FREEDOM OF THE PRESS—CONFIDENTIALITY—REPORTERS ARE LIABLE UNDER PROMISSORY ESTOPPEL DOCTRINE FOR BREACH OF SOURCE CONFIDENTIALITY AGREEMENT—*Cohen v. Cowles Media Company*, 111 S. Ct. 2513 (1991).

The Fourteenth Amendment protects the freedom of the press against arbitrary governmental interference.[1] Although courts recognize the importance of a free press in a democratic society,[2] freedom of the press is not absolute.[3] Courts are frequently forced to choose between two equally compelling interests: the rights of individuals and a free press.[4]

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[1] U.S. CONST. amend. I. The First Amendment reads, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

[2] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 882-83 (1963) (freedom of the press is a vehicle for public participation in the government decision-making process and is "indispensable to the operation of a democratic form of government"). *See also* Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 484-85 (1980) (The author debated "whether the values of a well-informed public and of the press' role in providing information have been accorded independent constitutional significance by the Court." *Id.* Moreover, the author articulated the "broad consensus that political speech is at the core of the [First] [A]mendment's concern."). *Id.*

[3] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942). Numerous decisions, for example, have held the press subject to laws of general applicability. *See, e.g.*, Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2518 (1991) ("generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"); Zacchini v. Scripps-Howard Publishing, 433 U.S. 562, 576 (1977) (press subject to copyright laws); Citizen Publishing Co. v. United States, 394 U.S. 131, 139-40 (1969) (press subject to Sherman Antitrust and Clayton Acts); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-93 (1946) (press subject to Fair Labor Standards Act); Associated Press v. United States, 326 U.S. 1, 12-13 (1945) (press subject to Sherman Act); Associated Press v. National Labor Relations Board, 301 U.S. 103, 128-29 (1937) (press subject to National Labor Relations Act).

[4] Emerson, *supra* note 2, at 920-22, 926. Some of the competing concerns include one's reputation, fair adjudication of claims and privacy. *Id.* at 922-26. Two major areas of First Amendment litigation are defamation law and protection of confidential news sources. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BUS. FOUND. RES. J. 521, 523 (1977). For a discussion of the competing interests of individuals and the press, see generally Vincent Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 229-30 (1971) (outlining the results of an extensive empirical study on reporters and their attitudes on confidential sources, the subpoena controversy and qualified testimonial privilege); Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1208 (1976) (tracking the Court's decisions in the areas of defamation and invasion of privacy, suggesting integration of the two in determining appropriate First Amendment parameters); Harold L. Nelson, *The Newsmen's Privilege Against Disclosure of Confidential Sources and Information*, 24 VAND. L. REV. 667, 668 (1971) (tracking the post-1970 case history of the newsmen's privilege).

In making this choice, the United States Supreme Court has not consistently applied one rule of law.[5] Indeed, the methodology of judicial decision-making in such cases has varied according to the underlying policy principles embraced by the Court.[6] At times, the Court has emphasized the Constitution's protection of the press as an important informational source for the public, thereby placing the press in a preferred position in society.[7] At other times, however, the Court has held the press subject to the same limitations as the rest of society.[8] In other cases, the Court has refused to give either interest a preferred position and has compromised by balancing the individual's constitutional rights against the rights of the press.[9]

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[5] Emerson, *supra* note 2, at 907-18 (analyzing several "theories of reconciliation" which have been used to balance free expression with other individual rights). *See also* C. Edwin Baker, *Scope of First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964 (1978) (illustrating how Supreme Court decisions have reflected one of three First Amendment theories: classic model, market failure model or liberty model).

[6] Emerson, *supra* note 2, at 908-18.

[7] *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (public officials and public figures must prove actual malice before recovering for intentional infliction of emotional distress from media); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (public official in defamation suit must prove actual malice to recover damages from media); Caldwell v. United States, 434 F.2d 1081, 1086, 1089 (9th Cir. 1970) (First Amendment provides newsmen a qualified privilege not to testify at grand jury proceedings absent demonstration of compelling need for information). *See also* Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 658 (1975) (favoring special rights for press based on constitutional distinction between freedom of speech and freedom of press); Michael J. Armstrong, Comment, *A Barometer of Freedom of the Press: The Opinions of Mr. Justice White*, 8 PEPP. L. REV. 157, 157-58 n.2 (1980) (newsman's privilege exempts reporters from certain legal processes).

[8] Branzburg v. Hayes, 408 U.S. 665, 689-90 (1972) (press's testimonial privilege not to disclose identity of confidential source in grand jury proceeding denied). *See also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 610-11 (1982) (Massachusetts statute prohibiting press access to minor sex-offense trial proceedings declared unconstitutional); Herbert v. Lando, 441 U.S. 153, 169-70 (1979) (journalist in public-figure defamation case did not have absolute privilege to prevent discovery on editorial process); Zurcher v. Stanford Daily, 436 U.S. 547, 567-68 (1978) (press not exempt from search warrants); Saxbe v. Washington Post Co., 417 U.S. 843, 849-50 (1974) (First Amendment press protection did not allow the press direct contact interviews with prisoners, a privilege also denied to the general public); State v. Jascalevich, 158 N.J. Super. 488, 386 A.2d 466, 470 (1978) ("[R]eporters had no special First Amendment immunity from the application of general law or any special privilege to invade the rights and liberty of others.").

[9] *See, e.g.*, Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 393 (1979) (the Sixth Amendment outweighed the press's First Amendment right of access to pre-trial criminal proceedings); Pell v. Procunier, 417 U.S. 817, 822-24 (1974) (press's First Amendment rights balanced against legitimate governmental interest in prison security and safety). *See also* Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV.

The tension between these competing interests arises in the context of confidentiality agreements between reporters and their sources.[10] Recently, in *Cohen v. Cowles Media Company*,[11] the Court confronted the conflict between the press' right to publish lawfully obtained truthful information, and a confidential informant's right to a remedy in a breach of contract action.[12] The *Cohen* Court afforded the press no special treatment and held Cowles Media liable under the generally applicable law of promissory estoppel.[13]

In 1982, Dan Cohen was the public relations director for an advertising agency handling Independent Republican Wheelock Whitney's Minnesota gubernatorial campaign.[14] During the final days of the campaign, Cohen approached reporters from the Minneapolis Star and Tribune (Star Tribune) and the St. Paul Pioneer Press Dispatch (Pioneer Press) with information concerning an opponent in the upcoming election.[15] Cohen released the documents to the reporters only upon receiving a promise of confidentiality.[16] The information consisted of public

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815, 866-67 (1983) (criticizing the Court's ad hoc balancing test approach and recommending a more uniform approach); *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1532-33 (1974) (calling for greater protection of the press via formulation of a general standard that takes into account the freedom of the press guarantee, instead of applying an ad hoc balancing test that varies according to the individual circumstances).

10 *See* Cohen v. Cowles Media, 111 S. Ct. 2513 (1991). Claims against the press for breach of contract due to disclosure of confidential sources are a recent development in First Amendment litigation. The first such case was addressed by the Santa Clara Superior Court in *Fries v. NBC*. Mary A. Galante, *Source Confidentiality Suit Ends in Deadlock*, NAT'L L.J., April 2, 1984, at col. 1. Plaintiff Fries, a police officer, contacted KRON-TV, with some information about an internal police department dispute. *Id.* At trial the case ended in a deadlock, *id.*, and the parties eventually settled. Michael Dicke, Note, *Promises and the Press: First Amendment Limitations on News Source Recovery For Breach of Confidentiality Agreement*, 73 MINN. L. REV. 1553, 1555 n.14 (1989). Analyzing the competing interests involved when confidentiality agreements are breached, the author proposed a standard requiring proof of the existence and breach of a confidentiality agreement "with reckless disregard for the source's interests." *Id.* at 1579-80. Another commentator suggested a two prong standard requiring proof of the existence of a confidentiality contract and breach of that contract with malice. Jens B. Koepke, Comment, *Reporter Privilege: Shield or Sword? Applying a Modified Breach of Contract Standard When a Newsperson "Burns" a Confidential Source*, 42 FED. COMM. L.J. 277, 304-16 (1990).

11 111 S. Ct. 2513 (1991).

12 *Id.* at 2518.

13 *Id.* at 2518-19.

14 Cohen v. Cowles Media Company, 445 N.W.2d 248, 252 (Minn. Ct. App. 1989).

15 *Cohen*, 111 S. Ct. at 2516. Cohen also contacted reporters from the Associated Press and WCCO-TV. *Cohen*, 445 N.W.2d at 252.

16 *Cohen*, 111 S. Ct. at 2516. In a meeting with Lori Sturdevant, the reporter for

court records concerning Marlene Johnson, the Democratic-Farmer-Labor-Party's candidate for Lieutenant Governor.[17] The court records revealed an unlawful assembly charge, which subsequent press investigation indicated was dismissed, and a petit theft conviction that was later vacated.[18] The editorial staffs of both newspapers independently decided to divulge Cohen's name in their stories concerning Johnson.[19] Cohen was fired from his job the same day the stories were published.[20]

Cohen instituted suit in the Minnesota trial court against Cowles Media Company, the publishers of the Star Tribune and the Pioneer Press, alleging breach of contract and fraudulent misrepresentation.[21] A jury awarded Cohen $200,000 in compensatory damages and $500,000 in punitive damages based on

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the Star Tribune, and Bill Salisbury, the reporter for the Pioneer Press, Cohen stated the following:

> I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and that you will also agree that you're not going to pursue with me a question of who my source is, then I will furnish you with the documents.

Cohen, 445 N.W.2d at 252. Each reporter willingly and voluntarily assented to the promise of anonymity. *Id.* The reporters from the Associated Press and WCCO-TV likewise promised anonymity. *Id.*

17 *Cohen*, 111 S. Ct. at 2516.

18 *Id.* The 1969 unlawful assembly charge resulted from Johnson's participation in a protest advocating the hiring of more minority workers for municipal construction jobs. *Id.* Johnson received the 1970 petit theft conviction after leaving a store with $6.00 worth of unpaid merchandise, an incident which occurred during an apparently emotionally tumultuous period of Johnson's life. *Id.*

19 *Id.* Several editors at the Star Tribune met amongst themselves and decided to reveal Cohen's identity as part of their story. *Cohen*, 445 N.W.2d at 253. Reporter Sturdevant adamantly opposed the Star Tribune editors' decision to dishonor Sturdevant's confidentiality promise. *Id.* Sturdevant then telephoned Cohen several times seeking to be released from her promise, each time to no avail. *Id.* On October 28, 1982, the Star Tribune published its story and used Cohen's name. *Id.* The Pioneer Press, however, engaged in no such extensive deliberations concerning the matter and on October 28th, over the objections of reporter Salisbury, included Cohen's name in its publication. *Id.*

20 *Id.*

21 *Id.* at 251. As the United States Supreme Court noted, a defamation suit would have been inappropriate because the material published was true. *Cohen*, 111 S. Ct. at 2519. Therefore, the court distinguished Cohen's case from Hustler Magazine v. Falwell, 485 U.S. 46 (1988). *Id.* In *Hustler*, the Court held that a public figure could recover for a false publication only upon proving "actual malice." Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988). The Court defined "actual malice" as meaning "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

both claims.[22]

A divided Minnesota Court of Appeals affirmed the compensatory damages award, holding that each newspaper had breached its confidentiality contract with Cohen.[23] The appellate court reversed the punitive damages award, however, because Cohen had not established a fraudulent misrepresentation claim.[24] The Minnesota Supreme Court, after affirming the appellate court's denial of punitive damages, reversed the compensatory damages award and denied Cohen any recovery.[25] The court held that a contract action was inappropriate under the circumstances and that a promissory estoppel claim was not viable when balanced against the publishers' First Amendment rights.[26]

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22 *Cohen*, 445 N.W.2d at 251. The trial court rejected the publisher's argument that the First Amendment barred Cohen's suit. *Id.*

23 *Id.* at 252, 258. Specifically, the court stated:

> It is apparent from these and other federal cases that news organizations cannot rely on the [F]irst [A]mendment to shield themselves from criminal or civil liability simply because the acts giving rise to such liability were taken while in pursuit of newsworthy information. It is even more apparent that news organizations are not exempt from liability when they breach contracts entered into for the very purpose of gathering the news. The governmental interest in allowing the civil damage award in the instant case outweighs the intrusion on press freedom. The government has an interest in protecting the expectations of a person who freely enters into a contract in reliance on the court's power to remedy any damage he or she might suffer should the other party fail to perform.

