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COMMENT

TRASH TORT OR TRASH TV?: *FOOD LION, INC. V. ABC, INC.*, AND TORT LIABILITY OF THE MEDIA FOR NEWSGATHERING

I don't like to hurt people. ... I really don't like it at all. But in order to get a red light at the intersection, you sometimes have to have an accident.

—Jack Anderson, Investigative Journalist¹

Although criticism of the press is certainly not new,² the media³ has recently come under increasing scrutiny for what critics see as a more intrusive style of tabloid journalism.⁴ The

¹ A *Muckraker with a Mission*, NEWSWEEK, Apr. 3, 1972, at 53, 55.

² It is noteworthy that even over a hundred years ago, the press was held in low esteem, as it is today. See Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 196 (1890) (“The press is overstepping in every direction the obvious bounds of propriety and of decency.”); see also Everette E. Dennis, *Internal Examination: Self-Regulation and the American Media*, 13 CARDOZO ARTS & ENT. L.J. 697, 699 (1995) (noting that, as early as 1890, the public was disturbed by the extensive investigating into the lives of prominent citizens).

³ The generic terms “the media,” and “the press” will be used throughout this Comment. Unless noted otherwise, the terms will be used interchangeably. Noted First Amendment attorney Floyd Abrams argues that there is “nothing intrinsically unique about broadcast journalism as opposed to print journalism which makes the principles in ... [the *Food Lion*] case more applicable to one than another.” Russ Baker, *In Greensboro: Damning Undercover Tactics as “Fraud,”* COLUM. JOURNALISM REV., Mar.-Apr. 1997, at 28, 29; see also *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (“The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”).

⁴ See Ann Sjoerdsman, *Daily Break: Journalism, Don't Shoot Messenger; Study Message*, VA.-PILOT & LEDGER STAR, Sept. 2, 1997, at E4, available in 1997 WL 12453955 (comparing the press conduct in the Princess Diana incident with that of ABC in the Food Lion story, and predicting that the nation “will try to carve out laws directed at harassing paparazzi that do not infringe upon constitutional protections”). Some critics of media techniques have come from within the industry it-

First Amendment⁵ generally immunizes the press against liability to public figures for damages resulting from the publication of unfavorable material.⁶ Critics assert that this protection has

self. Washington Post editor Ben Bradlee criticized a 1978 *60 Minutes* program where the producers set up a Chicago tavern to record a city inspector taking bribes. Bradlee deplored the use of misrepresentation to get a story, no matter how worthwhile the results might be. See Clarence Page, *Good-bye Nellie Bly! Undercover is Interred*, BALTIMORE SUN, Feb. 14, 1997, at 17A.

⁵ "Congress shall make no law ... abridging the freedom of speech, or of the press ..." U.S. CONST. amend. I. The provisions of the First Amendment have been applied to the states through the Fourteenth Amendment, thus state laws must meet the same constitutional requirements as acts of Congress. See *City of Cin. v. Discovery Network, Inc.*, 507 U.S. 410, 412 n.1 (1993) (citing *Stromberg v. California*, 283 U.S. 359 (1931)). See generally Zechariah Chafee, *The Great Liberty: Freedom of Speech and Press*, in FOUNDATIONS OF FREEDOM IN THE AMERICAN CONSTITUTION 52-87 (Alfred H. Kelly ed., 1958) (tracing the development of the freedoms of speech and press and concluding that the framers of the Constitution intended that protecting the press must weigh heavily when examining the relative importance of potential restrictions). James Madison made clear that he understood the potential harm of the press, but balanced that harm with the benefits of a free press:

Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press ... [I]t is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any one who reflects that to the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression ... ?

James Madison, *Report on the Virginia Resolutions*, in 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 571 (Jonathon Elliot ed., photo. reprint 1937) (1836).

The Free Press clause, like many in the Constitution, has been the subject of continual debate as to its meaning and scope. See generally T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FOURTH ESTATE: THE LAW OF MASS MEDIA* 31-46 (6th ed. 1994) (explicating various theories on the bases of freedom of speech). Justice Stewart argued that the Free Press guarantee is a "structural" protection, separate and apart from other individual rights such as speech and religion. See Potter Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631, 633 (1975) (noting that "[t]he publishing business is, in short, the only organized private business that is given explicit constitutional protection."). Justice Burger disagreed, arguing "the history of the Clause does not suggest that the [Framers] contemplated a 'special' or 'institutional' privilege" for the press. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 798 (1978) (Burger, C.J., concurring).

⁶ The protection was first afforded in cases of defamation, but has gradually been expanded to include other claims arising from publication or broadcast. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (applying the actual malice standard to an intentional infliction of emotional distress claim made by a parodied public figure); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 156-58 (1967) (applying the actual malice standard to prove defamation of a public figure); *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (holding that a public official must prove "actual malice" to sustain a claim for defamation). It is unsettled

emboldened the press to use unlawful and tortious means in newsgathering.⁷

Subjects of unfavorable or intrusive media investigations have changed legal tactics and have brought actions against the media under tort theories that differ from the traditional suits in defamation and libel.⁸ Media supporters have called these suits

whether a corporation is inherently a public figure for First Amendment purposes, and thus would require the *New York Times* standard. Compare *U.S. Healthcare, Inc. v. Blue Cross*, 898 F.2d 914, 939 (3rd Cir. 1990) (holding the corporation was not a public figure in commercial disparagement claim), with *Snead v. Redland Aggregates, Ltd.*, 998 F.2d 1325, 1329 (5th Cir. 1993) (noting “[p]rominent consumer goods makers or merchants ... are much more likely to attain public figure status.”), and *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273 (7th Cir. 1983) (noting in dicta, “if the purpose of the public figure-private person dichotomy is to protect the privacy of individuals who do not seek publicity or engage in activities that place them in the public eye, there seems [to be] no reason to classify a large corporation as a private person”). See generally Norman Redlich, *The Publicly Held Corporation as Defamation Plaintiff*, 39 ST. LOUIS U. L.J. 1167 (1995) (examining the legal questions which must be addressed by corporations contemplating the initiation of a defamation suit).

⁷ See John J. Walsh, et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111, 1113-14 (1996). One court said “[i]n the age of ‘channel surfing,’ news organizations are hard-pressed to disseminate information in a manner that will capture the viewers [sic] attention.” *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 754 (N.D. Cal. 1993) (footnote omitted); see also Marc Gunther, *Prime Time News Blues; Magazine Shows Try to Regroup After a Bad Year*, WASH. POST, Sept. 17, 1995, at G7 (noting “competition and ratings pressure ... [have driven] down the quality of journalism on the magazines [and] ABC, in particular, has been hit with a flurry of lawsuits, particularly over hidden-camera reporting”).

⁸ See, e.g., *Berger v. Hanlon*, 129 F.3d 505, 513 (9th Cir. 1997) (allowing a claim for trespass against The Cable News Network and Turner Broadcasting System, which secretly recorded a federal Fish and Wildlife Service search of the plaintiff's property); *Desnick v. ABC, Inc.*, 44 F.3d 1345, 1347 (7th Cir. 1995) (denying the plaintiff's assertion that an undercover investigative report of an ophthalmic clinic constituted trespass and fraud); *Medical Lab. Management Consultants v. ABC, Inc.*, No. CIV-95-2494-PHX-ROS, 1997 WL 405908, at *5 (D. Ariz. Mar. 27, 1997) (refusing to dismiss claims of numerous torts regarding the surreptitious recording of plaintiffs in the investigation of faulty pap smear tests); *Sussman v. ABC, Inc.*, 971 F. Supp. 432, 435 (C.D. Cal. 1997) (dismissing claims of fraud and surreptitious recording in investigation of phony tele-psychics); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 811-12 (M.D.N.C. 1995) (addressing various tort claims arising from an undercover investigation of sanitary conditions in a supermarket); *Russell v. ABC, Inc.*, No. 94C5768, 1995 WL 330920 (N.D. Ill. May 31, 1995) (addressing the claims of intrusion, invasion of privacy, and wiretap violations for an investigation of sanitary conditions in the commercial fish industry).

Defamation, however, remains a useful weapon for subjects of questionable media coverage. In December 1996, a jury awarded a Florida state record \$10 million to a plaintiff who claimed he was libeled by ABC News' *20/20* program. See Beatrice Garcia, *In Miami: Paying for Technique*, Colum. Journalism Rev. Mar.-Apr. 1997, at 33; cf. *Purcell v. Bankatlantic Fin. Corp.*, 85 F.3d 1508, 1510 (11th Cir.

a "wave of 'trash torts.'"⁹ Rather than seeking damages for the publication of injurious reports, plaintiffs have claimed that the newsgathering activities of the media prior to publication were tortious.¹⁰ Such plaintiffs have argued that the media does not have any special constitutional protections in gathering news, seizing upon the Supreme Court's general statement 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."¹¹ In a recent federal action, a North Carolina jury awarded Food Lion, Inc.¹² ("Food Lion") over \$5.5 million in punitive damages from Capital Cities/ABC¹³ ("ABC") and certain reporters for trespass,

1996) (noting that the plaintiff in the libel case also settled a class action lawsuit for \$8 million involving the real estate investors 20/20 claimed plaintiff defrauded).

⁹ Alicia C. Shepard, *Fighting Back*, AM. JOURNALISM REV., Jan.-Feb. 1996, at 36. One critic of the *Food Lion* verdict feared that it would lead to "all kinds of nuisance actions about any journalist who is trying to uncover a story about an important matter that the subject doesn't wish to have uncovered." Jane Kirtley, in *The NewsHour With Jim Lehrer: ABC-Malpractice* (PBS television broadcast, Jan. 15, 1997) available in LEXIS, News Library, Curnws File. Critics claim that such actions will have the proverbial "chilling effect" on speech, and will deprive the public of valuable information, such as the material exposed in the *Food Lion* story. John R. Bull, *Address to Pennsylvania Bar Ass'n Civil Litig. Section* (Mar 27, 1997), VITAL SPEECHES, May 15, 1997, available in 1997 WL 10024419. Judge Posner voiced similar concerns by remarking:

Today's "tabloid" style investigative television reportage, conducted by networks desperate for viewers ... although ... often shrill, one-sided, and offensive, and sometimes defamatory ... is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort. ... If the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it ... then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly.

Desnick v. ABC, Inc., 44 F.3d 1345, 1355 (7th Cir. 1995) (citations omitted).

¹⁰ See *supra* note 8.

¹¹ Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991).

¹² Until the *PrimeTime Live* story broadcast, Food Lion was one of the fastest growing grocery store chains in the country. See Jane E. Kirtley, *Vanity and Vexation: Shifting the Focus to Media Conduct*, 4 WM. & MARY BILL RTS. J. 1069, 1097 (1996). Although Food Lion enjoys a reputation of being a local supermarket in the South, it is actually owned by Etablissements Delhaize Freres et Cie "Le Lion" SA, a multinational firm centered in Belgium. See Jonathan Yardley, *The Food Lion Jurors' Reverberating Roar*, WASH. POST, Jan. 27, 1997, at C2.

