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Beyond *Cohen v Cowles Media Co.*: Confidentiality Agreements and Efficiency within the “Marketplace of Ideas”

*Joseph H. Kaufman†*

Modern American journalists have an ethical obligation to their sources.¹ In particular, if an informant requests anonymity, that request should be honored. Recently, courts and legislative committees have both threatened and imposed sanctions on journalists who refuse to reveal their sources of information.² Revealing the name of a source runs contrary to a journalist’s ethical obligation; indeed, the example of Bob Woodward and Carl Bernstein continuing to protect the identity of “Deep Throat” almost two decades after Watergate illustrates the sanctity of this duty.³

Recently, courts have addressed whether this ethical duty implies a formal legal obligation that would permit sources to collect damages from reporters who break promises to maintain confidentiality. In *Cohen v Cowles Media Co.*,⁴ the Supreme Court held that the First Amendment does not prohibit a source from recover-

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† A.B. 1989, Harvard University; B.A.(Hons.) 1990, University of Canterbury; J.D. Candidate 1994, University of Chicago.

¹ “[A] basic principle held by news reporters and editors is that confidences shall be kept and confidential sources of information shall be protected . . . .” Brief for the American Newspaper Guild, AFL-CIO, CLC as Amicus Curiae at 3, *Branzburg v Hayes*, 408 US 665 (1972). See also Low Warren, *Journalism* 83 (Cecil Palmer, 1922).


³ Bernstein writes:

Woodward had a source in the Executive Branch who had access to information at [the Committee to Re-elect the President] as well as at the White House. His identity was unknown to anyone else . . . Woodward had promised he would never identify him or his position to anyone. Further, he had agreed never to quote the man, even as an anonymous source.

Carl Bernstein and Bob Woodward, *All the President's Men* 71 (Simon and Schuster, 1974). To this day, that promise has been kept. See Alex S. Jones, *Anonymity: A Tool Used, and Abused*, NY Times A20 (June 25, 1991).

ing damages under a promissory estoppel theory from a publisher who breaches a confidentiality agreement.\(^6\)

This Comment offers an economic analysis of the issues raised in the *Cohen* decision. Part I examines *Cohen* and subsequent cases. Part II develops an economic structure for the confidential information\(^6\) market and determines the efficiency effects of imposing publisher liability. Part III discusses the results of the economic model in light of First Amendment ideals, concluding that enforcing promises of confidentiality increases the level of publicly available information. Additionally, this Comment maintains that, because of the relatively small costs imposed on publishers, the Supreme Court’s holding in *Cohen* provides an economically beneficial result. Finally, this Comment advocates the extension of the *Cohen* doctrine into the realm of contractual relations, permitting a source to recover on a breach of contract claim against a publisher in addition to a promissory estoppel theory.

**I. CONFIDENTIALITY AND THE COURTS: THE COHEN DECISION**

*Cohen v Cowles Media Co.* involves a reporter’s confidentiality agreement turned sour. The plaintiff, Cohen, worked for an advertising agency representing the Independent Republican (“IR”) candidate for governor in Minnesota.\(^7\) Upon discovering information that the opposing party candidate for lieutenant governor had been arrested on two occasions on charges that were later dropped or vacated, Cohen contacted several media outlets, including the Minneapolis Star and Tribune, owned by Cowles Media. Meeting with a Tribune reporter, Cohen claimed to have material relevant to the election and offered to provide it to the newspaper if given a promise of confidentiality. The reporter agreed.\(^8\) Later, after concluding that printing the information without attaching the source’s name would unfairly damage the opposing candidate, the Tribune’s editors printed Cohen’s name and his relationship to the IR campaign. The next day, Cohen was fired.\(^9\)

Cohen brought an action against Cowles, alleging breach of contract and misrepresentation. At trial, a jury found Cowles liable

\(^{1993:}\)

\(^6\) Id at 2516.

\(^7\) “Confidential information,” as used in this Comment, refers to information obtained from a confidential source. This should not be confused with illegally obtained trade secrets or military records, which often acquire a similar label.

\(^8\) *Cohen v Cowles Media Co.*, 445 NW2d 248, 252 (Minn Ct App 1989). Cohen was also a member of the IR party. Id.

\(^9\) Id.

\(^{1993:}\)
on both claims, awarding $200,000 in compensatory damages and $500,000 in punitive damages. Subsequently, the Minnesota Court of Appeals dismissed the misrepresentation claim and punitive damages award but upheld the breach of contract claim and the award of compensatory damages. The Minnesota Supreme Court, however, dismissed Cohen's breach of contract claim, stating that "contract law seems here an ill fit for a promise of news source confidentiality."

