Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines

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FOOD FOR THE LIONS: EXCESSIVE DAMAGES FOR NEWSGATHERING TORTS AND THE LIMITATIONS OF CURRENT FIRST AMENDMENT DOCTRINES

ANDREW B. SIMS*

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INTRODUCTION

Courts frequently observe that neither the common law nor the First Amendment will shield the media from liability for crimes or torts committed during the course of newsgathering. A highly publicized legal controversy has, however, prompted renewed debate on this issue. On January 22, 1997, in Food Lion v. Capital Cities/ABC, Inc., a North Carolina federal

1 The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The First Amendment has been made applicable to the states by incorporation through the Fourteenth Amendment Due Process Clause. See Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

2 See Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973) (holding that harassment of celebrity plaintiff by "paparazzo" was not immunized by First Amendment); see also Branzburg v. Hayes, 408 U.S. 665, 690 (1972) (holding that the First Amendment does not afford reporters a privilege against testifying before grand jury investigations into the criminal conduct of their sources); Dietemann v. Time, Inc., 449 F.2d 245, 249-50 (9th Cir. 1971) (holding media defendant liable for common law tort of invasion of privacy).

FOOD FOR THE LIONS

jury awarded the plaintiff $5.5 million in punitive damages against the media defendant, ABC, for fraud, trespass, and breach of employee duty of loyalty.\(^4\) ABC exposed itself to this liability by instructing its investigators to conceal their media connections, gain employment in plaintiff’s supermarkets, and surreptitiously film alleged unsanitary meat handling procedures. Part of the footage that the investigators obtained aired nationally on ABC’s PrimeTime Live program on November 5, 1992.\(^5\)

Although some of the Food Lion jurors apparently thought that punitive damages of $5.5 million would not mean much to a media giant like ABC,\(^6\) many commentators were stunned by the size of the award,\(^7\) which brought the case to the public’s immediate attention.\(^8\) Many decried the danger to investigatory journalism,\(^9\) as well as to techniques used to test for abuses ranging from racial discrimination to substandard restaurant cuisine.\(^10\)
investigatory media and its defenders would, however, have had far greater cause for concern if the trial judge had permitted the jury to consider Food Lion’s publication-predicated tort claims. The airing of the story forced Food Lion to close 88 stores and lay off more than 1000 employees, and caused the value of its stock to plummet by nearly one half. Food Lion originally sought compensatory damages of $5.5 billion, but following the trial judge’s instructions, the jury awarded Food Lion only $1402 in compensation.

To the relief of the investigatory media and its defenders, the Food Lion trial court subsequently granted ABC’s post-trial motion of remittitur to the extent of reducing the punitive damages award to $315,000. Nevertheless, both the punitive and compensatory damage awards in Food Lion continue to raise significant, unresolved legal issues. The Food Lion court applied the Supreme Court’s recent ruling in BMW of North America, Inc. v. Gore to reduce the punitive damages award. Under BMW, the first and most significant of the factors to be weighed is the “reprehensibility” of the tort. It is, however, unclear whether in assessing reprehensibility it is appropriate to consider the tortfeasor’s intention of exposing matters of serious public con-
cern to public scrutiny. Moreover, the standards set forth under *BMW* are  
general rules applicable to cases in which no fundamental rights are at  
sta**ke**.\(^\text{20}\) Because First Amendment issues are implicated in *Food Lion*  
and other cases involving punitive damage awards for newsgathering torts,  
the standard of review should arguably be more rigorous.\(^\text{21}\)

Food Lion argued that its enormous financial losses were proximately  
caused by the *PrimeTime Live* broadcast and should properly have been  
include**d** in its compensatory damage award,\(^\text{22}\) a position that does find some  
support in common law precedent.\(^\text{23}\) Although Food Lion did not sue ABC  
for defamation,\(^\text{24}\) it argued that given the nature of the defendants’ conduct,  
it should be permitted to recover for damages to its reputation without having  
to prove the falsity of the broadcast, let alone ABC’s knowledge of any fal-

\(^{20}\) Where a fundamental liberty is not burdened, due process requires only that the law  
be rationally related to the furtherance of a valid or legitimate government purpose. *See*  
right nor targets a suspect class, we will uphold the legislative classification so long as it  
bears a rational relation to some legitimate end.”); United States v. Carolene Products  
Co., 304 U.S. 144, 152 & n.4 (1938) (stating that legislation is to be presumed constitu-
tional where it “rests upon some rational basis” but noting that this presumption may be  
narrower where constitutional rights are at stake). *But see Food Lion*, 984 F. Supp. at 923,  
932 (holding that ABC was not entitled to any First Amendment immunity from punitive  
damages).

\(^{21}\) *See infra* Part III.E.

\(^{22}\) *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 822 (M.D.N.C.  
1995).

\(^{23}\) *See infra* Part III.D.1.

\(^{24}\) Food Lion asserts that it did not sue for defamation because the statute of limitations  
had run before it could gather evidence sufficient to meet its burden of proving that ABC  
acted with “actual malice.” *See* Paul Nowell, *ABC Challenges Punitive Damages Awarded to  
Food Lion*, ASSOCIATED PRESS, Feb. 24, 1997, available in 1997 WL 4857260; Singer,  
*supra* note 5, at 58; *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)  
(requiring public figure defamation plaintiffs to prove “actual malice”). Outside of court,  
however, Food Lion continues to contest the truthfulness of the *PrimeTime Live* broadcast,  
asserting that it unsuccessfully attempted to add a libel claim to its lawsuit in 1995. *See*  
Singer, *supra* note 5, at 65. In response, ABC has challenged Food Lion to lift the  
“confidential” designation on internal documents that ABC obtained from Food Lion in  
discovery. *See id.* ABC contends that these documents support its claim that the broadcast  
was substantially true. *See id.* Food Lion claims that ABC depicted it in a false light by  
suggesting that the televised footage of unsanitary food-handling practices represented  
company policy rather than violations thereof. *See id.* at 61. Food Lion further emphasizes  
that these were incidental abuses found at only three of nearly 900 Food Lion stores; that  
ABC selectively edited some 45 hours worth of tapes to produce a ten-minute segment de-

\(^{25}\) *See Food Lion*, 887 F. Supp. at 820-21.
protections afforded by the First Amendment to the publication itself,\(^2\) including the requirement that defendants prove actual malice to establish defamation claims as required by *New York Times Co. v. Sullivan*.\(^2\) Food Lion argued that newsgathering torts “taint” the ensuing speech and divest it of the First Amendment protections that would otherwise shield it.\(^2\)

Was the punitive damage award excessive? Should Food Lion have been compensated for the publication damages? The two questions are interrelated because it was the great disparity between Food Lion’s punitive and compensatory awards that made the former especially vulnerable to reversal under *BMW*.\(^2\) The size of the punitive damage award suggests that although the jury was able to segregate and exclude publication damages from the compensatory damage award, it may to some degree have unconsciously factored the publication effects into the punitive damage award.

If these critical questions with regard to the propriety of damages in *Food Lion* remain unresolved, so too does the very issue of ABC’s tort liability. Should the media be liable at all for newsgathering torts of the kind that ABC and its reporters committed? Might not such investigatory activity be deemed to be privileged under state common law or, alternatively, protected by the First Amendment?\(^3\)

Although the Supreme Court has not yet squarely addressed the constitu-

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\(^2\) See *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that civil liability could not be imposed on a newspaper that published the name of a sexual assault victim in violation of a state privacy law when the information was truthful and lawfully obtained and where more narrowly tailored means were available to protect the interest at stake); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 349 (1974) (holding that states are free to define the standard of liability applicable in defamation suits brought by private individuals but that an award of punitive or presumed damages must be based on a knowledge of falsity or reckless disregard for the truth); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (holding that states cannot constitutionally permit “false light” invasion of privacy claims arising out of publication of matters of public interest to proceed unless they are published either with knowledge of falsity or with reckless disregard for the truth); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that the First and Fourteenth Amendments prohibit states from awarding defamation damages to public officials except in cases where the official can prove that the defamatory statements were made with “actual malice”).

\(^2\) 376 U.S. 254 (1964).

\(^2\) See *Food Lion*, 887 F. Supp. at 820-21.

\(^2\) The “disproportionality” of the punitive damage award to the compensatory damage award in *Food Lion* is staggering, nearly 4000:1. In *BMW*, the Court held that a ratio of 500:1 was unconstitutionally disproportionate. See *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1602-03 (1996). (describing a 500:1 ratio of punitive to compensatory damages as “breathtaking”). Even after punitive damages were remitted in *BMW*, the punitive award still stood at a nearly 225:1 ratio with respect to the compensatory damages award.

\(^3\) See infra Part I.
tional issue, it has held that the First Amendment does not provide the media
with any special immunity from the application of state contract and promis-
sory estoppel rules.\textsuperscript{31} It has also suggested in dicta that the same would be
true as to state tort laws of general applicability.\textsuperscript{32} Lower court decisions
have generally rejected the idea of extending either First Amendment protec-
tion or common law privilege to newsgathering torts.\textsuperscript{33}

Chief Judge Richard Posner of the Seventh Circuit Court of Appeals took
a very different tack in \textit{J.H. Desnick, M.D., Eye Services, Ltd. v. Capital
Cities/ABC, Inc.},\textsuperscript{34} a 1995 decision involving the same defendant and similar
claims as in \textit{Food Lion}. In \textit{Desnick}, ABC exposed itself to liability when, in
the course of gathering material for a \textit{PrimeTime Live} broadcast, it sent
"test" patients carrying hidden cameras into clinics where ophthalmologists
were suspected of performing unnecessary cataract surgery.\textsuperscript{35} Noting that
most of the precedents had involved trespass and intrusion into private homes
rather than businesses,\textsuperscript{36} and construing state tort law narrowly,\textsuperscript{37}
the court dismissed the fraud and trespass claims.\textsuperscript{38} The \textit{Desnick} court's innovative
approach of reading the torts small and distinguishing between the home and
the workplace as targets of surreptitious media investigation was rejected in
\textit{Food Lion}. Reasoning that hiring employees is different from accepting pa-
tients or other customers, the trial judge in \textit{Food Lion} distinguished \textit{Food
Lion} from \textit{Desnick} and declined to dismiss the fraud and trespass com-
plaints.\textsuperscript{39}

This Article argues that the focus of the debate should not be on limiting
media liability for newsgathering torts, but rather on preventing the award of

\begin{itemize}
\item \textsuperscript{31} \textit{See} Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (holding that the First
     Amendment does not bar the application of state promissory estoppel law to the press).
\item \textsuperscript{32} \textit{See}, \textit{e.g.}, \textit{id.} at 669 ("[G]enerally applicable laws do not offend the First Amend-
     ment simply because their enforcement against the press has incidental effects on its ability
to gather and report the news."); Branzburg v. Hayes, 408 U.S. 665, 691-92 (1972) ("The
[First] Amendment does not reach so far as to override the interest of the public in ensuring
that neither reporter nor source is invading the rights of other citizens through repre-
hensible conduct forbidden to all other persons.").
\item \textsuperscript{33} \textit{See}, \textit{e.g.}, Dietemann v. Time, Inc., 449 F.2d 245, 249-50 (9th Cir. 1971) (holding
that the First Amendment provides the press with no immunity from liability in tort); Le
Mistral, Inc. v. CBS, 402 N.Y.S.2d 815 (App. Div. 1978) (holding that the First Amendment
does not insulate the media from tort liability and that, under state law, punitive
damages are a permissible sanction when there is "willful or intentional misdoing, or
reckless indifference equivalent thereto").
\item \textsuperscript{34} 44 F.3d 1345 (7th Cir. 1995).
\item \textsuperscript{35} \textit{See} \textit{id.} at 1348.
\item \textsuperscript{36} \textit{See} \textit{id.} at 1352-53.
\item \textsuperscript{37} \textit{See} \textit{id.} at 1352-55.
\item \textsuperscript{38} \textit{See} \textit{id.}
\item \textsuperscript{39} \textit{See} Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1217, 1224
(M.D.N.C. 1996).
\end{itemize}
excessive damages for such torts. It urges courts to recognize a First Amendment immunity from excessive damages, one that is broadly analogous to the protection the First Amendment extends to alleged defamations relating to matters of public concern.\textsuperscript{40} The Article takes the position that under certain conditions, the award of punitive damages for newsgathering torts should be barred entirely. It also argues that publication damages should be excluded from the assessment of compensatory damages for the underlying newsgathering tort and that any award of compensatory damages be limited to "actual injuries" sustained from the tort proper.\textsuperscript{41}

The proposed damage limitation model illuminates some significant limitations of, and incongruities in, current First Amendment doctrines.\textsuperscript{42} The Article examines the Supreme Court's ruling in \textit{Cohen v. Cowles Media Co.},\textsuperscript{43} and rejects the argument that \textit{Cohen} provides support for the proposition that the publication of information resulting from newsgathering torts be viewed as constitutionally "tainted." The approach in \textit{Cohen} is distinguishable because that case involved a promissory estoppel claim rather than a non-criminal newsgathering tort. The Article also examines First Amendment doctrine that prevents courts from circumventing the constitutionalized defamation rules of \textit{Sullivan} and \textit{Gertz}\textsuperscript{44}—a doctrine that the Seventh Circuit applied in \textit{Desnick}\textsuperscript{45} and that the \textit{Food Lion} court invoked in order to shield ABC from liability for publication damages.\textsuperscript{46} The reach of this doctrine is potentially so expansive that many judges do not appear comfortable resorting to it unless some nexus to classic defamation exists, such as falsity or injury to reputation. Thus, challenged speech that looks more like defamation might receive more judicial protection than speech which does not involve any hint of defamation.

The Article concludes that speech which is of public concern and which is substantially truthful should be conditionally afforded the same level of protection as was made available in \textit{Florida Star v. B.J.F.},\textsuperscript{47} notwithstanding the fact that the Court's later decision in \textit{Cohen} suggests that the publication of tortiously acquired information might not be entitled to such protection. The Article urges that the rule of \textit{Florida Star}, as well as that of \textit{Gertz} and \textit{Sullivan}, be modified to require, as a precondition to First Amendment protection

\textsuperscript{40} See \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 349 (1974) (holding that an award of punitive damages in a defamation suit involving matters of public concern must be accompanied by a showing of either knowledge of falsity or reckless disregard for the truth).

\textsuperscript{41} See infra Part III.D.

\textsuperscript{42} See infra Part IV.


\textsuperscript{44} See infra Part IV.B.

\textsuperscript{45} See infra Part I.B.2.b.


\textsuperscript{47} 491 U.S. 524 (1989). See infra Part IV.A.
of tortious newsgathering, that the information reported be of **significant** public concern. It further proposes that when the media intrudes into areas in which individuals possess heightened expectations of personal privacy, such as the home, the information obtained must be of the **most serious** public concern in order to qualify for such protection.

Part I of this Article briefly reviews the arguments both for and against protecting the media from liability under either the common law or the First Amendment. Part II compares newsgathering torts to constitutional defamation law in order to show that, given the goals of the First Amendment, extending some degree of constitutional protection to the media from tort liability would be justified. Part III describes the general principles of a proposed rule of damage limitation, explained by broad analogy to the rule in *Gertz*. It describes an approach often adopted at common law by which damages from publication are included in the calculation of damages for the underlying newsgathering tort and discusses the possibility that juries might, either subconsciously or willfully, adopt a similar approach. Part IV discusses the proposal to limit excessive damages for newsgathering torts in light of current First Amendment doctrine. It then explains the limitations of these doctrines and proposes modifications.

### I. DOES THE FIRST AMENDMENT OR THE COMMON LAW SHIELD THE MEDIA FROM CIVIL LIABILITY FOR NEWSGATHERING TORTS?

#### A. The Majority Rule: No Privilege or Immunity

Any media claim to a First Amendment immunity from civil liability for newsgathering torts is dubious given the substantial and weighty legal precedent to the contrary. Although the Supreme Court has not yet squarely addressed the issue, it stated in dicta a quarter of a century ago that the First Amendment “does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.”

Subsequently, in *Cohen v. Cowles Media Co.*, the Court held that a newspaper could be liable under a theory of promissory estoppel when it violated a pledge of anonymity in exchange for information, notwithstanding the fact that the story the newspaper printed was both true and of public concern. Noting that the media were subject to state tort and contract laws of general applicability, the Court reemphasized that the media “has no special privilege to invade the rights and liberties of others.”