¹³ In early 1996, the Walt Disney Co. completed a \$19 billion acquisition of Capital Cities/ABC, Inc. See *Disney Closes Acquisition, Signals Interest in Another*, WALL ST. J., Feb. 12, 1996, at B3. Disney later shortened the corporate name to ABC. See *Disney's Cap Cities/ABC Trims Unit Name to ABC*, WALL ST. J., May 6, 1996, at B6.

fraud, and breach of loyalty.¹⁴ The damages stemmed from a 1992 *PrimeTime Live* undercover story which exposed unsanitary food conditions at Food Lion supermarkets in North and South Carolina.¹⁵

The litigation was sparked in 1992, when ABC's legal department and management approved proposals by two *PrimeTime Live* producers to conduct an investigation of Food Lion.¹⁶ Once management approved the use of undercover cameras for the investigation, the producers sought employment at various

¹⁴ See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1997 WL 735490, at *13 (M.D.N.C. Aug. 19, 1997). The same jury had earlier held ABC liable for \$1,402 in compensatory damages. See *id.* Food Lion, naturally, was pleased with the decision. Tom Smith, the chairman and CEO of Food Lion stated "this case was not just about money, it was about right and wrong." *Jury Awards Food Lion More Than \$5.5 Million in Punitive Damages*, PR NEWSWIRE, Jan. 22, 1997, available in LEXIS, News Library, Curnws File. Richard L. Wyatt, attorney for Food Lion hoped the jury award would "be an effective reminder to ABC that it needs to follow the laws of this country." *Id.* Boone Arledge, then president of ABC News, stated that the verdict was "really a war against investigative reporting If the jury's punitive award stands, it will help protect powerful institutions that do wrong" Boone Arledge, *Hidden Cameras Find the Truth*, N.Y. TIMES, Feb. 1, 1997, at 19.

Citing the Supreme Court's decision in *BMW of North America v. Gore*, 517 U.S. 559 (1996), which held that punitive damages are unconstitutional if they are grossly excessive, the trial judge later reduced the punitive damages to \$315,000 holding the ratio between punitive and compensatory damages to be "constitutionally unsustainable." *Food Lion*, 1997 WL 735490, at *13. Food Lion accepted the reduced award, but has appealed the court's ruling that the supermarket chain was not entitled to recover \$1 billion in lost profits and stock value it lost after the broadcast. See Scott Andron, *Food Lion Appeals Judge's Ruling Concerning Lawsuit Against ABC*, GREENSBORO NEWS & REC. (N.C.), Nov. 11, 1997, at B4, available in 1997 WL 14476402. ABC has also filed a notice to appeal, seeking to have all damages overturned. See Scott Andron, *ABC News Appeals Food Lion Verdict*, GREENSBORO NEWS & REC. (N.C.), Oct. 28, 1997, at B1, available in 1997 WL 14474432.

¹⁵ See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 815 (M.D.N.C. 1995). "The ABC report described many unsanitary - and distinctly unappetizing - food handling practices at Food Lion: workers preparing sandwiches without gloves and altering expiration dates on deli products; old chicken tarted up with barbecue sauce; stinky fish rinsed with bleach." Amy Singer, *Food, Lies, & Videotape*, AM. LAW., Apr. 1997, at 57.

¹⁶ See Singer, *supra* note 15, at 58. There is considerable dispute over how ABC and *PrimeTime Live* first became interested in doing a story on Food Lion. The network claimed that the story was suggested to them by a public interest group that aided whistleblowers, after employees had reported abuses of food safety practices. See Kirtley, *supra* note 12, at 1097. Food Lion, however, believed that ABC was prompted by a labor union that had unsuccessfully tried to organize Food Lion workers for over ten years. See *id.* The court held that both communications occurred virtually simultaneously and were connected. See *Food Lion*, 887 F. Supp. at 814.

Food Lion stores.¹⁷ To ensure that the producers were hired, they "utilized means including the mails and interstate wire facilities to create false identities and backgrounds, complete with supporting documentation," including fake résumés and false references demonstrating previous experience.¹⁸ Two separate Food Lion supermarkets eventually hired both producers as at-will employees.¹⁹ While working, the producers wore hidden cameras²⁰ and filmed the activities of fellow employees.²¹ Portions of the film were recorded in areas not open to the general public.²² Their hidden cameras captured images of other Food Lion employees bleaching and selling out-of-date meat and fish, as well as repackaging and reselling food that had been thrown in garbage bins.²³ After filming approximately forty-five hours of video footage, the producers quit their positions under false pretenses.²⁴

Food Lion did not seek an injunction to prevent the broadcast of the *PrimeTime Live* report.²⁵ However, prior to the November 1992 scheduled air date, Food Lion filed a suit for damages against ABC. The complaint set forth fourteen different causes of action, but did not allege defamation.²⁶ District Court

¹⁷ See *Food Lion*, 887 F. Supp. at 814.

¹⁸ *Id.* On one application, a producer claimed "I really miss working in a grocery store, and I love meat wrapping I would like to make a career with the company." See Singer, *supra* note 15, at 59.

¹⁹ See Singer, *supra* note 15, at 58-59.

²⁰ A common misperception is that the case concerned the propriety of using hidden cameras and microphones. The court rejected Food Lion's claim that their use in this instance equated to mail and wire fraud, and the jury never addressed the issue. See *Food Lion*, 887 F. Supp. at 819. However, the tabloid media has concentrated on the hidden camera aspect in its coverage of the story. Geraldo Rivera devoted an entire show to the issue of the media's use of hidden cameras. See *Geraldo: Hidden Camera: Right or Wrong?* (Syndicated television program, Apr. 3, 1997), available in 1997 WL 10271597. Mr. Rivera ignored the *Food Lion* jury foreperson's repeated denial of the importance of hidden cameras in their decision. See *id.*

²¹ See *Food Lion*, 887 F. Supp. at 816.

²² See *id.* at 815-16.

²³ See Stuart Taylor, Jr., *Bad Food, Bad Taste, Bad Verdict; Huge Punitive Damages Against ABC in Food Lion Case Are Unwarranted*, FULTON COUNTY DAILY REP., Feb. 7, 1997, available in LEXIS, News Library, Fulton File.

²⁴ See Singer, *supra* note 15, at 59.

²⁵ See *id.* Food Lion's attorneys felt that a suit for an injunction would be unsuccessful. They did, however, meet with ABC's general counsel prior to the broadcast. See *id.*

²⁶ See Kirtley, *supra* note 12, at 1098. Food Lion publicly maintained that the report was false, and that many of the scenes were staged by the reporters, but a magistrate dismissed a belated attempt to add a libel claim during the proceedings.

Judge N. Carlton Tilley refused to dismiss most of these claims²⁷ and rejected ABC's arguments that the producers' actions were protected by the First Amendment.²⁸ Citing the Supreme Court's decision in *Cohen v. Cowles Media Co.*, the court held that the laws that applied to Food Lion's claims of fraud, trespass, and breach of loyalty were "generally applicable laws which do not target the press."²⁹ The court, however, relied on the Supreme Court's decision in *Hustler Magazine, Inc. v. Falwell*³⁰ and held that Food Lion could not recover damages to its reputation arising out of the broadcast of the *PrimeTime Live* report.³¹

This Comment examines the two issues that the Fourth Circuit will likely address in the *Food Lion* appeal. Part I considers ABC's claim that the network is constitutionally privileged to engage in routine newsgathering practices and is therefore not liable to Food Lion. Although the Supreme Court has not directly ruled on the issue, this Comment examines the case law leading up to the *Food Lion* case. Additionally, Part I asserts that there are other means to ensure that the media is not unduly burdened and concludes that a better way of balancing the competing interests is to refrain from immunizing the press for non-publication related damages. Part II argues that the district court correctly applied traditional defamation jurisprudence by denying Food Lion damages for loss of reputation allegedly caused by ABC's report. Part III discusses various proposals to reconcile the rights of those targeted by investigative reports, and how such proposals would impact the right of the public to receive information without undue regulation. This Comment

See Singer, supra note 15, at 57-65 (providing a detailed description of the events before and after the litigation). The court instructed the jury to assume that the broadcast was truthful. *See id.* at 64.

²⁷ *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1224, 1233 (M.D.N.C. 1996) (upholding state Unfair Practices statutory claim, and common law fraud, trespass, negligent supervision, civil conspiracy, and breach of fiduciary duty claims). *But see Food Lion*, 887 F. Supp. at 824 (dismissing claims of violations of Civil RICO and federal wiretapping statutes).

²⁸ *See Food Lion*, 887 F. Supp. at 821.

²⁹ *Id.* at 824 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991)).

³⁰ 485 U.S. 46 (1988). *See infra* notes 115-117 and accompanying text.

³¹ *Id.* In the year after the broadcast, Food Lion's company sales plummeted, at least 88 stores were closed, and over 1,000 employees were laid off. *See Singer, supra* note 15, at 58. In September 1997, the supermarket announced plans to close 61 stores and layoff 3,100 workers in the Southwest and attributed it to the Food Lion story. *See Food Lion to Close 61 Stores and Lay Off 3,100 Workers*, N.Y. TIMES, Sept. 19, 1997, at D3.

supports an approach which would allow an aggrieved party to recover all compensatory, non-publication damages arising from the tortious conduct, but prevent plaintiffs from recovering punitive damages unless the conduct is criminal or reckless. Such an approach would prevent a chilling effect on speech.

I. THE SEARCH FOR CONSTITUTIONAL PROTECTION FOR NEWSGATHERING

The Supreme Court has generally applied a strict scrutiny standard to content-based governmental regulations restricting speech.³² In cases where the government wishes to regulate conduct, and the conduct has speech elements, the Court has been more permissive and has allowed limited regulation of such "expressive conduct."³³ Laws regulating conduct that does not contain speech elements need only have a rational basis to be upheld.³⁴ Early cases established that the press is not exempt from generally applicable laws unrelated to the content of speech such as labor laws,³⁵ antitrust laws,³⁶ copyright laws,³⁷ and non-

³² See, e.g., *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) ("[T]he state must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."); *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591 (1983) (noting that the state bears a heavy burden to justify action that singles out the press).

³³ See *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (creating a four-part test which provides that conduct combining speech and non-speech elements can be regulated if: the "regulation is within the constitutional power of the government; ... furthers an important or substantial governmental interest; ... the governmental interest is unrelated to the suppression of free expression; and ... the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."); see also *Turner Broad. Sys., Inc. v. F.C.C.*, 117 S. Ct. 1174 (1997) (upholding the Cable Television Consumer Protection Act, which requires cable systems to reserve channels for local broadcast television); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 561 (1991) (upholding a public indecency statute that prohibits dancers at adult entertainment establishments from dancing in the nude); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 790 (1984) (upholding a Los Angeles ordinance that prohibited campaign signs on public property); *Buckley v. Valeo*, 424 U.S. 1, 15-23 (1976) (applying the *O'Brien* test in striking down campaign expenditure limits that unconstitutionally impacted the campaigner's First Amendment rights).

