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When a Promise Is Not a Promise: The Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources

by
KATHRYN M. KASE*

Introduction

It was an offer Minneapolis Star Tribune reporter Lori Sturdevant could not refuse. Days before Minnesota’s statewide elections in 1982, a prominent Minneapolis Republican told Sturdevant he would give her damaging information about a statewide candidate if Sturdevant would promise not to reveal her source.1 Sturdevant pledged confidentiality and, in return, received a manila envelope containing a reporter’s bonanza: copies of secret court records showing that the democratic candidate for lieutenant governor had been convicted of shoplifting twelve years earlier.2 When Sturdevant submitted the story to the newspaper, however, her editors refused to honor her promise of confidentiality.3 The better story, the editors decided, concerned the well-known Republican who had stooped to leaking information about a democratic candidate on the virtual eve of a statewide election.4 The next day, the Star

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2. Id. (Confidential information detailed the candidate’s shoplifting record.) Like Sturdevant, the reporters for the Associated Press, St. Paul Pioneer Press, and WCCO-TV promised to conceal the source’s identity in return for his information.

3. Id. at 253. Unbeknownst to Sturdevant and her editors, editors at the St. Paul Pioneer Press also decided to reveal the source’s identity along with the information. Only the Associated Press and WCCO-TV honored their reporters’ promises of confidentiality.

4. Id.; see also Confidentiality Suit Trial Starts Today In Minneapolis Court, Minneapolis Star Tribune, July 5, 1988, at 1B, col. 1 [hereinafter Trial Starts Today]; Cohen Awarded $700,000 in Newspaper Suit, Minneapolis Star Tribune, July 23, 1988, at 1A, col. 5 [hereinafter Cohen Awarded]. A number of factors contributed to the Star Tribune’s decision to expose Sturdevant’s source, including the fact that the shoplifting conviction involved only six dollars worth of merchandise and that it had been expunged from court records. Additionally, Star Tribune editors believed it to be significant that Sturdevant’s source was working for an adver-
Tribune revealed not only the candidate's criminal record, but also its reporter's source of the information: Minneapolis advertising executive Dan Cohen. Cohen was fired the day the story was published and two months later he sued the newspaper, claiming it had breached an oral contract by exposing him as Sturdevant's confidential source. He also sued Sturdevant for misrepresenting her authority to grant anonymity to sources.

At trial nearly six years later, a Minnesota district court agreed with Cohen that the Star Tribune had breached a contract when it voluntarily revealed him as its source of the information regarding the shoplifting conviction. The contract arose, the court found, when Sturdevant promised Cohen confidentiality in exchange for the information. The newspaper argued that the first amendment, in addition to giving it the right to print truthful news, also gave it the right to gather the news as its editors saw fit. The newspaper asserted this latter right, notwithstanding the harm inflicted on sources. The court disagreed, asserting that
the first amendment's newsgathering privilege does not give journalists the right to violate criminal or civil laws in the pursuit of a news story.\footnote{14}

The district court also found Sturdevant guilty of misrepresenting her authority to keep Cohen's identity secret, when in fact editors could override that promise of secrecy.\footnote{15} On appeal, however, the Minnesota Court of Appeals reversed the lower court after determining that no misrepresentation occurred, because Sturdevant was unaware of internal \textit{Star Tribune} policies enabling editors to override a reporter's grant of confidentiality.\footnote{16}

Affirmed on appeal, the finding in \textit{Cohen v. Cowels Media Co.} of a contract between Sturdevant and her source has caused a furor in the journalism community.\footnote{17} Journalists believe \textit{Cohen} encroaches on ethical territory and curtails freedom of the press.\footnote{18} Media commentators question whether \textit{Cohen} signifies that a journalist cannot identify sources who provide information that is false or substantially different from that

\textit{Contradicted}, Minneapolis Star Tribune, July 16, 1988, at 12B, col. 3. Experts projected that his salary eventually would have risen to $78,000 had he been able to keep his job. \textit{Id.}

\footnote{14} \textit{Cohen II}, 15 Media L. Rep. at 2290, \textit{aff'd} in part and \textit{rev'd} in part in \textit{Cohen III}, 445 N.W.2d 248, 254 (Minn. Ct. App. 1989). In a written opinion denying the newspaper's motion for judgment notwithstanding the verdict, the district court judge bolstered his decision to disallow a first amendment defense by citing \textit{Galella v. Onassis}, 487 F.2d 986 (2d Cir. 1973), a celebrated newsgathering case involving a tabloid photographer who assaulted the Onassis family in the pursuit of photographs. In \textit{Galella}, the court contradicted photographer Galella's contention that the first amendment gave him virtually unlimited rights to gather the news. 487 F.2d at 992. In a much-quoted decision, the court held "there is no such scope to the [first [a]mendment right. Crimes and torts committed in news gathering are not protected." \textit{Id.}

\footnote{15} \textit{Cohen II}, 15 Media L. Rep. at 2290 (jury finds misrepresentation by newspapers).

\footnote{16} \textit{Cohen III}, 445 N.W.2d at 258-63. For the same reasons, Salisbury also was acquitted of misrepresentation. \textit{See id.}

\footnote{17} \textit{See, e.g., Confidentiality Ruling}, \textit{EDITOR & PUBLISHER}, Sept. 16, 1989, at 4 (editorial warning that decision invades news decision-making); Denniston, \textit{A Right to Expose Sources?}, \textit{WASH. JOURNALISM REV.}, Nov. 1988, at 18 (decision could make any editorial decision subject to court review); \textit{Breaking the Code of Confidentiality}, \textit{TIME}, Aug. 1, 1988, at 61 (verdict will increase debate over whether promise of confidentiality is absolute); Langley & Levine, \textit{Broken Promises}, \textit{COLUM. JOURNALISM REV.}, July/Aug. 1988, at 24 [hereinafter Langley & Levine] (decision in effect penalizes reporters for publishing accurate information); \textit{Media Experts Call Decision a Minefield of Possible Effects}, Minneapolis Star Tribune, July 23, 1988, at 1A, col. 5 (decision considered threat to newsgathering privilege) [hereinafter \textit{Minefield}].

**Editor's Note:** Subsequent to the author's completion of this Note, the Supreme Court of Minnesota reversed the holding of the Minnesota Court of Appeals, finding that a reporter's promise to keep a source's identity confidential was not enforceable. \textit{Cohen v. Cowles Media Co.}, 457 N.W.2d 199, 202, 203 (Minn. 1990) [hereinafter \textit{Cohen IV}]. This reversal does not vitiate the validity of Ms. Kase's Note; by contrast, her conclusion is now more appropriate in light of the court's disavowal of the source's contract theory of recovery.

\footnote{18} \textit{See Minefield, supra} note 17, at 1A, col. 5; \textit{see also} Denniston, \textit{supra} note 17.
promised. Finally, newspaper owners perceive the decision as simply another means by which press foes may "harass" the media in court.

The legal issues raised, and to be discussed within this Note, are both broad and narrow. The degree to which the first amendment protects newsgathering constitutes the broad issue. The narrow issue focuses upon whether the first amendment or another legal mechanism should allow a journalist to identify a source to whom confidentiality has been promised.

I

Confidential Sources

A. "According to a Senior Administration Official": The Growth of Media Reliance on Confidential Sources

If indeed "[t]here are eight million stories in the naked city," the average newspaper each day publishes hundreds of them, many of which rely on information from anonymous sources. It is commonly believed that media reliance on unnamed sources began with Bob Woodward's relationship with "Deep Throat" during Watergate, yet case law demonstrates that the use of confidential sources dates back to 1848. The modern era of confidential sources appears to have begun with President Franklin Delano Roosevelt, who held press conferences on the condition

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20. See, e.g., Confidentiality Ruling, supra note 17 (ruling opens new area of litigation that will benefit press foes); see also Cunningham, Should Reporters Reveal Sources To Editors?, The Quill, Oct. 1988, at 6 (decision paves way for many victimization claims from sources); Langely & Levine, supra note 17 (press antagonists would have powerful weapon in breach of contract claim); Minefield, supra note 17 (finding of contractual obligation would enable plaintiffs to circumvent first amendment protections); cf. N. Hentoff, The First Freedom 255-56 (1980) (libel lawsuits filed to frighten newspapers into censoring themselves). But see Knoll, supra note 19 (Star Tribune's decision to expose source unconscionable).

21. See The Naked City (ABC television serial, 1958-1963) (opening line: "There are eight million stories in the naked city, and this is one of them.").


