col. 1 (quoting attorney Elliot C. Rothenberg); cf. Blasi, supra note 53, at 267 (noting that one cannot conclude that threat of reporter being subpoenaed certainly causes "drying up" of sources because many factors affect reasons sources reveal information); Osborne, supra note 52, at 75 (stating it is virtually impossible to ascertain reasons why some sources are reluctant to provide information).

125. See supra note 81 and accompanying text (discussing purpose of contract damages). A complete discussion of damages is beyond the scope of this Note. One observation, however, is in order. Damages for emotional distress may be available in these cases, although they are unavailable in other contract cases, because breaches of confidentiality contracts foreseeably can cause emotional distress as well as pecuniary loss. Cf. Huskey v. NBC, Inc., 632 F. Supp. 1282, 1293 (N.D. Ill. 1986) ("By their very nature, contracts not to invade privacy are contracts whose breach may reasonably be expected to cause emotional disturbance").

126. Sources who bargain for confidentiality often seek to protect important interests by remaining anonymous. Their careers, their status in the community, or even their lives may be at risk when they disclose information. Foreman, supra note 58, at 27.

Everyone has an interest in controlling what others know about him or her and how they receive that information. See A. WESTIN, PRIVACY AND FREEDOM 32-36 (1967). The issues raised by breach-of-confidentiality contract actions thus recall the tension between the right to keep intimate facts private and the public's "right to know" that arises in an action for disclosure of private facts. See supra note 45; Bezanson, Public Disclosures as News: Injunctive Relief and Newsworthiness in Privacy Actions Involving the Press, 64 IOWA L. REV. 1061, 1078-79 (1979).
The countervailing interest at stake whenever press freedoms are threatened is the constitutionally recognized role of the press in informing the public, checking the government, and promoting individual self-expression.127 As the Supreme Court's decisions in the defamation and privacy areas illustrate, courts must identify the ways in which particular common-law actions abridge those interests.128

A source's contract cause of action threatens to abridge free press interests in several ways. The indefinite nature of confidentiality agreements129 could leave the press vulnerable to suits based upon little more than a source's word against a reporter's.130 In addition, strict contract liability chills the freedom of the media to exercise complete editorial discretion to publish newsworthy information.

Under the basic contract model, each party negotiates terms, often laboriously, until the two reach a mutual understanding. There are exceptions to the paradigm, but courts are accustomed to settling disputes with the assistance of written documentation and other evidence of negotiations.

The hurried nature of the newsgathering process, however, normally precludes a reporter and a source from generating such extensive documentation. Confidentiality agreements are nearly always oral and frequently are vague and imprecise.131 A factual determination by a court as to whether a confidentiality agreement in fact exists, and as to what the agreement's terms are, may turn on nothing more than the recollections of the parties.132 Such cases create difficult issues for factfinders and would subject the press to protracted and expensive litigation.133

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127. See supra notes 20-29 and accompanying text.
128. See supra notes 35-47 and accompanying text.
129. See supra note 98 and accompanying text.
131. See supra note 98 and accompanying text.
132. A related problem is contract law's allowance of courts to fill the gaps that parties leave in agreements. This power works well in a commercial setting, where most issues are laboriously negotiated and trade usage and custom provide guidelines for filling in implied terms. See generally Bayles, Introduction: The Purposes of Contract Law, 17 VAL. U.L. REV. 616, 642-43 (1983) (noting courts rely on custom to imply contract terms). The imprecise nature of confidentiality contracts, however, creates great uncertainty about how judges will fill in gaps in such contracts.
133. The use of contract law in other areas of the reporter-source relation-
Members of the Supreme Court have stated that the very possibility of engaging in protracted litigation may impermissibly chill the exercise of first amendment rights. Significantly, one newspaper recently prevented distribution of an entire section after a source claimed that publication of a story would violate her confidentiality agreement with a reporter. Because the newspaper's editors could not verify whether this agreement in fact existed, they decided not to publish the story rather than to risk litigation.