³⁴ See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (noting that heightened scrutiny is required only when First Amendment protection is involved).

³⁵ See *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others The regulation here in question has no relation whatever [sic] to the impartial distribution of news.").

discriminatory tax laws.³⁸

When the media claims that the First Amendment protects them from liability from tort lawsuits brought by private citizens, it claims, in effect, that such lawsuits constitute an impermissible regulation on speech.³⁹ This regulation (whether in the form of a statute or common law) does not fit neatly into one of the categories mentioned above. Rather, tort liability on its face essentially regulates conduct only. In *New York Times Co. v. Sullivan*,⁴⁰ however, the Supreme Court recognized that regulating even false speech concerning public officials must be constrained in order to avoid impeding the flow of information to the public.⁴¹

The Court has often given greater First Amendment protection to the press than to the general public, most notably in the area of prior restraints.⁴² Lower courts have given this protec-

³⁸ See *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139 (1969) (holding that the negotiation of a joint operating agreement between two papers and subsequent price fixing violated the Sherman Act); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951) (upholding the enjoinder of a newspaper from further attempts at monopolizing interstate commerce in violation of the Sherman Act); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (noting that allowing an exemption of antitrust laws for the press would actually impede free speech because other prospective publishers would not be able to publish).

³⁷ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578-79 (1977) (holding that the First and Fourteenth Amendments do not immunize the press from liability for infringement of the "right of publicity" where the plaintiff sought remuneration for the unauthorized broadcast of his performance).

³⁸ See *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (striking down a state licensing tax on selling newspapers, but noting "[i]t is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government"); see also *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943) (differentiating between a permissible tax on the income of a person who engages in activities protected by the First Amendment, and an impermissible tax imposed on that person for the privilege of engaging in those activities).

³⁹ See *Allen v. Combined Communications Corp.*, 7 Media L. Rep. (BNA) 2417, 2420 (Colo. Dist. Ct. 1981) (recognizing the uncertainty in the amount of protection to grant to newsgathering). In *Allen*, the court ruled that the media is free from liability unless "1) the reporter knew that he/she was committing a trespass or committed the trespass in reckless disregard of that fact; or 2) ... the Plaintiff suffered damage as a result of the trespass." *Id.*

⁴⁰ 376 U.S. 254 (1964).

⁴¹ *Id.* at 279 ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to a comparable 'self censorship.'").

⁴² See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1039-54 (2d ed. 1988). Prior restraints doctrine bars pre-publication suppression of speech. See *id.* at 1040. The Supreme Court first applied this doctrine in *Near v. Minnesota*, 283 U.S. 697

tion regardless of the newsgathering conduct.⁴³ Thus, the primary protection afforded to the media is that publication itself can not be curtailed, but the media is not immune from subsequent civil sanctions. In certain cases the Court has refused to absolve the media from liability despite blameless conduct in gathering the information.⁴⁴ Despite this, the Court has asserted that "[it is not] suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."⁴⁵ However, the Court has not explicitly extended this protection to pre-publication and newsgathering conduct, and it is unclear

(1931) (striking down a state law which applied public nuisance law to the publication of "scandalous and defamatory" newspapers). See *TRIBE*, *supra*, at 1039.

For modern day examples of prior restraints Supreme Court jurisprudence, see *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994), which noted that "[i]f CBS has breached its state-law obligations, the First Amendment requires that [the plaintiff] remedy its harms through a damages proceeding rather than through suppression of protected speech," *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105-06 (1979), which held unconstitutional a statute prohibiting the unauthorized publishing of the names of youths charged as juvenile offenders, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978), which held that the First Amendment does not allow for a criminal penalty for publisher of confidential judicial proceedings, *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 558 (1976), which stated that the state had to meet a "heavy burden" to justify prior restraint of press from publishing admissions made by a criminal defendant to police, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), which rejected the government's attempt to prohibit publishing of Pentagon Papers, and *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963), which struck down a book censorship program and noting the "heavy presumption against [the] constitutional validity" of a prior restraint.

⁴³ See *In re King World Productions, Inc.*, 898 F.2d 56, 59-60 (6th Cir. 1990) (criticizing a television news magazine for surreptitious videotaping of plaintiff, but vacating a temporary restraining order preventing broadcast of the videotape); *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (restricting further activities of a paparazzi photographer, but refusing to enjoin publication of the photographs); *Wolfson v. Lewis*, 924 F. Supp. 1413, 1435 (E.D. Pa. 1996) (enjoining defendants from further harassing activities, but refusing to enjoin the right to broadcast the result of the prior activities). See generally Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 *STAN. L. REV.* 927, 928-29 (1992) (citing "the Supreme Court's willingness to interpret the First Amendment as affording the press a broad range of freedom from restraints on publication ... [and] argu[ing] that it is both appropriate and desirable that the press enjoy a special constitutional right of access in newsgathering").

⁴⁴ See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (finding television station liable for copyright infringement for publishing plaintiff's "human cannonball" act despite the truthfulness of the story and no evidence of trespass). See generally Robert M. O'Neil, *Tainted Sources: First Amendment Rights and Journalistic Wrongs*, 4 *WM. & MARY BILL RTS. J.* 1005 (1996) (discussing varied levels of newsgathering conduct with regard to First Amendment rights).

⁴⁵ *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

whether newsgathering is as "constitutionally significant" as defamatory speech.⁴⁶

A. Supreme Court Precedent

In *Time Inc. v. Hill*,⁴⁷ the Court addressed an invasion of privacy claim for the publication of material which allegedly placed the plaintiff in a false light.⁴⁸ In *Hill*, *Time* magazine published a false article reporting that a new play portrayed the experience of the plaintiff's family, which had been held hostage by three escaped convicts.⁴⁹ The Court held that because the Hills' story was of legitimate public interest, the plaintiff could not recover damages under New York's right of privacy law⁵⁰ absent a showing of reckless falsity.⁵¹

In his concurring and dissenting opinion, Justice Harlan briefly discussed the power of a state to impose liability for improper media tactics: "No claim is made that there was any intrusion upon the Hills' solitude or private affairs in order to obtain information for publication. The power of a state to control and remedy such intrusion ... cannot be denied but is not here asserted."⁵² While the Court specifically declined to rule on tort liability for newsgathering,⁵³ a majority of the Court rejected Justice Harlan's proposal to hold the press to a "duty of making

⁴⁶ Paul A. Lebel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection From Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145, 1150 (1996).

⁴⁷ 385 U.S. 374 (1967).

⁴⁸ A discussion of false light privacy is outside the scope of this Comment. For an explanation of this area of law, see, for example, *Cox Broad. Co. v. Cohn*, 420 U.S. 469 (1974), *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 252-53 (1974), which upheld the validity of an invasion of privacy claim despite the absence of an actual malice standard of proof, William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960), for an outline of false light and other privacy torts, and Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L. REV. 421 (1980), which advocates a commitment to privacy as a legal value and notes the limitations of the law in protecting privacy.

⁴⁹ 385 U.S. at 377-78.

⁵⁰ N.Y. CIV. RIGHTS LAW §§ 50 & 51 (McKinney 1992) (providing for both civil and criminal causes of action for the unauthorized use of a person's "name, portrait, or picture").

⁵¹ See *Hill*, 385 U.S. at 397.

⁵² *Id.* at 404 (Harlan, J., concurring in part and dissenting in part) (citation omitted).

⁵³ "Nor do we intimate any view whether the Constitution limits state power to sanction publication of matter obtained by an intrusion into a protected area, for example, through the use of electronic listening devices." *Id.* at 384 n.9.

a reasonable investigation," for false light claims.⁵⁴ Soon after *Hill*, a New York court noted that the Supreme Court "implicitly rejected [that] standard, perhaps because it would force the courts to act as wide-ranging critics of the manner of exposition used by the press."⁵⁵ Regardless, the Court seemed to be more concerned with the media's behavior in deciding to publish the information, than in the techniques used to gather it.

In *Branzburg v. Hayes*,⁵⁶ the Court did address the press' pre-publication conduct. The Court decided the issue of whether a reporter has a "newsman's privilege" not to reveal confidential sources, despite being subpoenaed to testify before a grand jury.⁵⁷ The Court rejected the reporters' claim that forcing them to reveal confidential sources would cause future sources to refuse to furnish newsworthy information, "to the detriment of the free flow of information protected by the First Amendment."⁵⁸ The Court did not find any evidence that "there would be a significant constriction of the flow of news to the public,"⁵⁹ and held that because the First Amendment did not allow the press to have a "special immunity from the application of general laws,"⁶⁰ the press was not exempt from being required to testify before a grand jury.⁶¹ The Court balanced "the public interest in possible

⁵⁴ *Id.* at 409. Note, however, that unlike *Food Lion*, the plaintiffs in *Time v. Hill* were not public figures.

⁵⁵ *Costlow v. Cusimano*, 311 N.Y.S.2d 92, 95 (App. Div. 1970). The plaintiff in *Costlow* sued over the publication and exhibition of photographs and a story regarding the deaths of two of the plaintiff's children who had trapped themselves in the family refrigerator. *See id.* at 93. The court found that because the subject matter was an area of legitimate public interest and the portrayal was accurate, the parents could not sue under New York's privacy statute. *Id.* at 94.

Subsequent Court decisions have placed doubt upon *Time, Inc. v. Hill*'s central holding. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (utilizing a different standard of simple falsity as opposed to reckless falsity in cases where the plaintiff is a private figure but the issue is of public concern); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (declining to apply the actual malice standard to private figures in defamation actions even if the issue is of public concern).

⁵⁶ 408 U.S. 665 (1972).

⁵⁷ *See id.* at 686 (determining whether "the First Amendment interest asserted by the newsman ... [is] outweighed by the general obligation of a citizen to appear before a grand jury or at trial").

⁵⁸ *Id.* at 680.

⁵⁹ *Id.* at 693.

⁶⁰ *Id.* at 683 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)).

