Food Lion as Reform or Revolution: "Publication Damages" and First Amendment Scrutiny

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I. INTRODUCTION

Media litigation\(^1\) has gone through four phases.\(^2\) In the first phase, plaintiffs sued for libel. Libel was traditionally a very plaintiff-friendly road to recovery—one of the most plaintiff-friendly in all of tort law. The libel plaintiff needed only to prove publication of a statement “of or concerning” her which would diminish her reputation.\(^3\) No proof of fault, no proof of falsity, and no proof of damages were required.\(^4\) Against this backdrop, the impact of *New York Times Co. v. Sullivan*\(^5\) and its progeny cannot be over-emphasized: plaintiffs went from no-fault to, in most cases, perhaps the highest standard of fault in all tort law (clear and convincing evidence of actual malice).\(^6\) In addition, plaintiffs

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\(^1\) This paper discusses suits against the media. It does not address non-media defendants.

\(^2\) I do not want to suggest that this is a strictly historical account. Plaintiffs have always filed a variety of suits against the media. However, certain trends in litigation can be observed. Others have noted a trend away from the traditional libel action. *See*, e.g., Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the Cohen Maledicta that Bar First Amendment Protection for Newsgathering*, 58 *Ohio St. L.J.* 1135, 1137-38 (1997) (reporting that plaintiffs have resorted to suits based on the media’s actions in gathering the news to avoid the constitutional limits of the First Amendment); David A. Logan, *Masked Media: Judges, Juries and the Law of Surreptitious Newsgathering*, 83 *Iowa L. Rev.* 161, 167-68 (1997) (noting that plaintiffs began pleading multiple tort theories in an effort to evade the First Amendment protection imposed by the Court); Charles G. Scheim, Comment, *Trash Tort or Trash TV?: Food Lion, Inc., v. ABC, Inc., and Tort Liability of the Media for Newsgathering*, 72 *St. John’s L. Rev.* 185, 187-88 (1998) (noting a change in legal tactics by plaintiffs); Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 *Geo. Wash. L. Rev.* 1097, 1103 (1999) (noting an increasing number of highly visible cases brought for intrusion).

\(^3\) *See*, e.g., DAN B. DOBBS, *THE LAW OF TORTS* 1120 (2000).

\(^4\) *See* id.

\(^5\) 376 U.S. 254 (1964).

\(^6\) *See* id. at 285-86.
now had to prove falsity\(^7\) and, in many cases, actual damages.\(^8\) Even if plaintiffs surmounted this initial barrier, they were faced with a second hurdle—a very stringent standard of appellate review.\(^9\) The libel route no longer looked attractive, and may have become impassable.

The reaction of the plaintiffs' bar was to pursue other routes to recovery. Cases that originally would have been framed as libel actions now appeared in other guises. This began the second era of media litigation, as plaintiffs turned to other speech torts, such as false light or publication of private facts. These cases are similar to the classic libel case in two ways. First, like libel, the plaintiff seeks to recover for a publication (one which places her in a false light or reveals private details of her life). Second, as in libel, these torts are designed to punish "wrongful" publication—by definition the plaintiff is seeking damages because of the defendant's speech. When the United States Supreme Court considered these cases, it extended protections, identical or parallel to those recognized in *New York Times*, and once again made recovery difficult or impossible.\(^10\)

Media law then entered a third phase—plaintiffs sought to use tort actions that had nothing to do with publication as a vehicle for recovery against media defendants.\(^11\) Plaintiffs continued to sue because of a publication, but they used tort actions which were not designed to punish speech, for example, cases sounding in negligence, products liability, and intentional infliction of emotional distress. The classic illustration is *Hustler Magazine, Inc. v. Falwell*,\(^12\) where the Reverend

\(^7\) See id. at 279-80 (holding that a public official must prove falsity or reckless disregard). See also Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69 (1986) (holding that private figures must also prove falsity on suits over matters of public concern).

\(^8\) See Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (holding that private figures may only collect actual damages unless they prove actual malice); cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (holding that presumed damages are permissible where the plaintiff is a private figure and the matter is one of private concern).


\(^11\) For similar observations by other authors, see supra, note 2.

\(^12\) 485 U.S. 46 (1988).
Jerry Falwell sued Hustler Magazine for intentional infliction of emotional distress because it published a parody portraying him as engaged in drunken and incestuous behavior. This claim resembled the traditional libel case in that it sought damages for a publication, but it used a tort—intentional infliction of emotional distress—which was not created to punish a wrongful publication, but rather to be used against any behavior which intentionally inflicts emotional distress. While the Court extended the protections of *New York Times* in the *Hustler* case, as discussed later, the Court's position is by no means clear, and it took a seemingly conflicting position a few years later in *Cohen v. Cowles Media Co.*

In the fourth and final era, plaintiffs moved away from publication, and instead sought to recover for torts committed by the media while gathering news. Actions for trespass, breach of duty of loyalty, fraud,

13. I will use the phrase “traditional speech torts” to define torts, like libel, where the plaintiff sues because of a publication and the tort action itself is designed to penalize wrongful speech. In these torts, speech is an essential element of the plaintiff's claim and, by definition, the plaintiff seeks damages because of speech.