The Supreme Court consistently has recognized that editors have wide latitude in deciding what to publish. Information about an individual that is embarrassing, causes extreme emotional distress, or is false and defamatory but published without the requisite degree of fault enjoys constitutional protection. The first amendment imposes such limits on press liability to enable the press to perform its constitutionally recognized roles.

When a media entity knowingly publishes information it has promised to keep confidential, it often will have made an

ship also could create new legal problems for the press. For instance, a reporter who tells a source that he wants to get the source's side of a story to "balance the piece" could risk a breach of contract suit if the published story omits the source's statements. The source could claim that he gave the reporter information in exchange for a promise that the story would quote the source. Even worse, a source could sue for breach of contract based on the reporter's failure to achieve balance even if the story did quote the source. The source could allege that the reporter promised to achieve balance, not merely to quote the source. Such suits would require that a court engage in a potentially chilling, content-based inquiry to determine if the piece was or was not balanced. The newspaper defendants in Cohen raised the latter scenario as a likely result of allowing confidential sources to bring common-law breach-of-contract actions. See Defendants' Brief, supra note 7, at 5.

134. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (plurality opinion); id. at 82 (Harlan, J., dissenting).

135. See supra note 16.

136. See, e.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("It has yet to be demonstrated how governmental regulation of this crucial process [of editing] can be exercised consistent with First Amendment guarantees of a free press. . .").


140. See supra notes 20-29 and accompanying text.
editorial decision that the value of making the information public outweighs the value of upholding its agreements.\textsuperscript{141} When a source sues for breach of contract, the source asks a court to impose absolute liability on the press entity for its editorial decision without regard to the circumstances that led to breach. In a normal commercial setting, such liability would be unobjectionable.\textsuperscript{142} Normal common-law rules must be modified, however, if free speech and free press interests are present.\textsuperscript{143}

The strong ethic of protecting anonymous sources influences editorial decisions regarding publication in violation of confidentiality agreements.\textsuperscript{144} Important reasons therefore may motivate a decision to breach such an agreement. Events may have changed dramatically since a press entity promised anonymity.\textsuperscript{145} Alternatively, the press entity may discover that the source lied,\textsuperscript{146} making the source's identity and motive themselves newsworthy. In addition, the information offered by the source may implicate the source in a criminal investigation,\textsuperscript{147} or in other ways may have taken on a newsworthiness not anticipated when the promise of confidentiality was made.\textsuperscript{148} Such reasons explain why the press chooses to breach a promise of confidentiality.

An analysis of the interests at stake is necessary to the formulation of an appropriate standard. Sources are most justified in pursuing claims arising from substantial injury to the interests their requests for confidentiality are intended to protect. The press, on the other hand, has legitimate interests in avoiding disputes over ambiguous and indefinite confidentiality agreements, and in being able to publish information that is extraordinarily newsworthy. Under an optimum standard for claims of breach, liability would arise if a definite agreement

\textsuperscript{141} See supra note 76 and accompanying text.
\textsuperscript{142} Under traditional contract doctrine, the defendant's motive for breaching a contract is not relevant. See supra note 79 and accompanying text.
\textsuperscript{143} See supra note 47 and accompanying text.
\textsuperscript{144} In the Cohen case, discussed at notes 8-12 and accompanying text, supra, the editors of a newspaper debated whether to disclose the identity of a confidential source for more than five hours before reaching a decision. See Defendants' Brief, supra note 7, at 23-25.
\textsuperscript{145} For example, the information may implicate national security or bear on an important political contest. Investigative reporter Bob Woodward contends that the death of the source abrogates any agreement between the source and the reporter. Langley & Levine, supra note 13, at 22.
\textsuperscript{146} Id.; see also supra note 76 (discussing instances in which press decided disclosure of confidential information was in public interest).
\textsuperscript{147} See supra note 76.
\textsuperscript{148} For two examples of such changed circumstances, see id.
existed and a press entity breached an agreement in a particularly egregious manner without regard for the interests and rights of the source. As in other areas in which first amendment free press interests are present, courts should apply a constitutional standard under which a defendant must be found to have acted with some degree of fault to be held liable.\footnote{149}