Id. at 256-57.

24 *Id.* at 252. The court explained that a false misrepresentation claim was necessary to sustain an award of punitive damages. *Id.* at 260. The court further explained that a successful misrepresentation claim must relate to some past or present fact. *Id.* at 259 (citing Dollar Travel Agency, Inc. v. Northwest Airlines, 354 N.W.2d 880, 883 (Minn. Ct. App. 1984)). The court stated that "[s]imply because a party in the future fails to perform does not mean that there was any misrepresentation at the time the contract was made." *Id.*

25 Cohen v. Cowles Media Co., 457 N.W.2d 199, 205 (Minn. 1990).

26 *Id.* at 203, 205. Although this agreement consisted of an offer, an acceptance and consideration, the Minnesota Supreme Court concluded that the parties did not intend to create a legally binding contract, but rather looked upon the exchange of promises as a moral obligation. *Id.* at 202-03. The court noted that a moral obligation alone is insufficient to create a binding contract. *Id.* at 203. Thus, reasoned the court, the parties assume the risks of entering such agreements and must rely on the good faith of the other to fulfill the obligation. *Id.* Furthermore, the court determined that recovery under the theory of promissory estoppel was also inappropriate due to its restrictive effect on the press's First Amendment rights. *Id.* at 204-05. Employing a promissory estoppel analysis, the Minnesota Supreme Court agreed that there had been a definite exchange of promises, but was not persuaded that injustice could be prevented solely by the enforcement of the promise. *Id.* at 204. In making its determination, the court weighed the First Amendment freedom of the press against the state's interest in protecting one's

The United States Supreme Court granted certiorari to address the First Amendment implications of the case.[27] The Supreme Court held that the generally applicable law of promissory estoppel applied equally to all citizens of Minnesota, including the press.[28]

Although the press has demonstrated deep conviction in the strength of First Amendment protections,[29] courts have demonstrated that freedom of the press is not unlimited.[30] In *Branzburg v. Hayes*,[31] for example, the Supreme Court held that the press is subject to laws of general applicability.[32] In *Branzburg*, a reporter

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promise of anonymity and concluded that the former outweighed the latter in this case. *Id.* at 205. The court emphasized the significance of the public's interest in the information involved in this dispute, and recognized the chilling effect that a contrary decision would have on public debate. *Id.*

[27] *Cohen*, 111 S. Ct. 578 (1990) (mem.).

[28] Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2518-19 (1991). The Supreme Court, however, declined to reinstate the Minnesota trial court's award of $200,000 in compensatory damages because the award was based on grounds other than promissory estoppel. *Id.* at 2519. The case was reversed and remanded to the Minnesota Supreme Court for the purpose of determining damages based on promissory estoppel, the state constitution and any other applicable state law. *Id.* at 2520.

[29] State v. Knops, 183 N.W.2d 93, 95 (Wis. 1971). Indeed, reporters have gone to jail in defense of their position. *See id.* at 94; *In re* Farber, 78 N.J. 259, 263-64, 394 A.2d 330, 332 (1978).

[30] *See* Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 762-63 (1985) (defamatory speech of purely private interest not protected by the First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (obscene, libelous or "fighting" words are unprotected speech).

[31] 408 U.S. 665 (1972). Marcus, *supra* note 9, at 827-29 (supporting a qualified newsman's privilege in certain circumstances, after careful weighing of the appropriate criteria). For discussion of *Branzburg*, see Richard V. Bennett, Note, *Must Newsmen Reveal Their Confidential Sources to Grand Juries?*, 8 WAKE FOREST L. REV. 567, 580 (1972) (balancing test employed by dissenting Justice Stewart appropriately resolved the conflict between two equally compelling interests); Comment, *The Right of the Press to Gather Information After* Branzburg *and* Pell, 124 U. PA. L. REV. 166, 191 (1975) (advocating right of special access for the press); William S. Hurst, Comment, *Has* Branzburg *Buried the Underground Press?*, 8 HARV. C.R.-C.L. L. REV 181, 191 (1973) ("Variations in the governmental interests involved and in the burdens imposed on news-gathering should be weighed as distinctions begin to come into focus in the process of adjudication."); Thomas W. Sacco, Comment, Branzburg, Caldwell *and* Pappas — *A Quick Lateral Pass to Congress*, 8 NEW ENG. L. REV. 336, 347-49 (1973) (recommending that Congress pass a federal shield law granting the press at least a limited privilege not to identify confidential sources); Sanford V. Teplitzky & Kenneth A. Weiss, Comment, *Newsmen's Privilege Two Years After* Branzburg v. Hayes*: The First Amendment in Jeopardy*, 49 TUL. L. REV. 417, 437-38 (1971) (arguing for newsmen's testimonial privilege on the basis that it is the public's right to know rather than the reporter's personal rights at stake).

[32] *Branzburg*, 408 U.S. at 682. In *Branzburg*, three cases were consolidated for review. *Id.* at 667-69, 672, 675. Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970), involved two articles published by Branzburg, a reporter. *Id.* at 668. The first article described Branzburg's observations of youths making and selling hashish, and

who was subpoenaed before a grand jury asserted a "conditional"[33] newsman's privilege.[34]

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of them generating $5,000 within three weeks. *Id.* at 667-68. The publication also contained a photograph of a pair of hands engaged in the hashish preparation process and stated that the two participants "asked for and received a promise that their names would be changed." *Id.* & n.1. Branzburg was subpoenaed and refused to identify the individuals. *Id.* at 668. The Kentucky Court of Appeals held that newsmen could not refuse to testify regarding events personally witnessed. *Id.* at 669. The second publication recounted Branzburg's two-week comprehensive study of drug traffickers in Frankfort, Kentucky. *Id.* When subpoenaed to testify about the " 'use and sale of drugs,' " Branzburg again refused, and sought mandamus from the court of appeals. *Id.* at 669-70. Branzburg argued "that if he were forced . . . to answer questions regarding the identity of informants or disclose information given to him in confidence, his effectiveness as a reporter would be greatly damaged." *Id.* at 670. The court of appeals, however, held that the First Amendment did not include a reporters' privilege. *Id.*

In *In re* Pappas, 266 N.E.2d 297 (Mass. 1971), reporter Pappas gained entry to a Black Panther Party meeting only after agreeing "not to disclose anything he saw or heard." *Branzburg*, 408 U.S. at 672, 674. Pappas remained inside the radical political group's headquarters for about three hours without reporting on any of it. *Id.* Two months later, Pappas responded to a grand jury subpoena with a motion to quash, claiming a First Amendment privilege not to reveal a source's identity. *Id.* at 672-73. The Massachusetts Supreme Judicial Court adhered to earlier court decisions granting the public the " 'right to every man's evidence.' " *Id.* at 674 (quoting *In re* Pappas, 266 N.E.2d 297, 299 (Mass. 1971)). The Massachusetts court also held that the First Amendment did not embody either a qualified or an absolute newsmen's testimonial privilege. *Id.* (citing *In re* Pappas, 266 N.E.2d 297, 302-03 (Mass. 1971)).

In Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), a New York Times reporter, Caldwell, received a subpoena duces tecum requiring him to testify before a grand jury with notes and tape recordings of his interviews concerning the goals and activities of the Black Panther Party. *Branzburg*, 408 U.S. at 675, 679. Caldwell moved to quash the subpoena on grounds that it violated " 'vital First Amendment freedoms.' " *Id.* at 676. On December 14, 1969, the New York Times carried Caldwell's story, which included the following quotation from the Party's chief of staff: " 'We advocate the very direct overthrow of the Government by way of force and violence.' " *Id.* at 677. Other publications included such statements as "[w]e will kill Richard Nixon." *Id.* The district court ordered Caldwell to testify about the information he published, but acknowledged his First Amendment privilege not to reveal confidential sources or information unless there was a compelling state interest which could not be satisfied by other means. *Id.* at 677-78. Following the expiration of the grand jury term, a second grand jury was empanelled and Caldwell was again subpoenaed. *Id.* at 678. Caldwell's second refusal to testify led to a contempt order against him. *Id.* The court of appeals reversed the order, recognizing a reporter's qualified testimonial privilege. *Id.* at 679. The United States Supreme Court granted certiorari. *Id.*

[33] *Id.* at 702. Although the press in each instance asserted a qualified, rather than an absolute, privilege, the Court refused to proceed upon such a "slippery slope." *Id.* at 703. The Court pointed out that freedom of the press applied to all forms of communications, including researchers, lecturers and novelists, and noted the problem of a subjective standard inherent in a qualified news-gathering privilege. *Id.* at 703-05.

[34] *Id.* at 680. The press refused to disclose the identity of its confidential sources unless it was established that: i) the reporter had information relevant to

Justice White, writing for the Court, articulated several prin-

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the crime being investigated by the grand jury; ii) the information could not be obtained from any other source; and iii) there was a compelling need for the information. *Id.* The press relied on earlier cases, each of which presented a different proposition supporting the press's position. *Id.* First, the press relied on cases emphasizing the importance of the press's role in informing the public and encouraging society's active participation in the government process. *Id.* In *Grosjean v. American Press Co.*, the Court stressed the press's "vital role as a source of public information," specifically stating:

> The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

297 U.S. 233, 250 (1936). In New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), the Court similarly recognized that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* *See also* Near v. Minnesota, 283 U.S. 691, 713 (1931) (stating that the Freedom of Press Clause was created to prevent prior restraints and censorship, particularly with regard to publications consisting of "charges against public officers of official dereliction").

Other case law supporting the press's claims asserted that any state action infringing First Amendment freedoms must serve a compelling state interest. *Branzburg*, 408 U.S. at 680. *See* N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963) (Virginia's interest in regulating the legal profession is not "compelling" enough to justify limitation on the N.A.A.C.P.'s First Amendment freedoms of expression and association); N.A.A.C.P. v. Alabama, 357 U.S. 449, 466 (1958) (Alabama failed to provide "controlling justification" to justify its imposition on defendant's First Amendment freedom of association). The Court in *Branzburg*, however, determined that the present interest in the prosecution of crimes was a compelling "fundamental governmental role securing the safety of the person and property of the citizen." *Branzburg*, 408 U.S. at 700.