The court also rejected a promissory estoppel theory of liability on First Amendment grounds. Because "[u]nder a promissory estoppel analysis there can be no neutrality towards the First Amendment," the Minnesota Supreme Court refused to balance "the constitutional rights of a free press against the common law interest in protecting a promise of anonymity."

The United States Supreme Court, in a 5-4 decision, reversed the Minnesota high court, holding that the First Amendment does not bar a promissory estoppel cause of action against the press. The Court followed a line of cases stemming from Associated Press v NLRB, which stated that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." The Court distinguished a line of cases emerging from Smith v Daily Mail Publishing Co., which held 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." The Court found Smith inapplicable because the legal obligation in Cohen was self-imposed rather than state-determined:

Minnesota law simply requires those making promises to keep them. The parties themselves . . . determine the scope of their legal obligations and any restrictions which

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10 Id at 254.
11 445 NW2d at 262.
13 Id at 205.
14 Id.
15 Cohen, 111 S Ct at 2513.
16 301 US 103 (1937). See also Branzburg, 408 US at 665.
17 Cohen, 111 S Ct at 2518.
19 Id at 103. See also The Florida Star v B.J.F., 491 US 524, 533 (1989).
may be placed on the publication of truthful information are self-imposed.\textsuperscript{20}

Because this obligation was of general applicability, reasoned the Court, the First Amendment did not forbid its application to the press.\textsuperscript{21}

Dissenting, Justice Blackmun, joined by Justices Marshall and Souter, relied on \textit{Smith} to conclude that, because the state's interest in enforcing its promissory estoppel doctrine was "far from compelling," the First Amendment required affirmance of the Minnesota Supreme Court's decision.\textsuperscript{22} In a separate dissenting opinion, Justice Souter, joined by Justices Marshall, Blackmun and O'Connor, found that the law's general applicability was not dispositive.\textsuperscript{23} The importance of the public interest in expanding "the universe of information" helped to tip the balance against enforcement of the confidentiality agreement.\textsuperscript{24} Because the revelation of Cohen's identity gave voters additional information, its publication should have been protected.\textsuperscript{25}

\textit{Anderson v Strong Memorial Hospital},\textsuperscript{26} the first case to address this issue since \textit{Cohen}, involved a plaintiff who sued a publisher for violating a confidentiality agreement when it printed a recognizable photograph of the plaintiff with a caption labelling him an HIV-positive patient.\textsuperscript{27} Citing \textit{Cohen}, a New York superior court held that the action was not barred by the First Amendment.\textsuperscript{28} Additionally, it found no basis to invoke more stringent free speech protection under New York's state constitution: "Compelling the press to respect a promise made and relied upon, and to be responsible for that commitment, does no more than compel the

\textsuperscript{20} \textit{Cohen}, 111 S Ct at 2519.
\textsuperscript{21} Id. Because the Court thought that the Minnesota Supreme Court's erroneous First Amendment analysis may have truncated its consideration of the promissory estoppel claim, it remanded the case for reconsideration of the issue. Id. On remand, the Minnesota Supreme Court held that the plaintiff could recover under a promissory estoppel theory. \textit{Cohen v Cowles Media Co.}, 479 NW2d 387, 388 (Minn 1992). Because the defendants themselves testified to the importance of honoring promises of confidentiality and because there was no compelling need to break that promise, the court found the defendant liable and reinstated the $200,000 compensatory award. Id at 389.
\textsuperscript{22} Id at 2522 (Blackmun dissenting).
\textsuperscript{23} Id (Souter dissenting).
\textsuperscript{24} Id at 2523 (Souter dissenting).
\textsuperscript{25} Id.
\textsuperscript{26} 573 NYS2d 828, 151 Misc 2d 353 (Sup Ct 1991).
\textsuperscript{27} Id at 829-30.
\textsuperscript{28} Id at 830.
press to act as any other responsible citizen with respect to laws of
general application."

II. ECONOMIC ANALYSIS OF CONFIDENTIALITY AGREEMENTS

A. Economic Analysis and the First Amendment

In his Cohen dissent, Justice Souter argued that imposing publisher liability would decrease the robustness of the information market:

[F]reedom of the press is ultimately founded on the value of enhancing . . . discourse for the sake of a citizenry better informed and thus more prudently self-governed. "[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."

Souter claimed that laws that enforce confidentiality promises decrease the level of publicly available information. The enforcement of such agreements prevents media outlets from publishing some legally obtained information, such as the identity of a confidential source. Because the First Amendment ultimately seeks to maximize the amount of public information, such laws are not constitutional.