III. THE PROPOSED STANDARD AND HOW COURTS SHOULD APPLY IT

A two-part standard that addresses both the definiteness\footnote{150} and the newsworthiness concerns\footnote{151} of the press offers the best reconciliation of the competing interests. This section proposes such a standard, discusses this standard’s protection of the competing interests, suggests how courts should apply the standard, and addresses possible criticisms of the standard.

A. THE PROPOSED STANDARD

Under the first prong of the standard, courts should require source plaintiffs to produce clear and convincing evidence\footnote{152} that a confidentiality agreement existed and that a media entity breached the agreement by publishing information in violation of its terms.

This prong parallels the Supreme Court’s holdings in the defamation area, which require that public figure plaintiffs prove by clear and convincing evidence that defendants acted with actual malice.\footnote{153} A heightened burden of proof is necessary to preserve first amendment values.\footnote{154} Application of a clear and convincing standard of proof is especially appropriate in source contract causes of action, because a media defendant faces difficulty in refuting a source’s claim that confidentiality

\footnote{149. \textit{See} Hill, \textit{supra} note 89, at 1254-55 ("The first amendment must be deemed generally to preclude imposition of liability upon the media for activities peculiar to their media functions except upon a finding of fault"); \textit{see also} Eastwood v. Superior Court, 149 Cal. App. 3d 409, 423-24, 198 Cal. Rptr. 342, 351 (1983) (same).}

\footnote{150. \textit{See} \textit{supra} notes 129-35 and accompanying text.}

\footnote{151. Newsworthiness concerns include the interest of the press in deciding which information to publish as well as the inherent newsworthiness of the information to be published. \textit{See} \textit{supra} notes 136-48 and accompanying text.}

\footnote{152. Clear and convincing evidence is an intermediate standard of proof, demanding more than a preponderance of the evidence but less than evidence beyond a reasonable doubt. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 271 (Rehnquist, J., dissenting).}


\footnote{154. \textit{Id.}}
was promised. This prong of the proposed standard limits the potential for frivolous and vexatious suits in which a source makes only vague allegations and the media entity involved denies that it promised confidentiality or disputes key terms of an alleged confidentiality agreement.

Assuming the source plaintiff can prove the existence and breach of the agreement with clear and convincing evidence, courts further should require that the plaintiff prove the media entity breached the agreement with reckless disregard for the source’s interests in seeing the promise of confidentiality honored.

The second prong of the proposed standard resembles the *New York Times* fault standard for public figure defamation cases because it requires a showing of reckless disregard. Like the *Times* rule, the proposed standard abrogates the common-law, which imposed strict liability, by requiring a showing of fault on the part of a media defendant before a court can impose liability. The proposed standard, however, is not intended

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155. See supra notes 101-03 and accompanying text. One possible alternative to a constitutional standard that raises the burden of proof would be to employ the common-law contract rule that courts will enforce only agreements that are certain. That rule, however, inadequately protects first amendment interests. Courts are reluctant to declare agreements void for uncertainty until the parties have had an opportunity to present all relevant evidence, and will find a contract void for indefiniteness only as a last resort. Wedtke Realty Corp. v. Karanas, 286 A.D. 339, 143 N.Y.S.2d 198, aff’d., 309 N.Y. 904, 131 N.E.2d 579 (1955). Such a protracted factfinding process is incompatible with first amendment interests. See supra note 134 and accompanying text.