The third doctrine supporting the reporter's argument is that the means invoked to achieve the government's objective must be narrowly tailored, avoiding unnecessary abridgement of First Amendment freedoms. *Id.* at 680-81. *See* Martin v. City of Struthers, 319 U.S. 141, 147-49 (1943) (holding unconstitutional a municipal ordinance forbidding persons to knock on doors to distribute pamphlets and circulars, and declaring the ordinance a blanket restriction of idea dissemination); Freedman v. Maryland, 380 U.S. 52, 56-57 (1965) (Maryland statute requiring censorship of certain films declared unconstitutional because of its overbroad, "sweeping and improper application"). In *N.A.A.C.P. v. Alabama*, the Court held that state regulation of constitutionally protected guarantees "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." 377 U.S. 288, 307 (1964) (quoting N.A.A.C.P. v. Alabama, 357 U.S. 449, 463-64 (1958)). The Court added that even a substantial government interest cannot be furthered by "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 307-08 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

ciples concerning the press's First Amendment guarantees.[35] First, the Court stated that there was neither a constitutional nor a common-law basis for granting a newsman's testimonial privilege.[36] Instead, the Court stated that the press was subject to laws of general applicability.[37] Therefore, the Court held that the press, just as any other citizen[38] or informant,[39] must respond to grand jury subpoenas and answer questions relevant to crimi-

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[35] *Branzburg*, 408 U.S. at 682-84.

[36] *Id.* at 689-90. Specifically, the Court stated:

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

Id. at 690. The Court relied on several common law cases in refusing to grant such a privilege. *See, e.g, In re* Grand Jury Witnesses, 322 F. Supp. 573, 577 (N. D. Cal. 1970) (reporters denied privilege to withhold informants' names at grand jury investigation concerning allegations of schemes to overthrow the U.S. Government); People *ex rel.* Mooney v. Sheriff of New York County, 199 N.E. 415 (N.Y. 1936) (reporter's privilege denied in refusing to testify at grand jury criminal investigation of gambling and lottery allegations); *Ex parte* Lawrence, 48 P. 124, 125 (Cal. 1897) (reporters had no privilege not to reveal source names of a published report alleging state senators had taken bribes in relation to the passage of a bill). The Court relied on the foregoing line of cases, although it mentioned a few recent cases that have recognized a limited newsmen's privilege. *See* State v. Knops, 183 N.W.2d 93, 95, 98-99 (Wis. 1971) (investigation of the individuals responsible for bombing building which killed one student and injured others). Although the Court in *Knops* recognized the press's constitutional privilege not to disclose a source's identity, it stated that "when such confidence is in conflict with the public's overriding need to know, it must yield to the interest of justice." *Id.* at 99. *See also* Caldwell v. United States, 434 F.2d 1081, 1086-89 (9th Cir. 1970) (granting newsman's testimonial privilege under First Amendment).

In addition, several commentators have expressed their disfavor for granting a newsman's privilege. *Branzburg*, 408 U.S. at 690 n.29; *see also* 8 *John H. Wigmore, Evidence* § 2192 (McNaughton rev. 1961); Zechariah Chafee, *Privileged Communications: Is Justice Served by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943).

[37] *Branzburg*, 408 U.S. at 682-83 (citing Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937)). The Court pointed to other cases wherein the press was subject to laws of general applicability. *See, e.g.*, Citizen Publishing Company v. United States, 394 U.S. 131, 138-40 (1969) (press subject to anti-trust regulations of Sherman Act and Clayton Act); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-93 (1946) (Court held that the Fair Labor Standards Act applied to the press and did not act as a restraint on expression); Associated Press v. United States, 326 U.S. 1, 12-13 (1945) (Associated Press's practices of restraining and hindering sale of interstate news to competitors held violative of Sherman Act); Associated Press v. National Labor Relations Board, 301 U.S. 103, 128-29 (1937) (press's engagement in interstate commerce of newsworthy information subjected it to the National Labor Relations Act).

[38] *Branzburg*, 408 U.S. at 682.

[39] *Id.* at 698.

nal investigations.[40] The Court was not persuaded that this requirement would significantly impair the flow of information to the public.[41] Consequently, the Court stated that the public interest in law enforcement and grand jury proceedings outweighed any First Amendment newsgathering privilege of the press.[42]

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[40] *Id.* at 682. The Court stated that grand jury proceedings seek to uncover and investigate sources of criminal behavior not simply to restrain the press. *Id.* at 691. The Court posited that only where a news source or a reporter himself is implicated in a crime or possesses relevant information will a reporter be subpoenaed. *Id.* The Court continued, stating that:

> [W]e perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial. [No First Amendment right] confers a license on either the reporter or his news sources to violate valid criminal laws. . . . Private restraints on the flow of information are not so favored by the First Amendment that they override all other public interests.

Id. at 690-91, 697. The Court reasoned that a source's preference for anonymity under such circumstances is due to one's "desire to escape criminal prosecution." *Id.* at 691. Thus, the Court concluded that "we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it." *Id.* at 692.

[41] *Id.* at 693. Although the Court acknowledged the press's concerns on this issue, the Court "remain[ed] unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury." *Id.* Although the Court acknowledged the press's heavy reliance on confidential sources for its information, it nevertheless stated:

> [T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. . . . Reliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsman before a grand jury. . . . [Q]uite often, such informants are members of a minority political or cultural group that relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public. Moreover, grand juries characteristically conduct secret proceedings, and law enforcement officers are themselves experienced in dealing with informers, and have their own methods for protecting them without interference with the effective administration of justice.

Id. at 693-95.

[42] *Id.* at 691-92. The Court articulated the grand jury process's dual role of determining whether there was probable cause to support a criminal indictment, and of protecting citizens against unwarranted criminal prosecutions. *Id.* at 686-87. Moreover, the Court pointed out that, historically, the concealment of information relative to criminal conduct has been discouraged. *Id.* at 696. In short, the Court

Next, the *Branzburg* Court noted that the press may not have access to information that is not generally available to the public.[43] The Court emphasized the necessity to distinguish between the right to speak and publish versus the right to gather information.[44] Finally, the Court articulated that the press was not free to publish anything at will without being subject to liability.[45]

Two years later, in *Saxbe v. Washington Post Co.*,[46] the press asserted a First Amendment right to access information.[47] In *Saxbe*, the Washington Post alleged that the Federal Bureau of Prisons regulation prohibiting the press from conducting personal interviews with individual prisoners violated the First Amendment freedom of press guarantees.[48] Justice Stewart,

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embraced the prevailing view that the press may not publish anything it chooses, without liability. *Id.* at 683.

43 *Id.* at 684-85. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1 (1965). In *Zemel*, all United States citizens were required to receive special permission from the Secretary of State to travel to Cuba because of a break in consular and diplomatic relations between the two countries. *Id.* at 3. The plaintiff's request for a tourist visa was denied. *Id.* at 3-4. The Court rejected the plaintiff's claim that the travel ban infringed upon his First Amendment right to gather information, stating that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* at 16-17. *See also* New York Times v. United States, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring) (international diplomacy and national security interests require a certain amount of confidentiality and secrecy); see infra notes 46-53 and accompanying text for a discussion of Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

44 *Branzburg*, 408 U.S. at 684 (citing Zemel v. Rusk, 381 U.S. 1, 17 (1965)). The Court stated, for example, that: " 'the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.' " *Id.* at 684 n.22 (quoting Zemel v. Rusk, 381 U.S. 1, 16-17 (1965)).

45 *Id.* at 683; *see* Curtis Publishing Co. v. Butts, 388 U.S. 130, 146-47 (1967) (holding that the press, like other institutions performing a public service, must pay the price for attacks on personal reputation).

46 417 U.S. 843 (1974). For a discussion on *Saxbe*, see Recent Developments, 60 CORNELL L. REV. 446, 458 (1975) (examining how the Court focused on the lack of a constitutional newsgathering right, while completely ignoring the public's right to know); Gary S. Mobley, Comment, *Bans on Interviews of Prisoners: Prisoner and Press Rights After* Pell *and* Saxbe, 9 U.S.F. L. REV. 718, 731, 733 (1975) (arguing for a special press right of access based on the press's function "as the predominant gatherer and disseminator of information in modern society" and the public's right to know).

47 *Saxbe*, 417 U.S. at 844-45.

48 *Id.* at 844. Paragraph 4b(6) of Policy Statement 1220.1A stated:

> Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.

writing for the Court, determined that the regulation applied evenhandedly to all prospective visitors, including the press, who had no personal or professional relationship with the inmates.[49] Justice Stewart opined that a balancing of First Amendment rights against penal considerations[50] was unnecessary because the limitation imposed on the press was merely a particularized application of a general law.[51] Moreover, the Justice emphasized that the Constitution did not require the government to provide journalists with information not available to the general public.[52] Therefore, the Court held that, because the prison regulation did not single out the press, no First Amendment freedoms were infringed.[53]

Id. at 844 n.1. In March, 1972, reporters of the Washington Post were denied interviews with specific inmates at federal prisons in Danbury, Connecticut and Lewisburg, Pennsylvania. *Id.* at 844-45.

For a discussion of press interviews with prisoners, see Paul A. Freund, *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 169 (1974) (criticizing the Court's complete deferral to prison officials' determinations which resulted in its "abrogation of the usual standard for evaluating [F]irst [A]mendment claims").

[49] *Saxbe*, 417 U.S. at 846. Among the privileged were clergy, family members and inmates' attorneys. *Id.* Aside from the ban on face-to-face interviews, the press members enjoyed other forms of access, such as the right to tour and photograph the facility. *Id.* at 847. Additionally, reporters were permitted to briefly question any inmates encountered during such tours. *Id.* Unlimited, written correspondence with inmates was also permitted. *Id.* Prison officials were also required to assist the press in investigating any inmate complaints. *Id.* at 847-48. Randomly selected groups of inmates were also available for press interviews, as were recently discharged prisoners. *Id.* at 848.

[50] *Id.* at 849. One of the penal considerations in running an orderly institution includes the equal treatment of prisoners. *Id.* The Court recognized the tendency of reporters to single out a few prisoners for interviews, thereby creating prison leaders. *Id.* at 848. The Court deferred to the prison officials' "expert and professional judgment" concerning the problems that would ensue from such inequality among the prisoners. *Id.* at 848-49.

[51] *Id.* at 849.

[52] *Id.* at 850 (citing Pell v. Procunier, 417 U.S. 817, 834-35 (1974)). In *Pell*, the Court was faced with a similar prison regulation denying the media face-to-face inmate interviews. Pell v. Procunier, 417 U.S. 817, 819 (1974). The inmate plaintiffs alleged freedom of speech violations under the First and Fourteenth Amendments. *Id.* at 820-21. The press plaintiffs asserted a First Amendment newsgathering right. *Id.* at 821. In rejecting both claims, the Court focused on the penal goals of security and rehabilitation, the availability of alternate means of communication, the neutrality of the regulation's application, and the lack of a press "constitutional right of special access to information not available to the public generally." *Id.* at 833.