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50 *See id.* at 665.
51 *See id.* at 669-70.
52 *Id.* at 670 (quoting Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937)).
precedents more closely on point with *Food Lion* also adhere to the general rule that the First Amendment will not protect the media from liability for crimes and torts committed during the newsgathering process.53

In *Dietemann v. Time, Inc.*,54 the Ninth Circuit affirmed a judgment for invasion of privacy and intrusion when reporters for Life magazine gained admittance to the home of a "healer with clay, minerals and herbs" by means of deception. The reporters took photographs and voice recordings that were subsequently used in a story about the plaintiff, who was later arrested for practicing medicine without a license.55 The *Dietemann* court specifically rejected Life magazine's First Amendment defense, stating that:

We agree that newsgathering is an integral part of news dissemination. We strongly disagree, however, that the hidden mechanical contrivances are "indispensable tools" of newsgathering . . . . 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.56

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53 See Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973) (holding that the First Amendment does not afford the paparazzi any immunity from state tort law where the tortious conduct was "unwarranted and unreasonable"). Some courts have recognized a limited media privilege against trespass claims where reporters enter a crime or accident scene located on private property at the invitation or in the company of police or fire department authorities. Courts which recognize such a privilege do so on a theory of implied consent from longstanding custom and usage. See, e.g., Florida Publ'g Co. v. Fletcher, 340 So. 2d 914, 918-19 (Fla. 1976) (holding that, by virtue of longstanding custom, a newspaper was not liable for trespass when its reporters entered private premises at the invitation of police and fire department officials to view the scene of a fire). In a case decided by a Florida District Court of Appeals only a few months prior to the decision of the Florida Supreme Court in *Fletcher*, the court rejected a "custom and usage" defense to a trespass claim where the media defendant had, at the invitation of the police, accompanied officers onto private property as they executed a search warrant. See Green Valley Sch., Inc. v. Cowles Florida Broad., Inc., 327 So. 2d 810, 819 (Fla. Dist. Ct. App. 1976), reh'g denied, 340 So. 2d 1154 (Fla. 1976). The Florida Supreme Court, which had originally granted review in this case, later discharged the writ of certiorari as improvidently granted. See id. Although the court did not explain its reason for discharging the writ, it is clear that *Green Valley* presented no conflict with the court's holding in *Fletcher* because there was no room for a finding of implied consent in *Green Valley*. See id.; cf. Anderson v. WROC-TV, 441 N.Y.S.2d 220 (Sup. Ct. 1981) (holding that a defense of implied consent arising from custom or usage is not available to trespassing reporters); Prahl v. Brosame, 295 N.W.2d 768, 780-81 (Wis. Ct. App. 1980) (distinguishing *Fletcher*).

54 449 F.2d 245 (9th Cir. 1971).

55 See id. at 246.

56 Id. at 249 (footnote omitted).
In the New York case of *Le Mistral, Inc. v. CBS*, the defendant had directed a reporter and camera crew to visit restaurants cited for health code violations. Without seeking the plaintiff restaurant's permission, the crew entered the premises at dinner hour with cameras rolling and lights shining. The appeals court upheld an award of $1200 in compensatory damages but ordered a retrial on an award of $250,000 in punitive damages. Although both cases involved intrusions onto business premises, *Le Mistral* differed from *Food Lion* because it involved a noisy and obstreperous intrusion by the media for purposes of publicizing the results of a government investigation rather than an undercover media investigation.

B. *Arguments In Favor of Non-Liability: J.H. Desnick*

The strongest and most frequently cited judicial support for a media privilege or immunity from liability for minor newsgathering torts is the Seventh Circuit decision in *J.H. Desnick, M.D., Eye Services, Ltd. v. ABC*, authored by Judge Richard A. Posner. Both the common law tort and First Amendment analyses in *Desnick* warrant special attention.

1. *Desnick*’s Common Law Tort Analysis

The Desnick Eye Center, its owner, Dr. Desnick, and two surgeons employed by the center sued ABC for trespass, fraud, defamation, and violation of state and federal wiretap statutes. The suit arose out of a *PrimeTime Live* broadcast suggesting that employees at the multi-state ophthalmology practice recommended and performed unnecessary cataract surgery in order to gain unjust enrichment. The plaintiffs alleged that ABC’s reporters gained access to Desnick’s Chicago clinic under false pretenses by assuring Dr. Desnick that there would be no “ambush” interviews or undercover surveillance and by promising that the program would be “fair and balanced.” Meanwhile, ABC sent seven test patients armed with concealed cameras to Desnick Test Centers in Wisconsin and Indiana.

Although the court would not dismiss the defamation count, it disposed of the plaintiffs’ remaining four claims by construing them narrowly. The court dismissed the trespass claims on the grounds that there had been ex-

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58 The Appellate Division ordered a retrial of the issue of punitive damages because the trial judge erroneously excluded testimony as to CBS’s motive and purpose for entering the restaurant. See id. at 817-18.
59 44 F.3d 1345 (7th Cir. 1995).
60 See id. at 1347, 1353.
61 See id. at 1348.
62 Id.
63 See id.
64 See id. at 1351.
65 See id. at 1351-55.
press consent to the entry and that the question of whether consent was fraudulently obtained was irrelevant to the viability of a common law action for trespass. The state privacy tort claims were dismissed because the PrimeTime Live broadcast did not reveal any details concerning the lives of the individual plaintiffs. Nor was there any intrusion into "legitimately private activities" such as private conversations: the only conversations recorded were conversations with the test patients themselves. The claims based on alleged violations of federal and state wiretapping statutes were dismissed because the federal statutes permit one party to a conversation to record conversations except when the party's purpose in doing so is to commit a crime or a tort. The Wisconsin statute additionally bars wiretapping for the purpose of committing any other "injurious act."

The court concluded that ABC had not ordered the test patients into the clinics for illegal purposes but only "to see whether the Center's physicians would recommend cataract surgery on the testers." The court noted that although the actual broadcast may have been defamatory, this was irrelevant to the question of the defendant's liability under the wiretapping statutes because there was "no suggestion that the defendants sent the testers into the [plaintiffs'] offices for the purpose of defaming the plaintiff . . . ." The court dismissed the fraud claims as well because, despite the fact that ABC gained access to Desnick's Chicago clinic by means of false promises, the court found no "scheme to defraud," a prerequisite for recovery under the state's "promissory fraud" law. "An elaborate artifice of fraud is the central meaning of a scheme to defraud through false promises. The only scheme here was a scheme to expose publicly any bad practices that the investigative team discovered, and that is not a fraudulent scheme."

The court concluded by stating that:

[If the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it (for the media have no general immunity from tort or contract liability . . . ), then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly.]

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66 See id. at 1351.
67 See id. at 1353.
68 Id.
71 Desnick, 44 F.3d at 1353.
72 Id.
73 See id. at 1354-55.
74 Id. at 1355.
75 Id.
Although the court explicitly affirmed that media have no general immunity from tort or contract liability, the broad language used in the opinion might be viewed as containing the seeds for a limited media "privilege" to commit minor newsgathering torts free of liability. Referring to the fact that the test patients entered offices that were open to anyone for professional consultations, the court stated that "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."\(^7\)

The court distinguished *Dietemann* on the grounds that it had involved intrusion into a home as opposed to a business.\(^7\) The court also distinguished *Le Mistral*, where the court found that the reporters' activities were disruptive, from the facts in *Desnick*.\(^7\) The court then drew a strong analogy to cases upholding the legality of "testers" posing as prospective home buyers to gain evidence of housing discrimination.\(^7\)

Nevertheless, *Food Lion* presents a more difficult case than *Desnick* for reading the trespass tort small because *Food Lion* did not involve prospective customers but prospective employees—employees who misrepresented themselves on their employment applications and otherwise betrayed their "employer's" confidence in them. A property owner who holds property open to customers might not be permitted to complain of trespass when "customers" enter the premises for reasons at odds with the invitation, but a property owner as employer may still have the right to insist upon a duty of loyalty from its employees. Judge N. Carlton Tilley, Jr., the North Carolina federal district court judge presiding over the *Food Lion* trial, held that the case before him could be distinguished from *Desnick* on this ground. Denying ABC's motion for summary judgment,\(^8\) Judge Tilley emphasized that, unlike *Desnick*, which involved media entry into areas to which anyone expressing a desire for ophthalmic services had access, *Food Lion* involved granting the *PrimeTime Live* reporters access to areas from which the general public was excluded. These reporters, Judge Tilley reasoned, were really the employees of ABC, and a reasonable jury might find that their presence at *Food Lion* was purely incidental to their jobs with *PrimeTime Live*.\(^8\)

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\(^{7}\) *Id.* at 1353.

\(^{7*}\) *See id.* at 1352-53.

\(^{7*}\) *Id.* at 1352.

\(^{7*}\) *See id.* at 1353 (citing Northside Realty Assocs., Inc. v. United States, 605 F.2d 1348, 1355 (5th Cir. 1979)).


\(^{8}\) *See id.* Ultimately, the *Food Lion* jury found the ABC reporters liable not only for fraud and trespass, but also for breach of the duty of loyalty they owed to Food Lion as employees. Judge Tilley had earlier ruled that the courts of both North and South Carolina would recognize such a cause of action and therefore denied defendants' motion to dismiss. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1228-30
Thus, notwithstanding Desnick, the general strategy of allowing media defendants to escape liability for newsgathering torts by reading traditional tort actions small appears to have judicially imposed limitations. From a broader jurisprudential standpoint, if courts read tort law ever more narrowly in newsgathering tort cases while at the same time purporting to adhere to the idea that the media remain subject to laws of general applicability, it may create problems of credibility. To avoid such problems, judges must do more than merely pay lip-service to the principle that the media "has no special privilege to invade the rights and liberties of others." 82

2. Desnick's First Amendment Analysis: Adhering to Gertz and Sullivan

In addition to intimating that any media privilege must be based on a reevaluation of the interests that lie at the heart of historic common law tort actions, the Desnick court also suggested that claims seeking to hold media defendants liable for newsgathering torts be viewed with skepticism. The court recognized that such claims could serve as a means of circumventing the constitutional safeguards that surround defamation law. 83

(M.D.N.C. 1996). A cause of action for breach of this duty of loyalty was first recognized under North and South Carolina law by the court in Food Lion. See Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956, 959 n.2 (M.D.N.C. 1997). The jury found that the reporters violated this duty by "failing to make a good faith effort toward performing the job requirements of [their] employer Food Lion as a result of the time and attention [they were] devoting to [their] investigation for ABC." and by "performing specific acts on behalf of ABC which proximately resulted in damage to Food Lion." Id. Because the court found that state common law implied a duty of loyalty in the employer/employee relationship, this case sounded in both contract and tort. See generally W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 92, at 655 (5th ed. 1984) (defining the tort of breach of contract); 17 AM. JUR. 2D Contracts § 732 (noting that states may modify substantive law to permit recovery in tort for breach of contract).


83 Under the rule of New York Times Co. v. Sullivan, the First Amendment limits the ability of public figures to recover for defamation. See 376 U.S. 254 (1964). In order to establish liability for defamation under Sullivan, public figures must prove "actual malice"—defined as "knowledge of falsity or reckless disregard of the truth." Id. at 279-80. They must do so with "convincing clarity." Id. at 285-86. Where defamatory speech relates to matters of public concern, plaintiffs who are not public figures must still prove "actual malice" in order to recover presumed or punitive damages. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). Non-Sullivan plaintiffs need only prove compensatory damages by whatever standard—apart from injury without fault—that the state may set. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (holding that plaintiffs need not allege "actual malice" in order to recover presumed or punitive damages for defamatory speech addressing matters of purely private concern). All defamation plaintiffs must prove falsity by a preponderance of the evidence if the speech in question relates to matters of public concern. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986). "Substantial truth" is a defense. See Masson v. New Yorker
When speech is constitutionally protected, the courts should also protect the means of acquiring the content of that speech if such protection is necessary to prevent plaintiffs from circumventing the First Amendment. Although Judge Posner’s remarks in Desnick might be viewed as dicta, they nevertheless strongly suggest that the First Amendment provides the media with at least some protection from liability for newsgathering torts.

If Desnick is read to imply that the First Amendment’s protection of speech itself requires protection of the underlying newsgathering tort on an “anti-circumvention” theory, it is important to ask what limiting principle could be applied to render such an approach consistent with the statements in Dietemann and Cohen that the media is not immune from liability for newsgathering torts. Many lawsuits for newsgathering torts can be characterized as an effort by the target of the media investigation to settle accounts for damage to reputation, and many of these suits arise under circumstances in which plaintiffs cannot recover for defamation.

If Desnick does imply that First Amendment “anti-circumvention” analysis should come into play only when the alleged torts are deemed too trivial to amount to a violation of “established rights,” the “anti-circumvention” argument only serves to buttress the court’s narrow reading of traditional common law torts. However, such an interpretation fails to answer the question of why Food Lion’s rights as an employer should be entitled to more weight than those at issue in Desnick when applying the general rule of Dietemann and Cohen.

If the argument in Desnick is, in effect, that the speech should protect the tort, a contrary argument might be made that the tort “taints” the ensuing

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84 Because the court ruled for defendants on common law grounds, it properly refrained from deciding constitutional issues. See Champagne v. Schlesinger, 506 F.2d 979, 984 (7th Cir. 1974) (stating that federal courts should “avoid premature decisions of constitutional questions”); see also Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 136-37 (1946) (“If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided. This same rule should guide the lower courts as well as this one.” (footnote omitted)).

85 See also Cohen, 501 U.S. at 675-76 (Blackmun, J., dissenting) (arguing that laws of general applicability should not be “enforced to punish the expression of truthful information or opinion”).

86 See id. at 669; Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971).

87 See infra Part IV.
speech, stripping it of First Amendment protection.\textsuperscript{88} Taken to its logical conclusion, this counterargument requires that publication damages “refer back” to the assessment of compensatory damages for the underlying tort.\textsuperscript{89}

Given the statements in Dietemann and Cohen that acknowledge the states’ interest in neutral enforcement of tort and contract law, the media-protective viewpoint impacts state interests too severely by seeking complete and comprehensive immunity for non-criminal newsgathering torts. On the other hand, the target-protective viewpoint, by referring reputational damages back to the underlying newsgathering torts, inflates compensatory damages and, perhaps, punitive damages—thus chilling protected speech.

This Article proposes a compromise between these two positions. Recognizing the states’ legitimate interest in the neutral enforcement of their tort laws, courts must nevertheless intervene on the basis of First Amendment protections to prevent the award of excessive compensatory or punitive damages against media defendants. The following discussion makes a functional and conceptual comparison of newsgathering torts and defamation law in order to determine whether established constitutional protections of defamatory speech\textsuperscript{90} might provide an analogy in support of affording constitutional protection to newsgathering torts.

\textsuperscript{88} See infra Part IV.A.

\textsuperscript{89} See infra Part III.D.1.

\textsuperscript{90} In cases where the Supreme Court construes the First Amendment as forestalling the operation of state defamation laws, it frequently does so on behalf of media defendants. Although in early First Amendment cases the Court did not specifically limit its holdings to media defendants, it has done so in later cases. See, e.g., Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69 (1986) (“[W]e hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are also false.”); Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974) (noting that the holding “shields the press and broadcast media from the rigors of strict liability for defamation”). The Court has intimated that non-media defendants are similarly protected, and for a brief time, the Court seemed virtually unanimous in the view that media defendants should not be afforded more protection than non-media defendants. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 773 (1985) (White, J., concurring) (“[T]he First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech.”); see also id. at 783-84 (Brennan, J., dissenting) (“[A]t least six Members of this Court agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations . . . .”). Nevertheless, in more recent cases, the Court suggests that the question of whether media and non-media defendants are equally privileged is an open one. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 n.6 (1990) (reserving judgment, in a defamation case, as to whether the holding should apply equally to non-media defendants); Hepps, 475 U.S. at 779 n.4 (declining to address the question of whether the same standards apply to media and non-media defendants). But see Underwager v. Salter, 22 F.3d 730, 734-35 (7th Cir. 1994) (rejecting the media/non-media distinction).
II. THE CONSTITUTIONAL LAW OF DEFAMATION AS A MODEL FOR LIMITING NEWSGATHERING TORT LIABILITY

Courts have consistently reaffirmed the principle that the media are subject to laws of general applicability to the same extent as members of the general public.\textsuperscript{91} It is therefore unlikely that courts will grant the media a general immunity from civil liability for news gathering torts. There are, nevertheless, strong arguments in favor of recognizing that the First Amendment limits the extent to which the media may be held liable for punitive and excessive compensatory damages.