156. In such cases, the media defendant almost always would prevail on a motion for summary judgment. A court would be required to apply the clear and convincing standard in evaluating the summary judgment motion. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). In a “swearing contest” involving only the recollections of a reporter and a source, a plaintiff would be unable to meet the clear and convincing standard. The consequence may be that meritorious claims are precluded because the plaintiff lacks corroborating evidence, but such a result is not unique. Other procedural safeguards employed to protect first amendment values produce a similar result. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (stating that requiring defamation plaintiffs to prove falsity of publication may cause some otherwise meritorious claims to fail, although they would have succeeded had burden been on defendant to prove speech was truthful).


158. The *Times* standard is employed in public figure defamation cases and has been extended to similar common-law actions seeking compensation for injury caused by publication. See supra notes 45-47 and accompanying text.
to be a blind application of the Times rule.\textsuperscript{159} Although New York Times and its progeny generally illustrate the weight courts should give the competing interests involved in such cases,\textsuperscript{160} the nature of the contract cause of action and of the competing interests to be balanced preclude simple application of the New York Times standard.\textsuperscript{161} The meaning of reckless disregard in this context necessarily differs from its meaning in the defamation context.\textsuperscript{162}

The reckless disregard part of the proposed standard focuses on the harm to the source that flows from the breach of a confidentiality agreement. To impose liability under this standard, a factfinder must find that the media defendant published the information in violation of the confidentiality agreement without giving due deference to the source’s rights. This approach requires balancing of the particular interests at stake in a given case. Relevant considerations in determining the existence of recklessness include the extent of a media defendant’s knowledge of the reasons why a source requested confidentiality, the defendant’s reason for publishing the specific information, and the newsworthiness of that information. Such considerations are significant because “reckless disregard” is a standard of culpability that has meaning only when the defend-


\textsuperscript{160} R. SMOLLA, supra note 41, § 11.01 [a]-[b], at 11-4.5.

\textsuperscript{161} Professor Smolla forcefully argues that courts cannot apply the New York Times standard blindly to other causes of action. Discussing the tort of intentional infliction of emotional distress, he argues that it is “logically impossible to simply lift the New York Times formulation out of the context of defamation and apply it literally to the tort of infliction of emotional distress because the relationship between the publisher’s conduct and the risk encompassed by the emotional distress tort is different in kind from the relationship between the conduct and the risk at stake in defamation.” See R. SMOLLA, supra note 41, § 11.01[2][b], at 11-44 to .5. The Court’s application of New York Times to the intentional infliction cause of action in Hustler Magazine v. Falwell is not a pure application of New York Times, however; its “relational terms” must mean something different from their meaning in the defamation context. See infra note 163 (explaining Professor Smolla’s concept of “relational terms”); supra note 46 (citing Hustler decision).

\textsuperscript{162} See Hill, supra note 89, at 1254-55. Professor Hill argues that the first amendment precludes imposition of liability for activities peculiar to the media function of the press unless fault is shown. Id.

The type of scienter found in defamation law is not present in private facts disclosure cases, however, because the disclosure itself is willful. Courts therefore must formulate a different standard of fault for those cases, and for source disclosure cases where a breach of contract is alleged. See supra note 160-61 and accompanying text.
B. How the Proposed Standard Protects the Competing Interests

The proposed standard strikes a balance between strict liability for contract breaches and absolute protection for the press. In essence, it allows liability for particularly egregious breaches, but protects the press from the chilling effects that imposing strict liability for breaches of confidentiality contracts would create.

Requiring that a source prove the terms of an alleged agreement with clear and convincing evidence, and that the press recklessly disregarded the source's rights in breaching such an agreement, will provide sources with a strong incentive carefully to negotiate the terms of confidentiality agreements. Sources also will have an incentive to make certain that reporters understand the consequences of breaching such agreements. So long as a journalist knows why the source seeks confidentiality, and understands the likely harm to the source from breach, a court is likely to impose liability for such

163. Professor Smolla notes that "[t]erms describing levels of fault have no meaning in the abstract. The terms 'intentional,' 'reckless,' and 'negligent' are always relational; they make sense only as descriptions of relations between an actor's conduct and specific risks." R. SMOLLA, supra note 41, § 11.01 [2][b], at 11-4.4.