[53] *Saxbe*, 417 U.S. at 850. In dissent, Justice Powell criticized the majority for its broad restriction on access to information. *Id.* at 857 (Powell, J., dissenting). Justice Powell distinguished the two primary cases relied on by the majority. *Id.* at 857-60 (Powell, J., dissenting). The Justice first noted that Zemel v. Rusk, 381 U.S. 1 (1965), dealt with " 'an inhibition of action rather than a restraint of speech.' " *Id.* at 858 (Powell, J., dissenting). Second, although the Court in *Branzburg* rejected a

Following the decision in *Saxbe*, the Court again held the press subject to laws of general applicability in *Zacchini v. Scripps-Howard Broadcasting*.[54] In *Zacchini*, the petitioner brought suit against a local broadcasting station after the station filmed and televised his unique "human cannonball" act.[55] Although posi-

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newsgathering privilege in the context of grand jury proceedings, the Justice observed that, under different circumstances, such a privilege was proper. *Id.* at 859 (Powell, J., dissenting). Thus, Justice Powell argued that *Branzburg* did not stand for a blanket prohibition on newsgathering protection. *Id.* In contrast to the majority's narrow focus on the equal treatment of the press and individuals under the First Amendment, Justice Powell also weighed the competing interest of the public's right to know, emphasizing the press's societal role as an informer. *Id.* at 861, 863 (Powell, J., dissenting). Finally, the Justice rejected the prison's "big wheel" theory as justification for the blanket ban on face-to-face interviews. *Id.* at 866, 868 (Powell, J., dissenting). In short, Justice Powell agreed with the district court in recommending a case-by-case approach to interview requests weighing fully all of the competing concerns. *Id.* at 870 (Powell, J., dissenting).

The United States District Court had emphasized that prisons, as public institutions, are a "matter of obvious public interest." Washington Post Co. v. Kleindienst, 357 F. Supp. 770, 771 (D.D.C. 1972). Furthermore, the court stated that " '[a] prisoner does not shed his First Amendment rights at the prison portals.' " *Id.* at 772 (quoting Brown v. Peyton, 437 F.2d 1228, 1230 (4th Cir. 1971)). Thus, although the Court recognized the safety and disciplinary concerns of the Federal Prison Bureau, it concluded that the blanket prohibition on press interviews was unjustifiably restrictive. *Id.* at 773. Any restrictions on one's First Amendment freedoms, reasoned the court, must be narrowly tailored. *Id.* at 773-74. Moreover, the court noted that other penal institutions, such as ones located in New York City, permit press interviews, and suggested that interviews be granted on a case-by-case basis, according to the administrative and disciplinary factors in each instance. *Id.* at 774-75. For further analysis of Justice Powell's dissent, see Lillian R. BeVier, *Justice Powell and the First Amendment's "Societal Function": A Preliminary Analysis*, 68 VA. L. REV. 177, 184 (1982) (contrasting the majority's emphasis on First Amendment individual rights versus Justice Powell's emphasis on the press's societal function of informing the public).

[54] 433 U.S. 562 (1977).

[55] *Id.* at 563-64. Zacchini's fifteen-second act, which he was performing at a county fair, consisted of him being fired from a cannon into a net about 200 feet away. *Id.* at 563. Zacchini's act originated in his family several generations earlier and was one he had devoted his lifetime to mastering and performing. *Id.* at 564. Zacchini had noticed the reporter in the crowd the previous day and had asked him not to film the performance. *Id.* In spite of Zacchini's request, however, the reporter returned unnoticed the following day to film the act, which was broadcast that evening. *Id.* For further discussion on *Zacchini*, see *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 208 (1977) (agreeing with dissenting Justice Powell's test focusing on the use of the film as a more appropriate means of balancing the public's right to know against an individual's right of publicity); Douglas G. Baird, Note, *Human Cannonballs and the First Amendment:* Zacchini v. Scripps-Howard Broadcasting Co., 30 STAN. L. REV. 1185, 1209 (1978) (recommending a fair-use test similar to that of copyright law, that would give First Amendment protection to the broadcast of performances when there is no better means of expression available); Phyllis Glass, Note, *State "Copyright" Protection For Performers: The First Amendment Question*, 1978 DUKE L.J. 1198, 1227-29 (1978) (recommending a balancing test of "the public interest served by the unauthorized broadcast of a protected work

tive comments accompanied the broadcast, the petitioner alleged that the telecast represented an impermissible appropriation of his right of publicity in the act.[56] Conversely, the broadcasting company claimed that its role in informing society on matters of public concern afforded it a First Amendment privilege to broadcast any or all portions of the act.[57]

Reversing the Ohio Supreme Court decision, the Supreme Court of the United States held that the First Amendment did not protect the media when they televise a performer's entire performance absent the performer's consent.[58] The Court characterized the state's interest in the right of publicity as one of protecting an individual's proprietary interest in his act, thereby encouraging entertainment.[59] Moreover, the Court analogized

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against the economic interest of the performer" instead of the Court's "entire-act" test); Edward C. Nucci, Note, *Invasion of Privacy and the First Amendment: Zacchini Makes the Press Pay*, 39 U. PITT. L. REV. 561, 574-75 (1978) (arguing that the public is the ultimate loser as a result of the Court's decision because Zacchini's act was newsworthy material that should have been afforded First Amendment protection).

[56] *Zacchini*, 433 U.S. at 564. The Ohio trial court granted defendant's motion for summary judgment. *Id.* The Ohio Court of Appeals reversed, holding that the First Amendment did not entitle the media to air the entire act without compensating Zacchini for economic injuries he sustained. *Id.* The Ohio Supreme Court acknowledged Zacchini's right of publicity on two grounds. *Id.* at 565. First, the court recognized that one may not use the name or likeness of another for one's own benefit. *Id.* Second, the court found an appropriation of Zacchini's right of publicity in his performance. *Id.* These findings notwithstanding, the court held that the defendant's broadcast fell within the First Amendment's generally protected category pertaining to matters of public concern and interest and upheld the press's editorial privilege. *Id.* at 569-70.

[57] *Id.* at 569.

[58] *Id.* at 575.

[59] *Id.* at 573. The Court distinguished this interest from the privacy interest in Time, Inc. v. Hill, 385 U.S. 374 (1967), relied upon by the Ohio Supreme Court. *Zacchini*, 433 U.S. at 570-73. *Time* involved a right of privacy claim against Time Magazine for falsely portraying the plaintiff and his family as the subject of a newly-released play. Time, Inc. v. Hill, 385 U.S. 374, 377 (1967). The Court in *Time* noted the Court of Appeals assertion that " '[t]he factual reporting of newsworthy persons and events is in the public interest and is protected.' " *Id.* at 383 (citation omitted). The Ohio Supreme Court analogized *Zacchini* to *Time* and concluded that: "Just as the press was held to be privileged to report matters which would otherwise be private, if they are of public concern, so too, it must be held privileged when an individual seeks to publicly exploit his talents while keeping the benefits private." Zacchini v. Scripps-Howard Broadcasting Co., 351 N.E.2d 454, 461 (Ohio 1976). The United States Supreme Court, however, distinguished the claims of "false light" (privacy) and right of publicity. *Zacchini*, 433 U.S. at 571-77. The Court stated that the "false light" cases seek to "minimize publication of the damaging matter, while in 'right of publicity' cases the only question is who gets to do the publishing." *Id.* at 573. The Court emphasized that Zacchini did not seek to stop publication of his act, but rather sought to be compensated for its broadcast. *Id.* at 573-74.

the right of publicity to that of copyright protection stating that both rights allowed individuals to reap the rewards of their endeavors.[60] The two most influential factors in the Court's decision were the media's broadcast of the petitioner's entire act[61] and the petitioner's dependence on his performance's economic value for his livelihood.[62] Although the Court acknowledged that both entertainment and news received First Amendment protection,[63] Justice White nonetheless opined that prohibiting the broadcast would not limit the benefit of the petitioner's performance if petitioner's economic interest was duly protected.[64]

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60 *Id.* at 573, 575. Specifically, the Court stated: "[T]he Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner." *Id.* at 575. The Court relied on the following cases for that principle: Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 490 (3d Cir. 1956) (the broadcast of portions of a prize fight without fighter's consent actionable under state law of unfair competition); Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490, 492 (W.D. Pa. 1938) (unauthorized broadcast of baseball games constituted "unfair competition and [was] a violation of the property rights of the plaintiffs"); Kalem Co. v. Harper Brothers, 222 U.S. 55, 61 (1911) (holding that the unauthorized public exhibition of motion pictures constituted copyright infringement). By contrast, the Court distinguished three cases that did not "involve an alleged appropriation by the press of a right of publicity existing under state law." *Zacchini*, 433 U.S. at 574; *see* Gertz v. Robert Welsh, Inc., 418 U.S. 323, 351 (1974) (*New York Times* standard of actual malice not extended to private plaintiff's suit in defamation); Rosenbloom v. Metromedia Inc., 403 U.S. 29, 52 (1971) (private plaintiff suing licensed radio station for defamatory statements regarding matter of public concern must meet actual malice standard); New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (public figure must prove actual malice in libel action). The Court articulated that underlying both state interests was the rationale of providing individuals the "economic incentive for him to make the investment required to produce a performance of interest to the public." *Zacchini*, 433 U.S. at 576.

61 *Id.* at 575. Specifically, the Court stated: "Much of its economic value lies in the right of exclusive control over the publicity given to his performance; if the public can see the act free on television, it will be less willing to pay to see it at the fair." *Id.* In essence, continued the Court, the rationale for protecting one's right of publicity lies in preventing unjust enrichment. *Id.* at 576.

62 *Id.* The Court noted that the right of publicity law protected against "the appropriation of the very activity by which the entertainer acquired his reputation in the first place." *Id.* The Court emphasized that Zacchini was not suing to enjoin the broadcasting of his act, nor was the Court interested in punishing the press for its broadcast. Rather, Zacchini sought compensation for the broadcast. *Id.* at 578.

63 *Id.*

64 *Id.* The Court focused on the right of publicity, which sufficed to substantiate its holding. *Id.* The Court did not attempt to delineate First Amendment parameters. *Id.* at 575.

In dissent, Justice Powell criticized the majority for basing its holding on the injury caused by broadcasting the petitioner's entire act. *Id.* at 579 (Powell, J., dissenting). Justice Powell instead focused on the press's role as informant and feared that the majority's decision could lead to self-censorship. *Id.* at 580 (Powell, J., dis-

Although the foregoing cases appear to classify freedom of the press as a qualified right, there are instances where the Court has deemed an asserted state interest insufficient to justify infringement of that right.[65] In *Landmark Communications v. Virginia*,[66] for example, the Court declared unconstitutional a Virginia statute that prohibited the public disclosure of a state judicial review commission's confidential proceedings.[67] Chief

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senting). Such restrictions discourage press coverage of public events, reasoned Justice Powell, and "[t]he public is . . . the loser." *Id.* at 581 (Powell, J., dissenting). Justice Powell posited that the dispositive issue was the use to which the film was put. *Id.* The Justice observed that petitioner's act was aired as "a routine portion of a regular news program." *Id.* Justice Powell continued by distinguishing the present misappropriation suit from privacy suits. *Id.* at 581-82 (Powell, J., dissenting). The Justice remarked that privacy actions generally seek to avoid publicity altogether, whereas in the present case, petitioner welcomes the publicity and merely seeks compensation for the broadcast. *Id.* at 582 (Powell, J., dissenting). In sum, because petitioner's act was newsworthy, Justice Powell held its broadcast privileged under the First Amendment. *Id.*

In dissent, Justice Stevens was not convinced that the Ohio Supreme Court's decision was based on adequate federal grounds to establish federal jurisdiction. *Id.* at 583 (Stevens, J., dissenting). Therefore, Justice Stevens proposed remanding the case back to the state court for "a clarification of its holding before deciding the federal constitutional issue." *Id.*

65 Emerson, *supra* note 2, at 920-28 (discussing two common opposing interests: reputation and privacy).

66 435 U.S. 829 (1978). For a discussion of *Landmark*, see Douglas O. Linder, *When Names Are Not News, They're Negligence: Media Liability for Personal Injuries Resulting From the Publication of Accurate Information*, 52 UMKC L. REV. 421, 439-41 (1984) (recommending the application of a combined approach of weighing the state interest and granting the press a qualified privilege in cases involving the publication of truthful information); Christopher P. Wells, Comment, *Confidentiality Statutes and the First Amendment: A Landmark Opinion?*, 31 Fed. Comm. L.J., 85, 110, 116 (1978) (analyzing how the Court's decision in *Landmark* failed to establish concrete boundaries of the press's and the individual's First Amendment rights, thereby leaving future courts with little guidance in resolving this conflict).