In distinction, by “non-speech torts,” I mean those in which speech is not a necessary element. These include both the newsgathering cases (where the complaint is about the media's conduct in gathering the news) and cases where the action focuses on a publication but uses a tort which does not necessarily focus on speech. Examples of the latter include negligence, products liability, and intentional infliction of emotional distress. To illustrate, a libel action is a speech tort: it always seeks damages because of the defendant's speech—it requires a “publication.” In contrast, a products liability action can be founded on a cup of coffee, a car, or a book. See, e.g., *Herceg v. Hustler Magazine, Inc.*, 814 U.S. 1017 (5th Cir. 1987) (dismissing claims based on incitement, negligence, products liability, dangerous instrumentality, and attractive nuisance filed when 14 year old died of asphyxia after reading a *Hustler* article on autoerotic asphyxia). While the Court has been clear that some form of First Amendment protection extends to traditional speech torts, it is confused as to when, if ever, the First Amendment applies to torts which are not designed to punish publication.

Others have used the terms “speech tort” differently. For example, Anderson uses the phrase “speech torts” to cover any tort used to sue for speech even if speech is not an element of the tort. See, e.g., David A. Anderson, *Torts, Speech, and Contracts*, 75 *Tex. L. Rev.* 1499, 1499-50 (1997).


16. I will use the phrase “newsgathering torts” to describe tort actions based on the media's conduct while gathering the news.

17. Fraud is a hard tort to classify. Fraud (or fraudulent misrepresentation) usually involves speech by the defendant to the plaintiff, since it requires a representation. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 106, at 736 (5th ed. 1984 & Supp. 1988) (noting that while the representation “usually consists ... of oral or written words ... it is not necessarily so limited”). I think, however, that fraud probably is best seen as a non-speech tort because it does not require speech to a third party (i.e., “publication”) in the way that the traditional speech torts, like libel, false
and even statutorily-created actions became the routes of choice. These actions not only do not use traditional speech torts, but also do not even purport to complain about publication. Rather, these claims focus on the media’s conduct while gathering news. This article discusses these newsgathering torts and, in particular, the latest “poster child” of this trend, the case of *Food Lion, Inc. v. Capital Cities/ABC Inc.*, recently decided by the Fourth Circuit.

On November 5, 1992, ABC broadcast a segment on its *PrimeTime Live* show alleging unwholesome food handling practices at Food Lion stores (a broadcast which contained footage shot by undercover reporters who had obtained employment using fictitious resumes). Food Lion sued for fraud, breach of the employees’ duty of loyalty, trespass, and unfair trade practices. At trial, the jury found for the plaintiff on all the counts before it. It awarded Food Lion $1,400 on the fraud claim and $1,500 on the Unfair Trade Practices Act (UTPA) claim (the trial court later required Food Lion to elect between the two, and Food Lion elected fraud). The jury awarded nominal damages of only one dollar each on the trespass and breach of duty of loyalty claims because Food Lion conceded at trial that it could not quantify actual damages on these counts. However, a week later the jury awarded over $5.5 million in punitives based on the fraud claim, which the trial judge reduced to $315,000 after post-trial motions. Thus, as appealed, the award was $1,402 in compensatory damages (for fraud, UTPA, trespass and breach of duty of loyalty) and $315,000 in punitives.

The Fourth Circuit held that Food Lion, as a matter of state law, had not proven a claim for fraud or a claim under the UTPA. It therefore reversed the “lion’s share” of the compensatory damages ($1,400), and reversed the award of punitive damages since they were based on the fraud claim. The Court of Appeals then considered the claims of

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18. 194 F.3d 505 (4th Cir. 1999).
19. See id. at 510-11.
21. See *Food Lion*, 194 F.3d at 511.
22. See id.
23. See id. at 511, 515 n.3.
24. See id. at 511.
25. See id.
26. See id. at 512, 520.
27. *Food Lion*, 194 F.3d at 512, 522. The Fourth Circuit’s ruling confirms Professor Logan’s position that the common law can be an effective tool to protect the media in newsgathering cases. See Logan, *supra* note 2, at 192. I agree that the
trespass and breach of duty of loyalty. First, it held both claims were supported by state law. Turning to the media's argument that the First Amendment barred recovery, the court then held that the First Amendment did not alter the common law rules on liability for such torts. It thus upheld the one dollar nominal damage awards on both counts.