⁶¹ *See id.* at 667. ABC recently unsuccessfully claimed such a privilege involving a subpoena ordered by Whitewater Independent Counsel Kenneth Starr seeking the transcript and videotape of a *PrimeTime Live* interview with Susan H. McDougal. *See In re Grand Jury Subpoenas American Broad. Cos., Inc.*, 947 F. Supp. 1314,

future news about crime," with "the public interest in pursuing and prosecuting those crimes reported to the press by informants."⁶² Thus the Court held against the reporters only after the state had demonstrated that it had a compelling interest in obtaining their testimony in a grand jury hearing.⁶³ However the Court did not address the press' newsgathering practices in general, beyond noting that the press is not immune from laws of general applicability.⁶⁴ The case is ambiguous, perhaps purposely so, regarding the amount of protection, if any, that should be granted to the press for newsgathering conduct.⁶⁵ Moreover, *Branzburg* addressed only the impact of governmental requirements on the press and not the impact of private parties through civil actions.⁶⁶

The Court directly addressed the issue of private citizens' suits against the media in *Cohen v. Cowles Media Co.*,⁶⁷ a case that is a bit of a twist on *Branzburg*. In *Cohen*, a confidential source of information sued the publisher of a newspaper for breach of contract and for misrepresentation for *revealing* his

1316-17 (E.D. Ark. 1996); see also *In re Grand Jury Subpoena to Maguire*, 615 N.Y.S.2d 848, 849 (Westchester County Ct. 1994) (holding *PrimeTime Live* producers had no privilege to withhold out-takes of an interview with a murder suspect).

⁶² *Branzburg*, 408 U.S. at 695.

⁶³ See *id.* at 708.

⁶⁴ See *supra* notes 60-61 and accompanying text.

⁶⁵ In his concurring opinion, Justice Powell emphasized that the *Branzburg* holding should not be interpreted as inhibiting the press where legitimate First Amendment interests exist. See *Branzburg*, 408 U.S. at 710 (Powell, J. concurring) (asserting that a balance must be struck on a case by case basis between the reporter's right to withhold the name of a confidential source and the legitimate need of law enforcement); see also David F. Freedman, Note, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 COLUM. L. REV. 1298, 1307 (1984) (arguing that subsequent reliance on *Branzburg* by courts should be reconsidered because the case "both was ambiguous and relied on inapposite precedent"). See generally Eugene Cerruti, "Dancing in the Courthouse": *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237 (1995) (tracing the Court's interpretation of the Free Press Clause relating to the media's right of access to the news). The Supreme Court subsequently restricted the protection afforded the media in instances where the Court felt that the restrictions would have little impact on publication. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978) (holding that a search warrant for confidential files of a student newspaper only burdened publication "incremental[ly]," and was not sufficient to make a "constitutional difference").

⁶⁶ See *State v. St. Peter*, 315 A.2d 254, 255 (Vt. 1974) ("[T]he language and attitude of the *Branzburg* majority does not indicate an entire absence of concern for the newsgathering function so relevant to the full exercise of the First Amendment. The opinion confines itself to grand jury proceedings and trials.").

⁶⁷ 501 U.S. 663 (1991).

name, despite promising not to divulge it.⁶⁸ The Court held that the First Amendment did not bar the plaintiff's promissory estoppel claim against the newspaper's publisher.⁶⁹

Justice White, writing for the majority, emphasized that the Court's earlier decisions that granted constitutional protection to the press were limited to circumstances in which the press published "truthful, lawfully obtained information."⁷⁰ Justice White explained, however, that the First Amendment does not confer a right of the press to disregard laws of "general applicability."⁷¹ Finding that promissory estoppel is such a law, Justice White upheld Cohen's claim.⁷² Echoing *Branzburg*, the Court held that

⁶⁸ See *id.* at 666. The plaintiff, Dan Cohen, was a campaign worker for a Minnesota gubernatorial candidate, who had obtained potentially embarrassing documents about his candidate's opponent. See *id.* at 665. He contacted a number of media sources offering the documents in exchange for a promise of confidentiality. See *id.* Two newspapers printed the story, and, after much deliberation, also identified Cohen as the source of the information. See *id.* at 666. For a detailed description of the events leading up to the news company's decision to identify Cohen as the confidential source, see Daniel L. Levin & Ellen Blumberg Rubert, *Promises of Confidentiality to News Sources After Cohen v. Cowles Media Company: A Survey of Newspaper Editors*, 24 GOLDEN GATE L. REV. 423, 425-432 (1994). The newspaper's editors felt not only that the information provided by Cohen was important, but that Cohen's actions so close to the election itself were newsworthy. Additionally, the defendant justified breaching the agreement because Cohen's expectation of confidentiality "while so brazenly distributing the material was ridiculous." *Id.* at 431 (citation omitted). After his name was published as the source of the information, Cohen was fired from his job. See *Cohen*, 501 U.S. at 666.

⁶⁹ See *Cohen*, 501 U.S. at 665.

⁷⁰ *Id.* at 669. See, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that a newspaper was protected from liability for publishing the lawfully acquired name of a rape victim); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (holding publisher not liable for publishing a lawfully obtained juvenile delinquent's name); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (holding statute imposing criminal sanctions for publishing legally acquired confidential review proceedings unconstitutional); see also *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir.), *cert. denied* 395 U.S. 947 (1969) (holding that claim against a newspaper that lawfully receives documents that were unlawfully copied by source is not actionable). *But see Natoli v. Sullivan*, 606 N.Y.S.2d 504, 509 (Sup. Ct. 1993), *aff'd*, 616 N.Y.S.2d 318 (App. Div. 1994) (declining to extend *Smith* and *B.J.F.* to prohibit liability for publication for legally acquired, but illegally intercepted telephone conversations and stating, "[a]lthough the material published here was of public interest, it cannot be said to be material of paramount public significance or import"). The *Cohen* Court rejected the Minnesota Supreme Court's holding that the promises made by the newspapers arose "in the classic First Amendment context of the quintessential public debate in our democratic society." *Cohen*, 501 U.S. at 673 (Blackmun, J., dissenting) (quoting *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 205 (Minn. 1990).

⁷¹ *Cohen*, 501 U.S. at 670.

⁷² See *id.* (noting that promissory estoppel "does not target or single out the press").

“enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.”⁷³ Moreover, the Court found that an award of compensatory damages did not have constitutional significance and thus declined to balance the interests of the plaintiff and the value of the information.⁷⁴

Food Lion and *Cohen* are similar in some respects and different in others. In both cases the claims did not arise from the publication of the harmful material. Thus, the plaintiffs could have alleged both claims without publication or broadcast.⁷⁵ In

⁷³ *Id.* In dissent, Justice Blackmun argued that the circumstances in *Cohen* were indistinguishable from *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), in which the Court applied the *New York Times* “actual malice” standard to a public figure’s claim for damages against a magazine publisher based on the tort remedy of intentional infliction of emotional distress. *Hustler*, 485 U.S. at 56. Justice Blackmun believed that there was no discernable difference between the promissory estoppel claim in *Cohen* and the emotional distress claim in *Hustler*, and argued “[t]here is no doubt that Virginia’s tort of intentional infliction of emotional distress was ‘a law of general applicability’ [also] unrelated to the suppression of speech.” *Cohen*, 501 U.S. at 675 (Blackmun, J., dissenting).

One commentator agreed that the *Cohen* majority was at odds with *Hustler*, accusing the Court of “formalistic labelling [sic].” Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasion of Privacy*, 43 BUFF. L. REV. 1, 77 (1995) (summarizing the Court’s inconsistent application of the First Amendment as follows “if an action can be labelled as contract or possibly property, then the First Amendment is cast aside. In contrast, if the action acquires the label of tort, it faces strict scrutiny and presumptive unconstitutionality”). Similarly, Justice Souter did not believe “the fact of general applicability to be dispositive.” *Cohen*, 501 U.S. at 677 (Souter, J., dissenting). He favored a balancing test to “articulate, measure, and compare the competing interests involved in any given case to determine the legitimacy of burdening constitutional interests” *Id.*

Another commentator argued that the Court’s shift of emphasis away from the information’s impact on the public towards the applicability of the law in question, allowed plaintiffs to circumvent the requirement for actual malice successfully to bring a claim for damages for a media publication. See Kirtley, *supra* note 12, at 1085. “What began as an attempt to give news organizations breathing space to support the ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open,’ [has] turned into a license for the government to scrutinize and to regulate newsroom practices.” See Eric B. Easton, *Two Wrong Mock a Right: Overcoming the Cohen Maledicta that Bar First Amendment Protection for Newsgathering*, 58 Ohio St. L.J. 1135, 1137 (1997) (arguing that *Cohen* has led to a “long series of lawsuits that aim[] to circumvent the First Amendment protections that have been accorded to ... publication-dependent torts ... by focusing not on the publication or broadcast, but on the newsgathering process itself”). The media and its supporters undoubtedly feel that this has led to the proliferation of the so-called “trash torts.” *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

⁷⁴ See *Cohen*, 501 U.S. at 670 (holding that “the characterization of the payment makes no difference for First Amendment purposes”).

⁷⁵ See Joseph W. Ragusa, Comment, *Biting the Hand That Feeds You: The Re-*

Food Lion, the actual broadcast of the report was not relevant to the liability of the network.⁷⁶ The district court analogized the producers' conduct to the publisher's breach of its promise of confidentiality in *Cohen*, and determined that the producers' conduct violated "generally applicable criminal or civil laws in the name of newsgathering."⁷⁷ However, the court failed to recognize that gathering news is fundamentally related to the publication of the results of the investigation, thus holding the media liable for such conduct may potentially chill speech. By contrast, the enforcement of plaintiff's promissory estoppel claim in *Cohen* can be distinguished because it may actually give confidential informers more confidence that their identities will be protected, thus beneficially increasing the flow of information to the public.⁷⁸

B. Lower Court Cases

An early, widely influential case attaching tort liability to newsgathering conduct is *Dietemann v. Time, Inc.*⁷⁹ Two report-

porter-Confidential Source Relationship in the Wake of Cohen v. Cowles Media Company, 67 ST. JOHN'S L. REV. 125, 136 n.57 (1993) (noting that publication did not trigger liability in *Cohen*; it was only evidence of the breach of the agreement).

⁷⁶ Indeed, because *Food Lion* chose not to challenge the accuracy of the report, the jury never viewed the actual *PrimeTime Live* broadcast, nor were they informed of ABC's allegations against *Food Lion*. See Singer, *supra* note 15, at 58.

⁷⁷ *Food Lion*, 887 F. Supp. at 822.

⁷⁸ The Court in *Cohen* did not articulate this reasoning in their decision. However, one scholar opined that

[A] properly written decision in [*Cohen*] might well have reached the same result as did the Court, but the analytical process would have been drastically different, focusing on the impact of any ruling on the functioning and nature of society as it relates to the aspirations and goals of the First Amendment.

Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473, 1649 (1994).