23. See D. Shaw, supra note 22, at 66.

24. See Ex parte Nugent, 18 F. Cas. 471, 471-72 (C.C.D.C. 1848) (No. 10,375) (journalist refused to reveal source of information regarding secret Senate meetings on Mexico treaty); see also Note, Qualified Privilege for Journalists, 61 U. Det. L. Rev. 463, 468 (1984) (Nugent is the earliest reported case of a journalist refusing to reveal a source).
that reporters not quote him directly.\textsuperscript{25} Press chroniclers uniformly agree that, since then, the use of confidential sources has skyrocketed, boosted primarily by secretive presidents and growing journalistic acceptance of stories attributed to "senior administration officials."\textsuperscript{26} So accepted is the use of anonymous sources today among journalists that the rare decision to ban their use from news stories usually is perceived by journalists to be a function of political pressure, rather than an effort to improve the quality of journalism.\textsuperscript{27}

Despite widespread acceptance of unattributed news stories among journalists, the overuse of confidential sources harms both the reporting and public perception of the news.\textsuperscript{28} Spurred by Janet Cooke's revelation that she fabricated the 8-year-old heroin addict portrayed in her Pulitzer Prize-winning story, "Jimmy's World,"\textsuperscript{29} reporters and editors have suggested that the public does not believe in the existence of most anonymous sources quoted in news stories.\textsuperscript{30} Another significant problem,

\textsuperscript{25} See D. Shaw, supra note 22, at 65 (Roosevelt forbade reporters to quote him directly). President Harry Truman also invoked Roosevelt's rule. \textit{Id.}

\textsuperscript{26} See, e.g., \textit{id.} (use of unnamed sources is prevalent in Washington; presidents are the worst offenders); N. Isaacs, supra note 22 (use of unnamed sources a lifestyle in Washington); Johnston, \textit{The Anonymous-Source Syndrome}, COLUM. JOURNALISM REV., Nov./Dec. 1987, at 58 (\textit{New York Times} and \textit{Washington Post} use unnamed sources most frequently). Former \textit{Los Angeles Times} reporter David Shaw traces the prevalent use of unnamed sources back to the Kennedy administration, which frequently leaked stories attributed to anonymous officials. D. Shaw, supra note 22, at 66. President Lyndon Johnson escalated the use of unnamed sources, Shaw asserts, because Johnson's sensitivity to criticism forced administration officials to leak stories to the press in order to make dissenting viewpoints known. Watergate added to the problem of confidential sources, not only because sources feared the legal consequences of being identified, but also because journalists were under great pressure to "scoop" the competition. \textit{Id.}

\textsuperscript{27} See Sibbison, \textit{A.P.: The Price Of Purity}, COLUM. JOURNALISM REV., Nov./Dec. 1987, at 56-57 (wire service ban on confidential sources perceived as result of political bias); cf. D. Shaw, supra note 26, at 59 (ban on confidential sources could restrict free flow of news).

\textsuperscript{28} See, e.g., N. Isaacs, supra note 22, at 52 (sources cloaked for effect, not need); T. Goldstein, supra note 5, at 219 (confidentiality enabled Janet Cooke to fabricate story about child heroin addict); D. Shaw, supra note 22, at 57 (use of anonymous sources misleads public); Knoll, supra note 19 (confidentiality rules confusing and misunderstood); Zuckerman, \textit{Breaking A Confidence}, TIME, Aug. 3, 1987, at 61 (confidentiality allows sources to manipulate journalists); Johnston, supra note 26, at 54 (reporters give in to requests for anonymity too easily); Alter, \textit{When Sources Get Immunity: Was North Pampered?}, NEWSWEEK, Jan. 19, 1987, at 54 (confidentiality can lead to immunity from scrutiny); cf. Branzburg v. Hayes, 408 U.S. 665, 629-93 (1972) (confidentiality should not shield source from consequences of violating the law).


\textsuperscript{30} See D. Shaw, supra note 22, at 60-61 (unidentified sources believed to be made up); \textit{see also} T. Goldstein, supra note 5, at 241 (New York Gov. Mario Cuomo believes quotes from unattributed sources often made up, particularly in state government stories); Johnston,
revealed in detail through the Iran-Contra Affair, concerns the cozy relationships journalists often develop with trusted sources. These relationships frequently cause journalists to neglect verification of the source's statements or to overlook important news events in which the source is implicated. Over-reliance on anonymous sources also discourages aggressive pursuit by journalists of information for attribution, as reporter Sturdevant demonstrated when she granted anonymity to her source without first determining Cohen's relation to the story sealed in the manila envelope. Against this background of varied concerns, journalists must decide not only whether anonymous sources are needed to

supra note 26, at 54 (Miami Herald executive believes anonymity an invitation for reporter to exaggerate).

31. See Alter, supra note 28 (scandal involving illegal assistance to Nicaragua via profits from arm sales to Iran).

32. Id.

33. See, e.g., Zuckerman, supra note 28 (confidentiality allows sources to manipulate journalists); Alter, supra note 28 (confidentiality pacts kept journalists from scrutinizing Lt. Col. Oliver North's role in the Iran-Contra affair). The Washington press corps often takes the most blame, and for good reason, for protecting sources instead of reporting the big stories implicating those sources. See id. As Jonathan Alter reported in Newsweek, many Washington, D.C. reporters suspected Lt. Col. Oliver North was deeply involved in obtaining illegal aid for the Nicaraguan Contras. Yet, those reporters failed to aggressively pursue the story because North was a well-known and oft-used confidential source for capitol journalists. Id.

Hometown journalists also have been known to show more loyalty to a well-liked confidential source than to the important story concerning that source. In San Antonio, Texas, the news media overlooked Mayor Henry Cisneros' extra-marital affair, which he admitted in confidential conversations with journalists. See Thompson, The Facts vs. the Rumors in the Cisneros-Medlar Story, San Antonio Express-News, Oct. 15, 1988, at 3A, col. 1 (mayor told journalists about affair in confidence); see also San Antonio's Mayor, a Hero of Hispanics, Falls From Grace Amid Moral Lapse, Media Scrutiny, Wall St. J., Oct. 17, 1988, at A24, col. 1 (many local editors refused to break story of mayoral affair). Cisneros admitted to members of the news media that he was having an affair, but he did so on a confidential basis, which effectively prevented journalists from revealing the story. Thompson, supra; but see Peverson, 'I am not Perfect,' Newsweek, Oct. 24, 1988, at 25 (columnist refused to be bound by promise in revealing story of affair).

34. See Trial Starts Today, supra note 4 (reporters offered confidential information on statewide candidate); see also D. SHAW, supra note 22, at 67 (quicker to get story from anonymous source); Knoll, supra note 19 (reporters are stupid to guarantee confidentiality before knowing content of information); Johnston, supra note 26, at 58 (pressure to produce stories quickly contributes to use of anonymous sources).

Additionally, commentators say reporters overuse confidential sources, mistakenly believing that this use adds prestige to their stories. Id.; see also D. SHAW, supra note 22, at 67 (quoting anonymous sources is more glamorous). Certainly, the prevalence of anonymous sources has had its impact on the journalist community. David Shaw wrote that when he interviewed Washington journalists for a book chapter on anonymous sources, several reporters agreed that unnamed sources are overused, but requested anonymity in connection with those comments. Id.
tell a particular story, but whether use of these sources ultimately aids both the journalism profession and the public.\textsuperscript{35}

As journalists have increasingly turned to anonymous sources, so have sources increasingly begun to demand that their identities remain secret—occasionally even before the interview begins.\textsuperscript{36} A source’s demand for anonymity in return for information is but one way confidentiality can be established. Frequently, reporters will offer anonymity in return for information,\textsuperscript{37} particularly if the source hesitates to comment or if the reporter believes the story to be politically sensitive.\textsuperscript{38} Clearly, anonymity has become a commodity in which both journalists and their sources traffic.

B. The Usual Story: Journalists Fight Court Orders That Demand Identification of Secret Sources

Journalists ordinarily disclose the identities of confidential sources only when ordered to do so as a result of a legal proceeding.\textsuperscript{39} For example, journalists may be ordered to reveal their sources for stories regarding criminal activity.\textsuperscript{40} If the journalist is a party to libel litigation, he or

\textsuperscript{35.} \textit{See generally} D. Shaw, \textit{ supra} note 22, at 59-60 (reduction in use of anonymous sources suggested as means of rebuilding public trust).

\textsuperscript{36.} \textit{See} Branzburg v. Hayes, 408 U.S. 665, 672 (1972) (reporter agreed not to identify individual Black Panthers prior to being let into headquarters); D. Shaw, \textit{ supra} note 22, at 64 (sources routinely request confidentiality); Johnston, \textit{ supra} note 26, at 58 (White House briefings routinely given in confidence); Alter, \textit{ supra} note 28 (Lt. Col. Oliver North's briefings for reporters usually confidential).

\textsuperscript{37.} \textit{See} D. Shaw, \textit{ supra} note 22, at 67. Commentators, editors, and other media watchers complain, however, that some reporters are too willing to grant confidentiality for any story. \textit{See id.; see also} Johnston, \textit{ supra} note 26 (journalists known to coach sources into being anonymous). Shaw reports that Bill Kovach, the former Washington editor of the \textit{New York Times}, once lectured a reporter for saying over the telephone to a source, “I assume that’s on background,” meaning that the source would not be identified. D. Shaw, \textit{ supra} note 22, at 67. Kovach followed up by reminding his Washington bureau staff that confidentiality should not be volunteered, but granted reluctantly. \textit{Id.}

\textsuperscript{38.} \textit{See, e.g.,} Branzburg, 408 U.S. at 693 (reporters frequently offer anonymity to obtain news of others' illegal conduct); D. Shaw, \textit{ supra} note 22, at 62, 66 (attribute not demanded in investigative reporting during Watergate because of political tenor of times); Thompson, \textit{ supra} note 33 (columnist offered confidentiality to mayor to obtain marital affair story); Zuckerman, \textit{ supra} note 28 (offering confidentiality sometimes the only way to get news).