67 *Landmark*, 435 U.S. at 833-34. The statute provided in pertinent part:

> All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11, 2.1-37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character. . . . Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor.

Id. at 831 n.1 (quoting VA. CODE ANN. § 2.1-37.13 (Michie 1973)). In *Landmark*, the Virginia Judicial Inquiry and Review Commission was investigating the conduct of a state judge. *Id.* at 831. A Landmark newspaper, the *Virginian Pilot*, disclosed the judge's identity and reported that no formal charges had yet been filed against the judge. *Id.* Shortly thereafter, Landmark, the editor, was indicted for violation of VA. CODE ANN. § 2.1-37.13. *Id.* Landmark testified at trial that he interpreted the statute to restrict only participants, and argued that the First and Fourteenth

Justice Burger, writing for the Court, recognized the need for confidentiality in judicial inquiry and review proceedings.[68] The Chief Justice opined, however, that the imposition of criminal sanctions upon innocent third parties unduly burdened First Amendment guarantees.[69] Chief Justice Burger asserted that the First Amendment's primary purpose was to protect uninhibited discussion of governmental matters.[70] The Chief Justice opined that the operations of the courts and conduct of judges fell within this category and qualified as "matters of utmost public concern."[71] Moreover, the Court determined that the state's inter-

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Amendments allowed him, a third party non-participant, to publish the proceedings. *Id.* at 832.

68 *Id.* at 835. The Court noted several purposes in keeping judicial review commission proceedings confidential. *Id.* First, the Court posited that confidentiality encouraged complaint filing and judges' cooperation. *Id.* Second, the Court noted that the integrity of the judicial system and of the judges would be protected from injury resulting from the publication of premature, unwarranted and/or false allegations. *Id.* In addition, the Court articulated:

> When removal or retirement is justified by the charges, judges are more likely to resign voluntarily or retire without the necessity of a formal proceeding if the publicity that would accompany such a proceeding can thereby be avoided. . . . In the more common situation, where the alleged misconduct is not of the magnitude to warrant removal or even censure, the confidentiality of the proceedings allows the judge to be made aware of minor complaints which may appropriately be called to his attention without public notice.

Id. at 835-36.

69 *Id.* at 838. Landmark Communications argued that truthful reporting on the public officials' conduct was guaranteed protection under the First Amendment. *Id.* The Court stipulated that, although such speech may not always be protected, the state's competing confidentiality interest in the instant case was insufficient to abridge First Amendment protection. *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 64-65 (1976) (per curiam)). In *Buckley*, the Court "recognized that significant encroachments on First Amendment rights . . . cannot be justified by a mere showing of some legitimate state interest. . . . [W]e have required that the subordinating interests of the State must survive exacting scrutiny" and be substantially related to achievement of the State's goal. Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam).

70 *Landmark*, 435 U.S. at 838. Chief Justice Burger noted: "Whatever differences may exist about interpretation of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Id.* (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)); *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (" 'Recognizing the occasional tyrannies of governing majorities, [the Framers] amended the Constitution so that free speech and assembly should be guaranteed.' ").

71 *Landmark*, 435 U.S. at 839. The Court observed:

> A responsible press has always been regarded as the handmaiden of effective judicial administration . . . . Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards

est in preserving the reputation of its judicial members[72] and the integrity of its courts was inadequate to prevent the publication of lawfully-obtained truthful information.[73]

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against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Id. (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)). Moreover, in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975), the Court noted: "With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Id.*

[72] *Id.* at 841. The Court noted "that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.' " *Id.* at 841-42 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 272-73 (1964)). The Court also relied on Garrison v. Louisiana, 379 U.S. 64 (1964). *Id.* In *Garrison*, a District Attorney in Louisiana publicly reprimanded and made derogatory statements about the eight Criminal District Court judges in his jurisdiction. *Id.* at 64-65. The District Attorney accused the judges of being lazy and "vacation-minded," and blamed the backlog of cases on their inefficiency. *Id.* at 66. As a result, the District Attorney was convicted of violating the Louisiana Criminal Defamation Statute. *Id.* at 65. The Louisiana Supreme Court upheld the conviction, rejecting the District Attorney's First Amendment freedom of speech claims. *Id.* at 67. The United States Supreme Court reversed, noting that while this was a criminal and not a civil case, the *New York Times* "actual malice" standard applied with equal force. *Id.* at 67, 74. The Court articulated that the statement concerned official conduct of public officials. *Id.* at 76. Moreover, the *Garrison* Court continued, "[t]he *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants." *Id.* at 77.

[73] *Landmark*, 435 U.S. at 841. The Court disagreed with the lower court's reliance on *Cox Broadcasting*, which held that the First Amendment protected the truthful publication of information already in the public domain. *Id.* at 840. In *Cox Broadcasting*, a reporter obtained a rape victim's name from public court records and published it in violation of a statute forbidding the disclosure of such information. Cox Broadcasting v. Cohen, 420 U.S. 469, 471 (1975). Based on the decision in *Cox Broadcasting*, the defendant, Commonwealth of Virginia, argued that publication of information "which by Constitutional mandate is to be confidential" was not protected by the First Amendment. *Landmark*, 435 U.S. at 840 (quoting Appellee Brief at 17). The *Landmark* Court, however, held that the Court in *Cox Broadcasting* never addressed the issue of "whether the publication of truthful information withheld by law from the public is similarly privileged" and, therefore, refused to extend the *Cox Broadcasting* holding to the facts of the present case. *Id.* The Court conceded that the state's interest in confidentiality was a legitimate concern, but that it did not warrant the imposition of criminal sanctions for the publication of truthful information and was insufficient to justify any First Amendment infringement. *Id.* at 841.

The Court suggested that less restrictive means of protecting judicial confidences were available. *Id.* at 843. For instance, the Court pointed out that several states had implemented internal safeguards to maintain the confidentiality of Commission proceedings. *Id.* at 845. The Court noted that Florida, Minnesota, New Mexico and Pennsylvania required all participants to a proceeding to take an oath of secrecy, the violation of which leads to contempt, while Kentucky and Massachusetts have similar regulations. *Id.* at 841 n.12; *see also* Bridges v. California, 314 U.S.

The Court again evidenced its disdain for state statutes prohibiting the publication of lawfully-obtained, truthful information in *Smith v. Daily Mail Publishing Co.*[74] In *Smith*, the Court considered the constitutionality of a West Virginia statute prohibiting the publication of a juvenile offender's name absent court permission.[75] The Court declared that punishing the pub-

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252, 270-71 (1941) (Court reasoned that free speech on public matters was essential for public faith and knowledge, whereas silence bred contempt and suspicion).

In closing, the Court rejected the clear and present danger test relied upon by the Virginia Supreme Court. *Landmark*, 435 U.S. at 842. The Virginia Supreme Court had concluded that: " 'What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.' " Landmark Communications, Inc. v. Commonwealth, 233 S.E.2d 120, 125 (Va. 1977) (quoting Bridges v. California, 314 U.S. 252, 263 (1941)). The Virginia Supreme Court added that "actual facts" were necessary to prove the "clear and present danger to the orderly administration of justice." *Id.* Although no specific facts were presented in the present case, the court stated that:

> The sanction imposed springs from a clear and well-defined legislative declaration that breach of the confidentiality of Commission proceedings is so contrary to the public interest that it constitutes a substantive evil of immediate and serious peril to the orderly administration of justice, and, therefore, should be punishable.

Id. at 127. This matter, noted the court, involved a "serious and substantive evil . . . [whereby] courtroom evidence is unnecessary to sustain their truth and validity." *Id.* at 127-28. For further discussion of the clear and present danger test, see Wells, Comment, *supra* note 66, at 104-06 (agreeing with the Court's rejection of the clear and present danger test).

The United States Supreme Court, however, was not convinced that a legislative declaration alone sufficed to abridge First Amendment rights. *Landmark*, 435 U.S. at 843. Otherwise, continued the Court, "the function of the First Amendment as a check on legislative power would be nullified." *Id.* at 844. In concurrence, Justice Stewart stated that "[t]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary," and asserted that all those who violated the confidentiality requirement should be punished. *Id.* at 848-49 (Stewart, J., concurring). Justice Stewart, however, emphasized that once the information had fallen into the hands of the press, its publication could not be punished or prohibited. *Id.* at 849 (Stewart, J., concurring). Thus, the Justice implied that steps to maintain confidentiality must be taken before the press gains access to information. *Id.*

74 443 U.S. 97 (1979).

75 *Id.* at 98-99. The West Virginia statute stated, in pertinent part:

> "[N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court . . . . A person who violates . . . a provision of this chapter . . . shall be guilty of a misdemeanor . . . ."

Id. (quoting W. VA. CODE ANN. §§ 49-7-3, 49-7-20 (1976)). Respondents first learned of the newsworthy events over a police radio transmission. *Id.* at 99. The incident involved the shooting of a 15-year-old student at a small suburban high school. *Id.* The name of the alleged offender, a 14-year-old classmate, was obtained through questioning various witnesses, police and others present at the scene of the crime. *Id.* The following day, both the Charleston Daily Mail and the Charles-

lication of truthful information seldom could be constitutional,[76] and that a state interest of the "highest order" was necessary to sustain the validity of a statute levying such punishment.[77] The Court concluded that the state's interest in keeping the name confidential[78] did not validate the statute's imposition of criminal sanctions.[79] Moreover, the Court asserted that the statute, which punished only newspapers, was underinclusive, and that alterna-

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ton Gazette had published the name of the juvenile offender. *Id.* at 99-100. Both before and after the juvenile's name appeared in print, the name was broadcast over several radio stations. *Id.* at 99. The West Virginia Supreme Court of Appeals concluded that the West Virginia statute operated as a prior restraint on the press and was not justified by a sufficiently compelling state interest. *Id.* at 100. The West Virginia court relied heavily on Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977), where an Oklahoma statute providing for closed juvenile proceedings, and allowing access to such records only upon receipt of court permission, was declared an unconstitutional prior restraint. State *ex rel.* Daily Mail Publishing Co. v. Smith, 248 S.E.2d 269, 272 (W. Va. 1978). For additional discussion of media liability in similar cases, see generally Linder, *supra* note 66.

[76] *Smith*, 443 U.S. at 102.

[77] *Id.* at 105. Although the Court recognized the state's interest, it was not convinced that criminal sanctions were necessary to accomplish this goal. *Id.* The Court stated that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 103. The *Smith* Court relied principally on the same three cases as the West Virginia Supreme Court of Appeals: Landmark Communications v. Virginia, 435 U.S. 829 (1978), Cox Broadcasting v. Cohen, 420 U.S. 469 (1975), and Oklahoma Publishing v. District Court, 430 U.S. 308 (1977). *Smith*, 443 U.S. at 102-03. Unlike the lower court, however, the Supreme Court considered prior restraint to be a peripheral issue, stating that: "First Amendment protection reaches beyond prior restraints." *Id.* Specifically, the Court stated:

> Whether we view the statute as prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity. Prior restraints have been accorded the most exacting scrutiny in previous cases.