While some commentators have reached a similar conclusion, other scholars suggest that the focus of Souter's inquiry is misplaced. They argue that the inquiry, rather than dwelling on the inability of the press to print one piece of information, should instead examine the net flow of information to the public. If confidentiality agreements increase the amount of public information, according to this argument, they should be constitutionally permissible.

Assuming that one goal of the First Amendment is to maximize public information, an economic model can be created to de-

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[Id at 832.
[30] See, for example, Note, Confidentially Speaking: Protecting the Press From Liability for Broken Confidentiality Promises, 67 Wash L Rev 501, 511 (1992) ("The Court should have examined the effect of the inhibiting law on the press' ability to print information serving the public's interest.").
termine which rule would best achieve this goal.\textsuperscript{38} Justice Holmes first introduced the notion of a "marketplace of ideas" when he argued that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."\textsuperscript{34} In recent years, the concept of a market for information has been more carefully analyzed,\textsuperscript{35} and detailed models of the economics of the First Amendment\textsuperscript{36} have been introduced. Such analyses, however, have not been universally accepted. Some scholars disavow the marketplace of ideas concept, suggesting that it is too market- and socially-driven, and thus fails to consider adequately individual liberties.\textsuperscript{37} Thus:

[C]ourts that invoke the marketplace model of the first amendment justify free expression because of the aggregate benefits to society, and not because an individual speaker receives a particular benefit. Courts that focus their concern on the audience rather than the speaker relegate free expression to an instrumental value, a means towards some other goal, rather than a value unto itself.\textsuperscript{38}

For those concerned with the individual rather than the social perspective, therefore, an economic analysis may not be wholly satisfying. However, regardless of whether Holmes's marketplace concept adequately describes the goals of the First Amendment, an economic analysis can help to determine which measures will increase the amount of public information in the long run.

B. A Basic Economic Model for Confidential Information

Two questions should be examined in order to determine under an economic model whether a publisher ought to enjoy First Amendment protection from enforcement of a confidentiality


\textsuperscript{34} Abrams v United States, 250 US 616, 630 (1919) (Holmes dissenting).

\textsuperscript{35} See, for example, Posner, 20 Suffolk U L Rev at 1 (cited in note 33).


\textsuperscript{37} See, for example, Stanley Ingber, 1984 Duke L J at 4 (cited in note 37).
agreement. First, does enforcing such arrangements increase the quantity of confidential information being released into the public domain? Second, if the model indicates that the market for ideas will be enhanced through enforcement, do such gains in efficiency justify the resulting press restrictions?

An analysis of confidentiality agreements requires use of a dual market model. The first is the market for confidential information (the "factor input market"): a source supplies this information to a reporter, acting as an agent for the publisher. The second market is for published information (the "finished product market" or "primary market"): the publisher uses the confidential information in articles to help produce a newspaper, which is then sold to the public. Both markets must be examined in order to determine whether confidentiality agreements increase the flow of information into the marketplace.

In the factor input market, confidential information, by definition, comes exclusively from informants. Sources determine whether to disclose information by conducting a cost-benefit analysis. If the expected utility from divulging information is greater than that from remaining silent, the source will elect to provide the reporter with the information. If not, the source will remain silent.

The source's utility analysis rests on three factors. First, the source derives value from income, which includes any payment from a reporter to induce the source to divulge information. Second, the source's utility depends on the subjective value to him of publication. For example, the publication of the confidential infor-

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39 This analysis is an extension of concepts introduced by Judge Posner in Free Speech in an Economic Perspective, 20 Suffolk L Rev at 1 (cited in note 33).
40 See note 6.
41 The model is very similar to analyses in intellectual property law, particularly those involving disclosure of trade secrets. See Edmund W. Kitch, The Law and Economics of Rights in Valuable Information, 9 J Legal Stud 683, 689-701 (1980). In this context, a source's identity is tangible property retaining public goods characteristics: once revelation occurs the information can be costlessly spread throughout the public domain. When disclosing information to a reporter, a source necessarily discloses his identity as well. The source's identity has value as information and is not generally known to others. Id at 689. In such a situation, "courts should fashion property rights to overcome the information externality problem" which otherwise would create negative incentives, in this case, involving a source's disclosure decision. Id at 699. See also William M. Landes and Richard A. Posner, Trademark Law: An Economic Perspective, 30 J L & Econ 265, 287-88 (1987).
42 In economic terms, information is a factor input in publishing newspapers.
43 Although, for simplicity, the economic analysis in this Comment refers to newspapers and the publishing industry, the model can be extended to other media outlets, including television and radio broadcasting.
information may benefit the source for a subjective personal reason, as in Cohen, where the information helped the candidate whom Cohen supported. In other cases, sources preferring that the information be kept secret may be financially induced to divulge. Using an expected-utility analysis, the source will discount the value of publication by the probability that publication will take place. Finally, a source’s utility depends on the probability of exposure, which imposes a high cost on the source. If revealed as a source, the source’s employment and reputation may be at risk. Again, the source will discount the subjective cost of revelation by the probability of revelation.