\textsuperscript{39.} \textit{See, e.g.,} Branzburg, 408 U.S. at 668-76 (consolidation of four cases involving newsmen called to testify about identities of confidential sources); Tennessee v. Hendricks, 14 Media L. Rep. (BNA) 2369, 2372 (Tenn. 1988) (reporters subpoenaed to testify in court about confidential sources regarding criminal activity of defendant); Tribune Co. v. Hufstedter, 489 So.2d 722, 723 (Fla. 1986) (journalist subpoenaed by state attorney investigating county commissioners' alleged ethics violations).

\textsuperscript{40.} \textit{See, e.g.,} Branzburg, 408 U.S. at 668-76 (newsmen subpoenaed by grand juries for reporting about confidential sources involved in criminal activity); \textit{In re} Farber, 78 N.J. 259, 263, 394 A.2d 330, 332 (1978), \textit{cert. denied}, 439 U.S. 997 (1978) (journalist ordered to reveal confidential source in murder trial of doctor); Hendricks, 14 Media L. Rep. at 2372 (reporters
she also may be forced to expose sources. 41 Further, journalists may be ordered to reveal sources in civil proceedings to which journalists are not parties. 42 American journalists generally resist such orders, 43 claiming that if they are forced to reveal the identities of confidential sources, newsgathering will be impaired because sources, fearful of exposure, will be reluctant to cooperate. 44 Yet, the possibility of incarceration, fines, loss of work, and public disdain can make the costs of such resistance high. 45

subpoenaed to testify about confidential sources of information regarding criminal activity of defendant); Huffstetler, 489 So.2d at 723 (journalist subpoenaed in investigation for information on confidential sources).


43. See, e.g., Branzburg, 408 U.S. at 675-76 (newsmen attempted to quash subpoena compelling appearance before grand jury to discuss confidential source); Maine v. Hohler, 543 A.2d 364, 364 (Me. 1988) (reporter refused to testify about confidential source in murder trial); Huffstetler, 489 So.2d at 723 (journalist moved to quash state attorney’s subpoena regarding disclosure of source of allegations of ethics violations by county commissioners).

In addition to the more recent cases mentioned in the previous paragraph, there are many earlier cases which involve journalists resisting disclosure of their sources to government tribunals. See, e.g., Ex parte Lawrence, 116 Cal. 298, 299, 48 P. 124, 125 (1897) (newsmen refused to divulge source of allegations of bribery among state senators); Joslyn v. People, 67 Colo. 297, 300, 184 P. 375, 376 (1919) (reporter refused to reveal source of confidential grand jury information to grand jury); In re Grunow, 84 N.J.L. 235, 236, 85 A. 1011, 1011-12 (1913) (newsmen refused to tell grand jury the identity of source of graft allegations); Plunkett v. Hamilton, 136 Ga. 72, 81, 70 S.E. 781, 785 (1911) (reporter resisted order to reveal confidential source of murder information to police commission).

44. See, e.g., Branzburg, 408 U.S. at 679, 682 (compelled disclosure of sources would cause confidential sources to distrust the media and would hurt reporter’s ability to gather news by silencing the sources); Plunkett, 136 Ga. at 81, 70 S.E. at 785 (forced disclosure of reporter’s sources would ruin reporter’s ability to report the news); Farber, 78 N.J. at 265, 394 A.2d at 333 (identifying sources from offering sensitive information); N. HENTOFF, supra note 20, at 229-30 (journalists assert that forced disclosure of sources would undermine ability to gather news).

45. See, e.g., Storer Communications v. Giovann, 810 F.2d 580, 583 (6th Cir. 1987) (reporter held in custody for failure to disclose source pursuant to court order); Farr v. Pitchess, 522 F.2d 464, 466 (9th Cir. 1975) (reporter jailed for failing to name confidential sources of information relating to murder case), cert. denied, 427 U.S. 912 (1975). Perhaps the most famous case of a reporter who resisted disclosing his source is that of New York Times reporter Myron Farber. See Farber, 78 N.J. at 259, 394 A.2d at 332. Farber was held in contempt of court and sentenced to six months in jail. His employer, the New York Times, also was fined
Until recently, the law has been largely indifferent to journalistic arguments for protecting the identity of confidential sources in legal proceedings.\(^\text{46}\) Common law affords journalists no special treatment.\(^\text{47}\) It grants them no privilege to avoid testifying about their sources' identities.\(^\text{48}\) Not until 1972, in the landmark *Branzburg v. Hayes*\(^\text{49}\) decision, did the United States Supreme Court begin to delimit when journalists could be compelled to identify confidential sources.\(^\text{50}\) *Branzburg* established that grand juries may compel journalists to disclose their sources.\(^\text{51}\) The decision, however, did not address whether journalists might claim a privilege of confidentiality when subpoenaed to testify in

\footnotesize{\begin{align*}
\$100,000 & \text{ as a consequence of Farber's non-cooperation. Farber actually served only 82 days in jail because the trial at which he refused to testify ended. } \textit{Id.} \\\n\text{46.} & \text{ See, e.g., United States v. Bryan, 339 U.S. 323, 331 (1950); Garland v. Torre, 259 F.2d 545, 550 (2d Cir. 1958) (rejecting claim that first amendment shielded journalists from revealing confidential sources), } \textit{cert. denied}, 358 U.S. 910 (1958); \textit{In re Grand Jury}, 322 F. Supp. 573, 574, 577-78 (N.D. Cal. 1970) (journalists have no privilege not to testify before grand jury about confidential sources); \textit{Ex parte} Lawrence, 116 Cal. 298, 299, 48 P. 124, 125 (1897) (case finding no common law right of privilege for newsmen who refused to reveal confidential source). \\\n\text{47.} & \text{ See } \textit{Branzburg}, 408 U.S. at 688 (no common law privilege for newsmen to refuse to disclose identity of anonymous source). \\\n\text{48.} & \text{ See, e.g., } \textit{Joslyn}, 67 Colo. at 298-300, 184 P. at 375-79 (reporter ordered to reveal source of confidential grand jury information to grand jury); \textit{In re Grunow}, 84 N.J.L. at 236-37, 85 A. at 1011-12 (newsmen ordered to tell grand jury the identity of source of graft allegations); \textit{Plunkett}, 136 Ga. at 81, 70 S.E. at 785 (reporter ordered to reveal confidential source of murder information to police commission); \textit{Lawrence}, 116 Cal. at 299, 48 P. at 125 (no privilege protecting journalist from divulging source of allegations of bribery among state senators); \textit{Ex parte} Nugent, 18 F. Cas. 471, 471-72 (C.C.D.C. 1848) (No. 10,375) (earliest case finding no common law right for newsmen to refuse to disclose source of information regarding Mexico treaty). \\\n\text{49.} & \text{ 408 U.S. 665 (1972). } \textit{Branzburg} \text{ was comprised of four separate lawsuits, only one of which concerned a journalist's outright refusal to identify a source to a grand jury. Only journalist Paul Branzburg appealed a judgment involving his refusal to identify a source to a grand jury investigating drug use. } \textit{Id.} \text{ at 667. In the other three cases, journalists Branzburg, Paul Pappas, and Earl Caldwell had been subpoenaed to testify before grand juries about stories in which confidential sources had been used. In none of those cases, however, had any of the journalists refused to identify their sources. } \textit{Id.} \text{ at 668-79.} \\\n\text{50.} & \text{ Id. at 725-52 (Powell, Stewart, Brennan, and Marshall, JJ., dissenting). Lower courts generally have acknowledged that the dissenting opinions in } \textit{Branzburg} \text{ set the standards for a qualified privilege for journalists who refused to disclose the identities of confidential sources. } \text{See, e.g., } \textit{Zerilli v. Smith}, 656 F.2d 705, 711-12 (D.C. Cir. 1981). \\\n\text{51.} & \text{ 408 U.S. at 702-03. The Court found the government's fundamental interest in solving crime and administering the law led to the journalist's duty to testify when subpoenaed by the grand jury. } \textit{Id.} \text{ at 700-02. Today, the federal courts recognize a qualified privilege for journalists under federal common law. } \text{See Roach, } \textit{The Newsman's Confidential Source Privilege in Virginia}, 22 U. RICH. L. REV. 377, 380-81 (1988). \text{The federal courts first recognized the privilege in } \textit{Riley v. City of Chester}, 612 F.2d 708, 715 (3d Cir. 1976), which held that the first amendment interest in assuring the free flow of information required finding a qualified privilege that would enable journalists not to reveal their sources in federal question cases. This privilege later was extended to cover criminal cases. } \text{See United States v. Cuthbertson}, 630 F.2d 139, 147 (3d Cir. 1980), \textit{cert. denied}, 449 U.S. 1126 (1981).} \end{align*}
criminal proceedings.\textsuperscript{52} Other courts, however, have utilized Justice Stewart's dissent in \textit{Branzburg} to craft a balancing test to determine when a journalist's relationship with a confidential source is subordinate to a court's search for truth.\textsuperscript{53} When determining whether the journalist should be protected by a qualified privilege of confidentiality in criminal proceedings, a court weighs the following factors: (1) whether the journalist possesses information relevant to the heart of the claim at issue, (2) whether the information can otherwise be obtained, and (3) whether a failure by the court to obtain the information would cause a miscarriage of justice.\textsuperscript{54} A similar balancing test is employed by the courts in civil cases.\textsuperscript{55} Thus, a qualified privilege protects journalists from disclosure of sources in limited fact situations.