Id. at 101-02; *see also* Linder, *supra* note 66, at 433 (demonstrating how *Cox*, *Smith*, and *Landmark*, each applying a different test, allowed the press to publish truthful information).

In addition, the Court noted that it did not matter whether the press obtained information from the government or through its own diligence. *Smith*, 443 U.S. at 103.

[78] Some of the underlying reasons presented by the State supporting confidentiality included discouraging additional anti-social behavior and protecting the juvenile's future employment and other opportunities. *Id.* at 104. *See also*, Victor L. Streib, *From* Gault *to* Fare *and* Smith: *The Decline in Supreme Court Reliance on Delinquency Theory*, 7 PEPP. L. REV. 801 (1980) (discussing the Court's reliance on juvenile delinquency research in asserting the need for confidentiality).

[79] *Smith*, 443 U.S. at 104-05. Relying on Davis v. Alaska, 415 U.S. 308 (1974), the Court in *Smith* placed the First Amendment on a par with the Sixth Amendment when weighed against the state's interest in protecting a juvenile offender's anonymity. *Smith*, 443 U.S. at 104. In both cases, the Court "refused to punish the

tives other than criminal sanctions could effectuate the goal of confidentiality.[80] The Court therefore declared the West Virginia statute unconstitutional.[81]

Most recently, in *Hustler Magazine v. Falwell*,[82] the Court deemed a state law, which was aimed at preventing the intentional infliction of emotional distress, to violate the press's First Amendment rights.[83] *Hustler* involved the publication of an advertisement parody featuring Jerry Falwell, a nationally known

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truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper" for the sake of preserving anonymity. *Id.* at 105-06.

80 *Id.* at 105.

81 *Id.* at 106. Chief Justice Rehnquist, in his concurrence, carefully balanced the two competing interests, and gave more weight to the state's confidentiality concerns than did the majority. *Id.* at 107 (Rehnquist, C.J., concurring). Chief Justice Rehnquist emphasized that although freedom of the press "is indispensable to a free society," it is not an absolute guarantee. *Id.* at 106 (Rehnquist, C.J., concurring). Chief Justice Rehnquist further stated his conviction that "a State's interest in preserving the anonymity of its juvenile offenders — an interest . . . of the 'highest order' — far outweighs any minimal interference with freedom of the press that a ban on publication of the youths' names entails." *Id.* at 107 (Rehnquist, C.J., concurring). The concurring Chief Justice viewed the state's interest as only minimally infringing on the press's freedoms. *Id.* at 108 (Rehnquist, C.J., concurring). The Chief Justice continued "that a generally effective ban on publication that applied to all forms of mass communication, electronic and print media alike, would be constitutional." *Id.* at 110 (Rehnquist, C.J., concurring). In the present case, however, the Chief Justice pointed out that West Virginia's statute was underinclusive in singling out the press, and therefore, failed to accomplish its stated purpose. *Id.*

82 485 U.S 46 (1988).

83 *Id.* at 50. For a discussion on the conflict between the right of privacy and the First Amendment rights, see Marc A. Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting Fact*, 16 STAN. L. REV. 107, 148 (1963) (encouraging greater professional conduct and more self-regulation among the media as one possible solution to the dilemma). For further commentary on *Hustler*, see Marc W. Boatwright, *Constitutional Law: Free Speech and Emotional Distress*—Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988), 11 HARV. J.L. & PUB. POL'Y 843, 848-49 (1988) (disagreeing with the Court's mechanical application of the actual malice standard to the tort of intentional infliction of emotional distress while suggesting a different, more flexible approach would have been more appropriate); Arlen W. Langvardt, *Stopping the End-Run by Public Plaintiffs:* Falwell *and the Refortification of Defamation Law's Constitutional Aspects*, 26 AM. BUS. L.J. 665, 669 (1989) (commending the Court for not succumbing to back-door approaches taken by public plaintiffs, such as intentional infliction of emotional distress claims, in their attempts to sue the media when they would not have been able to establish the "actual malice" necessary to sustain a defamation suit); Alicia J. Bentley, Comment, Hustler v. Falwell: *The Application of the Actual Malice Standard to Intentional Infliction of Emotional Distress Claims*, 49 OHIO ST. L.J. 825, 828-38 (1988) (comparing the relationship between defamation and intentional infliction of emotional distress claims); James R. Laguzza, Note, Hustler Magazine, Inc. v. Falwell: *Laugh or Cry, Public Figures Must Learn to Live With Satirical Criticism*, 16 PEPP. L. REV. 97, 109-11 (1988) (applauding the Court for applying objective actual malice standard to an intentional infliction of emotional distress claim against the media, as opposed to the subjective "outrageousness" standard traditionally applied in emotional distress cases).

preacher with outspoken political views.[84] The alleged libelous advertisement for Compari Liqueur suggested that the plaintiff's first sexual experience was with his mother.[85]

Chief Justice Rehnquist, writing for the Court, weighed the press's First Amendment interests against the state's interest in protecting individuals from the intentional infliction of emotional distress.[86] Although Chief Justice Rehnquist recognized the latter as a legitimate interest germane to other areas of the law, the Court held that it could not be asserted to curtail political debate on public figures.[87] Recognizing that First Amendment rights required breathing space, the Court concluded that an actual malice standard applied to cases of intentional infliction of emotional distress.[88] In the present case, the Court noted that the claim

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[84] *Hustler*, 485 U.S. at 47-48. The bottom of the advertisement contained the following disclaimer: "ad parody — not to be taken seriously." *Id.* at 48. The Court found the plaintiff had not met his burden of proof, requiring a public figure to show a false statement was made with actual malice. *Id.* at 56-57. The Court found that the publication did not describe actual facts that were "reasonably believable" to the public. *Id.* at 57. Falwell instituted suit based on invasion of privacy, libel and intentional infliction of emotional distress. *Id.* at 47-48. The jury awarded $200,000 in actual and punitive damages based solely on the claim of intentional infliction of emotional distress. Falwell v. Hustler Magazine, 797 F.2d 1270, 1273 (4th Cir. 1986). The Court of Appeals for the Fourth Circuit affirmed. *Id.* at 1278. Initially, the court of appeals recognized that the defendant was entitled to the same level of First Amendment protection in a case for intentional infliction of emotional distress as in the *New York Times* defamation action because the plaintiff was a public figure. *Id.* at 1274. The court, however, disagreed with a literal and mechanical application of the actual malice standard to an action for the intentional infliction of emotional distress. *Id.* The court was satisfied that the elements of establishing plaintiff's claim had been met. *Id.* at 1277. Specifically, the defendant's conduct was intentional or reckless, offended generally accepted decency and morality standards, and caused the plaintiff severe emotional distress. *Id.* at 1275 n.4. The court noted that under Virginia law, proof of "knowledge of falsity or reckless disregard of the truth" was not required to sustain a successful intentional infliction of emotional distress claim. *Id.* at 1275. The court was unwilling to impose such a requirement. *Id.*

The appellate court upheld the district court's dismissal of Falwell's invasion of privacy claim because Falwell's name and likeness had not been used "for purposes of trade" as required by Virginia law. *Id.* at 1278. The court also affirmed the lower court's dismissal of the plaintiff's libel claim because "no reasonable man would believe that the parody was describing actual facts about Falwell." *Id.* at 1273.

[85] *Hustler*, 485 U.S. at 48.

[86] *Id.* at 50.

[87] *Id.* at 53. The Court noted that this is especially true when no false statements of actual fact were at issue. *Id.* at 56.

[88] *Id.* at 56. The First Amendment, reasoned the Court, encourages open political debate. *Id.* at 51. As a result, the Court stated: "public figures as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks.' " *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). The Court, in such an atmosphere, posited that false statements are an inevitable

was based on a caricature and contained no false statements of actual fact.[89] Consequently, the Court reversed the court of appeals decision that had awarded the plaintiff damages for the tort of intentional infliction of emotional distress.[90]

It is against this background that the United States Supreme Court decided *Cohen v. Cowles Media Company*.[91] Justice White, writing for a divided Court, began his analysis by addressing whether sufficient state action was present under the Fourteenth Amendment to implicate First Amendment protection.[92] The Court opined that the enforcement of state laws in a state court

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and necessary element in preserving "breathing space for free expression" and are therefore not punishable absent a showing "that the statement was made with the requisite level of culpability." *Id.* at 52. Actual malice, as articulated by the Court in *New York Times v. Sullivan*, requires that a statement be made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. 254, 279-80 (1964). The subject of the *New York Times* case centered around a partly-true, partly-false published advertisement concerning the civil racial uprisings of the South. *Id.* at 256-58. The plaintiff, as Commissioner of Montgomery, Alabama, was in charge of supervising the police and other municipal departments. *Id.* at 256. Part of the advertisement contained derogatory language about the Montgomery police department, which the plaintiff claimed indirectly accused him of " 'intimidation and violence,' " and constituted the basis of plaintiff's defamation action. *Id.* at 256-58 (citation omitted). The Court, however, denied plaintiff recovery because the statements concerned the official conduct of a public official. *Id.* at 269-70.

89 *Hustler*, 485 U.S. at 56-57. Viewing the advertisement as a cartoon, the Court mentioned the significant role past caricatures have played in enhancing free discourse on matters of public interest. *Id.* at 53-55. The Court opined that the very nature of a cartoon is satirical and deliberately distorted. *Id.* at 53. Specifically, the Court articulated:

> The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events — an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided.

Id. at 54. Although the Court acknowledged that the First Amendment is not absolute, it articulated that the present cartoon did not fall within the area of unprotected speech. *Id.* at 56. Some of the exceptions to protected freedom of speech include "fighting words," or vulgar, shocking and offensive speech. *Id.*

90 *Id.* at 57. Specifically, the Court stated: "We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.' " *Id.* at 56. The Court accepted the lower court's finding that the parody could not " 'reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.' " *Id.* at 57 (citation omitted).

In a brief concurrence, Justice White opined that the majority's discussion of the *New York Times* actual malice standard was irrelevant to the present case because "the ad contained no assertion of fact." *Id.* (White, J., concurring).

91 111 S. Ct. 2513 (1991).

92 *Id.* at 2517.

constituted state action for purposes of the Fourteenth Amendment.[93] Because Cohen's recovery would be based on the state law doctrine of promissory estoppel, Justice White concluded that the First Amendment was applicable.[94]

Having resolved the state action issue, the Court posited that the press was subject to all laws of general applicability regardless of any incidental effects such laws might have on the newsgathering process.[95] The majority noted that the First Amendment did not immunize the press from answering questions at a grand jury,[96] breaking the copyright laws[97] or obeying

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93 *Id.* at 2518. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 770, 777 (1986) (Pennsylvania statute, which included common law "presumption of falsity" in defamation suits thereby placing the burden of proving the truth of a defamatory statement on the defendant, constituted state action restricting freedom of the press); NAACP v. Clairborne Hardware Co., 458 U.S. 886, 891-92 (1982) (prohibiting nonviolent, politically motivated boycotts was a state infringement on First Amendment freedoms); New York Times Co. v. Sullivan, 376 U.S. 254, 262 (1964) (Alabama law imposing strict liability for mere publication of a libelous statement, without having to prove falsity and malice, constituted state action restricting freedom of the press).