The source, in comparing the expected utility of divulging and of remaining silent, will elect to maximize utility. If a source remains quiet, he will receive no income payment or benefit from having the information revealed, but will also not be subject to risk of public exposure. The decision whether to divulge the information requires weighing the cost of exposure against both the income received and the expected benefit of potential information publication.

The publisher undertakes a different calculation. Publishers demand accurate, substantive information. The publisher of important information often reaps a material reward for its diligence though enhanced reputation, sales, and advertising rates.

Two factors, however, adversely affect a publisher’s demand for information. First, because the information cannot be assessed until divulged by a source, the publisher initially cannot determine the information’s newsworthiness. Thus, the value of quality information is discounted by the probability that any given piece of information will be unusable. Second, the publisher may be forced to pay a source to induce divulgence. From a cost-benefit standpoint, therefore, the publisher will only demand confidential information when its discounted value exceeds its cost.

Now suppose that publishers and sources elect to contract freely amongst themselves and to create legally enforceable obligations. In addition to contracting on the payment price, a source may demand that a publisher “guarantee” confidentiality by prom-

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45 Cohen, for example, was fired upon the Tribune's revelation. Cohen, 111 S Ct at 2516.

46 For broadcast media, income is derived through advertising rates dependent on market share, rather than through direct sales.
ising not to reveal her name. If the publisher breaks this promise, the source can legally recover all damages, which are, for now, assumed to be accurately and easily identifiable, as well as costlessly recoverable. Such a rule necessitates a new area of bargaining between the parties. For a source, the promise represents insurance: because of the guarantee of immediate and full compensation, a source receiving such a promise is indifferent as to whether her name is revealed. Thus, the expected cost of revelation disappears.

The publisher has been free all along to “promise” such confidentiality; now, however, the promise bears the weight of legal authority, giving the promise immediate credibility. Nonetheless, such promises impose a social cost. Because the law prevents the publisher from printing a source’s name, that particular bit of information is lost. In turn, market demand falls, since it directly depends on such information. Assuming that demand for a newspaper depends directly on the amount of information printed, fewer people will elect to pay the same price for a newspaper that contains information but no source names as compared to a paper that prints both information and names. This demand drop transfers back to the factor market, decreasing the demand for confidential information. Given an enforceable confidentiality agreement, therefore, a reporter will offer less because that information, unaccompanied by the source’s name, will now sell fewer newspapers.

Legally enforceable confidentiality promises simultaneously create a positive shift in supply of and a negative shift in demand for confidential information. Because the potential costs to them are reduced, more sources will be willing to supply information at any given price if the newspaper promises confidentiality. Publishers, on the other hand, will be less willing, given a set price, to trade for the information if the source requires confidentiality. If every publisher promises not to reveal a source’s name, then the same quantity of information will be supplied at a lower market price.

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47 Reporting newsworthy information in violation of a promise presumably increases newspaper sales. Supreme Court — Leading Cases, 105 Harv L Rev at 282 (cited in note 32).


49 See id at 2466.
If some publishers elect to promise confidentiality and others do not, a bifurcated market results. Those sources receiving confidentiality guarantees will trade their information at a lower price than those who receive no such guarantee. Only the source compensation package differs between the groups: One group receives more money, the other obtains a legally enforceable guarantee.\footnote{See id at 2468.}

The "Coase Theorem"\footnote{See Ronald H. Coase, The Problem of Social Cost, 3 J L & Econ 1 (1960).} predicts such a result: Given perfect information and zero transactions costs, initial rights allocations between two parties have no effect on the efficiency of the eventual outcome.\footnote{Id at 10.} Regardless of the initial rights distribution, the party who most values the right to reveal will eventually acquire it, either through retention of initial rights or a subsequent trade.\footnote{Id at 11.}

Here, a source who values confidentiality highly will acquire a newspaper's right to reveal through contractual exchange.