This limited liability might take a variety of forms. At one extreme would be complete immunity from all punitive damages: jury instructions could specify that no punitive damages be awarded against the media defendant even upon finding in favor of the plaintiff. A less expansive instruction might provide that punitive damages would not be available unless the jury finds that certain specified conditions have been met.\textsuperscript{92} Alternatively, courts could grant a "partial" immunity—recognizing that the First Amendment requires that punitive damage awards not be so large and burdensome as to deter the media's investigatory role.\textsuperscript{93} Another possible approach that courts might consider, apart from the question of punitive damages, would be to recognize an immunity from "excessive" compensatory damages.

The question of whether to accord the media immunity from excessive punitive or compensatory damages begs the question of whether media tort defendants should receive preferential treatment under the First Amendment at all. Although the Supreme Court has not given clear guidance on the issue of whether the media are entitled to special First Amendment protections denied to non-media tort defendants,\textsuperscript{94} such an approach, at least as it relates to punitive damages, might be supported by precedent.

Supreme Court cases dealing with defamation indicate that the Court might be prepared to accord the media some form of immunity from excessive damage awards. The Court has historically looked askance at the award of punitive damages against the media in defamation cases unless the publication is false and the plaintiff can prove that it was published with "actual malice." Commentators who advocate the recognition of a First Amendment privilege or immunity from news gathering tort liability argue that constitutional defamation law provides the appropriate analogy.\textsuperscript{95}

\textsuperscript{91} See supra notes 47-56 and accompanying text.

\textsuperscript{92} For instance, the jury might be instructed that they may assess punitive damages upon a finding of "actual malice."

\textsuperscript{93} See supra notes 7-9 and accompanying text.

\textsuperscript{94} See supra note 90.

\textsuperscript{95} See, e.g., Sandra S. Baron et al., Tortious Interference: The Limits of Common Law Liability for Newsgathering, 4 WM. & MARY BILL RIGHTS. J. 1027, 1062 (1996); 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 RIGHTS.
In New York Times Co. v. Sullivan, the Supreme Court for the first time ruled that the First Amendment imposes limits on state defamation law. The case arose after the New York Times printed an advertisement containing minor inaccuracies and criticizing the response of Montgomery, Alabama police to a civil rights demonstration. The plaintiff, an elected commissioner in charge of the police department, brought a defamation suit in state court and was awarded $500,000 in damages after the jury was instructed that the statements were "libelous per se" and that compensatory damages could be "presumed." The trial judge also instructed the jury that punitive damages required proof of "malice" but declined to require the jury to differentiate between punitive and compensatory damages in its verdict. The Supreme Court reversed, inaugurating the rule that public officials and public figures cannot prevail in defamation suits unless they prove "actual mal-
ice”—knowledge of the falsity or reckless disregard for the truth—by clear and convincing evidence in order to prevail. In a subsequent case, *Gertz v. Robert Welch, Inc.*, the Court held that where the plaintiff is a private person but the alleged defamation relates to “a matter of public concern,” the plaintiff must prove “actual malice” in order to recover punitive or presumed damages. The Court has made clear that defamation plaintiffs subject to the rules of *Sullivan* or *Gertz* bear the burden of proving falsity when they are confronted with an affirmative defense of truth. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court further clarified *Gertz* by holding that its rule did not apply in cases involving defamatory speech about private persons that is not of public concern.

Although tortious newsgathering may result in the publication of material that is alleged to be defamatory, defamation and similar tort claims are rarely founded on acts committed in the newsgathering process because the tort of defamation redresses injury of an altogether different nature. Some readers may not find the analogy between defamation and newsgathering torts entirely persuasive. The next Part of the Article therefore examines an alternative basis for constitutional protection of newsgathering torts—the chilling effects of media liability.

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102 *Sullivan*, 376 U.S. at 280.
103 See id. at 285-86.
105 See id. at 348-49 (holding that, absent a showing of “actual malice,” the First Amendment prohibits imposing of damages that go beyond “actual injury”). *Gertz* leaves open the question of what types of injury may be compensated under state law but requires that any claim of damages be supported by competent evidence. See id.; see also BRUCE W. SANFORD, *LIBEL AND PRIVACY* § 9.2.1, at 434 (2d ed. 1994 Supp.) (discussing the “actual injury” requirement of *Gertz*).
108 See id. at 761 (“In light of the reduced constitutional value of speech involving no matters of public concern, we hold that state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’”).
109 The Court has implicitly recognized the dangers post by state laws to First Amendment principles. See, e.g., Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (holding that the publisher of lawfully obtained, truthful information cannot be subjected to liability under state tort law except where the law is “narrowly tailored to a state interest of the highest order”); Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (holding that the First Amendment limits the ability of public officials to bring intentional infliction of emotional distress claims); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (holding that the First Amendment permits, but does not require, states to privilege the press in misappropriation of publicity case); Cox Broad. Corp. v. Cohen, 420 U.S. 469 (1975)
A. The Chilling Effect of Large Civil Damage Awards on Valuable Speech

In defamation and related tort claims where the Court has delineated First Amendment limitations on damages, the injury arises directly from publication. In newsgathering tort cases, however, the injury occurs as a result of actions taken by the media in the investigatory process prior to publication. Some may therefore argue that because such acts are at a further remove from the speech itself, the chilling effect of punitive or excessive compensatory damages on free speech is more attenuated. Under this analysis, newsgathering torts should merit less protection than harms caused by the speech itself.

This distinction may be more conceptual than real, however. The threat of punitive or excessive compensatory damages for newsgathering torts necessarily chills the newsgathering process and, therefore, the ensuing speech. Furthermore, just as the investigation is necessary to the speech, the torts may be necessary to the investigation. In *Food Lion*, if ABC’s investigative reporters had not committed fraud on their applications, they would not have gained admittance to Food Lion’s inner premises. If these reporters had been prevented from recording their observations with hidden cameras, the public would not have learned of the health threat posed by the unsanitary conditions discovered.

Although an argument can be made that ABC could have dealt with a perceived threat to public health by alerting the North Carolina Commissioner of Agriculture of its suspicions, it is still clear that a compelling public interest is served by permitting the media to conduct investigatory reporting using the methods in controversy in *Food Lion*. The media have the ability to alert the public to health problems with a speed that government authorities would probably not be able to match. Moreover, the use of media re-

(holding that the First and Fourteenth Amendments prohibit imposing liability on the press for publishing truthful information contained in official court records); Time, Inc. v. Hill, 385 U.S. 374 (1967) (holding that a state-law tort claim for false light invasion of privacy must be supported by evidence of actual malice).

10 See, e.g., J.H. Desnick, M.D., Eye Servs., Ltd. v. Capital Cities/ABC, Inc., 44 F.3d 1345, 1355 (7th Cir. 1995) (holding that plaintiffs stated a claim of defamation but dismissing claims of trespass, invasion of privacy, fraud, and illegal wiretapping).

11 See *LeBel*, *supra* note 95, at 1147 (arguing that “a legal link should be forged to correspond to the logical link between the acquisition and dissemination of information”).

12 See Singer, *supra* note 5, at 65 (noting that testing food samples for the presence of harmful bacteria is a much less effective way of uncovering unsanitary food handling practices than direct observation of those practices: “You can’t just go in and buy some food samples. Observation of practice is absolutely essential.” (quoting Kathryn Boor, Professor of Food Microbiology, Department of Food Science, Cornell University)).

13 See N.C. GEN. STAT. §§ 106-140. The North Carolina statute authorizes the Commissioner of Agriculture to conduct examinations and investigations concerning food safety and to suspend food handling permits when violations are found. See id.

14 See *LeBel*, *supra* note 95, at 1147 (“[T]he press serves a number of public interest
sources to supplement the government's monitoring role saves both the government and taxpayers considerable amounts of money. Finally, because it is often the government itself that is the target of investigatory journalism, merely reporting violations to the responsible agency may not always be effective.\textsuperscript{115}

\textbf{B. The Availability of Extrajudicial Remedies}

Another perceived difference between the law of defamation and that of newsgathering torts relates to the Court's assumptions about plaintiffs’ access to extrajudicial alternatives to redress their injuries and mitigate their damages.\textsuperscript{116} The erection of constitutional barriers to defamation actions is to some degree premised on the assumption that defamation plaintiffs have access to the media and thus have the opportunity to rebut allegedly defamatory statements.\textsuperscript{117} Although this presumption of media access is specific to \textit{Sullivan}-type public figure plaintiffs, the private figure/public controversy plaintiffs to whom the Court turned its attention in \textit{Gertz} also frequently have the opportunity to redress their injuries through media rebuttal.\textsuperscript{118} The underly-

\textsuperscript{115} \textit{See}, e.g., New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (vacating stays on the publication of the “Pentagon Papers”).

\textsuperscript{116} \textit{See} \textit{Gertz} v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) (“The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.”).

\textsuperscript{117} \textit{See id.} (“Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals might enjoy.”). This distinction was one reason the \textit{Gertz} Court subjected private figure/public controversy plaintiffs to a less stringent constitutional standard than public figures and officials under \textit{Sullivan}'s actual malice requirement. \textit{See id. at} 344-46; \textit{see also} Dameron v. Washington Magazine, Inc., 779 F.2d 736, 741 (1986) (noting that an individual may involuntarily become a “limited-purpose public figure”); Waldbaun v. Fairchild Publications, Inc., 627 F.2d 1287, 1293-98 (D.C. Cir. 1980) (discussing the factors that a court must consider in determining whether an individual is a “limited-purpose public figure”).

\textsuperscript{118} On rare occasions, purely private defamation plaintiffs may enjoy significant media access to rebut allegedly defamatory statements. \textit{See} Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541 (4th Cir. 1994). \textit{Foretich} involved a defamation action against producers and broadcasters of a television docudrama in which it was stated that the plaintiffs had sexually abused their granddaughter, an accusation that emerged during the course of a highly publicized custody dispute. \textit{See id.} at 1543. The plaintiffs were quoted in eleven newspaper and magazine articles, appeared on both the \textit{Phil Donahue Show} and a British television documentary dealing with the custody dispute, and gave a 30-minute interview that served as the basis of a full-length book about the case. \textit{See id. at} 1545-49. Despite this wide access to the media, the court found that the vast majority of the plaintiffs’ statements were made as a reasonable self-defense response to the abuse charges rather than as an attempt to influence the outcome of the custody dispute. \textit{See id.} at 1564. Thus, the plaintiffs
ing assumption of both *Sullivan* and *Gertz* is that, while media rebuttal alone will seldom suffice to undo defamatory harm, rebuttal speech can to some degree counteract the injurious effects of defamatory speech, both to the benefit of the individual's reputation and society's interest in knowing the truth.\(^{119}\) By comparison, the injuries typically caused by newsgathering torts could not normally be redressed even in part by opportunity for rebuttal. Therefore, plaintiffs in cases of newsgathering torts presumably would require full compensation via legal damages to be made whole again.

C. The Media Defendant's Mens Rea

Another significant difference between defamation and newsgathering torts is the defendant's state of mind in committing the tort. Defamation can be committed either intentionally or by inadvertence. The Court's introduction of an actual malice requirement in defamation claims raises the degree of culpability required to state a successful claim under state law. Under this rule, plaintiffs who fall into one of the categories delineated in *Sullivan*, *Gertz*, and their progeny must prove a mens rea similar to that required to establish an intentional tort. Rather than permitting states to set their own intent standard at negligence, gross negligence, or strict liability, the Court requires plaintiffs to prove, by clear and convincing evidence, that publication was made either with knowledge of falsity or with reckless disregard of the truth.\(^{120}\) Newsgathering torts, by comparison, are usually committed intentionally during the course of an investigation. Despite this fact, media defendants can make a solid argument that they committed these torts for an important and overriding public purpose. This argument provides the basis for constitutional protection of the media from liability for punitive or "excessive" compensatory damages.

D. The Value of the Protected Speech

To avoid the chilling effect that potential defamation liability may have on valuable First Amendment speech, the *Sullivan* and *Gertz* Courts devised

\(^{119}\) See *Gertz*, 418 U.S. at 344 n.9 ("An opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood . . . . But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry."); see also *Sullivan*, 376 U.S. at 304-05 (Goldberg, J., concurring) (noting that the Court's holding "does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements"). The Court continued: "'Under our system of government, counterargument and education are the weapons available to expose these matters . . . .’ The public official certainly has equal if not greater access than most private citizens to media of communication." (quoting Wood v. Georgia, 370 U.S. 375, 389 (1962)).

\(^{120}\) See supra notes 90-99 and accompanying text.
rules to protect the media from such liability. This protection applies equally to speech that is true and speech that is false—speech which, in and of itself, might be deemed socially worthless, if not harmful and dangerous.\textsuperscript{121}

In contrast, newsgathering torts typically yield speech that is both substantively truthful and of considerable social value.\textsuperscript{122} Although the targets of undercover media investigations have great incentive to allege that the ensuing publications are false and defamatory, newsgathering tort cases in which such allegations are well-founded are more likely to be the exception rather than the rule. Under constitutional analysis in defamation cases, the media need not go to great lengths to verify information prior to publishing in order to qualify for protection.\textsuperscript{123} Where the actual malice standard of \textit{Sullivan} and \textit{Gertz} applies, "reckless disregard" means that, from the media defendant's perspective, ignorance is often bliss and wisdom folly. By comparison, reporters are more likely to commit newsgathering torts when they are in hot pursuit of "the truth" and anxious to bring an important matter to the public's attention.\textsuperscript{124}

\textit{Sullivan} and \textit{Gertz} hold that, under certain circumstances, the First Amendment protects "bad speech" from liability in state law-based defamation suits so that "good speech" will not be chilled. This begs the question—why shouldn't the Court also afford the media protection for the relatively

\textsuperscript{121} See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective.").

\textsuperscript{122} See \textit{e.g.}, Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969) (refusing to hold publisher liable for printing documents relevant to accusations that the U.S. Senator had been corrupted by foreign lobbyists, even though the documents had been obtained by intrusion into the Senator's office files); \textit{Note, Intrusion and the Investigative Reporter}, 71 TEx. L. REV. 433, 433-34 (1992) (discussing 20/20 broadcast obtained by subterfuge that exposed inhuman treatment of nursing home patients and resulted in state investigations); Marcel Dufresne, \textit{To Sting or Not to Sting}, \textit{Col. Journ. Rev.}, May/June 1991, at 49-51 (detailing undercover investigation by suburban newspaper to document racial discrimination in real estate industry); Zay N. Smith & Pamela Zekman, \textit{The Mirage Takes Shape}, \textit{Col. Journ. Rev.}, Sept./Oct. 1979, at 51-57 (describing Chicago newspaper's undercover establishment of public tavern in order to expose government corruption in licensing and inspection). \textit{See also Mitchell V. Charnley, Reporting} 337-48 (3d ed. 1975); \textit{Leonard Downie, Jr., The New Muckrakers} 121-88 (1976).

\textsuperscript{123} See \textit{Gertz}, 418 U.S. at 341 ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); \textit{St. Amant v. Thompson}, 390 U.S. 727, 731 (1968) (holding that the failure to investigate was not, by itself, sufficient to demonstrate "reckless disregard" under \textit{Sullivan}'s actual malice standard).

\textsuperscript{124} It is worth noting that defamatory statements are still given protection under \textit{Gertz} and \textit{Sullivan}, even when they are published solely for the purpose of increasing profits. \textit{See} Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667 (1989) (noting that the statements at issue in \textit{Sullivan} were part of a paid advertisement).
minor "bad acts" that are sometimes necessary to produce "good speech?" Such an approach is in accord with accepted doctrine granting speech that is both substantially truthful and of public concern a very high level of common law and constitutional protection.\(^{125}\)

Many of the reasons for applying constitutional law to defamation claims have equal force in support of the extension of similar protection to newsgathering torts. Although providing the media with complete immunity would not be advisable, limits on the damages that the states can impose are essential to ensuring the health of the newsgathering process. Investigatory journalism serves an invaluable purpose in our society, and the information it uncovers serves the public interest in ways that defamatory statements cannot. The next Part of this Article proposes methods for limiting the media's liability for newsgathering torts.