94 *Cohen*, 111 S. Ct. at 2518. Initially, jurisdiction was established by a determination that the Minnesota Supreme Court's decision was not grounded solely on state law. *Id.* at 2517. The Court's reliance on federal law was evinced by the following: " '[i]n this case enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights.' " *Id.* at 2517 (quoting Cohen v. Cowles Media Co., 457 N.W.2d 199, 205 (1990)). In Franks v. Delaware, 438 U.S. 154, 161-62 (1978), for example, the Court determined that the Delaware Supreme Court had disposed of appellant's Fourth Amendment claim on the merits. *Id.* Conversely, the Supreme Court stated that it has jurisdiction when a state's highest court rules on the merits of a federal question. *Id.* Similarly, in Jenkins v. Georgia, 418 U.S. 153, 154, 157 (1974), an appellant accused of violating a Georgia obscenity statute did not claim constitutional protection under the First and Fourteenth Amendments. *Id.* Nevertheless, the Court found that the record was unequivocally clear that the Georgia Supreme Court had based its decision in part on these federal issues, thereby establishing United States Supreme Court jurisdiction. *Id.* at 156-57.

95 *Cohen*, 111 S. Ct. at 2518. The Court asserted that the case was not controlled by precedent holding that a state may not prevent the publication of lawfully obtained, truthful information without establishing an interest of the "highest order." *Id. See, e.g.*, Florida Star v. B.J.F, 491 U.S. 524, 526 (1989) (Florida statute making it unlawful to publish or broadcast information identifying sexual offense victim held to be an unconstitutional infringement on First Amendment freedoms); Smith v. Daily Mail Publishing Company, 443 U.S. 97, 103, 105, 106 (1979) (Court declared a West Virginia statute forbidding newspapers from publishing the names of juvenile offenders without a court's written approval unconstitutional because the information was a matter of public record and therefore its publication was protected under the First Amendment). For a discussion of *Smith*, see supra notes 74-81 and accompanying text.

96 *Cohen*, 111 S. Ct. at 2518. (citing Branzburg v. Hayes, 408 U.S. 665 (1972)). *See supra* notes 31-45 and accompanying text (discussing *Branzburg*).

the National Labor Relations[98] or Fair Labor Standards Acts.[99] The Court determined that the enforcement of general laws against the press was subject to no greater scrutiny than enforcement of the same laws against other organizations or persons.[100] Because the Minnesota promissory estoppel law was one of general applicability, Justice White reasoned that it encompassed all Minnesota citizens, including the press.[101]

Justice White next addressed Justice Blackmun's argument that the application of promissory estoppel doctrine would punish the press "for publishing truthful information that was lawfully obtained."[102] Justice White noted that the present case involved compensatory damages and not criminal sanctions for publication of truthful information.[103] Moreover, Justice White reasoned that the characterization of the cause of action was irrelevant when it resulted from the implementation of a generally applicable law.[104] Additionally, the Court was not convinced

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97 *Id.* (citing Zacchini v. Scripps-Howard Broadcasting, 433 U.S. 562 (1977)). For a full discussion of *Zacchini*, see *supra* notes 54-64 and accompanying text.

98 *Id.* (citing Associated Press v. NLRB, 301 U.S. 103 (1937)). In *Associated Press*, the Court determined that the Associated Press's activities of interstate transmission and receipt of newsworthy information constituted interstate commerce, thereby invoking the regulations of the National Labor Relations Act. Associated Press v. N.L.R.B., 301 U.S. 103, 128-29 (1937).

99 *Cohen*, 111 S. Ct. at 2518 (citing Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 199 (1946)) The Court in *Oklahoma Press* held that the Fair Labor Standards Act did not in any way restrain expression. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 193 (1946). Therefore, the Court held that the press must comply with the subpoena duces tecum issued pursuant to § 11(a) of the Act, permitting the inspection of its employment premises. *Id.* at 198-99. The *Cohen* Court likewise noted that the press cannot "restrain trade in violation of the antitrust laws" and "must pay non-discriminatory taxes." *Cohen*, 111 S. Ct. at 2518. *See also* Citizens Publishing Co. v. United States, 394 U.S. 131, 134-35, 140 (1969) (Court ruled that the defendant newspapers' practices of price-fixing, profit pooling, and market control, violated the Sherman Act and Clayton Act.).

100 *Cohen*, 111 S. Ct. at 2518.

101 *Id.* at 2518-19. The Court explained that the doctrine of promissory estoppel applied to all citizens in Minnesota and did not discriminate against the press in any way. *Id. Cf.* Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue, 460 U.S. 575, 579 (1983) (ruling that laws which single out the press are unconstitutional, thereby invalidating the State's use-tax on the ink and paper used in the publication process); Grosjean v. American Press Co., 297 U.S. 233, 250-51 (1936) (striking down a license tax levied against certain newspapers with a specified circulation level).

102 *Cohen*, 111 S. Ct. at 2519. For a full discussion of Justice Blackmun's dissenting opinion, see *infra* notes 111-19 and accompanying text.

103 *Id.* Criminal sanctions were at issue in Florida Star v. B.J.F, 491 U.S. 524 (1989) and Smith v. Daily Mail Publishing, 443 U.S. 97 (1979). *Id.*

104 *Cohen*, 111 S. Ct. at 2519. Justice White distinguished the present case from *Florida Star* and *Smith*, noting that in the latter two cases, the State imposed liability

that, in the present case, the information was lawfully obtained.[105] Justice White noted that the information was acquired by making, then subsequently, breaking a promise.[106]

Furthermore, Justice White noted that Cohen was not attempting to utilize a promissory estoppel claim to circumvent the strict requirements of a libel action.[107] Thus, the majority distinguished the present circumstances from the *Hustler* libel suit for the intentional infliction of emotional distress.[108] By contrast, Cohen sought compensatory damages for the loss of his job, not for injury to his state of mind or reputation.[109] Finally, the Court concluded that the restraint on truthful reporting would be a constitutionally insignificant and incidental consequence of applying a general law to the press.[110]

In dissent, Justice Blackmun criticized the majority for exclusively relying on the press's liability for violations of generally applicable laws.[111] Instead, Justice Blackmun contested that the Court should have focused on the speech's content, not the speaker's identity.[112] The Justice opined that both media and non-media persons should be allowed to disclose Cohen's identity, because this case involved truthful information used in the context of a political campaign.[113] Moreover, Justice Blackmun

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based on speech content. *Id.* By contrast, in the present case, the restrictions on publication were self-imposed by the parties to the action. *Id.*

105 *Id.*

106 *Id.*

107 *Id.* The Court noted that since the information was true, defamation law did not apply. *Id.*

108 *Id.*

109 *Id.*

110 *Id.* For the foregoing reasons, the decision of the Minnesota Supreme Court was reversed and remanded for a determination of damages consistent with Minnesota state law and the Minnesota Constitution. *Id.* at 2520. The Court was unwilling to reinstate the jury's $200,000 compensatory damages award because the "Minnesota Supreme Court's incorrect conclusion that the First Amendment barred Cohen's claim may well have truncated its consideration of whether a promissory estoppel claim had otherwise been established under Minnesota law and whether Cohen's jury verdict could be upheld on a promissory estoppel basis." *Id.* at 2519-20.

111 *Id.* at 2520 (Blackmun, J., dissenting). The Justice, however, agreed with the majority that federal jurisdiction was established and that state action was involved, implicating the First and Fourteenth Amendments. *Id.*

112 *Id.*

113 *Id.* Justice Blackmun observed that political speech was at the heart of the First Amendment protection. *Id.* Justice Blackmun relied on aspects of *New York Times* where the Court stated:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fash-

stated that the Court's reliance on the press's liability under generally applicable laws and supporting case law was misplaced because those sources did not address liability based on speech content.[114]

Instead, Justice Blackmun relied primarily on the Court's reasoning in *Hustler Magazine, Inc. v. Falwell* to contend that generally-applicable laws should not compromise free speech.[115] In *Hustler*, although the tort of intentional infliction of emotional distress was unrelated to speech restraint, that generally-applicable law was subject to First Amendment principles.[116]

Finally, Justice Blackmun pointed out that the Minnesota promissory estoppel law did not merely have an incidental burden on speech because the publication of speech itself was the violation.[117] Thus, reasoned Justice Blackmun, the law may not be enforced to suppress truthful speech absent a state interest of the "highest order."[118] Because the state's interest in enforcing

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> ioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'. . . . The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957); Stromberg v. California, 283 U.S. 359, 369 (1931)).

114 *Cohen*, 111 S.Ct. at 2520-21 (Blackmun, J., dissenting). *See, e.g.*, cases upon which the majority relied: Branzburg v. Hayes, 408 U.S. 665 (1972) (holding that the press must respond to grand jury subpoenas); Citizen Publishing Co. v. United States, 394 U.S. 131, 134-35 (1969) (press's practices of profit-pooling and price-fixing held violative of Sherman and Clayton Acts); Associated Press v. United States, 394 U.S. 1, 4 (1945) (declaring that Associated Press by-laws violated the Sherman Act by requiring all Associated Press members to keep news within its association and granting members the power to block membership to competitors); Associated Press v. National Labor Relations Board, 301 U.S. 103, 128-29 (1937) (press's interstate transmission of news subject to the National Labor Relations Act).

115 *Cohen*, 111 S. Ct. at 2521 (Blackmun, J., dissenting).

116 *Id.* Justice Blackmun disagreed with the majority's distinction of *Hustler* based "on the ground that there the plaintiff sought damages for injury to his state of mind whereas the petitioner here sought damages 'for a breach of a promise that caused him to lose his job and lowered his earning capacity.' " *Id.* at 2521 n.3. Instead, Justice Blackmun perceived both cases as similarly involving attempts to restrain speech publication. *Id.* For a discussion of *Hustler*, see *supra* notes 82-90 and accompanying text.

117 *Id.* at 2521-22 (Blackmun, J., dissenting).

118 *Id.* at 2522 (Blackmun, J., dissenting) (citing Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)). For a discussion of *Smith*, *see supra* notes 74-81 and accompanying text. Justice Blackmun agreed with the Minnesota Supreme Court's

promissory estoppel claims was not of the highest order, Justice Blackmun argued that the Minnesota Supreme Court's decision should have been affirmed.[119]

In a separate dissent, Justice Souter opined that a law's general applicability was not dispositive in determining whether it may infringe First Amendment protections.[120] Rather, the Justice proposed the application of a balancing test in all cases where possible restrictions of First Amendment guarantees may result, including those that involved generally-applicable laws.[121] Justice Souter stressed that abandoning this balancing test was not justified simply because the newspapers in question voluntarily promised confidentiality.[122] Indeed, the Justice emphasized that First Amendment protection did not solely belong to the speaker but extended to the public, who may benefit from the speech as well.[123] Therefore, the Justice articulated that the public's right to access information, not the press's right to report it, was paramount.[124]

Applying this analysis to Cohen's suit against Cowles Media,

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conclusion that a promissory estoppel cause of action regarding confidentiality agreements did not outweigh First Amendment considerations. *Cohen*, 111 S. Ct. at 2521-22; Cohen v. Cowles Media Co., 457 N.W.2d 199, 205 (Minn. 1990).

119 *Cohen*, 111 S. Ct. at 2522 (Blackmun, J., dissenting).

120 *Id.* (Souter, J., dissenting). Justice Souter distinguished the cases relied on by the majority because they involved commercial activities and relationships and did not bear on the speech content. *Id.* For a discussion of the cases distinguished by Justice Souter, see *supra* note 114.