Whether the parties to the transaction are "risk neutral" or "risk averse"\footnote{Risk aversion occurs when the existence of risk creates disutility for an individual. Richard A. Posner, Economic Analysis of Law § 3.6 at 55 (Little, Brown & Co., 4th ed 1992). The general assumption is that most people are risk averse most of the time. Id § 1.2 at 12. Risk neutrality implies that the existence of risk has no effect on utility.} has no effect on the distribution of information. A risk-neutral source is equally happy with the confidentiality promise or the additional financial compensation: the extra money equals the discounted risk of revelation. A risk-averse source will prefer the guarantee of confidentiality to the added income, because this insures the source against the chance of revelation. Assuming, however, that a private market for insurance exists, a source can insure against the loss. Where confidentiality agreements are unenforceable, the source, by taking the excess income from the publisher and purchasing insurance against revelation, again becomes indifferent to the risk of identity revelation.

If, on the other hand, the publisher is risk averse, when a binding confidentiality promise is made, it will invest the savings from the smaller source payment in a premium for insurance against a negative court judgment should the name of the source be revealed. Likewise, a risk-neutral publisher will "self-insure" against future damage claims by setting proceeds aside for such a purpose.

In practice, however, the market for confidential information has positive transactions costs. A publisher's reputation, for exam-
ple, changes the structure of the market. Because reputation helps the public to determine inexpensively the accuracy of the published information, the demand for a particular newspaper depends not only on the information printed, but also on the reputation of the newspaper. Suppose that reputation depends on only one factor: whether a publisher pays informants for confidential information. Under this analysis, paying sources leads the public to question the accuracy of the information provided. Therefore, if a newspaper pays its sources and readers know of such payments, the paper's reputation suffers, thereby diminishing demand.

If this reputational effect significantly affects a newspaper's overall demand, then the publisher will elect not to pay its sources any money for information. Assuming that different publishers have different reputational effects, a bifurcated market again results. Publishers who do not highly value reputation will continue to pay sources for information, while newspapers with a high reputational effect will not pay sources. In turn, this creates a self-selection process for sources: those who value publication (and desire that the information be perceived as accurate and reliable) will choose to give information to the reputable publisher for less money, while those more interested in money will approach the publisher that provides compensation.

For publishers seemingly unconcerned with reputational effects, such as "tabloid" newspapers, sources who provide information will continue to receive compensation, adjusted for whether confidentiality is assured. For newspapers experiencing strong reputational effects, however, compensation of sources will either be strongly discouraged or eliminated entirely. If nondisclosure promises are not legally enforceable, then a source providing information to such a media outlet will bear an additional cost for which she receives no monetary compensation.

Under these circumstances, the source is clearly not indifferent between the two alternatives: the source prefers a regime in which promises are binding. Although, for some sources, this will not affect the decision to divulge information, at the margin, sources will be dissuaded from providing information. As a result,

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58 See Watson, Atlanta J and Const at G1 (cited in note 56) (paying sources is "ethically unacceptable" for most journalists).
the quantity of information to "reputable" newspapers decreases in the absence of binding agreements, though the magnitude of this shift depends on the expected probability of revelation by a publisher.

This negative effect is exacerbated if sources are assumed to be inherently risk averse. Suppose that the market for insurance (1) is not actuarially fair given transactions costs, and (2) imposes an added cost to the source of revealing her name and admitting that she is an informant. Such a system requires a potential source to bear additional risk costs that, being uncompensated, will further stifle supply.

Given these assumptions, unenforceable promises impose a cost on sources that lowers the supply of confidential information. Other transactions costs, however, appear to limit this negative effect. Principally, the transactions costs involved with legal recourse make contracting a less desirable option. Optimally, if contracts are enforceable, a party who might be damaged through breach is indifferent to enforcement of the contract versus money damages. In reality, the legal system imposes several costs: success in court is not guaranteed, judicial delay creates a loss in time value of compensation, requisite legal fees can be substantial, and damages may be underestimated given the difficulty of calculating intangible factors such as reputational harm. These costs reduce the magnitude of preference for a legally binding obligation, because legal recourse becomes a less desirable, more costly, option.

A second form of reputational concern may also offset the preference for legally enforceable confidentiality agreements. Over a period of time, a publisher will develop a reputation among sources: if the publisher has revealed the names of confidential sources in the past, the reputation of that publisher will be poor. In such a situation, potential sources may elect to go elsewhere with their information or, alternatively, demand a higher payment reflecting the increased risk of revelation. In either event, a reputation for revealing sources creates adverse effects for a publisher, either through diminished product demand or higher costs of ob-

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8 Many economic models assume that individuals are risk averse and firms are risk neutral. See, for example, Hal Varian, Microeconomic Analysis § 3.20 at 158 (W.W. Norton & Co., 2d ed 1984); Posner, Economic Analysis of Law § 1.2 at 12 (cited in note 54).