⁷⁹ 449 F.2d 245 (9th Cir. 1971). In *Dietemann*, the Ninth Circuit expanded the scope of California's privacy law to include "clandestine photography" and secret recordation of the plaintiff in his home. *Id.* at 248. In an earlier case that did not address tort liability, reporters were held in criminal contempt for photographing a notorious killer at his sentencing, in violation of local law. See *In re Mack*, 126 A.2d 679 (Pa. 1956). The Pennsylvania Supreme Court rejected the reporters' First Amendment claims, holding that the freedom of the press "is subject to reasonable rules" to maintain decorum and order in court proceedings. *Id.* at 681. Moreover, the court felt that the privacy of the prisoner outweighed the press' rights in this instance. See *id.* at 693. The court stated that the photographs "[did] not inform the public as to any material facts[]" nor served any useful purpose other than to "pander to the lower tastes of some individuals," while the state had an important interest in maintaining decorum in court proceedings. *Id.* at 682. The court noted

ers employed by *Life* magazine, acting with the authority of the Los Angeles District Attorney's Office, used a ruse to gain entry into plaintiff's home, where defendants and authorities believed he was running a fraudulent medicinal "healing" practice.⁸⁰ The defendants surreptitiously photographed the plaintiff "examining" one of the reporters, and recorded their conversation with a hidden microphone.⁸¹ Police officers eventually arrested the plaintiff for practicing medicine without a license.⁸² The plaintiff later sued Time, Inc. claiming that the defendant's employees invaded his privacy when they entered his home without permission. The trial court awarded the plaintiff general damages of \$1000.⁸³

The Ninth Circuit rejected Time, Inc.'s claim of constitutional protection based merely on the subsequent publication of

that "[t]he essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery." *Id.* at 681 (quoting *Fitzgerald v. City of Philadelphia*, 102 A.2d 887, 891 (Pa. 1954)). One judge authored a concurring opinion, stating plainly that "while gathering of the news is an indispensable part of the privately owned newspaper business, it is important to point out that freedom of the press does not give a constitutionally protected right to gather news." *Id.* at 685. (Bell, J., concurring and dissenting in part) (citing *United Press Ass'ns v. Valente*, 123 N.E.2d 777, 778 (N.Y. 1954) (affirming a lower court order that excluded the press from a criminal proceeding)); see also *Tribune Rev. Publ'g. Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958) (upholding a state court rule that forbade taking photographs in courtrooms).

The elegant dissent in *Mack*, which could wisely be quoted by defenders of the press, argued that photography and newsgathering are both essential parts of freedom of the press:

Freedom of the press is not restricted to the operation of linotype machines and printing presses. A rotary press needs raw material like a flour mill needs wheat. A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees, or a lawn without verdure.

Freedom of the press means freedom to gather news, write it, publish it and circulate it. When any one of these integral operations is interdicted, freedom of the press becomes a river without water. Gathering of news embraces photographing of the news, printing of the photographs, and reproduction of the photographs in the finished newspaper.

Mack, 126 A.2d at 689 (Musmanno, J., dissenting).

⁸⁰ *Dietemann*, 449 F.2d at 245-46. Upon arriving at plaintiff's home, the reporters told plaintiff that they had been sent by his friend. See *id.*

⁸¹ See *id.* at 246. One of the reporters complained of a lump in her breast. The plaintiff diagnosed the cause of her condition to be "rancid butter" that the reporter had eaten years earlier. See *id.*

⁸² See *id.* The plaintiff subsequently plead no contest to two misdemeanor charges. See *id.* at 247.

⁸³ See *id.* at 245.

improperly acquired information.⁸⁴ The court held that defendant's use of subterfuge to gain entry into plaintiff's home to photograph him without his consent gave rise to a cause of action.⁸⁵ The court interpreted *Time, Inc. v. Hill* to support the proposition that the Constitution affords no protection to media defendants for unlawful pre-publication acts.⁸⁶ The court noted "[publication] is not the foundation for the invocation of a privilege. Privilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication."⁸⁷

The *Dietemann* court's reading of *Time v. Hill* is suspect. As previously discussed, in *Hill* the Supreme Court specifically refused to offer a view on whether the Constitution affords protection to reporters for improper newsgathering tactics.⁸⁸ *Dietemann* did, however, state the underlying principle upon which courts, including the *Cohen* and *Food Lion* Courts, have upheld plaintiffs' claims against the media:

The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.⁸⁹

The unique facts of *Dietemann* can bolster the arguments of media critics and supporters alike. Supporters of the press can point to the fact that although the plaintiff held himself out as a "healer," he was not a public figure.⁹⁰ Additionally, the reporters in *Dietemann* invaded the plaintiff's home to gather the story. Although in *Food Lion* the district court found that the reporters

⁸⁴ See *id.* at 249-50.

⁸⁵ See *id.* at 250.

⁸⁶ See *id.*

⁸⁷ *Id.* at 249-50.

⁸⁸ See *supra* notes 52-54 and accompanying text.

⁸⁹ *Dietemann*, 449 F.2d at 249.

⁹⁰ The district court held that *Dietemann* was not a public figure. See *Dietemann v. Time, Inc.*, 284 F. Supp. 925, 930-31 (C.D. Cal. 1968), *aff'd*, 449 F.2d 245 (9th Cir. 1971) (concluding that the plaintiff was not a public figure because he did not advertise his healing services and conducted his practice in his own home, which was not open to the public). On appeal, the Ninth Circuit addressed *Time's* argument that *Dietemann's* home was open to the public, but did not consider whether he was a public figure. See *Dietemann*, 449 F.2d at 247.

trespassed into private areas of the store, because the tortious conduct involved in *Food Lion* involved a public corporation, the Fourth Circuit may hold that the tortious conduct was not so intimately related to the injured party's privacy.⁹¹

On the other hand, media critics' arguments can be buoyed by the fact that in *Dietemann* the Ninth Circuit found liability even though the Los Angeles authorities approved the investigation. *Food Lion*, and indeed many investigative reports, are not backed by law enforcement and thus do not have the legitimacy that such express backing arguably casts.⁹²

⁹¹ See, e.g., *Desnick v. ABC, Inc.*, 44 F.3d 1345, 1352-53 (7th Cir. 1995) (distinguishing *Dietemann* in a claim of trespass by an eye clinic because the alleged intrusion occurred in an office open to the public rather than in the plaintiff's home); see also *Deteresa v. ABC, Inc.*, 121 F.3d 460, 466 (9th Cir. 1997) (dismissing a claim by a plaintiff who was surreptitiously taped answering questions about her observations of O.J. Simpson, because the facts did not "demonstrate a sufficiently offensive invasion of privacy for an intrusion claim to lie").

⁹² But see *Berger v. Hanlon*, 129 F.3d 505, 508 (9th Cir. 1997). In *Berger*, the United States Attorney's office authorized the Cable News Network ("CNN") to accompany agents of the United States Fish and Wildlife Service to the home of a suspected killer of bald eagles and hawks. The Ninth Circuit held that the cameras served no valid law enforcement purpose and that the reporters violated the plaintiff's right to privacy. See *id.* at 513-14; see also *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994) (upholding a criminal defendant's right to privacy action where camera crews filmed his home and family while accompanying law enforcement agents executing a search warrant); *United States v. Sanusi*, 813 F. Supp 149 (E.D.N.Y. 1992) (holding that plaintiff was entitled to the videotape made by reporters who accompanied law enforcement agents during a search of plaintiff's home). See generally Brad M. Johnston, Note, *The Media's Presence During the Execution of a Search Warrant: A Per Se Violation of the Fourth Amendment*, 58 OHIO ST. L.J. 1499 (1997).

Due to the proliferation of "reality based" television shows, in which camerapersons accompany public officials into homes to record arrests or rescues, there has been a corresponding increase in the number of suits brought by such citizens. Elsa Y. Ransom, *Home: No Place for "Law Enforcement Theatricals"—The Outlawing of Police/Media Home Invasions in Ayeni v. Mottola*, 16 LOY. L.A. ENT. L.J. 325, 325 (1996). The courts have generally upheld invasion of privacy and trespass claims and have followed dictum in *Branzburg* that "[n]ewsman have no constitutional right of access to the scenes of crime or disaster when the general public is excluded" *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972). In *Miller v. NBC*, 232 Cal. Rptr. 668 (Ct. App. 1986), the court held that valid claims were established against a television network whose reporters accompanied paramedics into the plaintiff's home and videotaped lifesaving measures being administered to her husband. See *id.* at 685. The court concluded that not allowing "unauthorized entry into the private premises of individuals like the Millers does not place an impermissible burden on newsgatherers, nor is it likely to have a chilling effect on the exercise of First Amendment rights." *Id.* Rather "[t]o hold otherwise might have extraordinarily chilling implications for all of us; instead of a zone of privacy protecting our secluded moments, a climate of fear might surround us instead." *Id.*; see also *Berger*, 129 F.3d at 512 (reversing the district court and concluding that the plaintiff was entitled to a reasonable expectation of privacy in buildings located on his property); *Ayeni v.*

The underlying rule of *Dietemann*, that the Constitution does not grant the media protection from liability for tortious conduct while gathering news, is clearly the majority rule.⁹³ Be-

CBS, Inc., 848 F. Supp. 362, 368 (E.D.N.Y. 1994), *aff'd, sub. nom.*, *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994) (upholding a claim for invasion of privacy brought against news reporters who accompanied police officers to plaintiff's home and filmed the officers executing a search warrant); *Shulman v. Group W Prods., Inc.*, 59 Cal. Rptr. 2d 434 (Ct. App. 1996), *review granted and opinion superceded by*, 934 P.2d 1278 (Cal. 1997) (holding that automobile accident victims had a claim for intrusion where the defendant videotaped the plaintiffs while they were being transported in an ambulance).

Some courts have carved out an exception to this rule in cases where the media defendant can demonstrate that the plaintiffs consented to the reporter's presence. *See, e.g.*, *Baugh v. CBS*, 828 F. Supp. 745, 757 (N.D. Cal. 1993) (dismissing trespass and intrusion claims against a network whose reporter misrepresented herself as being from the district attorney's office, because plaintiff had expressly consented to the intrusion, although it was fraudulently acquired); *Belluomo v. Kake TV & Radio, Inc.*, 596 P.2d 832, 844 (Kan. Ct. App. 1979) (holding that plaintiff's revocation of consent allowing defendant to photograph his restaurant became irrelevant after the photographing had occurred). *But see* *Copeland v. Hubbard Broad. Inc.*, 526 N.W.2d 402, 405 (Minn. Ct. App. 1995), *aff'd*, No. C7-97-733, 1997 WL 729195 (Minn. Ct. App. Nov. 25, 1997) (distinguishing *Baugh* because the plaintiff did not consent to have her home videotaped by a reporter impersonating a veterinary student). A limited amount of courts have held that the consent need not be express to be invoked. *See* *Florida Publ'g Co. v. Fletcher*, 340 So.2d 914, 917 (Fla. 1976), *rev'd in part*, 431 U.S. 930 (1977) (finding implied consent because it was "common usage, custom and practice for news media to enter private premises and homes to report on matters of public interest or a public event"). *But see* *Berger*, 129 F.3d at 516 (holding that the plaintiff did not consent to videotaping of his property, which did not serve a valid law enforcement purpose, even though federal agents had temporary control over plaintiff's property while executing a search warrant); *Miller*, 232 Cal. Rptr. at 683 ("One seeking medical attention does not thereby 'open the door' for persons without any clearly identifiable and justifiable official reason who may wish to enter the premises where the medical aid is being administered."); *Green Valley Sch. v. Cowles Fla. Broad., Inc.*, 327 So.2d 810, 819 (Fla. Dist. Ct. App. 1976) (holding that finding implied consent in such circumstances "could well bring to the citizenry of this state the hobnail boots of a [N]azi stormtrooper equipped with glaring lights invading a couple's bedroom at midnight with the wife hovering in her nightgown in an attempt to shield herself from the scanning TV camera"); *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 223 (Sup. Ct. 1981) (rejecting *Fletcher* and noting that such implied authority "does not extend by invitation, absent an emergency, to every and any other member of the public, including members of the news media"); *Prahl v. Brosamle*, 295 N.W.2d 768, 779 (Wis. Ct. App. 1980) (distinguishing *Fletcher* because, although defendant's reporter accompanied police to the scene of a shooting, no police had requested his help). For a general discussion of "sidekick journalists," see *Ransom, supra* note 92, at 350-53.