\textit{Branzburg}'s failure to establish a testimonial privilege for journalists caused the news media to briefly lobby for the passage of national and state shield laws.\textsuperscript{56} Analogous to the evidentiary rules which protect attorneys from compulsory testimony about confidential client communications,\textsuperscript{57} shield laws generally allow journalists to refuse to testify about the identities of confidential sources.\textsuperscript{58} Today, twenty-six states have shield laws that provide varying degrees of protection for journalists.\textsuperscript{59} Twelve of these shield laws provide an absolute privilege for journalists.

\begin{itemize}
  \item \textsuperscript{52} See Note, \textit{supra} note 24.
  \item \textsuperscript{53} \textit{Id}.
  \item \textsuperscript{54} See, \textit{e.g.}, United States v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976) (judge must balance interest in maintaining news-source confidentiality against needs of criminal justice system in deciding whether source must be disclosed); United States v. Liddy, 478 F.2d 586, 587 (D.C. Cir. 1972) (sixth amendment right to fair trial must be balanced against first amendment when determining whether to extend reporter's privilege); United States v. Orsini, 424 F. Supp. 229, 232 (E.D.N.Y. 1976), \textit{aff'd}, 559 F.2d 1206 (2d Cir. 1977) (judge must balance competing interests of journalist and defendant to determine whether confidential source must be identified), \textit{cert. denied}, 434 U.S. 997 (1977).
  \item \textsuperscript{56} See T. Goldstein, \textit{supra} note 5, at 157-58. Indeed, the \textit{Branzburg} Court virtually invited journalists to strengthen shield laws by noting that the United States Supreme Court is "powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." \textit{Branzburg}, 408 U.S. at 706.
  \item \textsuperscript{57} See Roach, \textit{supra} note 51, at 379 (reporter's shield laws similar to attorney-client privilege).
  \item \textsuperscript{58} See \textit{id.}, at 383; see also T. Goldstein, \textit{supra} note 5, at 158; cf. G. Robertson & A. Nicol, \textit{Media Law} 123-25 (1984) [hereinafter G. Robertson & A. Nicol].
  \item \textsuperscript{59} Roach, \textit{supra} note 51, at 387-88 n.70 (list of journalist's shield statutes in 26 states).
\end{itemize}
and thereby enable them to avoid testifying about their sources in any legal proceeding.\textsuperscript{60} Other state shield laws provide only a qualified privilege that enables journalists to protect the identities of their sources unless the information sought is proved to be important, relevant, and unobtainable from other sources.\textsuperscript{61} Despite vigorous lobbying by a media industry armed with thirty proposed statutes,\textsuperscript{62} a national shield law for journalists never won congressional approval.\textsuperscript{63} Congressional inaction has prompted at least one newspaper publisher to suggest that journalists are better off relying on the courts to define when journalists must testify about confidential sources.\textsuperscript{64} Thus, until Cohen v. Cowels Media Co.,\textsuperscript{65} the media's primary concern regarding confidential sources centered not on defending the "right" to identify those sources, but upon how to protect their identities, particularly in the face of government-ordered disclosure.\textsuperscript{66}

C. Today's Scoop: Journalists Seek the Right to Expose Their Confidential Sources Without Their Sources' Permission

Many journalists today support voluntary exposure of confidential sources when these sources' identities are in the public interest.\textsuperscript{67} Yet, these same journalists argue that forced disclosure of sources' identities impairs newsgathering by instilling fear in potential sources.\textsuperscript{68} Although Cohen vividly exposes the conflicting concerns of journalists with regard to confidential sources, the decision does not represent the frequency with which voluntary sources are revealed.

Prominent first amendment attorney Floyd Abrams has commented that voluntary exposure of confidential sources by journalists is quite

\textsuperscript{60} Id.

\textsuperscript{61} See Goodale & Moodhe, Reporter's Privilege Cases, 2 COMM. L. 7, 37 (1988). Generally, disclosure is more likely to be ordered in a criminal case than in a civil case. See 2 S. Metcalf, R. Bierstedt & E. Bildner, Rights and Liabilities of Publishers, Broadcasters and Reporters §§ 3.09-3.10 (1989) [hereinafter Rights and Liabilities]. The New Jersey shield statute, for example, has been eroded by court decisions holding that the sixth amendment right to a fair trial demands that journalists disclose confidential information whenever it is relevant to a criminal defendant's defense. See In re Farber, 78 N.J. 259, 268, 394 A.2d 330, 334 (1978).

\textsuperscript{62} See St. Dizier, supra note 22, at 45.

\textsuperscript{63} See T. Goldstein, supra note 5, at 157-58; see also Roach, supra note 51, at 389.

\textsuperscript{64} See St. Dizier, supra note 22, at 45.


\textsuperscript{66} See Langley & Levine, supra note 17, at 21; see also St. Dizier, supra note 22, at 48.

\textsuperscript{67} See, e.g., Cunningham, supra note 20, at 4 (Cohen's last minute disclosure of shoplifting conviction warranted exposing his identity to the public); see also Zuckerman, supra note 28 (journalists should be able to reveal sources if necessary to hold sources accountable).

\textsuperscript{68} See Branzburg v. Hayes, 408 U.S. 665, 677 (1972); In re Farber, 78 N.J. 259, 268, 394 A.2d 330, 333 (1978); N. Hentoff, supra note 20, at 229-30.
common, particularly in the context of libel trials. Recent journalism history also suggests that such exposure is commonplace and that it does not necessarily lead to lawsuits. Examples of source exposure abound and include: journalist Sidney Zion's exposure of Daniel Ellsberg as the confidential supplier of the so-called "Pentagon Papers" to the New York Times; Bob Woodward's identification of the late Supreme Court Justice Potter Stewart as his source for The Brethren; and Newsweek's unmasking of Lt. Col. Oliver North as the media's confidential source regarding retaliation towards terrorists who hijacked the Achille Lauro cruise ship.

In the same league as the voluntary exposure of a confidential source's identity is the disclosure of both the source's identity and her private information. For example, journalists frequently agree to have private conversations with sources in order to understand sensitive information or to gain the source's confidence. Sometimes, however, the journalist breaks his promise never to publish the information discussed in these conversations. In 1983, for instance, a Washington Post reporter divulged that democratic presidential candidate Jesse Jackson had, in a private conversation with reporters, referred to Jews as "Hymie" and New York City as "Hymietown." More recently, a newspaper colum-

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69. See Langley & Levine, supra note 17, at 21 (trend of revealing sources not widely known). But see Denniston, supra note 17 (broken promises of source confidentiality not common in journalism). Abrams asserts that journalists frequently reveal breaking their promises of confidentiality to sources, but "fib" about it to other members of the media. Langley & Levine, supra note 17, at 21.

70. See T. Goldstein, supra note 5, at 156-57. Significantly, Zion was not working for the New York Times when he identified Ellsberg as having leaked the Pentagon Papers to the Times. Id. Thus, it is questionable whether Zion had any duty to Ellsberg not to identify him as the paper's source. Many New York City journalists, however, believed Zion did have such a duty. Id.


72. See Two Leaks, But By Whom?, NEWSWEEK, July 27, 1987, at 16. Newsweek's controversial step in identifying North as a former confidential source drew criticism, not only from the journalism community, but also from Newsweek staffs. See Zuckerman, supra note 28, at 61 (journalists critical of decision to finger North). However, Newsweek media writer Jonathan Alter said the magazine was justified in exposing North after the lieutenant colonel told the congressional committee investigating the Iran-Contra Affair that several members of Congress had compromised the Nation's security by leaking information about the interception of a terrorist implicated in the Achille Lauro hijacking. Id. North, in fact, had himself leaked the details of the hijacking. Id. While North's duplicity may have justified Newsweek's decision, Alter did not explain to Time why Newsweek, in exposing North, also exposed a Time reporter who had relied upon the lieutenant colonel as a confidential source.