9 This assumption is certainly true in the modern insurance market. See Walter Nicholson, Microeconomic Theory 228-30 (Dryden Press, 3d ed 1985).

taining information. Assuming that publishers are rational and forward-looking, such reputational effects will diminish the level of source revelation even without a legal means of recourse. Nonetheless, enforceable publisher-source promises appear necessary to maintain efficiency because the mere threat of source revelation without either legal recourse or compensation will chill disclosure.

C. Distributional Effects on Efficiency

Given reputable publishers' transactional barrier of no cash payments, permitting a legal obligation between a publisher and source increases the net flow of confidential information into the marketplace. Additionally, these barriers create secondary, distributional effects increasing the preference for legally binding agreements.

Imposing a legal obligation on the publisher rather than on the source reduces certain system-wide costs. In particular, there is a "moral hazard" problem when the informant bears the risk of exposure. The model previously assumed that the probability of name revelation was independent; the decision whether to reveal a source's name was made without knowledge of the parties' legal obligations. This assumption is inaccurate because in every case the publisher, not the source, decides whether to print the name of a confidential source. If the cost of revelation lies with the publisher, she will do so only when the positive effect of revelation on a newspaper's sales exceeds the cost of breaching the agreement. On the other hand, if the source bears the cost of revelation, a publisher will continually elect to over-reveal, because this merely creates a negative externality on the source. Thus, imposing a legal obligation on the publisher will minimize costs to their efficient level.

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62 For a similar argument, see Supreme Court — Leading Cases, 105 Harv L Rev at 283 (cited in note 32).
63 See id at 284.
64 One possible distributional effect not analyzed here is whether enforcing confidentiality agreements will create a bias toward larger media outlets, thus limiting the channels of information available. Because larger publishers may be better able to afford damage awards for breach of confidentiality, potential sources could elect to give information only to these outlets. A situation could develop where the largest publishers remain competitive, the
This Comment initially assumed that the cost to society of not revealing a source's name was fixed. In practice, this assumption may be questioned, suggesting a more "promise-friendly" regime. A publisher can often limit the costs of incomplete information by conveying much of it through other means. For example, instead of actually printing the name "Lloyd Bentsen," much of the same information can be recovered by instead referring to "a senior official in the Clinton administration." Although, even in this example, some information is lost, if that information is sufficiently valuable, the publisher has the option of the "efficient breach" by revealing the name and paying damages. Such cost minimization, however, will only occur if the publisher, who can exercise such an option, bears the cost of revelation.

Moreover, the publisher's ability to spread costs make it the best bearer of those costs remaining after minimization. If a confidentiality promise is kept, the cost of lost information is spread among the newspaper's readers. Similarly, if a publisher does elect to reveal a source's name, damages can be spread to all of that newspaper's subscribers through higher daily rates.

III. CONSTITUTIONALITY AND RELATED ISSUES

According to this Comment's model, permitting publishers and sources to enforce confidentiality promises increases the amount of publicly available information. Making such promises legally enforceable, therefore, advances the "marketplace of ideas"

smaller publishers exit the market, and an oligopoly is created, increasing market inefficiency.

See Jones, NY Times at A20 (cited in note 3) ("Within the constrictions of confidentiality, most news organizations try to provide as much information about an anonymous source of information as possible . . . .").

Judge Posner, in discussing diminished publisher liability for public figure defamation, makes a similar argument:

[N]otice the curious distributive effects of externalizing the costs of news gathering by curtailing the law of defamation. Costs are shifted from the news media, their customers, and their suppliers to the victims of defamation. More than a redistribution of wealth is involved. The victims cannot spread the costs of being defamed, because it is impossible to insure one's reputation; therefore, if potential victims of defamation are risk averse, shifting the costs of news gathering to them by curtailing their ability to recover damages for defamation causes deadweight loss as well as a redistribution of wealth.


Because information of this nature is generally a public good, the cost of the lost information will actually be spread throughout the entire population. See, generally, Posner, Economic Analysis of Law § 27.1 at 665 (cited in note 54).