For example, speeding through a busy residential neighborhood could show reckless disregard for the rights of others. Such conduct may not be reckless, however, when the driver is rushing a dying person to the hospital. Similarly, when the press breaches a confidentiality agreement, the newsworthiness of the information may be so great as to support a finding that the press was not reckless.

164. Putting the burden on sources makes sense because they know best the extent of the interests they seek to protect. Indeed, some sources already operate in this fashion. See Blasi, supra note 53, at 242-43 (noting that government whistle blowers, who are especially vulnerable to reprisals, tend to use care in negotiating confidentiality and require an explicit understanding of the agreement).

165. This consequence also may promote the desirable goal of making reporters more careful in promising confidentiality.

166. The journalist may not know the precise reasons why a source requests confidentiality, and the source need not always disclose these reasons to the reporter. Reporters should be expected to make reasonable inferences from the circumstances and their knowledge of the nature of the reporter-source relationship. For instance, an employee in the Pentagon who gives a reporter information on cost overruns on condition of anonymity obviously risks being fired, and knowledge of that fact should be imputed to a journalist who accepts a tip from such an employee.
a breach. The standard also applies to sources with little at stake, however; a media entity is not absolutely free to breach an agreement just because a source has little to lose from breach. The proposed standard nonetheless recognizes that the sources requiring the most state protection generally are the ones with the most to lose from a breach.

When a media entity publishes highly newsworthy information, however, the factfinder might find that recklessness does not exist, even if a journalist knew that disclosure could cause a source great harm. There is nothing novel in this approach. It recognizes that a recklessness standard requires a factfinder to weigh the utility of the defendant's conduct against the foreseeable harm to the plaintiff.

Under the proposed standard, when a media entity publishes information it believes is not covered by a confidentiality agreement, the media entity need not fear liability unless a source can show with clear and convincing evidence that the

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167. This outcome is more likely because the second prong of the standard focuses on the conduct of the media defendant when it decided to abrogate the agreement.

168. The standard recognizes that all sources have legitimate expectations that confidentiality contracts will be honored and that the press should not be free recklessly to disregard sources' rights. As an example, suppose a reporter is doing a story on neighborhood crime-watch programs. The reporter grants confidentiality to a member of the neighborhood who criticizes the program as "worthless and ineffectve." The most the source risks is that neighbors might view the source as uncooperative or cranky. If the media entity decides that the article reads better with the confidential source named and breaches the agreement on that ground alone, however, there is a good case for liability.


170. For example, suppose that a source gave certain information about an air force jet fighter to a reporter as background. If the confidential information proves that the plane has a tendency to crash and the reporter cannot obtain this information from another source, the press may be justified in breaching the agreement and publishing the information.

171. See supra note 163 and accompanying text. The recklessness standard thus requires courts to engage in some ad hoc balancing in each particular case. Cf. Note, Media Liability for Physical Injury Resulting from the Negligent Use of Words, 72 MINN. L. REV. 1193, 1223-24 (1988) (noting that application of negligence theory in speech area necessarily involves ad hoc balancing). The proposed standard, however, is not an ad hoc balancing standard. Professor Nimmer explains that heightened constitutional standards such as the New York Times standard are definitional balancing standards. In developing the proposed standard, plaintiffs' rights and first amendment interests are balanced in the abstract, not in light of a particular case. See M. Nimmer, supra note 109, § 2.03. In applying the standard to the facts of a particular case, however, courts must engage in ad hoc balancing of the media defendant's conduct against the asserted rights of the plaintiff source.
media entity had promised not to publish the information.\textsuperscript{172} If the reporter denies such a promise and no corroborating evidence to support the source's allegation exists, a court should grant summary judgment to the media defendant.\textsuperscript{173}

The standard also gives the media "breathing space" to make editorial decisions about when the public interest demands that they breach a confidentiality agreement. The proposed standard imposes a duty on the media to pay special attention to the interests of the source in making these decisions. The press, however, is not given the final say about whether it has struck the correct balance of interests. As in other areas of the law, the judiciary must be the final arbiter of conflicting rights.