III. A PROPOSAL TO LIMIT EXCESSIVE DAMAGES UNDER THE FIRST AMENDMENT: GENERAL PRINCIPLES

A. **Limiting Damages by Analogy to Gertz Rather Than Sullivan**

The conditional First Amendment immunity that I propose as a means of eliminating excessive media liability for newsgathering torts has three principal goals: (1) exclusion of reputational damages when assessing compensatory damages; (2) limitation of compensatory damages for newsgathering torts to "actual damages" proven by competent evidence; and (3) a general prohibition against punitive damage awards. Courts would be permitted to make such damage relief available only if specific conditions are met.

The parallels between newsgathering torts and Gertz-type defamation cases

\(^{125}\) See, e.g., Florida Star v. B.J.F., 491 U.S. 524, 536 (1989) (refusing to allow a state to impose liability on a newspaper that published "'lawfully obtained truthful information about a matter of public significance'" (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979))); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978) (holding that the First Amendment precludes imposing liability for harms caused by the publication of information relating to a state's official inquiry into judicial conduct because the public interest is served by such publication); Oklahoma Publ'g Co. v. District Court, 430 U.S. 308, 310 (1977) (holding that the First Amendment does not permit a state to prohibit publication of information obtained in court proceedings that were open to the general public); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) ("[T]he First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records."); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993) (applying the Illinois common law rule that substantial truth is a complete defense to defamation); Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975) (explaining that speech which is "of legitimate concern to the public" is protected by the First Amendment); see also KEETON ET AL., supra note 81, § 652D (summarizing the rule that one can only be subject to liability for invasion of privacy via publication if the matter publicized is not of legitimate concern to the public).
support the proposed immunity being proposed, notwithstanding the Food Lion court’s rejection of such an argument. First, unlike a Sullivan plaintiff, the Gertz plaintiff’s inability to prove actual malice will not necessarily free the defendant from liability. A lack of actual malice only relieves the Gertz defendant from liability for the punitive and presumed damages that often account for high awards in defamation cases. Second, the defining characteristic of cases falling under Gertz is also present in newsgathering tort cases: the allegedly defamatory speech relates to a matter of public concern.

Media defendants may argue that when their speech is both truthful and of public concern, they should be entitled to complete First Amendment immunity from liability for newsgathering torts. The media would posit that, because speech which is both false and defamatory is of less social value than the speech generally produced via tortious newsgathering techniques, the analogy to Sullivan is stronger than the analogy to Gertz. Certainly, a significant number of plaintiffs suing for damages for newsgathering torts committed in the course of undercover journalism—including, arguably, Food Lion itself—could be classified as public figures within the meaning of Sullivan.

Nevertheless, a First Amendment rule of damage limitation drawn by analogy to Gertz would balance the states’ strong interest in the neutral enforcement of their tort laws against the media’s interest in investigatory journalism, as well as protecting the public’s right to receive information on matters of public concern. A broader rule of immunity modeled on Sullivan, by comparison, would serve the First Amendment interests of the media and the public but would undermine the states’ interest in the neutral enforcement of their laws. As such, it is doubtful that a rule based on an analogy to Sullivan comports with the Court’s concern in Cohen v. Cowles Media Co. about allowing states to enforce generally applicable laws.

B. The Scope of the Limited Immunity Confined to Non-Criminal Newsgathering Torts

Torts that reporters typically commit during newsgathering activities include: (1) fraud or misrepresentation, usually centering on the reporter’s em-

126 See Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 931-32 (M.D.N.C. 1997) (finding that Gertz could not support ABC’s argument that the First Amendment provides immunity from punitive damages for newsgathering torts).

127 See supra note 80 and accompanying text.

128 See infra note 208.

129 See supra note 97 and accompanying text.

130 See supra note 80 and accompanying text.

131 501 U.S. 663, 669 (1991) (“[G]enerally 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.”).
ployment status or affiliation;132 (2) trespass on the property of the target of the investigation;133 (3) intrusion into the privacy or seclusion of the target's home,134 often by means of subterfuge; (4) violation of privacy by hidden camera surveillance;135 and (5) tortious interference with contract in order to obtain information from third parties.136

132 See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 822 (M.D.N.C. 1995) (declining to dismiss fraud claim); see also LeBel, supra note 95, at 1156-58 (arguing that the needs of plaintiffs claiming harm because of reporter misrepresentation of identity must be balanced against the First Amendment value of the information sought).

133 See, e.g., Anderson v. WROC-TV, 441 N.Y.S.2d 220, 227 (Sup. Ct. 1981) (declining to allow immunity for reporters in a trespass claim); Prahl v. Brosamle, 295 N.W.2d 768, 778 (Wis. Ct. App. 1980) (holding reporter liable for trespass); see also LeBel, supra note 95, at 1158-59 (arguing that, in some circumstances, First Amendment interests outweigh state interests in providing a remedy for trespass).

134 See, e.g., Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971) (affirming an award for invasion of privacy); see also RESTATEMENT (SECOND) OF TORTS § 652B (1977) (discussing the tort of intrusion upon seclusion).

135 See, e.g., J.H. Desnick, M.D., Eye Services, Ltd. v. Capital Cities/ABC, Inc., 44 F.3d 1345, 1353-54 (7th Cir. 1995) (declining to hold reporters liable under state or federal wiretapping statutes); Food Lion, 887 F. Supp. at 824 (dismissing wiretapping claims); see also Sanders v. ABC, Inc., 60 Cal. Rptr. 2d 595 (Cal. Ct. App. 1997), review granted, 938 P.2d 1, 1 (Cal. 1997) (declining to recognize a cause of action for invasion of privacy by photography as a "subtort of invasion of privacy"); LeBel, supra note 95, at 1160 ("The additional credibility associated with the images and sounds that are recorded in an encounter [that is surreptitiously recorded] contributes to the public information about the matter in question in a more meaningful and dramatic way than an account of the encounter that is unsupported by film or tape.").

136 Recently, after a great deal of internal wrangling between producers of the CBS news program 60 Minutes and network attorneys and executives, CBS decided not to air an interview with Jeffrey Wigand, a whistleblowing tobacco company executive. See Howard Kurtz, '60 Minutes' Kills Piece on Tobacco Industry, WASH. POST, Nov. 10, 1995, at A3. CBS attorneys advised the network that if the segment aired, the network could be sued for tortious interference with contract for inducing Mr. Wigand to breach a confidentiality agreement between him and his former employer, the Brown & Williamson Tobacco Corporation. See id. Although Brown & Williamson did sue Mr. Wigand, no suit was ever filed against CBS. See Bill Carter, Tobacco Company Sues Former Executive over CBS Interview, N.Y. TIMES, Nov. 22, 1995, at A14. Eventually, after the Wall Street Journal published Mr. Wigand's deposition testimony in the suit between him and Brown & Williamson, CBS aired the interview. See Bill Carter, CBS Broadcasts Tobacco Executive's Interview, N.Y. TIMES, Feb. 5, 1996, at B8. It is, however, not clear whether CBS's attorneys' original fears were well-grounded. See James C. Goodale, '60 Minutes' v. CBS and Vice Versa, N.Y.L.J., Dec. 1, 1995, at 3 ("Apparently, there is no reported case where this claim, by itself, has ever been made against a news organization for publication."); see also RESTATEMENT (SECOND) OF TORTS § 766 (1977) (discussing the tort of intentional interference with contract); Baron, supra note 95, at 1067 ("[W]hen protected interests are burdened significantly . . . the tort can withstand constitutional scrutiny only
The proposed First Amendment immunity from liability for excessive damages is solely envisioned to cover non-criminal torts. States can assert an even stronger interest in the neutral enforcement of their criminal law than they can assert with respect to their tort law. When state legislatures classify certain acts as criminal rather than tortious, they are, to some degree, reflecting the public’s sense that such activity is reprehensible. Although there is not a great deal of unanimity among the states as to whether a particular activity is criminal, states generally do not treat newsgathering torts as crimes.

Where particular newsgathering acts that give rise to tort claims are also criminal acts, no First Amendment immunity should be made available. States must also be accorded considerable leeway in defining what is or is if its adverse impact is justified by some subordinating, valid, governmental interest ‘of the highest order.’ A tortious interference claim based on newsgathering activity seems unlikely to meet this test.”; LeBel, supra note 95, at 1160-62 (arguing that media liability for tortious interference with contract should be resolved by a First Amendment balancing analysis). See David A. Anderson, Torts, Speech, and Contracts, 75 Tex. L. Rev. 1499, 1513-37 (1997) (raising the possibility that state tort actions for inducement to contract breach by truthful persuasion might be held presumptively violative of First Amendment commercial speech doctrine; but suggesting that, because the application of such doctrine by the Supreme Court in any specific truthful persuasion case would rely on ad hoc balancing that would be both unpredictable and ill-suited to evaluation of tort liability, the better solution would be for state courts to adopt a tort rule, modeled on Restatement section 772, that inducement by truthful persuasion, without more, is not improper and not actionable); Alan E. Garfield, Promises of Silence: Contract Law and Freedom of Speech, 83 Cornell L. Rev. 261, (1998) (recommending that courts deny enforcement to confidentiality agreements “when there exists an overriding public interest in the suppressed speech,” at 266; and, while questioning whether such agreements constitute the state action necessary to implicate the First Amendment, at 347-53, suggesting that a similar constitutional balancing test might be applied, at 360-61).


not criminal activity.\textsuperscript{140} For instance, states should be permitted to impose criminal sanctions for a variety of acts, including: gaining access to the target’s office or home by breaking and entering\textsuperscript{141} or impersonating a government official;\textsuperscript{142} obtaining incriminating information by stealing the target’s documents;\textsuperscript{143} and wiretapping a phone conversation to which the investigators are not a party.\textsuperscript{144} Nevertheless, for purposes of the proposed immunity, newsgathering torts should not be deemed criminal on the basis of strained or hyper-technical constructions of broadly worded criminal statutes such as the Federal Mail Fraud Act\textsuperscript{145} or RICO\textsuperscript{146} under circumstances where it is unlikely that criminal charges would have been brought.

C. Minimum Prerequisites to First Amendment Relief

1. “Non-Publication” or “Pre-Publication” Conditions

If the courts recognize a First Amendment immunity from punitive and excessive compensatory damages for newsgathering torts, such immunity

\textsuperscript{141} See Cohen, 501 U.S. at 669 (“The press may not with impunity break and enter an office or dwelling to gather news.”).
\textsuperscript{142} See State v. Cantor, 534 A.2d 83, 87 (N.J. Super. Ct. App. Div. 1987) (affirming the conviction of a reporter who had falsely represented to the mother of a homicide victim that she was “from the morgue”). The charge in this case was impersonating a public official. See id.
\textsuperscript{143} But see Pearson v. Dodd, 410 F.2d 701, 708 (D.C. Cir. 1969) (declining to hold newspaper columnists liable for invasion of privacy or intrusion where documents were copied by the target’s employees and turned over to defendants who published the information knowing how the documents had been acquired).
\textsuperscript{144} See, e.g., J.H. Desnick, M.D., Eye Services, Ltd. v. Capital Cities/ABC, Inc., 44 F.3d 1345, 1353-54 (7th Cir. 1995) (holding that defendants did not violate either federal or state wiretapping statutes by surreptitiously recording a conversation to which they were party because their purpose in doing so was not to commit a crime or tort); Russell v. ABC, Inc., 23 MED. L. REP. 2428, 2429-30 (N.D. Ill. 1995) (declining to hold reporter liable under either state of federal wiretapping statutes where reporter secretly recorded his conversations with plaintiff).
\textsuperscript{145} 18 U.S.C. §§ 1342-1343 (1994). Section 1341 forbids using the federal mails for “a scheme or artifice to defraud;” or for “obtaining money or property by means of false or fraudulent pretenses.” Id. § 1341. Section 1343 covers fraud by “wire, radio or television.” Id. § 1343.
should be conditional. As a threshold, the media defendant should be required to show that the newsgathering tort was necessary to the investigation. Such a threshold would help to ensure that the proposed immunity is granted only in cases where large awards would, in fact, chill important and necessary newsgathering acts.

A second requirement should be that the investigation relate to a matter that the media defendant reasonably believed would lead to speech about a matter of “significant public concern.” This requirement correlates with the rule adopted by the Court in Dun & Bradstreet allowing private defamation plaintiffs to recover presumed or punitive damages even when they are unable to prove actual malice unless the allegedly defamatory speech relates to “matters of public concern.”147 However, the requirement that the information relate to a matter of “significant public concern” is intended to be a stricter standard than the “of public concern” standard in Florida Star148 and, arguably, implicit in Sullivan.149

The third condition that would need to be satisfied before granting immunity for newsgathering torts is that the tortious conduct, even if not criminal, is not unusually egregious in nature. Although virtually all newsgathering torts are intentional torts, some jurisdictions may find the newsgatherer’s conduct sufficiently willful as to permit the factfinder to impute common law malice—thus justifying an award of punitive damages.150 The common law malice requirement should, however, be construed narrowly to require outrageous, egregious, or aggravated behavior rather than merely intentional behavior. This condition is intended to limit punitive damage awards to extreme and unusual cases.

A final factor to consider would be whether the media defendants created or, as alleged in Food Lion, significantly contributed to, the conditions they were reporting. The trial judge in Food Lion found that none of the reporters’ acts could account for Food Lion’s publication damages and held that the jury could not consider the alleged “staging” incidents as a basis for assessing publication damages.151 This holding suggests that the ABC reporters

149 See Cynthia L. Estlund, Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category, 59 Geo. Wash. L. Rev. 1, 16-17 (1990) (noting that, in cases like Sullivan, which center on the significance of the speech involved, “the overtly political nature of the individuals’ activities and of the government’s punitive response played a catalytic role in the Court’s abrogation of this historic blind spot in First Amendment doctrine”).
150 See Keeton et al., supra note 81, § 2, at 9-10 (discussing the common law requirements for an award of punitive damages); Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 935 (M.D.N.C. 1997) (considering the reprehensibility prong of BMW and noting that “[t]his case involved deliberate false statements [made] . . . for the sole purpose of deceiving Food Lion”).
did not significantly contribute to the conditions that they were investigating.

Publication should not be made a prerequisite to the grant of any First Amendment-based immunity. Not infrequently, media defendants commence an undercover investigation but ultimately decide not to publish the information they obtain. This occurs in a variety of situations, including those in which the investigation reveals that the allegations are false, or the undercover reporters "blow their cover" before they have obtained the proof that would support their publication.

If there has been no publication and none is contemplated, then the media defendants should have to plead all four of the "non-publication conditions" in their defense. The defendants should bear the burden of proving, by a preponderance of the evidence, the first three conditions. However, the plaintiff should bear the burden of proving that the undercover reporters significantly contributed to creating the problems they reported. Additional considerations that should be taken into account in assessing the propriety of damage awards where the challenged conduct leads to publication are discussed in the next Part.

2. "Post-Publication" Conditions

In addition to the four "pre-publication" conditions outlined above, three additional "publication conditions" should apply both when the newsgathering tort has already resulted in publication and when publication is imminent. Courts should consider whether (1) the investigation in fact led to publication and the investigation was necessary to that publication; (2) the media speech did in fact relate to "a matter of significant public concern;" and (3) the speech was substantially truthful. The burden of proving falsity should rest with the plaintiff.

If all three of these additional "publication conditions" obtain, then higher First Amendment interests are implicated than in cases where there was no publication or where the publication was false or misleading. If reporters find it necessary to commit torts in their pursuit of "the truth," there is a significant First Amendment interest to be served by not deterring them from publishing because of their fear of liability for punitive or excessive compensatory damage awards.

The media defendant should have to plead all three of the "publication" conditions, and again, with the exception of truthfulness, should bear the

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152 See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986) (placing the burden of proving falsity on private figure plaintiffs in cases where the alleged defamation relates to a matter of public concern).

153 This condition differs from the second of the "prepublication conditions" in that it requires more than a good faith belief that the investigation will result in speech of significant public concern. See supra notes 146-47 and accompanying text.