See also Farber, 105 Harv L Rev at 576 (cited in note 32); Supreme Court — Leading Cases, 105 Harv L Rev at 283 (cited in note 32).
concept of the First Amendment. By raising the level of public information, currently accepted ideas are more readily challenged and debated, thus improving and facilitating the search for truth. Such market improvement, however, comes at a cost; making promises of this nature legally enforceable imposes a restriction on the media. When a publisher makes a promise not to reveal a source's name, the publisher is deterred from some amount of publication. Whether such a restriction on the media violates the First Amendment, therefore, remains unanswered.

A. The Hand-Posner Constitutionality Test

In United States v Dennis, Judge Learned Hand developed one principal economic model of First Amendment constitutionality, a model later modified by Judge Richard Posner. In Dennis, the central issue was whether, given First Amendment speech protections, the national leaders of the Communist Party of the United States could be prosecuted under the Smith Act, which prohibits the advocacy of government overthrow. Hand, in determining whether a restriction was justified by a "clear and present danger," wrote that the determination "depends on whether the mischief of the repression is greater than the gravity of the evil, discounted by its improbability."

Judge Posner later expanded this formula, finding government regulation desirable when \( V + E \) is less than \( P \times L \), where \( V \) is the loss to society of suppressing information, \( E \) is the error costs in determining what is valuable information, \( P \) is the probability that harm will result from the speech, and \( L \) is the resulting harm from the speech, discounted for present value. Simply put, if the societal costs of suppression are less than the harm from speech, then a speaker should enjoy no First Amendment protection.

Applying the Hand-Posner test to confidentiality agreements, \( V + E \) represents the cost to society of not publishing the name of a confidential source when a publisher makes a binding agreement. Although such costs are clearly positive, they can be minimized through the imposition of publisher liability. On the other side of

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74 Id.
75 See Part II(B).
the equation is \( P \times L \). The probability of harm is very high; absent publisher liability, the incentive to reveal a source increases. Similarly, such a source would most probably have a fairly high \( L \): being revealed as a source, depending on reputation and employment, could have a very damaging effect on a source. Additionally, this cost is not spread beyond the single individual.\(^7\)

In all, the amount by which the benefit of restriction exceeds the cost ultimately depends on the specific case, because both the nature of the information and the level of personal damage vary. Nonetheless, the analysis in this Comment suggests that the benefits of permitting contracts between publishers and sources generally exceed the costs of information loss. Principally, the burden to society of legally enforceable confidentiality agreements seems fairly small, while the probable loss prevented appears to be both large and unilaterally borne by the source. As a result, at least from the perspective of the Hand-Posner test, the First Amendment does not preclude imposing some form of liability against a publisher when a confidentiality agreement is broken.

In the end, however, the self-imposed nature of the obligation should prove dispositive. A publisher, should it not wish to bind itself, has several opportunities to avoid liability.\(^7\) First, the publisher need not agree to confidentiality as part of the bargain for information. Second, the publisher may opt not to print any part of the information. Finally, if not satisfied with the restriction, a publisher may engage in an "efficient breach" by printing with the knowledge that damages will result. Critically, however, the initial forbearance is self-imposed: a publisher agrees to bind itself if the benefits of such an arrangement exceed the costs. If publishers are permitted to reap the advantages of voluntary contractual relations, they should also be held accountable for any damages arising from the breach of those agreements. The Supreme Court's reasoning in *Cohen*, distinguishing *Smith v Daily Mail Publishing Co.*\(^8\) because of the voluntary nature of confidentiality agreements,\(^9\) therefore, appears well-founded.

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\(^7\) See notes 58-59 and accompanying text.
\(^7\) See Farber, 105 Harv L Rev at 576 (cited in note 32).
\(^8\) 443 US at 97.
\(^9\) *Cohen*, 111 S Ct at 2519.
B. Existing Moral Obligation

Regardless of legal liability, journalists have a moral obligation to refrain from disclosing the identity of a source.\(^{86}\) This Comment suggests that this ethical duty, rather than detracting from the efficiency benefits of liability imposition, highlights the desirability of such a legal obligation.

The existence of a moral obligation does not make enforceable contracts unnecessary; instead, the moral code may have developed due to the absence of any legal obligation.\(^{81}\) The journalist's ethical obligation has existed since at least the beginning of the century.\(^{82}\) Without legal recourse, a source's strongest indication of whether a reporter would keep a promise was the reporter's reputation. If a journalist had kept her sources confidential in the past, she was more likely to do so again. Eventually, a system of ethics developed, seeking to establish and maintain an upstanding public reputation for journalism.