⁹³ *See, e.g.*, *Berger*, 129 F.3d at 511-12; *Galella v. Onassis*, 487 F.2d 986, 996 (2d Cir. 1973) (holding that there is "no threat to a free press in requiring its agents to act within the law"); *Wolfson v. Lewis*, 924 F. Supp. 1413, 1433 (E.D. Pa. 1996) (enjoining defendant news magazine from conducting surveillance and attempting "ambush interviews" of plaintiffs, HMO executives and their family and finding it "difficult to understand how hounding, harassing and ambushing the Wolfsons

cause it does not allow the courts to evaluate the newsworthiness of the information gathered, it provides a bright-line standard for courts considering media conduct.⁹⁴ The court in *Food Lion* relied on the *Dietemann* rationale in upholding the supermarket's claim.⁹⁵

The *Food Lion* court rejected ABC's argument that according to the Seventh Circuit's analysis in *Desnick v. ABC, Inc.*,⁹⁶ no trespass occurred because Food Lion's management consented to the reporter's presence.⁹⁷ In *Desnick*, the plaintiff sued ABC for

would advance the newsworthy goal [of exposing the high salaries of health care executives] ... or how such conduct would advance the fundamental policies underlying the First Amendment"; *Miller*, 232 Cal. Rptr. at 683 ("The clear line of demarcation between the public interest served by public officials and that served by private business must not be obscured."); *Le Mistral, Inc. v. CBS*, 402 N.Y.S.2d 815, 817 (App. Div. 1978) (reinstating an award for compensatory damages for trespass because "the First Amendment is not a shibboleth before which all other rights must succumb"); *Stahl v. Oklahoma*, 665 P.2d 839, 842 (Okla. Crim. App. 1983) (affirming sentences of newsmen convicted of trespass, emphasizing that the press does not have a constitutional right of access to places not available to the general public); *Prahl*, 295 N.W.2d at 781 (finding no constitutional privilege to trespass in gathering the news).

Some courts have granted greater First Amendment protection for newsgathering tactics, thus support exists for a dismissal of Food Lion's actions against ABC. See, e.g., *Desnick v. ABC, Inc.*, 44 F.3d 1345 (7th Cir. 1995) (dismissing a claim of trespass brought against ABC by plaintiffs depicted on *PrimeTime Live* as practitioners of fraud); *Allen v. Combined Communications*, 7 Media. L. Rep. (BNA) 2417, 2419 (Colo. Dist. Ct. 1981) (dismissing as "pieties" the language of *Dietemann* and *Branzburg* stating the press has no special rights to gather the news, and arguing that the dividing line between newsgathering and news publication is not as clear as those cases intimate: "In an age of instant communication who is to say whether a television reporter standing in a field reporting his/her story by means of one of those video devices ... is at that moment gathering the news or disseminating it?"); *Cassidy v. ABC, Inc.*, 377 N.E.2d 126, 132 (Ill. App. Ct. 1978) (dismissing an invasion of privacy claim by a police officer who was secretly filmed while arresting a model in a massage parlor because "no right to privacy against intrusion can be said to exist with reference to the gathering and dissemination of news concerning discharge of public duties[]" and public officials implicitly "consent to informing the general public by all legitimate means regarding his ... public duties."); *Costlow v. Cusimano*, 311 N.Y.S.2d 92, 96-97 (App. Div. 1970) (holding that plaintiff's invasion of privacy claim failed because defendant, "a radio station employee investigating the death of two children," was acting under the protection of the constitutional guarantee of freedom of the press when he entered plaintiff's property to photograph the plaintiff's children).

⁹⁴ See Walsh, et al., *supra* note 7, at 1126 (arguing that by undertaking an examination of the newsworthiness of the information gathered, "courts will surely be creating dangerously subjective and ad hoc exceptions").

⁹⁵ See *Food Lion v. Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1997 U.S. Dist. LEXIS 11344, at *15 (M.D.N.C. July 9, 1997).

⁹⁶ 44 F.3d 1345 (7th Cir. 1995).

⁹⁷ See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1222

a variety of claims arising from a *PrimeTime Live* exposé on its ophthalmic clinic.⁹⁸ Using hidden cameras, the network filmed reporters posed as patients receiving false diagnoses for cataracts from the clinic.⁹⁹ Judge Posner, who has been described as “no pro-press patsy,”¹⁰⁰ dismissed all claims against the network, including fraud and trespass, except the plaintiff's claim for defamation.¹⁰¹

In dismissing plaintiff's claim for trespass, the *Desnick* court held that the clinic effectively consented to the reporters' entry, notwithstanding the fact that the reporters acquired consent through misrepresentation.¹⁰² While conceding that a logical rationale for this rule is elusive, the court concluded that “[t]he fact is that consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable ... reasons to revoke his consent.”¹⁰³

Judge Posner similarly dismissed the clinic's claim of fraud,

(M.D.N.C. 1996).

⁹⁸ See *Desnick*, 44 F.3d at 1347. The producers of the series had contacted Dr. Desnick, the head of the clinic, about doing a story on his work, and reassured him that the investigation would not “involve ‘ambush’ interviews or ‘undercover’ surveillance and that it would be fair and balanced.” *Id.* at 1348.

⁹⁹ See *id.*

¹⁰⁰ Stuart Taylor, *Bad Food, Bad Taste, Bad Verdict; Huge Punitive Damages Against ABC in Food Lion Case are Unwarranted*, FULTON COUNTY DAILY REP., Feb. 7, 1997, available in LEXIS, News Library, Fulton File.

¹⁰¹ See *Desnick*, 44 F.3d at 1348-49. The court allowed the defamation charge to go forward, finding questions of fact regarding *PrimeTime Live's* allegedly false reporting of a “rigged” glare machine used by the plaintiffs. See *id.*

¹⁰² See *id.* at 1351-52. Although not cited, this logic parallels that of *Baugh v. CBS*, 828 F. Supp. 745 (N.D. Cal. 1993). See *supra* note 92. Judge Posner held that the tort of trespass was designed to protect “the inviolability of a person's property,” rather than that of the person. *Desnick*, 44 F.3d at 1352. Despite the misrepresentation, “the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land.” *Id.* at 1353. The court noted that a contrary rule would be ridiculous:

There must be *something* to this surprising result. Without it a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely claimed to be able to buy the same car elsewhere at a lower price would be a trespasser in the dealer's showroom.

Id. at 1351.

¹⁰³ *Id.*

which was based on the clinic's alleged reliance upon a series of assurances by the defendants.¹⁰⁴ The court characterized the network's statements as puffery, not to be taken seriously by intelligent professional physicians such as Dr. Desnick.¹⁰⁵ The court concluded that the "so-called fraud was harmless."¹⁰⁶

Although the court concluded that the network had not engaged in tortious conduct, it nevertheless discussed the relationship between the First Amendment and investigative reporting. The court noted that the investigative process is entitled to the same constitutional protections that the Supreme Court provides for defamation, "regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast."¹⁰⁷ Judge Posner further noted that if the content of the segment is not defamatory and "no established rights are invaded in the process of creating" the story, the targets of such investigative news reports have no legal remedy "even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly."¹⁰⁸ Thus, because ABC violated no state tort laws, the plaintiffs could not recover for the damages caused by the network's activities.

¹⁰⁴ See *id.* at 1354.

¹⁰⁵ See *id.*

Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promise, as any person of normal sophistication would expect. If that is 'fraud,' it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods.

Id. The court also relied on a quirk in Illinois law which, unlike most states, does not recognize promissory fraud as actionable unless the misrepresentations are part of a "scheme" to defraud. See *id.* (citing *Willis v. Atkins*, 106 N.E.2d 370, 377-78 (Ill. 1952)). The court noted that a scheme to investigate bad medical practices did not constitute a fraudulent scheme. See *id.* at 1355. However, the court intimated the holding would be the same if decided on the law of other jurisdictions. See *id.* at 1354 ("No legal remedies to protect [the plaintiffs] are required, or by Illinois provided.")

¹⁰⁶ *Id.* at 1355.

¹⁰⁷ *Id.* Because the court held that the network had not engaged in tortious conduct, the discussion of the constitutional implications is arguably dicta. See Andrew B. Sims, *Food Lion and the Media's Liability for Newsgathering Torts: A Symposium Preview*, 7 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 389, 398 n.44 (1997).

¹⁰⁸ *Desnick*, 44 F.3d at 1355. But see Eduardo W. Gonzalez, Comment, "Get That Camera Out of My Face!" *An Examination of the Viability of Suing "Tabloid Television" for Invasion of Privacy*, 51 *U. MIAMI L. REV.* 935, 948 (1997) (arguing that because the purpose of tabloid television is to entertain rather than to inform, it is not news, therefore, its producers should be prohibited from asserting a newsgathering privilege).

Judge Tilley distinguished the media's conduct in *Desnick* from the conduct in *Food Lion* because in the latter case, the reporters' misrepresentation granted them access to areas where only Food Lion employees were allowed.¹⁰⁹ Unlike *Desnick*, in which the reporters only entered public areas, the reporters' presence could be found to be "purely incidental to their jobs with *PrimeTime Live* and that they hoped to be admitted to areas of the store not open to the general public to 'steal' that which was otherwise not available to them—the images of those areas."¹¹⁰

This argument is not persuasive and ignores the constitutional implications of the purpose of the reporters' conduct. The reporters, as employees of ABC, could not benefit from "stealing" images from Food Lion, apart from contributing those images to a successful broadcast. To examine the reporters' actions apart from their newsgathering function ignores *Desnick's* principle that absent a violation of an established right, the First Amendment protects the media from liability.