73. See T. Goldstein, supra note 5, at 188.

74. See id. at 187-88. There are conflicting reports about what the ground rules were when Jackson made his "Hymietown" comments in the presence of Washington Post reporter Milton Coleman and other journalists. Id. at 188-90. Coleman maintained that the conversa-
nist in San Antonio, Texas, revealed that the city's mayor, Henry Cisneros, had confessed, in a confidential conversation, to an affair with a campaign aide.\textsuperscript{75} In both the Jackson and Cisneros incidents, the journalists had implicitly or explicitly promised not to reveal the speaker or the content of his conversation.\textsuperscript{76} Yet, the journalists in both cases justified their revelations as matters of importance to the public.\textsuperscript{77} Obviously, this rationale, if extended, justifies the exposure of nearly anything a journalist might agree to keep confidential. It also gives journalists the sole power to determine when a news story is so important that it compels the disclosure of previously secret conversations. Thus, this defense of importance to the public is replete with opportunity for journalistic abuse.

D. Newsroom Responses to the Use and Misuse of Confidential Sources

Codes of ethics are not new to the media industry. For decades, the Society of Professional Journalists and the American Society of Newspaper Editors have maintained ethical codes which define the limits of journalistic conduct in the pursuit of news.\textsuperscript{78} Some media outlets have adopted these codes outright, while others have established their own.\textsuperscript{79} Most codes have had one thing in common: until 1981, they addressed the issue of confidential sources in cursory fashion.\textsuperscript{80} Concern about possible overuse of confidential sources and the \textit{Cohen v. Cowels Media Co.} \textsuperscript{81}


\textsuperscript{76} See Peverson, \textit{supra} note 33 (columnist pledged to keep affair secret).

\textsuperscript{77} See, e.g., Thompson, \textit{supra} note 33 (city needed straightforward account of mayor's marital problems); T. Goldstein, \textit{supra} note 5, at 187 (candidate for public office could not hide behind confidentiality).

\textsuperscript{78} See T. Goldstein, \textit{supra} note 5, at 166 (referring to \textit{American Society of Newspaper Editors' Ethical Code}, in force since 1923, while Society of Professional Journalists' Code dates from 1973). However, the problem remains that the journalism community has refused to put teeth into its ethical codes. See \textit{The Commission on Freedom of the Press, A Free and Responsible Press} 74-75 (1947).

\textsuperscript{79} See T. Goldstein, \textit{supra} note 5, at 166-68 (news outlets either use industry codes or write their own).

\textsuperscript{80} See \textit{id.}, at 217 (stricter procedures regarding confidential sources urged); Cunningham, \textit{supra} note 20, at 7-8 (editors cracked down on use of confidential sources in early 1980s). The pivotal event that forced newspapers to re-examine their policies—or lack thereof—regarding confidential sources was Janet Cooke's revelation that she had fabricated the existence of an 8-year-old heroin addict.

\textsuperscript{81} \textit{Cohen III}, 445 N.W.2d 248 (Minn. Ct. App. 1989) (first mentioned \textit{supra} note 1).}
decision, however, have led some newspapers and television networks to establish policies regarding anonymous sources.82

The hallmark of most of these new policies is their requirement that reporters first receive permission from editors to grant confidentiality to a source.83 As a corollary, the reporter must reveal the source's identity to the editor, who presumably will determine whether the source or his information is the true story. This system of review has been criticized by reporters and media commentators alike, not only because these rules present logistical problems for reporters away from the newsroom, but also because they strip reporters of autonomy.84 Editors and publishers nonetheless argue that if the newspaper is to bear the legal responsibility for the reporter's stories, then the newspaper should have a measure of control over the reporting.85 Furthermore, logic indicates that the wiser policy is to avoid breach of contract initially by never promising confidentiality to a source whose identity is essential to a story.

Although the problems of confidential sources could be controlled by newsroom procedures, many newsrooms do not have comprehensive policies regarding the use of confidential sources or any other journalistic practice.86 Indeed, the news media is wary of establishing internal codes of ethics for fear they will be used against journalists in the courtroom.87

82. See Cunningham, supra note 20, at 6-8 (Cohen lawsuit led Star Tribune to promulgate anonymous source rules); see also To Our Readers: Guidelines on Anonymous Sources, Minneapolis Star Tribune, Aug. 11, 1988, at 1A, col. 3, and 16A, col. 1 [hereinafter To Our Readers] (explaining and reprinting newspaper policy on use of anonymous sources).

83. See To Our Readers, supra note 82, at 16A, col. 1 (editor must be consulted before reporter can promise confidentiality); see also Zuckerman, supra note 28, at 61 (Pioneer Press had policy since 1982 requiring editors to approve offers of confidentiality); Langley & Levine, supra note 17, at 22 (several news outlets require editor to approve offer of confidentiality).

84. See Cunningham, supra note 20, at 8 (rule changes relationship that should be one of mutual trust). Cunningham, a journalism instructor at New York University, suggests that removing a reporter's right to extend confidentiality to sources may discourage journalists from working at certain newspapers. Id. at 7. Cunningham argues that because journalists are naturally independent, they are likely to object to restrictions that strip them of independence. Id.

85. See generally, Langley & Levine, supra note 17, at 22 (some libel insurers require sharing of sources or insurance not supplied); Restatement (Second) of Agency §§ 212-218 (1984) (master's vicarious liability encompasses all acts by servant within scope of employment).

86. See T. Goldstein, supra note 5, at 167 (newspapers consider it sufficient to subscribe to ethical ideals of national newspaper organizations).

87. See id. at 166-67 (editor believes cryptic scraps of ethical rules could sway jury in libel trial). A possible source of this belief may stem from media lawyers' frequent advice that journalists throw away old notebooks. See also B. Dill, The Journalist's Handbook on Libel and Privacy 194-95 (1986); B. Sanford, Libel & Privacy § 6.4.2.3, at 177 (1985) which states that:

[Notes are rarely helpful in defending defamation litigation. Indeed, as every reporter knows, notes are often unintelligible to all but the note-taker and therefore of little interest or persuasion to a judge or jury. Moreover, they often omit the start-
Journalists must understand, however, that the lack of established procedures also could be used against them in court. Additionally, established guidelines would serve as a preventative measure to control journalistic abuses before they incite legal proceedings.

II

Proposed Responses to the Legal Issues That Arise When Journalists Voluntarily Identify a Source to Whom Confidentiality Has Been Promised

One criticism of the district court's decision in Cohen v. Cowels Media Co. is that it wrongly transformed an ethical matter into a legal issue. This criticism loses sight of the fact that many ethical issues also have legal implications. The Society of Professional Journalists' Code of...
Ethics, for example, states that a journalist should not plagiarize. No one, however, would question that the plagiarist news writer should not only be subject to censure for appropriating the work of another, but also subject to legal sanctions for plagiarism. When unethical behavior breaches another's rights and causes injury, resort to legal remedies is appropriate.

Journalists also argue that legal rules should not apply when a confidential source is injured through the journalist's disclosure of his identity because the journalist's decision is a "news judgment." Any decision relating to the subject matter and content of a news publication or program is considered a news judgment. Subjecting news judgments to review by the courts, journalists say, infringes on the first amendment right to a free press. This logic leads to the conclusion that the decision to plagiarize is a news judgment inasmuch as it is a decision to print the best available prose. Yet, case law indicates that a news judgment that resulted in the publication of plagiarized material would not be protected.

Just as news judgments are not rigid shields protecting journalists, neither should journalists always be required to conceal the identity of a confidential source. The ethical dimensions of the disclosure decision indicate, however, that the potential harm to both journalist and source warrants legal protection of both parties. Below, this Note examines the extension of confidentiality to sources under the bright light of three legal models. Also considered are the situations in which these models would

96. See Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974) (news judgment is "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and the treatment of public issues and public officials—whether fair or unfair").
97. See Denniston, supra note 17.
98. See, e.g., Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973) (newsgathering not protected by first amendment if laws broken by newsgatherer).
99. See Playboy Interview: Bob Woodward, supra note 71 (source and information would be disclosed if source had lied); see also Langley & Levine, supra note 17, at 22 (evidence of a source's involvement in the crime reported may justify identifying the source to the public); Zuckerman, supra note 28 (lying by source sufficient justification to reveal identity). Washington Post editor Bob Woodward, of Watergate fame, asserts that journalists may also identify confidential sources after the source has died. See Langley & Levine, supra note 17, at 22 (death a release from confidentiality pledge). Woodward's identification of the late CIA director William Casey and the late United States Supreme Court Justice Potter Stewart as confidential sources occurred only after their deaths. See Playboy Interview: Bob Woodward, supra note 71, at 60, 62 (source identities not disclosed while sources still alive).
enable a journalist to break the promise of source confidentiality without penalty.