154 See Hepps, 475 U.S. at 778.
burden of proof as to each.\textsuperscript{155} By analogy to the \textit{Hepps}\textsuperscript{156} rule involving \textit{Gertz}- and \textit{Sullivan}-type plaintiffs, the burden of proof should be shifted to the plaintiff on this point. Furthermore, the difficulty of separating, in the minds of jurors, newsgathering damages from publication damages suggests that it would be advisable to try the media defendant’s content-based defense that the publication was substantially true and of significant public concern to the judge rather than to the jury.

The interests protected by the First Amendment are far better served by the publication of truthful information of public concern than by the publication of false and defamatory information. If the plaintiff can prove that the tort-predicated publication is not substantially true, then the media defendant should be denied any First Amendment immunity from punitive damages and, as will be discussed in greater detail, must rely on his due process rights under \textit{BMW} to scale back excessive punitive damages.\textsuperscript{157}

3. “Of the Most Serious Public Concern:” Intrusions into Zones of Personal Privacy and Autonomy

When media defendants intrude into zones of personal privacy and autonomy, First Amendment protection from excessive punitive or compensatory damages should be further conditioned on whether the matters investigated or published were “of the most serious public concern.” Such matters would include felonies, corruption of public officials, dangers to our democratic institutions, and activities that imperil the public health and safety. In cases involving relatively minor, non-criminal torts that result in intrusion into zones of personal privacy and autonomy such as private homes or apartments, satisfying any lesser standard should not suffice to forestall the neutral application of state tort law.

The common law recognizes a greater expectation of privacy and confidentiality in some situations than in others. The tort of “intrusion upon seclusion” involves intrusion, physical or otherwise, “upon the solitude or seclusion of another.”\textsuperscript{158} To state a claim of intrusion, an individual must have both a subjective expectation of privacy as well as an objectively reasonable

\textsuperscript{155} Cf. James E. King & Frederick T. Muto, \textit{Compensatory Damages for Newsgathering Torts: Toward a Workable Standard}, 14 U.C. DAVIS L. REV. 919, 949 (1981) (suggesting that the media defendant bear the burden of rebutting the presumption that any matter which is unearthed through an intrusion or trespass is not of ‘public interest’). The author concludes that, except where the Supreme Court has held otherwise, the media should bear the burden of proof on the critical elements of the defense because they are invoking a constitutional defense.

\textsuperscript{156} 475 U.S. 767, 778 (1986) (placing the burden of proving falsity on the plaintiff).

\textsuperscript{157} See BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996); see also infra, Part IV.D (discussing BMW).

\textsuperscript{158} \textit{Restatement (Second) of Torts} § 652B (1977).
expectation of privacy. Under state law, individuals have reasonable expectations of privacy in areas such as private residences, private offices, private bedrooms in hotels and hospitals, and public restrooms. In the workplace, courts have also found a reasonable expectation of privacy in such places as private changing areas, closed offices in which employees receive confidential performance evaluations, and personal file cabinets and desk drawers. Open work areas are not among the areas protected by the tort of intrusion. However, the tort provides a remedy for more than just intrusions into physical space, including opening another's mail, examining someone's wallet, or inspecting private documents such as bank records.

In any case, defendants who gain access to non-public areas by committing a tort will not be liable for intrusion unless the plaintiff “had an actual expectation of seclusion or solitude and that expectation was objectively reasonable.” In Desnick, the Seventh Circuit correctly held that the tort of intrusion did not apply to reporters who entered a clinic that held itself open to the public. The court distinguished the facts before it from those in Dietemann, in which an intrusion into a private home met the criterion of violating

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160 See Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971) (“[O]ne who invites another to his home or office . . . does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording . . . .”); Miller v. NBC, 232 Cal. Rptr. 668, 679 (Ct. App. 1986) (holding that a camera crew’s intrusion into a private bedroom was the sort of “highly offensive” conduct proscribed by the tort of intrusion).
161 See Estate of Berthiaume v. Pratt, 365 A.2d 792, 794 (Me. 1976) (recognizing, for the first time under Maine law, an action for invasion of privacy where a physician photographed a patient lying in a hospital bed against the patient’s wishes).
163 See Doe v. B.P.S. Guard Servs., Inc., 945 F.2d 1422, 1427 (8th Cir. 1991) (holding that fashion models surreptitiously videotaped in their dressing area by security guards stated a claim of invasion of privacy under Missouri law).
165 See Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir. 1968).
167 See id.
168 People For The Ethical Treatment Of Animals v. Bobby Bersoni, Ltd., 895 P.2d 1279, 1279-80 (Nev. 1995) (“It is of no relevance to the intrusion tort that [defendant] trespassed onto the Stardust Hotel . . . unless at the same time he was violating a justifiable expectation of privacy on [plaintiff’s] part.”).
an objectively reasonable expectation of privacy.\textsuperscript{169}

A recent California case, \textit{Sanders v. Capital Cities/ABC, Inc.},\textsuperscript{170} also involved a \textit{PrimeTime Live} reporter going undercover as an employee, this time in order to investigate the "tele-psychic" industry.\textsuperscript{171} The reporter was assigned to work at an open, five-foot high, three-sided cubicle that afforded a standing adult a view into most of the other cubicles in the room.\textsuperscript{172} The ABC reporter secretly videotaped conversations with tele-psychics that were subsequently broadcast.\textsuperscript{173} Two tele-psychics sued for invasion of privacy and were awarded a judgment of $1.2 million against ABC. A state court of appeals reversed, holding that the tele-psychics had no objectively reasonable expectation of privacy.\textsuperscript{174} The court also held that secret videotaping was not sufficient, by itself, to state a claim for the tort of invasion of privacy.\textsuperscript{175}

Given precedents like \textit{Desnick} and \textit{Sanders}, Food Lion's claim that the employees-only, behind-the-counter areas of its meat and delicatessen departments are zones of privacy and personal autonomy appears to be quite weak. Because Food Lion could not claim a legitimate expectation of privacy in these areas, the proposed First Amendment "of most serious public concern" standard would not apply. Alternatively, if Food Lion could demonstrate that it had a reasonable expectation of privacy, the actions of the \textit{PrimeTime Live} reporters would be measured under the heightened "of most

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\item \textsuperscript{169} See J.H. Desnick, M.D., Eye Servs., Ltd. v. Capital Cities/ABC, Inc., 44 F.3d 1345, 1352-53 (7th Cir. 1995).
\item \textsuperscript{170} 60 Cal. Rptr. 2d 595 (Ct. App. 1997), \textit{review granted}, 938 P.2d 1, 1 (Cal. 1997).
\item \textsuperscript{171} See \textit{id.} at 596.
\item \textsuperscript{172} See \textit{id.}
\item \textsuperscript{173} See \textit{id.}
\item \textsuperscript{174} See \textit{id.} at 598.
\item \textsuperscript{175} See \textit{id.} Sanders alleged several different claims against ABC, but because the trial judge found the portion of the broadcast concerning the plaintiff to be true and legitimately newsworthy, only the claim for invasion of privacy went to the jury. See \textit{id.} at 596. Although the plaintiff testified that he believed his conversations with the reporter were confidential, the jury found that he lacked an objectively reasonable expectation of privacy in those conversations. See \textit{id.} Nevertheless, the trial judge sua sponte instructed the jury regarding the "sub-tort" of "photographic invasion." See \textit{id.} at The jury then returned a verdict for the plaintiff totaling $1.2 million. See \textit{id.} The court of appeals reversed and remanded with instructions that judgment be entered for the defendants. See \textit{id.} at 599. The court held that because the plaintiff lacked an objectively reasonable expectation of privacy, there could be no invasion of privacy and that there was no independent right to be free from "photographic invasion." \textit{Id.} The California Supreme Court has granted review of \textit{Sanders}. See \textit{Sanders}, 938 P.2d at 1. The court will also be reviewing a claim for invasion of privacy in which the victim of an automobile accident was filmed by a cameraman on board the helicopter ambulance that carried her to the hospital. See \textit{Shulman v. Group W Prods., Inc.}, 59 Cal. Rptr. 2d 434, (1996), \textit{review granted}, 934 P.2d 1278 (Cal. 1997). The court of appeals held that the plaintiff had an objectively reasonable expectation of privacy within the rescue helicopter but not at the accident scene. See \textit{id.} at 449-53.
serious public concern" standard. Even under this higher standard, it is likely that the reporters would not be found liable because of the threat to the public health and safety posed by the alleged unsanitary meat-handling practices at Food Lion.

D. Limiting Excessive Compensatory Damages

The Supreme Court historically has expressed the concern that excessive compensatory tort damage awards may burden First Amendment speech. Compensatory damage awards against media defendants in newsgathering tort cases may be substantial, particularly if damages assessed for newsgathering torts include damages caused by ensuing tort-predicated publications. The Court has therefore limited awards of presumed general damages in defamation actions involving "matters of public concern" because, like punitive damages, such awards may chill protected speech.

1. The "Dietemann Approach"

Media speech that is both substantially truthful and of public concern normally receives a very high level of common law and constitutional protection by virtue of its social value. As an example, take a hypothetical variation on the fact pattern in Dietemann. A private person in need of medical assistance and not affiliated with the media visits the private home/office of a faith healer. The faith healer's gratuitous prescriptions do not improve the patient's condition but seriously worsen it. The patient writes a letter to a local newspaper, a columnist interviews the former patient, and the newspaper subsequently publishes a derogatory but substantially truthful story about the faith healer. The faith healer then sues the newspaper on a variety of theories.

Under general common law principles, the substantial truth of the story would furnish the newspaper with a complete defense to defamation and false light depiction claims. A claim of alleged privacy invasion based on the

\[176\text{ See supra Part II.}\]

\[177\text{ For example, the trial court in Sanders v. Capital Cities/ABC, Inc., awarded the plaintiffs over \$560,000 in compensatory damages and \$525,000 in punitive damages. See Kersis v. Capital Cities/ABC, Inc., 23 Med. L. Rptr. 2321, 2321 (Cal. Super. Ct. 1994). Although the judgment was reversed in full on appeal, it is worth noting that the ratio of compensatory to punitive damages was approximately 1:1, and therefore a much higher punitive damage award would not have offended due process under BMW's "disproportionality" inquiry. See infra Part III.E.}\]


\[179\text{ 449 F.2d 245 (9th Cir. 1971).}\]

public disclosure of private and embarrassing facts would also be likely to fail. Even if the faith healer did have a reasonable expectation of privacy while providing medical treatment—a highly questionable assumption—the claim would still fail: the truthful disclosure of a matter of legitimate public concern does not normally provide the basis for an invasion of privacy claim.\footnote{81}

Under the Supreme Court’s ruling in \textit{Florida Star v. B.J.F.},\footnote{82} if the newspaper had published “lawfully obtain[ed] truthful information,”\footnote{83} there would be a strong presumption that the First Amendment would forestall the imposition of any civil damages on the basis of that publication.\footnote{84} If, however, the newspaper had obtained the same information through the commission of newsgathering torts—as in \textit{Dietemann}, where reporters pretended to be in need of medical attention and then surreptitiously recorded their conversation with the faith healer—the newspaper might well find itself bereft of both common law and constitutional protection from liability incurred in pursuit of substantially truthful information on a matter of legitimate public concern.\footnote{85} The publication itself, and not merely the newsgathering torts that the reporters committed to produce it, would provide a possible basis for recovering damages for any harm resulting from publication.\footnote{86} This is quite a different matter from assessing damages against the media for the underlying newsgathering tort itself. To put it another way, if we concede for the sake

\footnote{81} See, e.g., Meeropol v. Nizer, 560 F.2d 1061, 1066 (2d Cir. 1977) (holding that invasion of privacy claim brought by public figures was subject to the “actual malice” standard of \textit{New York Times v. Sullivan}); Virgil v. Time, Inc., 527 F.2d 1122, 1128 (9th Cir. 1975) (holding that the First Amendment affords the press no protection from invasion of privacy claim where the information published is not “newsworthy”); Beresky v. Teschner, 381 N.E.2d 979 (Ill. App. Ct. 1978) (affirming dismissal of invasion of privacy claim brought by parents of deceased teenager on the grounds that newspaper article discussing teenager’s death by drug overdose addressed issues of legitimate public concern); see also \textit{RESTATEMENT (SECOND) OF TORTS} § 652D (1977) (noting that liability for public disclosure of private facts may exist where the disclosure would be “highly offensive to a reasonable person” and the matter disclosed “is not of legitimate concern to the public”). \textit{But see} Alfred Hill, \textit{Defamation and Privacy under the First Amendment}, 76 \textit{COLUM. L. REV.} 1205, 1258-62 (1976) (arguing that the principal element of the tort of public disclosure of private facts is the shocking character of the disclosure, and that whether the matter is of public concern is only one of several factors to be considered by the court).

\footnote{82} 491 U.S. 524 (1989).

\footnote{83} \textit{Id.} at 533 (quoting \textit{Smith v. Daily Mail Publ’g Co.}, 443 U.S. 97, 103 (1979)).

\footnote{84} See \textit{id.} (holding that the states may not punish the publication of lawfully obtained truthful information absent a state interest of the highest order).

\footnote{85} \textit{See infra} Part IV.A.

\footnote{86} \textit{See Dietemann v. Time, Inc.}, 449 F.2d 245, 250 (9th Cir. 1971) (“No interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired.”).
of argument that the media defendant should be held liable for newsgathering
torts, is it fair that it should also face liability for the publication ensuing
from those torts where that publication would not be independently action-
able because of common law or constitutional defenses?

There is significant judicial authority, ostensibly applying common law
principles of proximate cause, for extending the media's liability for news-
gathering torts to damages arising from the ensuing publications. A num-
ber of cases—including most notably, Dietemann, and more recently, the
trial court's decision in Sanders—can be read as supporting this approach
to assessing damages. For simplicity, I will refer to this practice as the
"Dietemann approach." Where courts confronted with newsgathering tort
claims follow the Dietemann approach, media speech may be indirectly sub-
jected to tort damages solely by virtue of its origins, despite the fact that an
independent claim based on the speech itself might not be viable.

In Dietemann, the court could have distinguished three different but inter-
related causes of action, all sounding in invasion of privacy under California
law: (1) intrusion; (2) surreptitious electronic recording of conversations; and
(3) publication of true but embarrassing private facts. The Ninth Circuit con-
cluded that, under California law, the surreptitious electronic recording was
itself actionable, regardless of whether there had been any publication. Once
publication had been made, however, the court saw no First Amend-

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187 See, e.g., id. (permitting publication damages to be assessed under a claim of intru-
sion upon seclusion); Belluomo v. KAKE TV & Radio, Inc., 596 P.2d 832, 842 (Kan. Ct.
App. 1979) (holding that publication damages are available where information is obtained
by tortious means); Prahl v. Brosamle, 295 N.W.2d 768, 781-82 (Wis. Ct. App. 1980)
(stating that to bar a trespass plaintiff from recovering publication damages "would permit
the trespasser to enjoy the benefit of his tort without fully compensating [the] plaintiff for
his loss"). But see, Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir. 1969) ("[I]n analyz-
ing a claimed breach of privacy, injuries from intrusion and injuries from publication
should be kept clearly separate."); Costlow v. Cusimano, 311 N.Y.S.2d 92, 97 (App.
Div. 1970) (holding that reputational and emotional disturbance damages are not recover-
able under a claim for trespass); see also Rex S. Heinke, Added Damages for Publication
Should Not be Available in Intrusion- Trespass Cases without Independent Justification,
Comm. Law., Summer 1983, at 6 (arguing that publication damages should not ordinarily
be available to plaintiffs who could not successfully bring publication-based tort claims);
King & Muto, supra note 155, at 935 (arguing in favor of adopting a rule which would
"den[y] recovery of damages for publishing information of public interest unless it is ob-
tained in a manner which, under developed tort principles, would warrant an award of pu-
nitive damages").

188 449 F.2d 245 (9th Cir. 1971).

1994), rev'd on other grounds sub nom. Sanders v. ABC, Inc., 60 Cal. Rptr. 2d 595 (Cal.
App. 1997), review granted. 938 P.2d 1, 1 (Cal. 1997). See also supra notes 171-72 and
accompanying text.