Because the *Food Lion* court appears to have misread the *Desnick* decision, the court would have been on firmer analytical grounds if it had rejected the approach altogether, rather than attempting to limit its holding. It could have subjected the network to liability without ignoring constitutional implications. An approach imposing compensatory damages on the media for tortious conduct, if coupled with other protections, provides the best balance between protecting the rights of the media to gather information, and the rights of their targets not to have their possessory and personal rights violated. As discussed *infra*, the best means for providing these protections is not by providing a limited constitutional immunity for the press, but by limiting the damages recoverable to compensation for the direct harm caused by the tortious conduct, and barring the recovery of punitive damages.

II. MEDIA LIABILITY FOR PUBLICATION DAMAGES

Traditional tort jurisprudence allows an injured party to re-

¹⁰⁹ See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1222 (M.D.N.C. 1996) (finding that two ABC employees were working for Food Lion in order to gain access to restricted areas of the stores).

¹¹⁰ *Id.* The court also noted that in *Desnick*, the reporters only entered offices open to the public, while the *Food Lion* reporters were allowed to enter areas of the stores not generally open to the public. See *id.* at 1223.

cover all damages proximately caused by the tortfeasor's actions.¹¹¹ Therefore, barring any constitutional impediment to recovery, damages arising out of the publication of tortiously gathered information are a proximate result of the conduct and, as such, would be recoverable by the aggrieved party.¹¹² Whether the First Amendment provides such an impediment has not been addressed directly by the Supreme Court, and is in considerable dispute by the lower courts that have addressed the issue.¹¹³

Food Lion alleged damages resulting from the reporters' misrepresentation and trespass, as well as reputation damages resulting from the *PrimeTime Live* report.¹¹⁴ Relying on *Hustler Magazine, Inc. v. Falwell*,¹¹⁵ the court barred recovery of reputation damages.¹¹⁶ In *Hustler*, the Supreme Court held that a public figure alleging intentional infliction of emotional distress arising from the publication of injurious statements about the plaintiff cannot recover reputation damages without proving that the statement was false and made with actual malice.¹¹⁷ The

¹¹¹ See RESTATEMENT (SECOND) OF TORTS § 917 (1977).

¹¹² See James E. King & Frederick T. Muto, *Compensatory Damages for Newsgatherer Torts: Toward a Workable Standard*, 14 U.C. DAVIS L. REV. 919, 937 (1981).

¹¹³ Compare *Dietemann v. Time, Inc.*, 449 F.2d 245, 250 (9th Cir. 1971) (holding the defendant liable for all damages flowing from the publication of the ill gotten material and stating that allowing damages did not chill freedom of expression; it only chilled intrusive acts), with *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 756 n.5 (N.D. Cal. 1993) (dismissing claims based on the actual publication of the story, but noting that "these constitutional protections do not immunize pre-publication activities"), and *Costlow v. Cusimano*, 311 N.Y.S.2d 92, 97 (App. Div. 1970) (holding that publication damages were not recoverable because they did not "flow[] from the interference with possession").

There is a dispute concerning this issue amongst commentators as well. Compare *Walsh, et al.*, *supra* note 7, at 1141 ("[T]he only real question a court should ask is to what extent the injury resulting from the subsequent publication was, in fact, proximately caused by the initial, intentional tortious or unlawful act.") with *Randall J. Turk*, in *Symposium, Panel I: Accountability of the Media in Investigations*, 7 *FORDHAM INTEL. PROP. MEDIA & ENT. L.J.* 401, 424 (1997) (arguing that reputational damages in the *Food Lion* case "were caused not by ABC's conduct but by Food Lion's own labor and food handling practices" and thus should not be recoverable).

¹¹⁴ See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 822 (M.D.N.C. 1995).

¹¹⁵ 485 U.S. 46 (1988).

¹¹⁶ See *Food Lion*, 887 F. Supp. at 823. The court noted that if Food Lion proved its case to the jury, it would be able to recover non-reputational damages to the extent permitted under North Carolina law "without offending the First Amendment." *Id.* at 824.

¹¹⁷ See *Hustler*, 485 U.S. at 56. In *Hustler*, the Court held that a public figure must prove both the falsity of the material and actual malice to have a claim for in-

Food Lion court distinguished *Cohen v. Cowles Media Co.*,¹¹⁸ where, by contrast, the plaintiff was seeking to recover damages for breach of a promise, rather than injury to his reputation.¹¹⁹ One critic has argued that the court "unnecessarily blurred the distinction between reputation damages and publication damages," believing that *Food Lion* was entitled to all damages flowing from ABC's tortious conduct under traditional tort principles.¹²⁰ However, the correct reading of *Hustler* appears to be that plaintiffs are constitutionally proscribed from recovering reputation damages arising from the publication of the offensive material, unless the plaintiff can prove that the statements are defamatory under the *New York Times* actual malice standard.¹²¹

tentional infliction of emotional distress arising from the publication of the injurious material. *Id.* (referring to the standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). The case involved the claim of well known minister and political activist, Jerry Falwell, against *Hustler* magazine based on its satirical portrayal of him as having a drunken incestuous encounter with his mother in an outhouse. *See id.* at 47-48. In denying his claim, the Court "undertook a balancing test and determined that the First Amendment interest of the 'fundamental importance of the free flow of ideas and opinions on matters of public interest and concern' outweighed the state's interest in protecting public figures from emotional distress." *Food Lion*, 887 F. Supp. at 823 (quoting *Hustler*, 485 U.S. at 50). Because the plaintiff could not show the parody to be a false statement of fact, and thus was not defamatory, the emotional distress claim also could not be sustained. *Hustler*, 485 U.S. at 56-57; cf. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990) (holding that while defendant's statements about plaintiff's product constituted verifiable fact, plaintiff could not show the statements were false, thus product disparagement and tortious interference claims were dismissed).

¹¹⁸ 501 U.S. 663 (1991).

¹¹⁹ *See supra* notes 67-78 and accompanying text. The court felt that *Food Lion*'s claim for reputational damages arising from the broadcast were similar to a claim for damages based on the "generally applicable law of intentional infliction of emotional distress," and thus needed to meet the actual malice standard. *Food Lion*, 887 F. Supp. at 823. Therefore, *Food Lion* could not "recover any publication damages for injury to its reputation as a result of the *PrimeTime Live* broadcast." *Id.*

¹²⁰ Walsh, et al., *supra* note 7, at 1143. The author notes that under these traditional tort principles, "it seems clear that newsgathering defendants who commit an intrusion, trespass, act of fraud, or break a promise [as did ABC], with the intent of publishing information obtained thereby, could reasonably foresee both certain injuries caused by the antecedent unlawful act as well as additional losses flowing from the publication." *Id.* at 1136.

¹²¹ Although the *Food Lion* court seemed to indicate that the supermarket could recover nonreputational damages arising from the broadcast, it did not explain the scope of the damages. *See Food Lion*, 887 F. Supp. at 823. Since the court assumed that *Food Lion* was a public figure for purposes of constitutional analysis, this Comment takes no position as to whether the same protection should exist regarding reputational or nonreputational damages for private figure plaintiffs such as Mr. Dietemann or victims of intrusions by "sidekick journalists." *See supra* note 92 for a discussion of sidekick journalism.

The *Food Lion* court correctly analyzed the relationship between the two forms of damages as a blending, rather than a blurring.

The benefit of this approach is that it protects the dissemination of information regarding public figures, and is consistent with traditional First Amendment jurisprudence. By limiting damages to those arising from tortious conduct, the *Food Lion* court implicitly recognized that the interests that tort law aims to protect in imposing liability for trespass, fraud, and similar torts fundamentally differ from those interests recognized in imposing liability for defamation or false light invasion of privacy where publication is an essential element of the tort.¹²²

III. STRIKING A BALANCE BETWEEN THE INTERESTS

There have been a number of ideas proposed to address the uncertainties of the media's tort liability. While few commentators would disagree that the media should be liable for criminal or particularly egregious conduct, these approaches run the gamut from imposing liability on the media for any and all damages flowing from the tortious conduct,¹²³ to an almost blanket immunity for routine or even unorthodox newsgathering techniques.¹²⁴ Many theories fall between these two extremes, attempting to balance the competing interests of the media to disseminate the information and of the victims to recover for their harm.¹²⁵ This Comment proposes an approach that remains con-

¹²² See *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir. 1969) ("[I]ntrusion does not involve as one of its essential elements the publication of the information obtained. The tort is completed with the obtaining of the information by improperly intrusive means.") (footnote omitted); see also *King & Muto*, *supra* note 112, at 947 ("[T]he interests at stake at the time of publication may differ from those at stake when the published information is acquired").

¹²³ See *Walsh, et al.*, *supra* note 7, at 1144 ("[A]ll citizens and institutions ... [including the media] must take full responsibility for all the consequences of their transgressions, and pay the 'wages of sin.'"). See generally *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972) (noting that "the press may not circulate knowing or reckless falsehoods damaging to the private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution.").

¹²⁴ See *Easton*, *supra* note 73, at 1215 (proposing a standard requiring a showing of "deliberate wrongdoing in bad faith or outrageous conduct" in order to hold the media liable for newsgathering); *Kirtley*, *supra* note 12, at 1106 (noting that no one would suggest that routine newsgathering techniques would not be prohibited); cf. *Lyrissa C. Barnett*, Note, *Intrusion and the Investigative Reporter*, 71 *TEX. L. REV.* 433, 437-38 (1992) (advocating immunity from liability for newsgathering activities that promote the public welfare).

¹²⁵ More accurately, the balance is between the interest of the public to receive truthful information against the interest of the public not to have personal and

sistent with First Amendment jurisprudence and strikes an appropriate balance between these interests. This approach would allow victims to recover all compensatory damages arising directly from the media's misconduct, but would bar recovery of punitive damages from the media.¹²⁶

The benefit of a rule that does not limit the media's exposure to liability for tortious conduct is that it provides a bright-line rule to remedy aggrieved parties. There is popular appeal in holding the media to the same standard as the general public. Essentially, this is the standard that the *Food Lion* court used.¹²⁷ Proponents of this view feel that there is no need for the media to break laws in order to investigate a story.¹²⁸ However, if plaintiffs use these causes of action to recover from the media without being required to meet the strict requirements of defamation claims, the potential exists for an erosion of the existing protections for the media. The cases that follow this approach fail to recognize the impact that "neutral laws" have on the transmission of important information, and the chilling effect they might have on speech if applied blindly to the press.

If the *Dietemann* approach is followed, allowing *Food Lion* to

property rights damaged by the media. See, e.g., John L. Diamond, *Rethinking Media Liability For Defamation of Public Figures*, 5 CORNELL J.L. & PUB. POL'Y 289 (1996) (criticizing the limited government intrusion model of sanctioning the media only in extreme cases and proposing an approach that would limit damages to protect the media).

¹²⁶ Media protection from punitive damages is one of the grounds of ABC's appeal. See Memorandum in Support of Defendants' Motion for Judgment as a Matter of Constitutional Law on Punitive Damages, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 95-00513 (M.D.N.C. 1997) (cited in Sims, *supra* note 107, at 393 n.27).