A. The Contract Model: The Promise of Confidentiality as a Binding Contract

In *Cohen v. Cowels Media Co.* (*Cohen III*), the reporter’s promise to keep the source’s identity secret was found to provide the offer, acceptance and consideration necessary to establish a contract. *Cohen III* upheld the district court’s finding that the reporter’s promise need not have been memorialized in writing, as required by the statute of frauds, because the reporter-source agreement was fully performed within one year.102

1. Breach of Valid Contract Theory Compensates Source

If the journalist’s agreement to provide confidentiality in return for the source’s delivery of information is a valid contract, then failure to provide the anonymity promised to a source in return for his or her information would constitute a breach of their mutual agreement.103 When a party so completely fails to perform, the other contracting party may claim damages for total breach if the value of the contract has been substantially impaired.104 Substantial impairment occurs when the injured party must bear a “material inconvenience or injustice.”105 Because the objective of the source’s agreement with the journalist is to protect the source’s identity, the value of the contract to the source may be said to be substantially impaired when the journalist identifies the source by name.


101. **Editor’s Note:** As mentioned supra note 17, the Minnesota Supreme Court reversed *Cohen III*. The author’s original footnote follows; however, the most recent *Cohen* case overrules this finding. *Cohen IV*, 457 N.W.2d 199, 202 (Minn. 1990).

In *Cohen II*, 15 Media L. Rep. (BNA) 2288 (Minn. D.C.), the Minnesota district court found that a contract existed as a result of the reporter’s promise of confidentiality to the source. 15 Media L. Rep. at 2291, *aff’d* in part and *rev’d* in part in *Cohen III*, 445 N.W.2d 248 (Minn. Ct. App. 1989). A source’s promise to provide information to a journalist would be considered an offer because it is a promise to perform an act in the future. See J. CALAMARI & J. PERILLO, *The Law of Contracts* § 2-5, at 31 (3d ed. 1987) [hereinafter CALAMARI & PERILLO]. The reporter’s promise of confidentiality would constitute the acceptance because the reporter is voluntarily agreeing to the exchange proposed by the source. See id. § 2-11, at 73. The information to be provided by the source would constitute the consideration because the source would not normally be bound to give the reporter the information. See id. § 4-1, at 187-88.

102. *Cohen III*, 445 N.W.2d at 259.


105. Id. § 243, comment e.
In such cases, then, the source would be entitled to damages for total breach.  

Imposing the law of contracts on the reporter's pledge of confidentiality to the source provides great protection for the source, but not the reporter, who might not be able to guard against the receipt of false information. For this reason, journalists rightly fear that sources might intentionally relay false information and thereafter attempt to use anonymity as a shield against responsibility. Despite these fears, there are protections for journalists who fall victim to unscrupulous sources.

2. **Theory of Fraudulent Misrepresentation Protects Journalist**

The contract theory of fraudulent misrepresentation provides relief for the journalist who discovers that her confidential source has lied, either about his information or his motives, by enabling the obligor to either avoid the transaction or sue in tort. Fraudulent misrepresentation is held to occur under contract law whenever one party intentionally makes a false statement or misstates a material fact. A fact is material if it would induce a reasonable person to enter a contract or it is calculated to persuade an individual to enter a contract. A statement is

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106. In addition to breaching the contract, it also would appear that Sturdevant and her editors also repudiated it. The night before Sturdevant’s story was published in the newspaper, Sturdevant telephoned Cohen and informed him her editors had decided to identify him. When an obligor tells the obligee that she will not perform as promised, the obligor is repudiating. See Restatement (Second) of Contracts § 250(a) (1981). Because Sturdevant told Cohen that she would not perform as promised and keep his name secret, she had informed him that she was repudiating their contract. A repudiation that accompanies or follows a breach entitles the obligee to claim damages for total breach. A claim for total breach enables the injured party to claim damages for all remaining rights up to performance. Cohen, therefore, would have been entitled to claim damages for total breach.


108. See Langley & Levine, supra note 17, at 22.

109. See id. at 24.


111. See Restatement (Second) of Contracts § 164 (1981); see also 12 S. Williston, A Treatise on the Law of Contracts § 1488, at 332 (3d ed. 1981 and Supp. 1988); Calamari & Perillo, supra note 101 § 9-13, at 356. Under tort law, the requirements for misrepresentation are more stringent than under contract law. Compare Restatement (Second) of Contracts § 164, comment a (1981) (misrepresentation must be either fraudulent or material) with Restatement (Second) of Torts § 538 (1982) (tortious misrepresentation must be material and fraudulent).

112. Restatement (Second) of Contracts §§ 162(2), 164, comment b (1981). This rule's focus on the reasonable person has been interpreted as meaning that a person may be justified in relying on a misrepresentation unless the person knows or should know of facts that would make it unreasonable for him to rely on the statement. See Goff v. American Sav. Ass'n of Kansas, 1 Kan. App. 2d 75, 81, 561 P.2d 897, 903 (1977). Even if a misrepresentation is not
fraudulent when it is intended to induce a party to contract and the maker knows or has reason to know the statement is not true.\textsuperscript{113}

When a source provides false information in return for anonymity, he may be said to be misrepresenting a material fact.\textsuperscript{114} In addition, the source may also be said to have acted fraudulently if he intended his information to induce the journalist to extend confidentiality and the source knew or should have known his information was untrue.\textsuperscript{115} When a journalist enters a contract of confidentiality believing a source's information to be politically or otherwise sensitive,\textsuperscript{116} the journalist has been defrauded if the source's information later turns out to be false.\textsuperscript{117} The remedy of contractual avoidance therefore would allow the journalist to act as if the contract were never made.\textsuperscript{118} The journalist would then be free to identify the duplicitous source.

3. Public Policy Rationales

Contract law's respect for public policy may also affect the enforcement of a contract that provides anonymity for the source who has intentionally provided false information. Public policy reasons will render a contract unenforceable when the policy outweighs the law's natural interest in enforcing private agreements.\textsuperscript{119} Courts must consider a number of issues when determining whether to enforce a contract, including: the parties' expectations, forfeiture from non-enforcement of the contract, the public interest in enforcing the contract, the strength of the public policy and the possibility of furthering that policy.\textsuperscript{120} Public policy may be derived from legislation or judicial decree, but a court may also base it on the need to protect the public welfare.\textsuperscript{121} Regardless of the source of the public policy, a contract will not be enforced if public policy "clearly outweighs" the need for enforcement of the contract.\textsuperscript{122}

material, there will be cause for avoidance of the contract if the misrepresentation was made intentionally.

\textsuperscript{113} Restatement (Second) of Contracts §§ 162(1)(a)-(c), 164, comment b, illus. 1 (1981).
\textsuperscript{114} See id. § 162(2) (definition of material fact).
\textsuperscript{115} See id. § 162(1)(a)-(c).
\textsuperscript{116} See Branzburg v. Hayes, 408 U.S. 665, 693 (1972) (reporters promise anonymity in return for information about illegal activities); see also D. Shaw, supra note 22, at 62, 66 (investigative stories and Watergate are two instances where anonymity was allowed by reporters due to sensitivity of subject matter).
\textsuperscript{117} Calamari & Perillo, supra note 101 § 9-13, at 356; see also S. Williston, supra note 111.
\textsuperscript{118} Calamari & Perillo, supra note 101 § 9-13, at 356.
\textsuperscript{119} Restatement (Second) of Contracts § 178(1) (1981).
\textsuperscript{120} Id. § 178(2), (3)(a)-(b).
\textsuperscript{121} See id. §§ 178, comment b, 179(b).
\textsuperscript{122} Id. § 178, comment b.
In the case of the anonymous source who does not deal honestly with the journalist, the necessity for enforcing the contract of anonymity must be balanced against the public's right to know the truth.\textsuperscript{123} Although contract enforcement would uphold the bargain between a journalist and a dishonest source, the journalist then could not fulfill his obligation to report the truth.\textsuperscript{124} The dishonest source might argue in response that the journalist has the option of not using the false information at all, which would forestall any need to expose the supplier of the false information. Of course, if the dishonest source had leaked the same false information to other news outlets that subsequently released stories, public policy could well favor the journalist who violated her pledge of confidentiality in order to more fully inform the public. Public policy considerations within contract law should protect journalists who withdraw confidentiality promised to unscrupulous sources. This, then, lends weight to the Cohen court's decision to treat the reporter-source relationship as contractual.\textsuperscript{125}

Despite the inherent protections that contract law provides for journalists who enter into agreements of confidentiality with sources, some commentators assert that these agreements should not be enforced contractually because contract law exists largely to further commercial relationships.\textsuperscript{126} While it is true that commentators have described the reporter-source relationship in many ways—usually as sacred—"commercial relationship" has not been one of them.\textsuperscript{127} One theory of contract law does consider contract enforcement as a means of ensuring economic efficiency,\textsuperscript{128} but another theory propounds that the law of contract implements the Judeo-Christian ethic of keeping promises.\textsuperscript{129} By enforcing the promises of confidentiality that journalists make to sources, contract law therefore fulfills an historic duty that predates Eng-


\textsuperscript{125} Cohen III, 445 N.W.2d 248, 252 (Minn. Ct. App. 1989).

\textsuperscript{126} See Langley & Levine, supra note 17.