190 See Dietemann, 449 F.2d at 247.
ment obstacle to permitting the plaintiff to recover damages for publication, permitting such recovery on the theory that the publication exacerbated the plaintiff's emotional distress.\footnote{See id. at 250.}

Given its conclusion that publication was not necessary to the success of the plaintiff's claim but that the plaintiff could nevertheless recover publication damages, the Dietemann court did not consider whether the defendant's publication would have independently supported a claim of public disclosure of private facts under California law. One element of that tort is that the information disclosed had previously been private.\footnote{See Capra v. Thoroughbred Racing Ass'n of North America, Inc., 787 F.2d 463, 464 (9th Cir. 1986) (stating the elements of an invasion of privacy claim under California law).} One wonders, though, whether Dietemann could legitimately entertain any expectation of privacy when offering free medical advice to total strangers.

Another element of the tort of public disclosure of private facts under California law is that the information disclosed not be newsworthy.\footnote{See id.} While the Dietemann court's First Amendment discussion may be read as rejecting any argument that the information obtained was of legitimate public concern,\footnote{See Dietemann, 449 F.2d at 250 ("A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him without any countervailing benefit to the legitimate interest of the public in being informed." (emphasis added)).} Dietemann's subsequent arrest for practicing medicine without a license\footnote{See id. at 246.} calls into question the court's inferences on this point. The fact that the court could refer back publication damages back to the newsgathering tort without considering whether the elements of a publication tort could be independently satisfied illustrates how the Dietemann approach has the potential to be used to circumvent the legal protections afforded to the media against publication tort claims.\footnote{The award upheld in Dietemann was a mere $1,000 general damages for injury to the plaintiff's "feelings and peace of mind." Id. More troublesome is the recent decision of Kersis v. Capital Cities/ABC, Inc., in which the trial court, applying California privacy law, awarded the plaintiffs over $500,000 in compensatory damages. See Kersis v. Capital Cities/ABC, Inc., 22 Med. L. Rptr. 2321, 2321 (Cal. Super. Ct. 1994). The judgment was reversed on appeal and the California Supreme Court has granted review. See Sanders v. Capital Cities/ABC, Inc., 60 Cal. Rptr. 2d 595 (Ct. App. 1997), review granted, 938 P.2d 1,1 (Cal. 1997).}
common law and constitutional defenses will be impaired.\textsuperscript{197}

Although media defendants faced with newsgathering tort claims in courts expressly adopting a Dietemann approach might request the judge to instruct the jurors to take into account constitutional and common law defenses available in publication-based tort claims,\textsuperscript{198} it is questionable whether this approach would provide adequate protection. Had the claims been tried separately, the media defendants, through dismissal or summary judgment motions, might have prevented the publication-related torts from going to the jury altogether.

2. Separating Publication Injury from Newsgathering Injury

Even where courts decline to follow the Dietemann approach\textsuperscript{199} and attempt to distinguish newsgathering torts from publication torts for purposes of damage assessment, there is still a risk that the jury will conflate the two and award excessive compensatory or punitive damages. Willfully or unconsciously, jurors often circumvent common law and constitutional limitations on publication torts when they award reputational damages against the media for newsgathering torts. This can occur because newsgathering torts and publication torts may be difficult to segregate conceptually.

In assessing general compensatory damages, injuries sustained from the newsgathering tort, as distinguished from publication harms such as commercial embarrassment, loss of personal or professional reputation, and emotional distress, are likely to be inextricably linked in the minds of jurors, even when the jurors are given explicit instructions to guard against this confusion. Although juries awarding punitive damages should focus on the reprehensibility of the newsgathering tort alone, it is likely that they will also take the harms stemming from the subsequent publication into account. There is, therefore, considerable danger that juries will sub silentio follow what the Dietemann court pronounced to be a formal rule: referring back the injury from publication to the assessment of damages for the underlying newsgathering tort. When juries do act in this manner they circumvent the common law and constitutional defenses that protect the media from publication tort liability and run a considerable risk of awarding excessive damages. When maverick juries adopt a Dietemann approach and award large damage judgments, it becomes more difficult for trial and appellate judges reviewing

\textsuperscript{197} See King & Muto, supra note 155, at 943 (arguing that the potential for astronomical liability under the Dietemann approach forces self-censorship by the media and restricts the dissemination of information on matters of public interest).

\textsuperscript{198} See id. at 948-49 (proposing that application of the Dietemann damage rule should be limited to publications that are not of public interest).

\textsuperscript{199} See, e.g., Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir. 1969) (noting that injuries from intrusion and injuries from publication should remain separate); Costlow v. Cusimano, 311 N.Y.S.2d 92, 97 (App. Div. 1970) (holding that damages for trespass do not include damages to reputation).
their verdicts to determine whether the jurors, in awarding compensatory and punitive damages, properly focused on injuries stemming from the newsgathering torts alone, or whether the defendant's common law and constitutional defenses were circumvented. Additionally, double recovery may result where the jury considers publication injury when calculating newsgathering damages and the publication tort is later tried separately.

3. A Closer Look at *Gertz*

The proposed rule would forestall the formal inclusion of publication damages in any award of newsgathering tort damages and, lest the jury make such an award without court direction, would require that all compensatory damages for newsgathering torts be limited to recovery for actual injury from the newsgathering torts proper, based upon competent evidence. This is the same standard the *Gertz* Court adopted to rule out any award of presumed damages where the allegedly defamatory statements related to a matter of public concern and actual malice could not be proven with convincing clarity.200

Concededly, the analogy between excessive damage awards in constitutionalized defamation and newsgathering torts is not perfect. Although punitive and presumed damages, the categories of damages that are restricted in *Gertz*-type defamation cases,201 frequently account for high damage awards,202 it is nevertheless possible to recover significant compensatory

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201 See id.; see also *Smolla*, supra note 97, §§ 9.05[2][e], 9.08[2][a], at 9-10, 9-16.2 (noting that *Gertz's* actual harm requirement forecloses any award of presumed damages and that punitive damages are not recoverable absent a showing of actual malice in private figure/public controversy cases).

202 See, e.g., *MMAR Group, Inc. v. Dow Jones & Co.*, 25 Med. L. Rptr. 1747, 1755-56 (S.D. Tex. 1997) (holding, on post-verdict motion for judgment as a matter of law, that there was insufficient evidence of actual malice to support jury's award of $200 million in punitive damages against publisher in defamation action but upholding an award of compensatory damages of $22.7 million and punitive damages of $20,000 against an individual reporter); see also *Susan Borreson*, *Libel Blitz*, TEX. L., Mar. 31, 1997, at 1 (noting that the jury's verdict in *MMAR* was the highest libel award in U.S. history); id. (setting forth the top ten defamation verdicts in Texas courts since 1980—all of which included punitive damage awards of over $1 million). For examples of cases where large provable actual damage awards were recoverable in defamation actions, notwithstanding plaintiffs' ability or inability to prove actual malice, see *Lundell Mfg. Co. v. American Broadcasting Companies, Inc.*, 98 F. 3d 357, 364 (8th Cir. 1996) (affirming jury award of $158,000 for lost profits and $900,000 for damage to reputation); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 137-38 (6th Cir. 1996) (affirming an NASD arbitration award for defamation of $728,250 in compensatory damages); *Levine v. CMP Publications Inc.*, 738 F.2d 660 (5th Cir. 1984) (affirming award of $267,100 in actual damages); *Park v. First Union Brokerage Services, Inc.*, 926 F. Supp. 1085, 1087 (M.D. Fla. 1996) (upholding an arbitration panel award of $272,045 in actual damages and $500,000 in punitive damages);
awards in Gertz-type defamation cases for actual injuries based upon competent proof, even where there is no showing of actual malice. By comparison, the exclusion of publication damages from actual damages for newsgathering torts will significantly reduce the potential liability of the media.

E. Limiting Excessive Punitive Damages: Beyond BMW

In BMW of North America, Inc. v. Gore, the Supreme Court ruled that excessive punitive damages violate the Fourteenth Amendment’s Due Process Clause. The Court adopted a three-part test to determine whether a punitive damage award is unconstitutionally excessive. The test directs courts to examine punitive damage awards in light of three factors: (1) the “degree of reprehensibility of the defendant’s conduct;” (2) the ratio of punitive to compensatory damages; and (3) “the civil or criminal penalties that could be imposed for comparable misconduct.” Applying these factors to the punitive damages award in Food Lion, Judge Tilley granted remittitur, reducing the total punitive damages from $5.5 million to $315,000, relying principally on the disproportionality prong of BMW. The Food Lion jurors awarded punitive damages that exceeded compensatory damages by a ratio of nearly 4,000:1, even though a ratio of 500:1 was deemed unconstitutionally dispro-

LeDoux v. Northwest Publishing, Inc., 521 N.W.2d 59 (Minn. 1994) (affirming jury award of $676,000 in actual damages); Constant v. Spartanburg Steel Products, Inc., 447 S.E.2d 194 (S.C. 1994) (affirming jury verdict of $400,000 in actual damages and $100,000 in punitive damages); First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 702 (Tex. App. 1980) (upholding award of $150,000 actual damages and $450,000 punitive damages); Winkel v. Hawkins, 585 S.W.2d 889, 899-90 (Tex. App. 1979) (finding $500,000 actual and $200,000 punitive damages reasonable); Prozeralik v. Capital Cities Communications, Inc., 222 N.Y.S. 2d 913 (A.D. 4th Dept. 1995) (affirming award of $6,000,000 for injury to reputation and 3,500,000 for emotional and physical injury in defamation action); Eaton Vance Distributors, Inc. v. Ulrich, 692 So.2d 915 (Fla. Dist. Ct. App. 1997) (affirming $625,000 in compensatory damages and reversing and remanding $1,250,000 in punitive damages).

See Gertz, 418 U.S. at 350 (stating that although “all awards must be supported by competent evidence . . . there need be no evidence which assigns an actual dollar value to the injury”).

See id. at 1592.
See id. at 1598.
Id. at 1599.
See id. at 1601.
Id. at 1603.

See Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 938 (M.D.N.C. 1997). In reducing the punitive damages awarded against the individual plaintiffs, Judge Tilley held that the BMW guideposts were not exclusive and relied upon ability to pay rather than disproportionality. See id. at 939.
portionate in *BMW*. After remittitur, however, the ratio was still nearly 225:1, a difference that, while less than that which the Supreme Court found “grossly excessive” in *BMW*, is still high by any reckoning.

Whether the media defendants’ conduct in *Food Lion* was “reprehensible” is debatable. Indeed, neither the *BMW* decision nor subsequent cases clearly indicate whether a media defendant’s newsgathering purpose in committing a tort should be taken into account. The *Food Lion* court held that the First Amendment did not preclude the application of generally applicable laws to the media for newsgathering torts. The court did not factor into its decision the reprehensibility inquiry of *BMW* or the potentially mitigating fact that the torts were committed for the purpose of newsgathering. Nor did the court find that the defendants’ acts were particularly reprehensible, certainly not to the extent that would support an award of $5.5 million.

The third *BMW* guidepost requires courts to compare the punitive damage award to the civil or criminal penalties that could be imposed for comparable misconduct. North Carolina has no criminal statute on its

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211 *See BMW*, 116 S. Ct. at 1602-03. It should be noted that the disproportionality might have been less striking if Food Lion’s publication damages had been at issue. However, Food Lion did not sue for defamation. *See infra* note 23 and accompanying text.

212 *See BMW*, 116 S. Ct. at 1598.

213 The jury might have had grounds for finding the defendants’ behavior to have been reprehensible because they were presented with evidence that the ABC reporters staged various incidents. *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956, 963 (M.D.N.C. 1997). Nevertheless, the trial judge in *Food Lion* ruled that none of the alleged staged incidents could be deemed to be the proximate cause of the $5.5 billion in publication damages alleged by Food Lion. *See id.* at 966.

214 *See BMW*, 116 S. Ct. at 1599-1601 (noting that recidivism, as well as “deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive” are properly considered in determining whether the defendant’s conduct was reprehensible); *see also* Cates Constr., Inc. v. Talbot Partners, 62 Cal. Rptr. 2d 548, 569 (Ct. App. 1997) (observing that the *BMW* Court did not find the defendant’s behavior particularly reprehensible because the damages were purely economic and the complained of conduct did not endanger public health or safety).

215 *See Food Lion*, 984 F. Supp. at 932.

216 Considering each of the defendants separately, the court found that with regard to Capital Cities’ attorney, Jonathan Barzilay, “the evidence . . . did not indicate that his activities were particularly reprehensible.” *Id.* at 937. Accordingly, and in light of the “relatively minor involvement” of Capital Cities, it reduced Capital Cities’ share of punitive damages to $50,000. *Id.* at 938. The court also reduced the proportionate shares of ABC and the individual plaintiffs—in part because they had relied on the legal advice of Jonathan Barzilay, a fact which mitigated the reprehensibility of their actions. *See id.* at 938-39. The court levied most of the blame on ABC, finding that the deliberately false statements made by ABC employees could be imputed to ABC. However, the court held that these statements could not support such a disproportionate award and therefore reduced ABC’s punitive damages to $250,000. *See id.; see also supra* note 149.

217 *See BMW*, 116 S. Ct. at 1603.
books that levels a fine of $5.5 million for fraud in an employment application, nor does state law provide for comparable civil penalties. For example, the North Carolina Unfair Trade Practices Act, under which the Food Lion defendants were charged, provides for no more than an award of treble damages. In his discussion of this third guidepost, Judge Tilley notes that North Carolina recently enacted a statute limiting punitive damage awards to three times the amount of compensatory damages or $250,000, whichever is greater. Nevertheless, because the statute did not apply retroactively, Judge Tilley found that it did not "provide much guidance in this case."  

Even though the Food Lion punitive damage award was reduced under BMW, the verdict nevertheless raises the question of whether the media should not be afforded greater First Amendment protection. BMW provides a rule of general applicability for cases in which no fundamental rights are at stake. Although some punitive damage awards will not be so excessive as to offend due process under BMW, they may still be of such a magnitude as to burden First Amendment rights. Media defendants may argue that their tort-generated speech should be entitled to a high level of First Amendment protection, requiring that any burden placed on that speech be narrowly drawn in furtherance of a compelling governmental interest. The minor newsgathering torts often necessary to the production of valuable speech should at least be afforded some protection other than low-tier, rational basis review. An intermediate standard of First Amendment review may well be

218 See N.C. GEN. STAT. § 75-16 (1997); see also 31 U.S.C. § 3729 (1994) (providing that individuals who submit false claims to the federal government may be liable for a civil penalty of between $5,000 and $10,000, plus treble damages).

219 See Food Lion, 984 F. Supp. at 936 (citing N.C. GEN. STAT. § 1D-1 (1996)).

220 Id. Interestingly, Judge Tilley also stated that fraud is punishable by incarceration in both North and South Carolina. See id. He then rejected ABC's contention that none of the fraud statues in either state were applicable to it because the statutes required proof of intent "‘to cheat or defraud the victim of money or something of value.'" Judge Tilley wrote that the "something of value" in this case included: "jobs; wages; . . . time taken to train employees . . . [and] the right to make hiring decisions based on accurate information." Id. Judge Tilley continued: "When criminal sanctions are involved, monetary sanctions necessarily pale in comparison. Therefore, the legislative judgment that actions not entirely remote from the actions here punishable by imprisonment weighs in favor of allowing much of the monetary sanction to stand." Id. (emphasis added). Despite Judge Tilley's assessment that ABC's acts were not "remote" from acts that might have been punishable as fraud in North or South Carolina, no criminal prosecution was instituted in either state, suggesting that state prosecutors may have taken a different view.

221 See Food Lion, 984 F. Supp. at 931 (holding that the First Amendment provided ABC with no immunity from punitive damages).

222 See Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) ("[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . .").

223 Where a fundamental liberty is not burdened, due process requires only that a law
appropriate.224 Under such a standard, it is conceivable that a large punitive damage award could pass muster under Fourteenth Amendment Due Process but still run afoul of the First Amendment.

Media defendants who advocate a First Amendment immunity argue that large damage awards like those in Food Lion chill investigatory reporting. They claim that the media serves a unique watchdog function in our society as guardians of the First Amendment and that courts should take judicial notice of this function. If these arguments are accepted, then courts should expressly acknowledge the constraints the First Amendment places on state tort law. A more forceful and unambiguous approach to this problem would provide greater protection to free speech than leaving media defendants with only a BMW due process defense. A clear approach would also provide more protection than expressly incorporating First Amendment concerns into the application of the BMW reprehensibility indicium.