¹²⁷ See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 821 (M.D.N.C. 1995) ("[E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.") (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991)).

¹²⁸ See, e.g., *Branzburg*, 408 U.S. at 691 ("It would be frivolous to assert ... that the First Amendment, in the interest of securing news or otherwise, confers a license on ... [a] reporter or his news sources to violate valid criminal laws.").

One of the attorneys representing Food Lion commented, "I don't recall that Woodward and Bernstein used fraud or hidden devices to gather their facts about Watergate." John Walsh, in *Counsel Connect Debates: Food Lion, Fraud, and Free Speech*, 147 N.J. L.J. 616 (1997). It is, however, unlikely that ABC would have been able to achieve the same results without an undercover story, as "[o]bservation of practice is absolutely essential." Singer, *supra* note 15, at 65 (quoting Kathryn Boor, professor of food microbiology at Cornell University). Testing of food samples, for example, would not be effective because it cannot determine the age of the meat, nor how it was contaminated. See *id.* Clearly the story would not have had the impact without the undercover video.

recover reputation damages out of the *PrimeTime Live* broadcast risks an even greater suppression of speech. In *New York Times, Co. v. Sullivan*, the Supreme Court held that a rule imposing unlimited liability on the press for defamation of public officials would not merely inhibit false speech, but chill all speech.¹²⁹ Similarly, a rule imposing unlimited liability for newsgathering would not only inhibit tortious conduct, but would inhibit legitimate investigation of information clearly in the public's interest to be disclosed.

The *Desnick* approach, which gives the media immunity unless an "established right" is violated, has the same advantage of providing a bright-line standard. This approach recognizes that the media does not have the same motivation as the general public in committing tortious conduct when the media commits tortious acts incidental to newsgathering. Therefore, imposing liability only when an established right is violated ensures that journalists do not desist from pursuing truthful investigative reporting.¹³⁰ This approach would require the adoption of a set of ethical standards for the media that could be enforced if the conduct violated "established rights."¹³¹ However, unless these rights are clearly and uniformly defined under state law, there is a risk of having rights defined by the arbitrary predilections of individual courts, thus losing the advantage of certainty of application.

Another standard would allow courts to use its decisionmaking capacity to determine liability while considering public policy factors. Under this approach, "[c]ourts ... balance the state interest that is served by the legal rule sought to be applied against the representative of the press arising out of the newsgathering activity against the First Amendment interest that is served by the acquisition of the information through that activ-

¹²⁹ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) ("The rule thus dampens the vigor and limits the variety of public debate.").

¹³⁰ See Kirtley, *supra* note 12, at 1109 (noting the disadvantage that the risk of liability may cause journalists to avoid pursuing truthful stories regarding matters of public concern).

¹³¹ See Dennis, *supra* note 2, at 698 (discussing the self-regulatory approaches to media accountability, including recommendations for codes of ethics); Robert E. Drechsel, *Media Ethics and Media Law: The Transformation of Moral Obligation Into Legal Principles*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 8 (1992) (noting the public's use of the media's moral obligations to legally bind the media to a code of ethics it espouses).

ity."¹³² The primary public policy cited for using this balancing test is that often there are areas of public concern which the government is unable or unwilling to investigate, or is itself suspected of wrongdoing.¹³³ Under this method, the courts factor in the newsworthiness of the investigated matter to determine whether there is an overriding justification for the techniques used by the media to gather the information.¹³⁴ This approach does not have the advantage of providing a bright-line standard for the courts to judge the media's conduct. As one critic argues, "[b]y measuring the newsworthiness of the subject matter against the plaintiff's right to privacy, courts will surely be creating dangerously subjective and ad hoc exceptions."¹³⁵ The fundamental problem is the difficulty of determining what constitutes a public issue important enough to justify granting the media immunity for tortious conduct.¹³⁶ A risk associated with

¹³² Lebel, *supra* note 46, at 1154.

¹³³ Numerous investigations have led to important disclosures which have often resulted in significant societal change. For example, at the turn of the century, Upton Sinclair's descriptions of working undercover in the Chicago meat packing industry in his novel *The Jungle* led to the founding of the Food and Drug Administration. See Upton Sinclair, *The Jungle* viii (Robert Bentley, Inc. ed., 1971) (discussing the impact of the work on the meat inspection industry); Page, *supra* note 4, at 17A. At about the same time, Nellie Bly went undercover to expose the deplorable conditions in insane asylums. See *id.* Wall Street Journal reporter Tony Horwitz won a 1995 Pulitzer Prize for his exposé on food handling violations, poor hygiene, and wretched working conditions in a chicken processing plant. See Susan Paterno, *The Lying Game*, AM. JOURNALISM REV., May, 1997, at 40, 40.

¹³⁴ See Walsh, et al., *supra* note 7, at 1126.

¹³⁵ *Id.*

¹³⁶ One solution to this problem is to "lay down broad rules of general application" as the Supreme Court did in the defamation context in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974). See Lebel, *supra* note 46, at 1154-55 (quoting *Gertz*, 418 U.S. at 343-44). There have been few explications on how this would be accomplished. One suggested approach is to excuse media conduct only in investigations of "work-related activities" where the media can show that they had probable cause to believe that the target was engaged in "illegal, fraudulent or potentially harmful conduct." Barnett, *supra* note 124, at 449. Under the probable cause standard, the media would have, for example, the same privilege as police to use ruses to expose illegal conduct. See Stuart Taylor, Jr., in *Counsel Connect Debates: Food Lion, Fraud, and Free Speech*, 147 N.J. L.J. 617 (1997). This would prevent the media from engaging in "fishing expeditions." Barnett, *supra* note 124, at 449. However, giving the media, as private citizens, similar powers as law enforcement is problematic. Such a standard, if taken at face value, would immunize the press for virtually all damages inflicted on a target. Furthermore, if the theory is expanded to include allegations of criminal activity by private persons, one can imagine the specter of "Sam Donaldson ... [stopping] drivers at a 'media sobriety checkpoint[]'" James Clark, in *Counsel Connect Debates: Food Lion, Fraud, and Free Speech*, 147 N.J. L.J. 617 (1997).

the balancing test approach is that courts may second-guess the media as to whether the investigation under scrutiny is an important issue. It does, however, adequately protect private individuals who might suffer injury as a result of the pursuit of a clearly unnewsworthy story.

A better and more practical approach would be to focus on the damages aspect of the media's liability, rather than the newsworthiness of the story. Limiting the recovery of public figures injured by investigative reports to direct compensatory damages, without allowing punitive damages, prevents the imposition of exorbitant damages where the plaintiff suffered little actual harm from the tortious conduct. Implicitly this would prevent business targets, such as Food Lion, from recovering large damage awards for trespass, unless the reporters stole trade secrets or caused serious physical harm to the target's property. At the same time, this approach would permit recovery for all damages directly related to the conduct. In cases where the media's conduct harms an individual person, the injured party would be able to recover damages for pain and suffering, thereby exposing the media defendant to significant liability in clearly egregious cases.¹³⁷

The purpose of punitive damages is to deter parties from committing wrongful acts and punish blameworthy conduct.¹³⁸ Because such damages are not intended to recompense injured parties for tortious acts, the Supreme Court in *Gertz* found them "wholly irrelevant" in defamation actions by private figures because plaintiffs need only show that defendants were negligent

Finally, this approach is flawed because it requires a media defendant faced with a lawsuit to justify his belief after the fact that probable cause existed. Faced with such a circumstance, a reporter may be forced to decide between incurring liability for unsubstantiated probable cause or revealing a confidential informant, thus risking liability under *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). See *supra* notes 67-78 and accompanying text.

¹³⁷ For an example where such liability might have existed, see *Wolfson v. Lewis*, 924 F. Supp. 1413, 1434-35 (E.D. Pa. 1996) which describes the harassment of a pregnant HMO executive and her husband (also an HMO executive) by a syndicated news program which allegedly was aware that the family was receiving anonymous death threats. The reporters were eventually enjoined from continuing to harass the family, but an invasion of privacy suit was dropped just prior to oral arguments of the appeal of the injunction, without any payment of money by the news program. See *U.S. Healthcare Execs Drop Lawsuit Against Inside Edition Investigative Reporters with no Payment by Defendants*, PR NEWSWIRE, Jan. 27, 1997, available in LEXIS, News Library, Curnws File.

¹³⁸ See *Gertz*, 418 U.S. at 350.

to recover.¹³⁹ While the *Food Lion* court found ABC liable for intentional tortious conduct rather than negligence, the principle in *Gertz* is analogous, and both factors that concerned the Court are present in the *Food Lion* case. The threat of litigation and the negative publicity that follows provide a great deal of incentive for the media to function within the boundaries of acceptable conduct. The assumption that the media will only be dissuaded from engaging in such conduct when they are punished with large punitive damage liability is dubious.¹⁴⁰ Furthermore, the reporters' conduct could not be considered "reprehensible" because the reporters were merely pursuing a successful investigative report and were not interested in harming Food Lion.

The Court in *Gertz* disallowed punitive damages in defamation cases because of concern for irrational jury verdicts.¹⁴¹ The Court has also consistently held that the press cannot be held liable for the publication of truthful information of public significance.¹⁴² Plaintiffs have attempted to sue for torts other than defamation in order to recover damages arising from the harmful publication of truthful information. Given the courts' difficulty differentiating between publication and newsgathering in determining the media's tort liability, it is unwise to force juries to make this distinction.

CONCLUSION

The strict proof requirements developed by the Supreme Court in defamation actions have forced parties injured by unfavorable but truthful reports to attempt to recover damages by suing for the newsgathering techniques employed by the media. This has led to confusion as to whether First Amendment safeguards can be extended to protect the media from such tort liability or whether generally applicable tort laws have no First Amendment constitutional significance. The *Food Lion* case rep-

¹³⁹ *Id.*

¹⁴⁰ This theory is perhaps evidenced by ABC's appeal of the punitive damages award even after the damages were reduced to a relatively modest amount. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 823 (M.D.N.C. 1995) (denying recovery of reputational damages).

¹⁴¹ "[J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz*, 418 U.S. at 350.

¹⁴² See *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring); *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976); *Cox Broad. Corp. v. Cohen*, 420 U.S. 469, 495 (1975).

resents an opportunity for the courts to address this issue. The circumstances did not involve obviously egregious media conduct, nor was the media clearly justified in the techniques employed. A sensible solution would hold the network liable for actual harm it caused in its pursuit of the story, but prevent Food Lion from recovering punitive damages or damages arising out of the broadcast itself. This result would be consistent with constitutional jurisprudence and would strike an appropriate balance between the competing interests of personal privacy and First Amendment freedoms.

*Charles C. Scheim**

* I would like to thank my father, Sherwood Scheim, for all of his support. This Comment is dedicated to the memory of my mother, Cecilia Borregaard Scheim, who passed away before she could see me begin my second career.