\textsuperscript{127} Id. Commentators Langley and Levine distinguish news gathering from commercial enterprise by observing the divergent attitudes the media and commercial enterprises have toward government intervention. The media discourage government intervention in the gathering and publication of the news, while commercial enterprises seek intervention, particularly via the court system, in order to resolve disputes. Furthermore, the news media perceives government intervention as limiting press freedom, whereas commercial enterprises perceive resort to the court system as aiding profitable commerce. Id.

\textsuperscript{128} See 1 H. HUNTER, MODERN LAW OF CONTRACTS § 1.03, at 1-6 (1986 & 1989 Supp.) (some consider contract law to be a market mechanism).

\textsuperscript{129} See id. § 1.02, at 1-4 (contract law enforces moral virtue of keeping promises).
lish common law.\textsuperscript{130} In the alternative, the reporter-source relationship cannot properly be considered non-commercial if the resulting story aids newspaper sales and increases circulation or advertising.\textsuperscript{131} In either of these contexts, contractual enforcement of the reporter's promise is co-extensive with the smooth functioning of the economic system and with religion-influenced ethical systems.\textsuperscript{132}

B. The Newsgathering Model: The Exposure of a Confidential Source as a Right Unprotected by the First Amendment's Newsgathering Privilege

The first amendment, in addition to guaranteeing the freedom to print the news,\textsuperscript{133} also gives the news media a limited right to gather the news. The United States Supreme Court recognized this newsgathering privilege in \textit{Branzburg v. Hayes},\textsuperscript{134} but left unstated the protections newsgathering is to enjoy. Since \textit{Branzburg}, journalists have not been exempted from civil and criminal laws while gathering news.\textsuperscript{135} This limited privilege does not force the government to give journalists a right of access greater than that of the general public,\textsuperscript{136} nor does it enable journalists to flout the law in the pursuit of news.\textsuperscript{137}

\textsuperscript{130} See \textit{id}. Scholars have begun to extend the moral theory of contract law to include the theory of consent. \textit{Id.} §§ 1-1 to 1-3. This new theory argues that when parties voluntarily enter into an agreement, contract law should enforce the agreement as a means of recognizing each party's right to transfer alienable entitlements. \textit{Id.} By extension, the theory of consent would support contractual enforcement of the reporter-source agreement simply because the journalist and the source are able to voluntarily transfer their rights (e.g., the source's right to information in return for the journalist's right to protect the source's identity).


\textsuperscript{132} See H. HUNTER, supra note 128, §§ 1.02, 1.03, at 1-4.

\textsuperscript{133} See U.S. CONST. amend. I.

\textsuperscript{134} Branzburg v. Hayes, 408 U.S. 665 (1972).

\textsuperscript{135} See, e.g., Houchins v. \textit{KQED}, 438 U.S. 1, 8-9 (1978) (press responsibility to inform public does not require government to give the press access to places such as jails); \textit{Galella} v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973) (privilege provides no immunity for laws broken while gathering news); State of New Jersey v. Lashinsky, 81 N.J. 1, 13, 404 A.2d 1121, 1130 (1979) (newsgathering privilege did not prevent police from citing news photographer for disorderly conduct for entering restricted area at accident scene).

\textsuperscript{136} See, e.g., Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (1980); see \textit{KQED}, 438 U.S. at 8-9; \textit{Zemel} v. Rusk, 381 U.S. 1, 4, 17 (1965) (journalist's right to travel to certain countries not greater than general public's just because of journalist status).

\textsuperscript{137} See, e.g., \textit{Galella}, 487 F.2d at 995 (no right to assault news target while gathering news); \textit{Prahl} v. Brosamle, 98 Wis.2d 130, 151, 295 N.W.2d 768, 781 (Wis. App. 1980) (no constitutional right to trespass in pursuit of the news); \textit{Belluomo} v. \textit{KAKE}, 3 Kan. App. 2d 461, 463, 596 P.2d 832, 835-36 (1979) (television station tortiously trespassed in pursuit of news story); \textit{Lashinsky}, 81 N.J. at 12, 404 A.2d at 1123-24 (news photographer properly cited for disorderly conduct upon entering restricted area at accident scene); cf. I. KAUFMANN, THE MESSAGE, THE MEDIUM AND THE FIRST AMENDMENT 19 (1970) (illegal conduct not acceptable merely because it is the means to expressing an idea).
Journalists have endeavored to expand the newsgathering privilege by suing for greater rights of access, usually to government-controlled property, such as prisons and press galleries. When appraising government-imposed limits on the news media's access to news, the courts consider: (1) whether the state's action in limiting access is related to a compelling interest; and (2) whether the regulated activity is substantially related to that interest. Journalists may be tempted to resort to this balancing test when sources seek to restrict newsgathering by enforcing confidentiality agreements. The test, however, protects journalists only from government acts that impermissibly limit newsgathering. Because civil enforcement of a contract cannot properly be considered a government act, there is no basis for applying the balancing test to an action filed to enforce the journalist's pledge of confidentiality.

Journalists also have sought to extend the newsgathering privilege to cover violations of criminal and civil law that may occur when reporters pursue news stories. The courts, however, have held almost uniformly that there is no right to trespass or invade privacy while gathering news, nor is there a right to engage in wiretapping, assault, or disorderly conduct in order to obtain a story. Journalists may also violate

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139. See, e.g., Allen v. Combined Communications, 7 Media L. Rep. (BNA) 2417, 2420 (Colo. D.C. 1981) (balancing test outlined); Consumer's Union of United States Inc., 365 F. Supp. at 25-26 (balancing test delineated); Lewis v. Baxley, 368 F. Supp. 768, 778 (N.D. Ala. 1973) (balancing test described). Because this test is not as strict as other first amendment balancing tests, such as the actual malice test applied to public figures in media defamation cases, commentators believe it offers only moderate protection to journalists seeking to expand the right of access. See McLean, Recognizing The Reporter's Right To Trespass, 9 COMM. & L. 31, 41 (1987) (balancing test provides just moderate protection).

140. See Consumer's Union of United States Inc., 365 F. Supp. at 25-26 (government regulations limit newsgathering subject to balancing test). The test protects journalists from government acts by combining the freedom the first amendment affords the news media with the equal protection component of the fifth amendment afforded all citizens whenever government acts. See id. State regulations affecting newsgathering traditionally are measured against the fourteenth amendment's equal protection guarantee. See Quad-City Community News Serv. v. Jebens, 334 F. Supp. 8, 17 (S.D. Iowa 1971) (state government denial of press pass must meet fourteenth amendment standard of equal protection).

141. See, e.g., Galella, 487 F.2d at 995 (first amendment claimed as shield against liability for actions while newsgathering).


143. See Boddie v. American Broadcasting Co., 731 F.2d 333, 339 (6th Cir. 1984) (television station subject to lawsuit under federal wiretap law when reporters secretly tapped a woman's telephone); see also Galella, 487 F.2d at 995 (right to gather news does not include right
civil law if they breach a contract.\textsuperscript{144} If the journalist’s promise of confidentiality to a source in return for information is found to establish a contractual relationship,\textsuperscript{145} then the newsgathering privilege should not protect the journalist who breaches the contract. Therefore, the newsgathering privilege does not and should not shield the journalist who fails to honor the promise of confidentiality.

The failure of the newsgathering privilege to shield journalists from contractual claims appears harsh, and perhaps even a restraint on press freedom, but it is also just. Journalists prefer to believe the right to a free press exists in a vacuum,\textsuperscript{146} but the courts proclaim that the first amendment mandates responsibilities as well as rights.\textsuperscript{147} Among these responsibilities is the duty not to publish calculated falsehoods\textsuperscript{148} and the duty to obey the general law of the land while gathering news.\textsuperscript{149} If journalists insist on the right to capriciously renounce promises of confidentiality, the courts could well view this demand as an abdication of a first amendment responsibility and, therefore, as another justification for a narrow interpretation of press freedom. As observed in \textit{Bavarian Motor Works v. Manchester}:\textsuperscript{150}

\begin{quote}
[T]he exercise of the right of free speech and free press demands and even mandates the observance of the co-equal duty not to abuse such right, but to utilize it with right reason and dignity. Vain lip service to ‘duties’ in a vacuous reality wherein ‘rights’ exist, sovereign and independent of any balancing moral or social factor creates a semantical mockery of the very foundation of our laws and legal system.\textsuperscript{151}
\end{quote}

\textsuperscript{144} See Branzburg v. Hayes, 408 U.S. 665, 684 (1972) (newspapers not immune from general law).


\textsuperscript{146} See Le Mistral, 61 A.D.2d 494, 402 N.Y.S.2d at 817 (news media exaggerates threat to first amendment if cause of action for trespass allowed); see also T. Goldstein, supra note 5, at 192 (1985) (New York Times repeatedly exaggerates threat that court decisions pose to the first amendment).