C. APPLICATION OF THE PROPOSED STANDARD TO THE COHEN CASE

In \textit{Cohen v. Cowles Media Co.},\textsuperscript{174} the parties did not dispute the terms of the confidentiality agreement.\textsuperscript{175} Thus, under the proposed standard, the plaintiff would have had no problem proving the terms by clear and convincing evidence. The second prong of the standard therefore would determine the outcome of the case.

Whether the newspapers breached the agreement in reckless disregard of the rights of the source depends on three factors: the defendant's knowledge of the likely harm to the source flowing from publication, the newsworthiness of the information published, and the proffered reasons for disclosure. The media defendants in \textit{Cohen} argued that the newsworthiness of the source's identity outweighed their obligation to honor their promise of confidentiality.\textsuperscript{176} In addition, they argued that Cohen hid key information from the reporters when he extracted a promise of confidentiality.\textsuperscript{177} Cohen argued that

\textsuperscript{172} For instance, if the reporter's subpoenaed notes showed that the reporter granted confidentiality, the source would meet the burden of proof. Another example of evidence that would satisfy the burden is the production of eyewitnesses who heard the reporter promise confidentiality.

\textsuperscript{173} See supra note 156 and accompanying text.


\textsuperscript{175} See Defendant's Brief, supra note 7, at 20-21.

\textsuperscript{176} The newspapers argued that the only way to place the story in context was to identify Cohen as the source and to explain that his reason for offering the information about the opposing candidate was to smear her just before the election. See Defendants' Brief, supra note 7, at 28-29.

\textsuperscript{177} See supra note 7.
the newspapers knew that disclosing his identity would expose him to ridicule and that his resulting loss of employment was foreseeable. In addition, Cohen contended that the defendants could have accomplished their objective of informing the public by identifying the source of the information as “a Republican party activist,” or a similar tag.

The Cohen facts would present a difficult question for the factfinder under this Note’s proposed standard, because they constitute a truly “hard case” in which strong evidence supports both sides. The newspapers’ decision not to publish a story that simply attributed Cohen’s information to “a Republican party activist” or other such tag conveying the message that the tip was a political smear arguably suggests reckless disregard for Cohen’s rights. On the other hand, Cohen was rather well known in the community and the newsworthiness of his specific identity might persuade a jury that the defendants had not acted with reckless disregard.

The proposed standard does not dictate a particular result in Cohen, but it does provide a framework for analysis that takes into account the competing interests on both sides. The standard recognizes that the presence of important first amendment values mandates that a federal constitutional standard limit the common law of contracts when a source sues the press for breach of a confidentiality agreement.

D. A RESPONSE TO POSSIBLE CRITICISMS OF THE STANDARD

The proposed standard protects the media from the chilling effects of litigation over imprecise agreements and allows some editorial freedom to breach agreements where the media does not recklessly ignore the harm that will flow to the source. The freedom to disclose confidential information appears at first blush contrary to the newsperson’s privilege, which protects the press from forced disclosure of its sources. The different considerations involved in a source contract suit, however, make the proposed standard perfectly compatible with the newsperson’s privilege.

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179. Id.
180. This Note hypothesizes some “easy” cases under the proposed standard. See supra notes 145, 156, 163, 166, 168, 170.
181. See supra notes 70-73 and accompanying text. As media attorney Floyd Abrams noted: “It’s not easy to say we can’t reveal a confidential source in one case but can in another.” Langley & Levine, supra note 13, at 24.
182. Because of the first amendment newsgathering value involved, courts
A Newsperson's privilege protects the media's newsgathering function by limiting forced source disclosures in judicial proceedings. Forced disclosures, however, do not directly affect the media's core function of publication. In contrast, a state's enforcement of a confidentiality agreement through a source's breach-of-contract suit directly punishes the press for an editorial decision to publish. Were publication itself not an issue, little argument could be made for applying a constitutional standard of protection in favor of a press entity in a breach-of-contract suit.