121 *Id. See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (Court used balancing test to weigh individual's recovery for tort of intentional infliction of emotional distress versus the freedom of the press); Zacchini v. Scripps-Howard Broadcasting, 433 U.S. 562, 565 (1977) (state interest in protecting the right of publicity was balanced against the television station's First Amendment freedoms). For a full discussion of *Hustler*, see *supra* notes 82-90 and accompanying text. For a full discussion of *Zacchini*, see *supra* notes 54-64 and accompanying text.

122 *Cohen*, 111 S. Ct. at 2522-23 (Souter, J., dissenting).

123 *Id.* at 2523 (Souter, J., dissenting). " '[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.' " *Id.* (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)). The Justice also stated that the newspapers' actions were not sufficient to constitute waiver. *Id. See* Curtis Publishing v. Butts, 388 U.S. 130, 145 (1967) (Court pointed out that, when dealing with a "valued freedom [of expression or press], we are unwilling to find waiver in circumstances which fall short of being clear and compelling.").

124 *Cohen*, 111 S. Ct. at 2523 (Souter, J., dissenting) (citing CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981)). Justice Souter stated: " '[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.' " *Id.* (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975)).

Justice Souter considered the release of Cohen's identity vital information which reflected on both his character and the character of the candidate for whom he was employed.[125] Justice Souter argued that it was in the public's best interest for such information to be revealed because such information may have had a substantial impact on the election's outcome.[126]

Justice Souter concluded that the breach of a confidentiality promise may give rise to liability in certain circumstances.[127] For example, Justice Souter pointed out that a private individual may be able to recover because his identity is not of public concern.[128] Additionally, the Justice stated that the means by which confidential information was obtained was also relevant.[129] Viewing the facts in Cohen's case, however, the Justice reasoned that allowing free and open debate on matters of public concern outweighed the state's interest in enforcing a confidentiality promise.[130]

The *Cohen* majority did not engage in a balancing test to reach its decision. Instead, the Court embraced the view that the press did not occupy a special position in society.[131] Consistent with the majority's opinion, there are several justifications for subjecting the press to laws of general applicability. First, the underlying policy reason is that the press is not above the law. Rather, the press, just as any other citizen or institution, must answer to the law.[132] In *Cohen*, the parties agreed there was a

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125 *Id.* Justice Souter reasoned that such information should be accorded the highest level of First Amendment protection. *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.* For instance, the Justice stated that a private individual would have a better chance of recovering damages. *Id.*

131 *Cohen*, 111 S. Ct. at 2518-19. The Court in Employment Division, Department of Human Resources v. Smith, 110 S. Ct. 1595 (1990), utilized similar reasoning. In that case, the Supreme Court held that the free exercise clause of the First Amendment did not excuse one from the duty to obey " 'valid and neutral law[s] of general applicability.' " *Id.* at 1600. The Supreme Court held that sacramental peyote use, in violation of ORE. REV. STAT. § 475.992(4) (1987), was not protected by the Free Exercise Clause. *Id.* at 1606.

132 *See* Bruce Fein & William B. Reynolds, *High Court to Puzzle Press' Broken Promise*, N.J.L.J., Jan. 3, 1991, at 14, col.4. ("[The] application of federal and state . . . laws, or other forms of economic regulation, does not depend on a constitutional balancing act that weighs their chilling impact on press activities."); Peterson v. Idaho First National Bank, 367 P.2d 284, 286, 290 (Idaho 1961) (bank was liable for breach of implied contract, for disclosing the plaintiff's personal bank account records to plaintiff's employer, without consent); Horne v. Patton, 287 So. 2d 824, 831 (Ala. 1974) (that an implied contract arises out of the facts showing a mutual intent of the parties to be bound, as determined by ordinary course of dealings and

contract. Surely no court would allow the press to breach other types of contracts (e.g., a sales contract, or a contract with a syndicated columnist).[133] Thus, the Court's decision provides consistency.

The majority's decision also prevents the press from subscribing to a double standard. For example, the press has, on countless occasions, vehemently defended against the required disclosure of confidential sources.[134] Indeed, reporters have gone to jail to maintain their sources' confidentiality.[135] Therefore, given the press's firm position in prior cases involving confidential sources, the press's voluntary breach in *Cohen* was inexcusable.[136]

Second, the majority's decision is valid when one considers the press's role in society. One of the Free Speech Clause's underlying purposes is to create an informed citizenry and another is to encourage public participation in the government's decision-making process.[137] The press has frequently pointed out the dangers of revealing confidential sources.[138] The press's vol-

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common sense); Doe v. Roe, 400 N.Y.S.2d 668, 670-71, 675 (N.Y. 1977) (a psychiatrist was liable for publishing confidential accounts of therapy sessions with the plaintiff; the psychiatrist's First Amendment privilege claim, based on the scientific value of the information, was denied).

133 *See* Fein & Reynolds, *supra* note 132, at 14, col. 3-4 ("The press enjoys no special First Amendment immunity from suits for breach of ordinary commercial contracts for goods and services.").

134 *Id.* As one commentator noted: "Minnesota has a shield law protecting confidential sources specifically to promote the free flow of information to the media. Enforcement, not abrogation, of reporters' non-disclosure commitments furthers that objective." *Id.*

135 *See supra* note 29. In such instances, the press asserted a qualified privilege, and conditioned disclosure on the key elements of a compelling state interest in the need for the information and the absence of alternative means of obtaining the information. Riley v. City of Chester, 612 F.2d 708, 716-17 (3d Cir. 1979). Clearly, had the press applied this simple test to the editorial decision in *Cohen*, Cohen's name should not have been published.

136 *See* Emerson, *supra* note 2, at 888 (observing that it is common for groups to insist on particular rights for themselves and yet demand they be denied to others).

137 *See supra* note 2 (noting the importance of the press in a democratic system).

138 *See supra* note 34 and accompanying text. For example, the chilling effect, also termed the drying-up of sources, has been described as the withdrawal of sources from the market for fear of identification. Paul L. Glenchur, Comment, *Source Disclosure in Public Figure Defamation Actions: Towards Greater First Amendment Protection*, 33 HASTINGS L.J. 623, 631-33 (1982). Although the press has made this assertion, it is not easily quantifiable. *Id.* at 632-33. *See* Blasi, *supra* note 4 at 239 (discussing a study regarding the concept of the drying up of information sources due to forced disclosure of confidential sources). The possibility of self-censorship has also been raised as a potential danger. *See, e.g.*, New York Times Co. v. Sullivan, 367 U.S. 254, 279 (1964); CBS, Inc. v. Federal Communications Commission, 453 U.S. 367, 394-95 (1981); The Florida Star v. B.J.F., 491 U.S. 524, 535 (1989).

untary breach of contractual obligations certainly will not contribute to the flow of information in the future, and will ultimately inhibit free expression.

Finally, public policy considerations justify the Court's decision. The media, as an institution, has grown dramatically over the past several decades,[139] thereby increasing the press's susceptibility to corruption.[140] Therefore, any privileges afforded the press via the First Amendment must be shielded from abuse. The judiciary must play an active role in delineating the appropriate bounds.[141] An important consideration in this process is recognizing that all privileges necessarily carry with them an obligation to exercise the protected right responsibly.[142] This is "[a] duty widely acknowledged but not always observed by editors and publishers."[143]

The press, therefore, must be held accountable for its actions. Absent accountability, social institutions cannot survive.[144] An individual needs assurance that the exercise of rights will be protected.[145] Society must value the dignity and the worth of its individual members before cooperation can be expected from the whole.[146]

The foregoing considerations notwithstanding, there is a contrary line of case law that has established the press's preferred position in the law to maintain the free flow of ideas.[147] Libel law, for example, is a generally-applicable law that a public offi-

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139 One author has termed the media the "fourth estate" (family, church, and state being the first three). Leonard W. Levy, *Emergence of a Free Press* 117 (1985).

140 Too much power in the hands of few is always risky. As one commentator stated: "[A]bsolute power corrupts absolutely." N.J.L.J., Oct. 14, 1982, at 18, col. 1.

141 The First Amendment is not so expansive as to override the public interest in ensuring that a reporter is not "invading the rights of other citizens through reprehensible conduct forbidden to all other persons." Branzburg v. Hayes, 408 U.S. 665, 691-92 (1972).

142 Nebraska Press Association v. Stuart, 427 U.S. 539, 560 (1976).

143 *Id.*

144 Blasi, *supra* note 4, at 281.

145 Emerson, *supra* note 2, at 894.

146 Baker, *supra* note 5, at 991.

147 Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (public officials and public figures must prove actual malice before recovering for intentional infliction of emotional distress from media); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (public official in defamation suit must prove actual malice to recover damages from media); Caldwell v. United States, 434 F.2d 1081, 1086, 1089 (9th Cir. 1970) (First Amendment provides newsmen a qualified privilege not to testify at grand jury proceedings absent demonstration of compelling need for information); *see also* Nimmer, *supra* note 7, at 658 (favoring special rights for press based on constitutional distinction between freedom of speech and freedom of

cial or public figure may not enforce against the press without also showing "actual malice."[148] Another line of cases has prohibited the punishment of lawfully obtained, truthful information.[149] Prior cases have established that any laws attempting to infringe upon First Amendment privileges of the press must be content-neutral.[150] In *Cohen*, however, the effect of enforcing the promissory-estoppel theory of contract law against the press is to create liability based on speech content. The Court's reasoning in *Cohen* could threaten to undermine all that has been accomplished in the pursuit of a free press.

The array of prior law leaves an element of unpredictability in the area of future media litigation. Future courts will be faced with determining whether, in a particular situation, the dissemination of information will be given preferential or equal treatment. While some commentators have encouraged the Court to develop a uniform standard for the adjudication of First Amendment claims,[151] it seems unlikely that one standard could be consistently applied in all situations. Rather, it appears that the ad hoc balancing approach is the only fair way to do justice to the unique concerns of each case. In the area of confidentiality agreements, however, the press is in complete control and could abstain from such practices altogether. Conversely, reporters could carry with them standard, written confidentiality agreements.[152] Reducing the parties' agreement to writing would pre-

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press); Armstrong, Comment, *supra* note 7, at 157-58 n.2 (newsman's privilege exempts reporters from certain legal processes).

148 New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

149 Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103, 105, 106 (1979) (West Virginia statute prohibiting publication of juvenile offenders' names without court permission held unconstitutional because information was matter of public record, thereby qualifying for First Amendment protection); The Florida Star v. B.J.F., 491 U.S. 524, 526 (1989) (Florida statute making it unlawful to publish or broadcast information identifying sexual offense victim held unconstitutional infringement of First Amendment freedoms); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) (state interest in preserving reputation of judiciary and integrity of courts insufficient to prevent publication of lawfully obtained, truthful information concerning confidential judicial inquiry and review proceedings).

150 Cohen, 111 S. Ct. at 2520-21 (Blackmun, J., dissenting); Lovell v. Griffin, 303 U.S. 444, 450-52 (1938).

151 For a proposed standard of review for breach of confidentiality suits against the press, see Dicke, Note, *supra* note 10, at 1579-88; Koepke, Comment, *supra* note 10, at 304-16.

152 These written contracts would be legally enforceable, in the absence of a compelling state interest which would require disclosure. *See* Branzburg v. Hayes, 408 U.S. 665 (1972), *supra* notes 31-45.

vent ambiguity and confusion, and would aid the courts in defining the extent of one's rights.

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