\textsuperscript{147} See Time, Inc. v. Hill, 385 U.S. 374, 389-90 (1967) (first amendment not impaired by sanctions against the printing of calculated falsehoods); see also Lashinsky, 81 N.J. at 13, 404 A.2d at 1127 (press freedom must yield to important government interests); Le Mistral, 61 A.D.2d at 494, 402 N.Y.S.2d at 817 (news media must fulfill responsibilities if it is to enjoy first amendment protections); Bavarian Motor Works Ltd. v. Manchester, 61 Misc. 2d 309, 311, 305 N.Y.S.2d 593, 596 (1969) (co-equal part of free speech is responsibility to not abuse the right).

\textsuperscript{148} Time, Inc., 385 U.S. at 389-90.

\textsuperscript{149} See, e.g., Branzburg, 408 U.S. at 682-83 (first amendment contains no privilege enabling news media to violate laws while gathering news).

\textsuperscript{150} 61 Misc. 2d 309, 305 N.Y.S.2d 593 (1969).

\textsuperscript{151} Id. at 596.
C. The British Model: Exposure of the Confidential Source as a Breach of Confidence, Unless the Exposure Serves the Public Interest

Had Cohen v. Cowels Media Co.\(^1\) been litigated in Great Britain, it would very likely have been tried as a breach of confidence lawsuit. Breach of confidence affords the source a civil remedy when journalists promise confidentiality and subsequently disclose information without the source’s permission.\(^2\) A successful breach of confidence lawsuit hinges on the plaintiff’s showing that the information was confidential, that the journalist agreed to keep the information confidential, and that the journalist then broke the agreement by publicizing the information.\(^3\) Resorting to the breach of confidence remedy seems most appropriate when a reporter breaks the promise of confidentiality to a source. The cause of action, however, was developed initially in business-related lawsuits that sought to prevent the use of information learned in the course of a business venture.\(^4\) Today, breach of confidence increasingly is deployed against news outlets that rely on confidential sources for news stories.\(^5\)

One defense developed in response to the breach of confidence charge is that of the public interest.\(^6\) The defense requires the news outlet to demonstrate that the confidential information is of such importance to the public that the need for publication outweighs the source’s legitimate interest in keeping his information confidential.\(^7\) British

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153. See G. Robertson & A. Nicol, supra note 58, at 112; see also Cork v. McVicar, 6 J. Media L. and Prac. 108 (1985) (author breached confidentiality by publishing off-the-record statements of source).
154. G. Robertson & A. Nicol, supra note 58, at 112 (breach of confidence criteria).
155. See, e.g., Seager v. Copydex Ltd., [1967] 1 W.L.R. 923 (C.A.) (effort to prevent sale of carpet grips manufactured from confidential information); Saltman Eng’g Co. v. Campbell Eng’g Co., [1963] 3 All E.R. 413 (lawsuit to prevent manufacture of leather punches from copyrighted designs).
157. See Hammond, Copyright, Confidence and the Public Interest Defence: “Mole’s Charter” or Necessary Safeguard?, 1 Intell. Prop. J. 293 (1984-85) (claim of public interest recognized as justification for publishing confidential information); see also Lion Laboratories Ltd. v. Evans, [1984] 2 All E.R. 417, 435 (C.A.) (Griffiths, L.J.) (newspapers allowed to publish confidential information when of great importance to public); Grant, In the Public Interest? The Disclosure of Confidential Information, 6 J. Media L. and Prac. 178, 183 (1985) (detailing when breach of confidence restrains and allows publication of confidential information).
158. See Hubbard v. Vosper, [1972] 2 Q.B. 84, 95 (Denning M.R., L.) (information in the public interest exceeds interest in keeping it confidential); see also Woodward v. Hutchins, [1977] 2 All E.R. 751, 754 (Denning M.R., L.) (public interest defense enables publication when necessary to prevent the public from being misled); Initial Servs. v. Putterill, [1968] 1 Q.B. 396, 405 (Denning M.R., L.) (exposure of misconduct in the public interest); G. Robertson & A. Nicol, supra note 58, at 117 (public interest defense determines if just cause for
courts seem likely to allow publication in the public interest when the confidential information concerns activities that are "iniquitous," that is, activities that represent terrible wrongdoing by individuals or organizations. The public interest defense, therefore, constitutes a recognition by British courts that journalists may have valid reasons for breaching a source's confidence.

Unlike the common law and other products of the British legal system, United States courts have not yet adopted the breach of confidence theory. Adoption is warranted, however, with the advent of Cohen v. Cowels Media Co., which journalists predict could be the first of many such lawsuits. While proving that breach of confidence is virtually the same as proving breach of contract, the defense of public interest would give American journalists far greater protection than contract law by putting the public's welfare at issue in determining the propriety of disclosure. In contrast, the law of contracts narrowly focuses on the source's duplicity or on journalism's mission relative to the necessity for contract enforcement before allowing disclosure of the source's identity. The public interest defense also is valuable for its theoretical

disclosure); Hammond, supra note 157, at 298 (information of public interest must be important to world at large).

159. See Malone v. Commissioner of Police (No. 2), [1979] 2 All E.R. 620, 634 (Megarry, V-C, S.). In Malone, the court suggested that iniquity formerly referred to information that disclosed criminal activity, but now the word is considered inclusive of any just cause for breach of confidence. Id. at 635. See also British Steel Corp. v. Granada Television Ltd., [1981] 1 All E.R. 417, 434 (Megarry V-C, S.); but see Francome v. Mirror Group Newspapers Ltd., [1984] 2 All E.R. 408, 414 (Donaldson M.R., L.) (iniquitous criminal activity does not enable citizens to illegally tap telephones). Much confusion exists in British courts over the definition of iniquity. See Grant, supra note 157, at 180.

160. See Grant, supra note 157, at 185 (breach of confidence tort proposed). The proposed law would recognize the public interest defense and allow its application whenever warranted by the "extent and nature" of the information. Id.


162. See Langley & Levine, supra note 17, at 23 (sources inevitably will disagree with journalists about extent of agreement); see also Minefield, supra note 17, at 4A, col.5 (it is possible that sources will claim agreement when displeased with reaction to their information).


164. See Hubbard v. Vosper, [1972] 2 Q.B. 84, 95 (Denning M.R., L.); see also G. Robertson & A. Nicol, supra note 58, at 117; Hammond, supra note 157, at 298.

165. See CALAMARI & PERILLO, supra note 101 § 9-13, at 356 (contracting party may avoid contract when fraudulently induced to contract).

blindness to any journalistic motive other than the public good. This tunnel vision could prove helpful in cases such as Cohen, where editors flagrantly violated journalistic ethics to obtain a better story, or in situations where reporting or editing mistakes result in an inadvertent identification of a confidential source. Indeed, had Cohen been tried under breach of confidence, the fact that Dan Cohen leaked his information only days before the statewide elections may have been sufficient to prove that public interest in the elections warranted the newspaper's identification of Cohen. The broad protection that the public interest defense affords the news media, therefore, would justify the adoption by United States courts of the breach of confidence theory.

III
Conclusion

The use of confidential sources by journalists has grown phenomenally in the past two decades. This growth is due both to the increasing popularity of investigative reporting and to journalistic laziness. The increasing use of confidential sources also has changed the way journalists treat these sources. At one time, journalists' efforts focused on protecting their sources' identities in the face of court-ordered inquiries. Today, journalists are fighting for the legal right to voluntarily identify sources who were pledged confidentiality in exchange for information. One court has properly found that the act of voluntary identification constitutes a breach of contract and, therefore, is unprotected by the first amendment's limiting newsgathering privilege. The decision was a welcome indicator that courts will police journalists who refuse to police themselves. Yet, journalists correctly have criticized the decision because it failed to consider the importance of the news story that resulted from the breach of confidentiality.

Contract law serves as an excellent vehicle for enforcing journalists' promises of confidentiality. Yet, neither contract law nor the first amendment's newsgathering privilege always enable the courts to consider a story's ultimate importance to the public. This particularly holds true when civil laws are breached in the course of gathering news for that story. Only the British cause of action for breach of confidence considers a news story's value through the assertion of the public interest defense. Unlike its American counterparts in a breach of contract action, a British

167. See Hubbard, [1972] 2 Q.B. at 95-96 (Denning M.R., L.) (public interest examines danger to the public posed by confidential material); see also G. Robertson & A. Nicol, supra note 58, at 117 (public interest of confidential information determines if it falls within public interest); Hammond, supra note 157, at 117 (public interest determination focuses on interest of "world at large").
court in a breach of confidence case must nimbly balance the source's need for confidentiality against the necessity for more fully informing the public.

Availability of this cause of action forces journalists to use more care in determining when to expose the identities of confidential sources. The remedy, however, also protects journalists who serve the public interest by exposing the identity of a confidential source. If United States journalists wish to voluntarily expose sources and compel the courts to consider the importance of the resulting news story, they should lobby for adoption of Great Britain's breach of confidence remedy and its public interest defense. American adoption of Britain's breach of confidence remedy and its corresponding public interest defense is in the best interests of the journalistic profession.