Moreover, giving the press some protection against source contract suits should not cause sources to become generally less willing to speak to journalists. The present system allows courts in judicial proceedings to order the press to disclose confidential sources when the courts determine that disclosure is in the interest of justice. Thus, sources already are exposed to disclosure in the course of judicial proceedings, and evidently are not thereby deterred from communicating with the press.

The proposed standard alters the common-law contract framework in two ways for source breach-of-contract suits. The standard imposes on plaintiffs a heavier burden of proof, because they must prove the existence and terms of the alleged

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183. See supra note 164 and accompanying text.
184. See supra note 164.
185. See supra note 164.
186. See supra notes 61-65 and accompanying text. In addition, forthright judicial recognition that a promise of confidentiality is a legally enforceable agreement actually may persuade some sources that they should have less reason to fear speaking with the media.
187. See supra notes 70-73 and accompanying text. Such disclosure can cause sources injury similar to voluntary publication by the press. Most courts have disregarded this harm when ordering disclosure, however, holding that the newsperson's privilege protects only the newsgathering interest of the media, not the interests of the source. See supra note 73.
188. Because the judiciary can abrogate confidentiality agreements, it would be a perverse result to hold a press entity absolutely liable when, to fulfill its constitutional function of publishing newsworthy information, it abrogates a confidentiality agreement. Government, through the judiciary, could abrogate reporter-source agreements but would strictly enforce sources' rights against the press when the press made the same decision. That system, which would allow no balancing of interests, would cross the line from legitimate enforcement of the laws to invasion of the institutional autonomy of the press.
contract and that the media defendant breached the agreement with the requisite degree of fault. This proposal accords with the judicial trend of devising special rules for narrow classes of contract cases,\textsuperscript{188} such as the rule that courts will construe strictly agreements that insulate parties from tort liability.\textsuperscript{169} Courts apply such rules as a matter of state common law, whereas courts would apply the standard proposed by this Note as a matter of federal constitutional law protecting the first amendment values at stake.

Furthermore, the common law requires that the plaintiff prove the existence and terms of a contract with clear and convincing evidence in other contract contexts. When a patient alleges that a physician contracted to guarantee a specific result, for example, most courts require clear proof of the existence and terms of the agreement.\textsuperscript{190} The rationale for that rule is analogous to the rationale behind the proposed standard, that is, to limit the chilling effect on the practice of medicine caused by recognition of a contract cause of action against doctors.\textsuperscript{191}

The proposal also abrogates the general practice of imposing contract liability without regard to fault\textsuperscript{192} by requiring that a source plaintiff prove that a media defendant breached a confidentiality contract with reckless disregard for the source's rights. Common-law exceptions to this rule, however, are not unusual. The proposed standard thus follows the prevailing trend of courts to balance interests in interpreting contracts when important public policies are at stake.\textsuperscript{193} Moreover, in some states that allow punitive damages for contract breaches,