However, the skewed distributional effect resulting from revelation represents the principal problem with a purely ethical system. When the ethical obligation is breached, the source bears the entire cost. Such a system imposes unwanted market and distributional effects, particularly when sources are risk averse. If these effects are especially severe, and if publishers routinely violate their ethical duty, then the legal obligation seems both necessary and desirable.

Because of the costliness of the legal scheme, however, the ethical duty alone may be preferable in certain cases, especially when revelations occur infrequently. Rather than choosing between ethical and legal obligations, however, the most efficient scheme might be one in which the two obligations are combined in an enforcement mechanism. Moral obligations are cheaper to administer because enforcement takes place by honoring obligations and publicly disclosing violations rather than by using the courts. Nonetheless, the threat of legal action may be necessary to add credibility to a punitive scheme, particularly if such moral obligations are ignored. A combination of legal and ethical obligations, therefore, could create a system which reduces transactions costs and permits injured parties to recover when a duty has been violated.

\(^{86}\) See note 1.
C. Promissory Estoppel versus Breach of Contract

The economic model developed in this Comment has focused on the imposition of "legal liability," effectively treating breach of contract and promissory estoppel claims as identical. In *Cohen*, however, the United States Supreme Court failed to address the contractual issue, focusing only on the promissory estoppel theory. Whether the Court would find a breach of contract action constitutionally permissible, therefore, remains unclear. As demonstrated, however, either action is likely to satisfy the Hand-Posner test for constitutionality. This Comment examines the differences in the theories to determine whether one is preferable in the reporter-source context.

Given the economic analysis developed in this Comment, permitting legal enforcement under a breach of contract theory, as with a promissory estoppel theory, would promote efficiency in the marketplace for information and increase the level of such information in the public domain. Nonetheless, a breach of contract action has both advantages and disadvantages over one for promissory estoppel. The principal advantage would be a legal recognition that agreements between reporters and sources represent contracts. The model in this Comment has shown that, regardless of whether cash payments are used, sources provide publishers with information in exchange for value. Without transactional barriers, a source purchases a promise of confidentiality from a publisher by accepting a lower payment for the information. Such interaction between parties indicates a bargained-for contract and consideration rather than a one-sided promise and should be legally recognized as such.

Thus, enforcement of confidentiality agreements under a breach of contract theory eliminates the need for the balancing of fairness and justice typical in promissory estoppel analysis. Because a promise is legally binding only "if injustice can be avoided only by enforcement of the promise," a promissory estoppel claim permits the judiciary to introduce external evidence having little to do with the actual promise. Such concerns, however, obfuscate the central issue: a promise was bargained for and then not honored.

In other areas, however, a promissory estoppel analysis appears preferable. In particular, a breach of contract action may be

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83 111 S Ct at 2519.
84 See Part III(A).
85 See Part II(B).
86 Restatement (Second) of Contracts § 90 (1981).
subject to evidentiary limitations, especially given the usually oral nature of the promises.\textsuperscript{87} The absence of a written document may make it difficult to determine the true provisions of the agreement, especially given the ex-post incentives of the parties to shade the truth. Finally, the parties, for whatever reason, may not have intended to create a binding obligation.

Despite these relative advantages and disadvantages, this Comment advocates recognition of both causes of action. In cases where the evidence clearly shows a bargained-for agreement, the law should permit parties to bind themselves with the absolute assurance of legal recourse through a breach of contract action. In other cases, where it is less clear that a binding agreement has been formally created, a promissory estoppel action provides the best remedy because, rather than automatic enforcement, courts will introduce other evidence and balance the relevant equities. Indeed, promissory estoppel analysis may best incorporate the combination of ethical and legal obligations advocated in Part III(B) by reducing costs while permitting legal redress. Nonetheless, this Comment advocates recovery on contractual grounds as well when evidence indicates a formal confidentiality agreement.

**Conclusion**

This Comment has developed an economic model of the market for confidential information in light of the recent *Cohen* decision. The model suggests that, given the transactions costs apparent in the market due to reputational concerns and the lack of complete insurance, permitting sources and publishers to freely contract confidentiality agreements increases the net flow of information into the marketplace. Moreover, imposing liability on publishers produces the strongest incentive for minimizing costs and reaches the most equitable distributional result.

Given the minimal costs imposed on publishers, a cost-benefit analysis under the Hand-Posner model indicates that imposing liability on publishers should be constitutionally permitted. In addition, this Comment advocates the extension of liability into breach of contract claims. In all, it appears that the effect of *Cohen* will be a movement towards efficiency within the market for information, thereby benefitting all parties: sources, publishers, and the public at large.

\textsuperscript{87} See Jones, NY Times at A20 (cited in note 3).