A better rule would be to hold that where a media defendant charged with a newsgathering tort meets certain requirements, it should enjoy complete immunity from punitive damages.225 This immunity would be conditioned on a finding that the newsgathering tort not be of a particularly egregious or outrageous nature.226 The media's purpose in conducting the investigation should play a large part in a court's assessment of whether particular conduct is egregious or outrageous. In this regard, it is worth noting that in Dietemann, the trial court rejected the plaintiff's claim for punitive damages, emphasizing that "defendant's efforts were directed toward the elimination of quackery, an evil which has visited great harm upon a great number of gullible people."227 In Le Mistral, Inc. v. CBS,228 an award of $250,000 in punitive damages against CBS for noisy and obtrusive trespass into the plaintiff's restaurant was vacated by the trial judge.229 The appeals court ordered a new trial so that CBS would have the opportunity to present evidence that its motive in committing the torts was to bring attention to the fact that the restaurant had recently been cited for several health code violations.230

The acts complained of in Food Lion are arguably less blameworthy than

\[\text{rationally further a valid governmental purpose. See United States v. Carolene Prods. Co., 304 U.S. 144, 152-54 & n.4 (1938).}\]

\[\text{224 See United States v. O'Brien, 391 U.S. 367, 377 (1968) (A content-neutral regulation will be sustained "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.".).}\]

\[\text{225 See supra notes 121-58 and accompanying text.}\]

\[\text{226 See supra Part III.C.1.}\]


\[\text{228} \quad 402 \text{ N.Y.S.2d 815 (App. Div. 1978).}\]

\[\text{229 See id. at 833.}\]

\[\text{230 See id. at 817-18.}\]
the disruptive conduct involved in *Le Mistral* or the intrusion into a private residence involved in *Dietemann*. ABC's motive of investigating unsanitary food handling procedures at a major supermarket chain is at least as compelling, in terms of the public interest served by the investigation, as that of CBS in *Le Mistral*, where previously cited health code violations could have been publicized without disruptive intrusion. ABC's motive was also more compelling than that of the media defendant in *Dietemann*, because relatively few people would have been affected by Dietemann's gratuitous quackery, while the health of hundreds, if not thousands, of unsuspecting consumers might have been adversely affected by unsanitary meat handling procedures discovered at Food Lion.

ABC could have met all of the conditions prerequisite to an entitlement to the proposed First Amendment immunity. The problem with the *Food Lion* jury verdict was not merely that the punitive damages awarded were excessive in light of *BMW*, but that any punitive damages were awarded at all.\(^{231}\) If speech is both substantially truthful and of significant public concern, if the tort is not unusually reprehensible, and if the media reporters have not themselves significantly contributed to the targeted behavior, then punitive damages should be subject to review under a First Amendment rule more restrictive than the due process rule of *BMW* and, under certain circumstances, entirely precluded.

IV. APPLYING CURRENT FIRST AMENDMENT DOCTRINES TO THE PROPOSED MODEL OF EXCESSIVE DAMAGE LIMITATION

A. *Does the Newsgathering Tort “Taint” the Ensuing Speech?* Cohen v. Cowles Media Co. and *Florida Star v. B.J.F.*

The critical question raised by *Dietemann* is whether newsgathering torts should be viewed as “tainting” the ensuing speech so as to divest it of the First Amendment protection that it would otherwise enjoy. If the torts do taint the speech, then media defendants will not be able to raise the First Amendment as a bar to publication damages. In such cases, the tort-tainted speech might be divested of First Amendment protection, even if sued upon directly. Alternatively, if the torts do not taint the speech, the use of a *Dietemann* approach could be viewed as a circumvention of any First Amendment protection of the tort-predicated speech.

Even where media publications are truthful and of public concern, under

\(^{231}\) The trial record might have supported a jury finding that ABC's reporters actively and deliberately participated in creating the unsanitary food-processing conditions that they were supposed to be investigating—that they had staged various incidents. *See Food Lion, Inc.*, 964 F. Supp. 956, 963 (M.D.N.C. 1997). If the record reasonably supported such a finding, the jury would be justified in penalizing journalistic misbehavior with an award of punitive damages. However, the award should have been only a small fraction of the $5.5 million awarded to Food Lion.
current law they may receive little or no effective First Amendment protection where the media obtains the information published by committing news-gathering torts. The Supreme Court’s ruling in *Florida Star* protects the publication of “lawfully-obtained truthful information about a matter of public significance,”232 prohibiting states from punishing such publication unless the punishment is “narrowly tailored to a state interest of the highest order”—a high-tier, “strict scrutiny” test. Nevertheless, while the Court has yet to address the issue squarely, it is possible that the Court will not consider tortiously obtained information to be lawfully obtained information for purposes of invoking the *Florida Star* rule against a *Dietemann* approach to damage assessment.

In *Cohen v. Cowles Media Co.*,234 the Supreme Court upheld a promissory estoppel judgment against a newspaper that violated an oral agreement not to reveal the identity of a confidential informant.235 The informant, a public relations consultant to Minnesota’s 1982 Independent-Republican gubernatorial candidate, turned over court records indicating that the rival-ticket candidate for lieutenant governor had been charged with three counts of unlawful as-

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232 *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989) (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)). In *Florida Star*, the Supreme Court held that the media defendant could not be held liable under a Florida statute which made it unlawful to “‘print, publish or broadcast . . . in an instrument of mass communication,’ the name of the victim of a sexual offense.” *Id.* at 526, 541. B.J.F., a rape and robbery victim, sued for civil damages based on a violation of this statute after the defendant published her name in its newspaper, having obtained it from a police report of the investigation posted in a press room to which the media had access. *See id.* at 527-28. The *Florida Star* Court relied on a line of precedent sustaining the practice of publishing of truthful information obtained from court documents and public records. *See id.* at 530-31. The Court cited *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979), for the proposition that “[i]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.” *Florida Star*, 491 U.S. at 533. The majority also stated that the story about the crime was newsworthy. *See id.* at 536-37. The dissent took issue with the Court’s conclusion, arguing that the *name* of the crime victim was not similarly newsworthy—a criticism that this author shares. *See id.* at 550 (White, J., dissenting); *Smolla, supra* note 97, § 10.0412[a], at 10-31.

Perhaps sensing that it had the weaker side of this argument, the *Florida Star* majority rephrased the *Daily Mail* rule—alluding only to the protection of “truthful information . . . lawfully obtained” and omitting any reference to “matters of public significance.” *Id.* at 541. In this respect, *Florida Star* is significant in that it leaves the media to determine for itself what is “of public significance.” However, inasmuch as *Florida Star* specifically relies upon the rule of *Daily Mail*, I will assume, for purposes of this Article, that the “public significance” requirement is part of the *Florida Star* rule.

233 *Florida Star*, 491 U.S. at 541.


235 *See id.* at 665.
assembly in 1969 and convicted of petit theft in 1970. Upon investigation, the newspapers discovered that the court documents were authentic, but that the unlawful assembly charges arose out of a civil rights demonstration and the conviction for petit theft was based on an incident that occurred when the rival candidate was emotionally distraught and which was later vacated. Cohen lost his job when the newspaper editors, over the protests of the reporters who had made the promises, revealed his name in the ensuing article. At trial Cohen recovered $200,000 in compensatory damages and $500,000 in punitive damages, although the punitive damages award was reversed by an intermediate state appellate court. The Minnesota Supreme Court reversed the compensatory damages award, holding that a claim of promissory estoppel was inappropriate to the circumstances of the case and that the First Amendment prevented recovery of the $200,000 judgment.

The Supreme Court, by a 5 to 4 vote, reversed. Justice White, in the majority opinion, emphasized the state’s interest in the neutral enforcement of its laws, writing 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.” In what is arguably dicta, Justice White specifically rejected the newspapers’ *Florida Star* defense, noting that in *Florida Star*, the rape victim’s name had been obtained by lawful means, whereas “respondents obtained Cohen’s name only by making a promise that they did not honor.”

If the Court in *Cohen* would not consider information obtained through breach of contract to be lawfully obtained for purposes of First Amendment protection under *Florida Star*, it might well take the same view regarding information obtained by means of newsgathering torts. The state’s interest in the neutral enforcement of generally applicable laws encompasses both tort and contract. Media defendants who publish substantially truthful informa-

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238 See id. at 666.
239 See *id.* The court of appeals reversed the misrepresentation claim. The plaintiff was thus only entitled to recover compensatory damages under his remaining breach of contract claim. *See Cohen*, 445 N.W.2d at 260.
240 See *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 204, 205 (Minn. 1990).
241 *Cohen*, 501 U.S. at 669.
242 See O’Neil, supra note 140, at 1012 (“So brief a reference offers at most a hint that the Cohen majority saw the matter of newsgathering conduct as potentially relevant to resolving a close case, even where that conduct could surely not be called ‘unlawful’ in any conventional sense.”). The decision in *Cohen* may have turned on the theory that the defendants had waived their First Amendment rights. *See infra* note 298 and accompanying text.
243 *Cohen*, 501 U.S. at 671.
tion of public concern obtained by means of newsgathering torts may not have the benefit of high-tier *Florida Star* protection, against either a suit premised directly on the publication or against a newsgathering tort claim brought in a court adopting a *Dietemann* approach to damage assessment.

B. The “Gertz/Sullivan Circumvention” Doctrine and its Limitations

Although Justice White’s opinion in *Cohen* casts doubt on the ability of media defendants to raise the rule of *Florida Star* to protect substantially truthful tort-predicated speech of public concern, it does leave open the possibility of indirectly protecting such speech—under a doctrine that prevents circumvention of the constitutionalized defamation rules of *Gertz* and *Sullivan*. Given the possible adverse implications of the *Cohen* dicta for tort-predicated speech, it is not surprising that the *Desnick* and *Food Lion* courts invoked these anti-circumvention principles for the benefit of media defendants where the plaintiffs were unwilling or unable to prove the falsity of the tort-predicated publications, let alone the actual malice requirements of *Gertz/Sullivan*.

Anti-circumvention doctrine relies heavily on the Supreme Court’s decision in *Hustler Magazine, Inc. v. Falwell*.\(^{244}\) That case arose when Hustler Magazine published a satirical depiction of the Reverend Jerry Falwell, founder and president of the Moral Majority, which portrayed the Reverend Falwell’s first sexual experience as a “drunken, incestuous rendezvous with his mother in an out house.”\(^{245}\) A Virginia jury rejected Falwell’s claim for defamation on the theory that no reasonable person would have taken the parody to be an assertion of fact. Nevertheless, the jury awarded Falwell $100,000 in compensatory damages and $100,000 in punitive damages for intentional infliction of emotional distress.\(^{246}\) The Fourth Circuit affirmed the judgment.\(^{247}\)

Reversing the judgment below, the Supreme Court extended *Sullivan* and its actual malice requirement to public officials and public figures who claim intentional infliction of emotional distress, emphasizing the need “to give adequate ‘breathing space’ to the freedoms protected by the First Amendment.”\(^{248}\) In so doing, the *Hustler* Court had, as one commentator expressed


\(^{245}\) *Hustler*, 485 U.S. at 48.

\(^{246}\) See id. at 49.

\(^{247}\) See id.

\(^{248}\) Id. at 56.
it, prevented an “end-run around” Sullivan.249

Justice Blackmun, dissenting in Cohen, argued, inter alia, that the award of promissory estoppel damages represented a similar circumvention of the constitutional defamation rules and that Hustler was “precisely on point.”250 Justice White, writing for the Cohen majority, distinguished Hustler by citing the Minnesota Supreme Court’s observation that Cohen could not have sued for defamation because the information disclosed—his name—was true.251 White emphasized that “Cohen is not seeking damages for injury to his reputation or his state of mind.”252 Rather, Cohen was suing for breach of contract and the resultant loss of job and lowered earning capacity.253

White’s attempt to distinguish Cohen from Hustler might provide a way to avoid the implication in Cohen that protected speech can be “tainted” by newsgathering torts. In fact, Judge Tilley used this very distinction to rebuff Food Lion’s attempt to use a Dietemann approach. Food Lion had invoked Cohen in support of its argument that, given the nature of ABC’s alleged wrongful acts, Food Lion should be entitled to recover both reputational and non-reputational damages resulting from the broadcast, regardless of whether the information published by ABC was true or false.254 Focusing on Justice White’s statement in Cohen, Judge Tilley concluded that “[w]here . . . a plaintiff seeks to use a generally applicable law to recover for injury to reputation or state of mind while avoiding the requirements of a defamation claim (requiring proof of falsity and actual malice).”255 the controlling precedent should be Hustler and not Cohen.256 Finding that Food Lion was,


251 See id. at 671.

252 Id.

253 See id. But see id. at 675 n.3 (Blackmun, J., dissenting) (“I perceive no meaningful distinction between a statute that penalizes published speech in order to protect the individual’s psychological well being or reputational interest and one that exacts the same penalty in order to compensate the loss of employment or earning potential.”).


255 See id. at 822.

256 Id. at 823.

257 See id. But see Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 932 (M.D.N.C. 1997) (“Despite the many protections necessary for the proper operation of the press, it would be a peculiar rule indeed which immunized illegal activity, undertaken with a consciousness of wrongdoing, from punishment and deterrence through punitive damages.” (footnote omitted)). The court based its decision to deny ABC’s First Amendment defense to the punitive damages award on ABC’s “consciousness of wrongdoing.” Id. The court equated this level of intent with the higher threshold dictated by Gertz, which “provides protection for a member of the press who acts negligently or without in-
at least in part, attempting to avoid the First Amendment restrictions on a
defamation action which it had not brought, Judge Tilley ruled that Food
Lion could not recover any publication damages for injury to its reputation as a
result of the defendants' broadcast.258

Judge Tilley was certainly correct in recognizing that Food Lion's pro-
posed use of a Dietemann approach and its reliance on Cohen to recover
damages for reputational injuries in an action based on newsgathering tort
claims represented the same kind of end-run around the Gertz/Sullivan prin-
ciples that the jury verdict in Hustler did. The more difficult question, how-
ever, is whether the Gertz/Sullivan circumvention principles of Hustler af-
ford a doctrinal basis for extending comprehensive First Amendment
protection to truthful publications of public concern that are tainted by newsgath-
ering torts.

One problem with using anti-circumvention doctrine to protect newsgath-
ering torts is the difficulty of extrapolating a comprehensive rule from the
implications of a doctrine specifically designed to protect speech that might be false and defamatory, and whose language is specifically shaped to that
purpose. If Hustler's extension of the Sullivan rule to intentional infliction of
emotional distress might have distorted the concept of "actual malice," at
least the Court was acting upon a careful evaluation of the First Amendment
principles at stake in political satire.

By comparison, if anti-circumvention theory is systematically used to ex-
tricate the investigatory media from a Dietemann approach to damage as-
se ssment for the newsgathering torts, as in Food Lion, query whether that
would permit a comparable judicial focus either on the societal interest in
deterring certain types of newsgathering torts but not others, or on the so-
ci etal value of the tort-predicated speech. As to the latter, anti-circumvention
theory presently does not distinguish between truthful and false tort-
predicated speech. Where actual malice cannot be proved with clear and
convincing clarity, the Gertz/Sullivan circumvention rule protects speech that
may be false, defamatory, socially worthless, and perhaps even "doubly tor-
tious" because it was generated by means of newsgathering torts.

Moreover, anti-circumvention theory makes no distinction between minor
and more serious newsgathering torts. Reinterpreting "actual malice" for this
purpose would cause much greater doctrinal confusion than Hustler did, be-
cause there is not necessarily any correlation between the types of newsgath-
ering tort, the media's good faith or lack thereof when employing it in an in-
vestigation, the truth or falsity of any resulting publication, and the media's
knowledge of falsity or reckless disregard of the truth.

A related problem is that anti-circumvention theory remains ill-defined and
conceptually troublesome, and its precise application to actions for news-

tent to violate generally applicable laws." Id. It is, however, difficult to see why any in-
tentional tort would not be subject to punitive damages under such a standard.

258 See id.
gathering torts remains unclear. Although the theoretical reach of the doctrine might be broad, courts seem most comfortable invoking it when the plaintiff's intention to circumvent the constitutional defamation rules might be proved or inferred from the facts. Because anti-circumvention doctrine is specifically keyed to a constitutional defamation rule, courts are more likely to invoke it when the pleadings present an obvious nexus to defamation, such as an allegation of false publication or injury to reputation. Where one such obvious nexus to defamation is absent, the presence of the other may suffice to alert the court to the problem of Gertz/Sullivan circumvention.