\begin{itemize}
\item \textsuperscript{188} Courts and legislatures always have adapted contract rules to meet new public policy needs. Particular areas of contract law, such as the law of sales or insurance, grew out of the need for specialized rules to meet specific circumstances. See L. Friedman, Contract in America 20-24 (1965); Gilmore, The Death of Contract 6-7 (1974). Courts long have limited the enforceability of unconscionable contracts and contracts against public policy. E. Farnsworth, supra note 78, §§ 4.28, 5.1.
\item \textsuperscript{189} See, e.g., Goyings v. Jack & Ruth Eckerd Found., 403 So. 2d 1144, 1146 (Fla. Dist. Ct. App. 1981) (invalidating exculpatory clause because it did not state explicitly that defendant would be held harmless for injuries resulting from its negligence).
\item \textsuperscript{190} E.g., Sullivan v. O'Connor, 363 Mass. 579, 582-83, 296 N.E.2d 183, 185-86 (1973). (noting some courts have considered refusing to enforce these agreements as violative of public policy, but most courts have taken middle road by requiring heightened standard of proof); see Annotation, Recovery Against Physician on Basis of Breach of Contract to Achieve Particular Result or Cure, 48 A.L.R.3d 1221, 1225-26 (1972).
\item \textsuperscript{191} Annotation, supra note 190, at 1225-26.
\item \textsuperscript{192} See supra note 78 and accompanying text.
\item \textsuperscript{193} The proposed standard is in essence a balancing standard between the
courts apply a similar nonconstitutional standard of reckless disregard of the rights of others as a threshold for recovery.\textsuperscript{194} This kind of fault inquiry thus should pose few practical problems for courts.\textsuperscript{195}

In other areas of the law, constitutional rules limit the enforceability of contracts.\textsuperscript{196} Like the constitutional rule abrogating strict liability for defamatory falsehoods, the proposed standard alters the common-law contract framework by allowing recovery only to plaintiffs who prove the requisite degree of fault.\textsuperscript{197} The proposed standard applies only in the narrow class of cases in which a news source sues a media entity for publishing information in violation of a confidentiality agreement with that source.\textsuperscript{198} Grafting a federal constitutional standard onto contract law recognizes that contract law, like other areas in which the common law chills press freedoms, "can claim no talismanic immunity from constitutional limitations."\textsuperscript{199}

rights of the source in having the agreement enforced and the competing free-press interests.

\textsuperscript{194} E.g., Material Handling Indus., Inc. v. Eaton Corp., 391 F. Supp. 977, 981 (E.D. Va. 1975) (noting that standard for awarding punitive damages in contract action is "malice, bad faith, reckless disregard for the rights of others"). For variations on that language, see cases cited in C. KAUFMAN, CORBIN ON CONTRACTS: 1984 SUPPLEMENT 302-05.

\textsuperscript{195} One court has applied a fault standard to a source breach-of-contract claim. See supra note 14. A California court first ruled that a statute which on its face did not apply to the breach-of-contract situation should govern a contract case. See id. The court held that under the statute, the plaintiff had to show the defendant breached the contract with reckless disregard for the consequences to the source. See id.


\textsuperscript{197} Normally only tort plaintiffs must prove fault. Courts long have recognized, however, that a contract breach resembles a tort. See Greco v. Kresge Co., 277 N.Y. 26, 33-34 12 N.E.2d 557, 561 (1938) (noting that "distinction between torts and breaches of contract is, oftentimes, so dim and shadowy that no clear line of delineation . . . may be formulated").

\textsuperscript{198} In narrow classes of cases, constitutional rules can coexist harmoniously with common-law rules. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (allowing recovery under common-law defamation rules in narrow category of defamation cases in which plaintiff is private figure and speech at issue is not of public concern). The proposed standard, which applies constitutional restrictions only in the narrow class of source breach-of-contract actions, is thus consistent both with the evolution of contract doctrine and with the Court's treatment of other common-law causes of action that threaten first amendment values.

CONCLUSION

The press plays an important role in our democratic form of government, and is given constitutional protection to enable it to inform the public and to provide a check on the government. Important competing interests of the press and of news sources clash when sources are allowed to sue the press over alleged breaches of confidentiality agreements. A reconciliation of those interests points to applying a constitutional standard as a threshold for recovery by such sources.

The proposed standard requires sources to meet a two-pronged test. Sources must prove with clear and convincing evidence the terms of the alleged confidentiality agreement. Sources then must prove that the media breached that agreement by publishing information with reckless disregard for the rights of the source. This standard balances the interests of the source in having courts enforce confidentiality agreements with the competing first amendment interests of the press.

Michael Dicke