For example, in Hustler, injury to reputation was no longer at issue because the jury thought the falsity of the heavy-handed political satire so obvious that it could not be understood as defamatory statement of fact. Accordingly, the plaintiff's recovery was limited to the injury caused by emotional distress. An earlier case that may be viewed as an effort by the Court to prevent circumvention is Time, Inc. v. Hill,259 in which the Court extended the rule of Sullivan to false light depiction cases. This case troubled some commentators who believed that the tort of false-light was more closely related to invasion of privacy than to defamation.260 As in the case of Hustler, defamation was not an issue in Hill261 because, although the alleged falsifications (regarding the treatment of the plaintiffs when held hostage by escaped convicts) were embarrassing and emotionally disturbing, they were clearly not damaging to reputation. Both Hustler and Hill arguably present Gertz/Sullivan circumvention problems in that the plaintiffs sought recovery for state of mind injuries—humiliation, emotional distress, embarrassment—injuries that are either thought to be less serious than reputational injuries or that are usually recoverable as defamation injuries, and thus subject to Gertz/Sullivan limitations. As a practical matter, however, the Court might have been more directly clued to Sullivan's applicability by the presence in both cases of a more conspicuous nexus to defamation—the allegation of falsity.

In Food Lion, by comparison, falsity was not alleged, but the other obvious nexus to defamation— injury to reputation—was an issue in the case. Judge Tilley therefore recognized that Food Lion's attempt to link its reputa-

259 385 U.S. 374 (1967).
261 See Hill, 385 U.S. at 390-91 (noting that because the case was not a libel action, the question of what standard to apply to reputational injuries to private individuals was not before the Court).
tional injuries to the damages caused by the newsgathering torts without proving falsity or actual malice was, in fact, an attempt to circumvent Gertz and Sullivan.

Problems emerge, however, when the challenged speech lacks either obvious nexus to defamation, as would be the case where falsity is not alleged because the speech is conceded to be truthful and where injury to reputation is not alleged but rather some lesser state of mind injury, such as emotional distress, is at issue. Speech with these attributes might theoretically be protected under a Gertz/Sullivan circumvention analysis: if Gertz/Sullivan protects false and defamatory speech, then it should protect truthful speech; if Gertz/Sullivan would have protected the same speech were it alleged to have caused injury to reputation, then it should also protect that same speech when a lesser or included state of mind injury such as emotional distress is alleged.

In practice, however, such speech might not even be recognized as presenting a Gertz/Sullivan circumvention problem, since there is no obvious nexus to defamation which would suggest that the plaintiff is engaging in circumvention strategy and the defamation-specific language of Gertz/Sullivan would appear inapposite. Thus, ironically, categories of speech that are substantially truthful and of public concern—speech deserving and normally receiving the highest level of First Amendment protection—would be less likely to be viewed as falling within the scope of anti-circumvention doctrine and afforded First Amendment protection against a Dietemann approach to damage assessment, if only because the allegations look so unlike classic defamation.

Substantially truthful speech of public concern—the usual end-product of media undercover investigations—should not have to seek protection in the theoretical back-waters of doctrines specifically designed to protect defamatory speech. It would be more effective, logical, and jurisprudentially sound for speech that is both substantially truthful and of public concern to find shelter under the high-tier protection afforded by the affirmative rule of Florida Star.

C. Distinguishing Newsgathering Torts from Promissory Estoppel

Notwithstanding Justice White’s statements in Cohen concerning how information is or is not “lawfully obtained,” newsgathering torts can be functionally and conceptually distinguished from the promissory estoppel at issue in Cohen so that media speech which is substantially truthful and of significant public concern, albeit tortious in origin, can be afforded the benefit of high-tier First Amendment protection under the rule of Florida Star. The Cohen decision itself suggests one significant difference: in distinguishing Florida Star and Smith v. Daily Mail Publishing Co.\(^2\) from Cohen, Justice

\(^2\) 443 U.S. 97 (1979) (finding that a state statute which prohibited the publication of lawfully obtained names of juvenile offenders violates both the First and Fourteenth Amendments).
White writes that "the State itself defined the content of publications that would trigger liability"; whereas in Cohen, "Minnesota law simply requires those making promises to keep them. The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed."\(^{263}\) Contracts and promises were thus viewed by the Cohen majority as self-imposed limitations under which First Amendment rights are voluntarily waived. In contrast, the civil action in Florida Star was predicated on the violation of a state statute under which the state itself defined and imposed liability on the basis of the content of speech. Although the majority of newsgathering tort claims are more likely to be based on state common law than on state statute, in either case it is the state that imposes tort liability. Tort liability should therefore be distinguished from contractual liability arising from a voluntary waiver of First Amendment rights.

A second distinction between newsgathering tort law and contract/promissory estoppel law is the large difference in impact that each law has on the overall flow and volume of protected speech. The Cohen majority made the cogent argument that enforcing state contract and promissory estoppel laws in order to protect informants would, in the long run, augment the volume of valuable speech because confidential sources would feel more secure in confiding to the media.\(^{264}\) No comparable argument can be made for awarding large damage judgments against the media in the newsgathering tort cases. Such large damages only serve to chill investigatory journalism and the valuable speech it produces. Indeed, the need for First Amendment protection is greater in the case of newsgathering torts than it is where Cohen-type promissory estoppel is involved. Because reporters generally will not voluntarily name an informant in breach of a pledge of confidentiality, such promissory estoppel claims arise infrequently.\(^{265}\) By comparison, newsgathering torts are common and are, arguably, necessary to investigatory journalism so that litigation based on them will arise more often.

Another distinction is that it is much more likely that the media will be subjected to large punitive damage awards when they commit newsgathering torts than when they are sued on a theory of promissory estoppel. In cases of breach of contract or promissory estoppel, punitive damages are normally limited to situations where contract-related torts, such as fraud, are impli-

\(^{264}\) See The Supreme Court, 1990 Term—Leading Cases, 105 Harv. L. Rev. 177, 283-85 (1991) (noting that Cohen will increase the stock of information because informants will be more willing to disclose information when their identities are protected from disclosure).
\(^{265}\) But see Smolla, supra note 97, § 12.06[3], at 12-38.2 (noting that although Cohen may seem of little consequence because few journalists will voluntarily reveal the identity of their sources, it may be of greater significance regarding various subsidiary agreements such as how the information will be used).
Indeed, in *Cohen* itself an award of $500,000 in punitive damages was reversed by the appeals court which concluded that Cohen had failed to establish the fraud claim that would have supported such an award under Minnesota law. In contrast, there is a far greater likelihood of large punitive damage awards in newsgathering tort cases—a cause of concern here, as it was in *Sullivan*.

A final distinction between a *Cohen* promissory estoppel claim and a newsgathering tort claim is that publication completed the plaintiff's cause of action in *Cohen*, whereas newsgathering torts are severable and distinct claims that may be conceptually distinguished from publication torts, even if that distinction is not so readily apparent to jurors adopting a *Dietemann* approach to damages assessment. Thus the states' interest in the neutral enforcement of their tort laws can be successfully vindicated by trying newsgathering torts separately from publication torts while insisting that the juries confine their verdicts to damages flowing directly from newsgathering.

The publication-based claims should be analyzed as distinct from the newsgathering-based claims for First Amendment protection purposes. If the published speech is found to be truthful and of public concern, it should then be eligible for the high-tier First Amendment protection of *Florida Star*, notwithstanding *Cohen*’s narrow view of how information may be “lawfully obtained.” Individuals could still pursue an independent publication tort action, but that claim would be subject to the First Amendment protection of *Florida Star, Sullivan*, and *Gertz*.

There are thus a number of compelling reasons, in terms of vindicating First Amendment interests, for distinguishing newsgathering torts from the promissory estoppel in *Cohen*. Substantially truthful media speech which is of public concern should be able to claim the high-tier First Amendment protection of *Florida Star*, even if it is tortious in origin, and notwithstanding *Cohen*’s implication that such information might not be “lawfully obtained.” Such high-tier First Amendment protection should check the effect of potentially inflated compensatory and punitive damages that arise from the *Dietemann* approach.

D. *Tort-Predicated Publications That Are Proven to be False*

In the earlier discussion of constitutionalized defamation, the strongest argument for extending First Amendment protection to the media for newsgathering tort liability was that newsgathering torts normally are committed in order to generate truthful speech of public concern. But if the speech is false and defamatory, should either the speech or the tort have the benefit of

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266 See E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8, at 189-92 (1990) (noting that punitive damages are not ordinarily awarded for breach of contract but that they may be awarded where there is fraudulent conduct or an independent tort).


268 See *supra* Part II.
First Amendment protection if actual malice cannot be proven with convincing clarity as required by *Gertz/Sullivan*?

While it may be troubling to protect such doubly tainted speech, the First Amendment should still prevent courts from using a *Dietemann* approach to damage assessment if actual malice cannot be shown. *Gertz/Sullivan* and anti-circumvention principles still protect the publication itself, and this protection should not be forfeited even if the media commit newsgathering torts.

Courts should not adopt the *Dietemann* approach because the inclusion of publication damages in a newsgathering tort award would indirectly undermine the First Amendment protection of the publication by subjecting the media to large damage awards. Similarly, courts should require that any compensatory damages awarded for newsgathering torts be limited to actual injuries supported by competent evidence to ensure that the jury has not conflated newsgathering damages with publication damages.

Punitive damages are, however, another matter. Unlike the proposal to prohibit the award of compensatory damages under a *Dietemann* approach, the proposed punitive damages immunity is not derivative of the protection the First Amendment currently affords to the publication. Instead, prudence dictates that such immunity be granted so as not to discourage media investigations that are designed to produce substantially truthful speech on matters of public concern. If no such speech results but the information published is defamatory, the rationale for protecting the newsgathering torts proper against any award of punitive damages is lost. Media defendants in this position should instead look to *BMW* for due process relief from "excessive" punitive damages.

**E. Heightening the "of Public Concern" Requirements of Florida Star and Gertz/Sullivan**

The central focus in considering First Amendment protection for newsgathering torts is on the tension between the public’s legitimate need for information and the target’s legitimate need for privacy or personal autonomy. Many commentators, this author included, believe that the *Florida Star* Court defined “of public concern” too broadly when it held that the name of the rape victim, and not merely the fact of the crime, was “of public concern."269 By comparison, *Gertz’s “of legitimate public concern” requirement, as expounded upon in Dun & Bradstreet, is arguably too narrow if it excludes information directly bearing on the credit status of a corporation.270

Perhaps the discrepancy between the two cases can be reconciled by viewing the *Florida Star* rule as protecting substantially truthful speech and

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269 See, e.g., Smolla, *supra* note 97, § 10.04[2][a], at 10-31 (stating that it was not clear that the victim’s name in *Florida Star* was newsworthy).

270 See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985) (Brennan, J., dissenting) (criticizing the majority holding that a credit report was not a matter of public concern within the meaning of *Gertz*).
by viewing Gertz as protecting speech that may be false and defamatory. However, for purposes of First Amendment protection of tort-predicated speech, the constitutional standard should be closer to Gertz, requiring that the matter reported be not merely "of public concern," but "of significant public concern." A broad definition of this requirement would encompass all politically relevant information but exclude the merely morbid, prying, and sensational. Media defendants meeting this heightened requirement would be insulated from punitive damages as well.

Where the media obtains the published information by tortious intrusions into zones of privacy or personal autonomy, such as a home, then the requisite standard should be elevated an additional step, and First Amendment protection limited to matters "of the most serious public concern." Such might include, among other things, evidence of felonious conduct; corruption of public officials; dangers to our federal, state, or local governments and their democratic institutions; and activities or conditions otherwise dangerous to the public safety.

Applying these heightened "of public concern" standards to some of the major precedents produces consistent outcomes. In Dietemann, for example, if we accept for the sake of argument the Ninth Circuit's conclusion that plaintiff's home was a place with a heightened expectation of privacy, even given that he had invited virtual strangers into an office within that home, the information obtained through tortious intrusion was still arguably "of significant public concern" because practicing medicine without a license is a crime. It is doubtful, however, whether the defendants' disclosure would have met the requirements of the proposed "most serious public concern" standard. The crime was not a felony, the plaintiff prescribed no illegal drugs, and sought no remuneration for his advice. Any threat to public health was relatively limited since the number of individuals who voluntarily sought Dietemann's advice was small. Furthermore, they sought his advice knowing that he was not a licensed physician. Therefore, if one accepts the court's finding that Dietemann could legitimately entertain an expectation of privacy under the circumstances presented by that case, the First Amendment should not have forestalled the Dietemann court from using the approach to damage assessment that it did.

On the other hand, the proposed rule would support the different outcome in Pearson v. Dodd, where members of a Senator's staff stole confidential files from a file cabinet in the Senator's office and turned them over to the defendant newspaper columnists. While the file cabinet was arguably a zone of heightened privacy and personal autonomy, the stolen correspondence supported allegations of influence-peddling against the Senator. Because the matter disclosed was "of the most serious public concern," the First Amendment should have forestalled use of a Dietemann approach to damages assessment, even if the court of appeals had not reached the same result by

271 410 F.2d 701 (D.C. Cir. 1969).
common law analysis.\footnote{272}{The court of appeals ruled that the defendant newspaper columnists could not be held liable for intrusion, despite their knowledge of how the documents had been obtained. See id. at 705. In any case, the court made clear that it would not consider publication damages in its assessment of intrusion damages. See id.}

As for Food Lion, the evidence confirming the existence of unsanitary meat-handling procedures in a major, multi-state supermarket chain was not only "of significant public concern," it was "of the most serious public concern." Even assuming for the sake of argument the dubious proposition that the non-public areas of Food Lion's business premises—areas which were frequented by numerous employees—were areas in which Food Lion could legitimately entertain a heightened expectation of privacy, the "of most serious public concern" standard would still have been met. The tort-predicated publication appeared to be substantially true, and Food Lion balked at proving otherwise in court.\footnote{273}{See Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956, 959 (M.D.N.C. 1997) (noting Food Lion's failure to contest the truthfulness of the broadcast by bringing a libel suit).}

Thus, the modified Florida Star rule I have proposed should protect ABC's non-criminal newsgathering torts, as well as the tort-predicated publication, against the assessment of excessive damages. If media defendants cannot meet the proposed heightened "of public concern" requirements, should they be ineligible for all of the proposed First Amendment protections from excessive damage awards? Arguably, the unmodified Florida Star and Gertz/Sullivan rules already protect the publications, but such protections would be indirectly undermined if publication damages were assessed for the predicate torts. While I have argued that minor newsgathering torts do not taint the ensuing publications so as to forfeit First Amendment protection, imposing heightened "of public concern" requirements as a precondition to forestalling the inclusion of publication damages would hold the media to account for their tortious acts. Media defendants who fail to meet the heightened "of public concern" requirements should be denied the proposed conditional immunity from punitive damages and left to seek relief under BMW.

\begin{abstract}

As Food Lion illustrates, the significant First Amendment issue regarding newsgathering torts is not that of media liability, but rather, of excessive damages. Although states have a strong interest in the neutral enforcement of their tort laws, and plaintiffs have an interest in recovering compensatory damages, these concerns must be balanced against the strong societal interest in investigatory journalism and its frequent production of substantially truthful publications on matters of significant public concern. These interests can be accommodated by recognizing a limited and conditional First Amendment immunity for the media from punitive and excessive compensatory damages.
\end{abstract}
for newsgathering torts, broadly analogous to the damage limitation model
created in constitutionalized defamation under the rule of *Gertz v. Robert
Welch*.

Realization of this model requires clarification and modification of present
First Amendment doctrine. Most importantly, the possible implication of
*Cohen v. Cowles Media Co.*—that tortiously acquired information is not
"lawfully-obtained"—should be rejected and the high-tier First Amendment
protection of *Florida Star* extended under specific conditions to speech
predicated on non-criminal newsgathering torts. This, together with a height-
ening of *Florida Star*'s "of public concern" requirement (to discourage tor-
tious media behavior in pursuit of mere sensationalism as well as media in-
trusions into zones of personal privacy and autonomy), will do much to
resolve current doctrinal inconsistencies in First Amendment jurisprudence
while accommodating the conflicting interests at stake.