The actual damages awarded by the jury were so low in this case because the trial court held that the plaintiff was not entitled to recover the damages flowing from the publication (estimated by Food Lion to be in the billions of dollars). On appeal, this limitation on damages was upheld. The Fourth Circuit ruled that the Constitution precluded recovery, absent a showing of actual malice and falsity. Thus, the Food Lion court deals with the First Amendment twice: first it asked whether the First Amendment precludes liability, and concluded it does not; then it returned to the separate question of whether the First Amendment precludes the plaintiff from recovering "publication damages," and concluded it does.

Food Lion was a pyrrhic victory for the plaintiff. The pro-plaintiff verdicts on trespass and breach of duty of loyalty were upheld, but, as affirmed, the plaintiff's judgment was for two dollars in compensatory damages and no punitives. The Constitution was held not to bar the common law may sometimes be an effective safeguard, but disagree that state law provides a sufficient guarantee of protection to make First Amendment limitations unneeded.

28. See Food Lion, 194 F.3d at 515-19 (discussing breach of duty of loyalty and trespass).
29. See id.
30. See id. at 520-22.
31. See id. at 522.
32. See id. at 522. The trial court initially in its pretrial ruling based this limitation on damages on the First Amendment, see Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 822-23 (M.D.N.C. 1995), but its final post-trial ruling on the damages issue was based on proximate cause, see Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956, 965 (M.D.N.C. 1997). On appeal, the Fourth Circuit bypassed the proximate cause issue and upheld the denial of publication damages on First Amendment grounds, noting: "We do not reach the matter of proximate cause because an overriding (and settled) First Amendment principle precludes the award of publication damages in this case . . . ." Food Lion, 194 F.3d at 522.
33. In pleadings, Food Lion estimated its damages from the publication to be 5.5 billion dollars. See Logan, supra note 2, at 181 n.140. These damages allegedly stemmed from a dramatic drop in retail sales, the fall in the value of its publicly traded securities, and the forced closure of 88 stores (with resulting layoffs). Id. at 181 (citing various sources).
34. See Food Lion, 194 F.3d at 522-24.
35. See id. at 520-22.
36. See id. at 522-24.
plaintiff’s claims, but was held to bar recovery of any significant damages.

This essay discusses the Fourth Circuit’s opinion in Food Lion and its effort to deal with the Supreme Court’s conflicting decisions in Cohen v. Cowles Media Co. and Hustler Magazine, Inc. v. Falwell. As a prelude, it helps to separate two questions, which are often conflated: first, when should First Amendment scrutiny be triggered? Second, what limits—substantive, procedural and/or remedial—should the Constitution then impose? Let us briefly look at the latter, then turn to what this author considers the more interesting issue, namely, what triggers First Amendment scrutiny.

II. THE THREE-PRONGED APPROACH OF NEW YORK TIMES: WHAT CONSTITUTIONAL LIMITATIONS MAKE SENSE?

As this author has argued elsewhere, New York Times is a multi-dimensional case. The Court there held that the First Amendment imposed three distinct restrictions on recovery—substantive, procedural and remedial. Thus, New York Times altered the substantive law of libel (requiring plaintiffs to prove two new elements: fault and falsity); it altered the procedural path of libel law (switching the burden of proving falsity and fault to the plaintiff, heightening the level of proof to clear and convincing, and creating a searching standard of appellate review); and finally, in Gertz, it altered the remedy available by limiting damages.

Most of the debate has concerned which, if any, of these three constitutionally-driven reforms should apply when plaintiffs sue for newsgathering torts. I will briefly review the three options in light of the Fourth Circuit’s opinion in Food Lion.

41. See id. at 279-80 (discussing burden on plaintiff), at 285-86 (holding that proof must be with “convincing clarity”), at 284-87 (establishing an independent standard of appellate review).
43. I will focus on the three types of constitutional restrictions which flow from New York Times. For a pithy review of the various First Amendment standards drawn from throughout the Court’s First Amendment jurisprudence, see Anderson, supra note 13, at 1499, 1508-10.
A. The Transplantation of the Substantive Requirements of *New York Times*

One option is to apply the substantive requirements announced in *New York Times* (that a libel plaintiff must prove falsity and some degree of fault) to all torts.44 This seemed a popular response early on. Thus in *Time, Inc.*,45 and *Cantrell*,46 and then when confronted with the tort of false light, the Supreme Court simply transplanted actual malice and falsity into these torts.

Although the Court bristled at the accusation that it had simply engaged in "blind application" of the *New York Times* standard,47 the Court provided little analysis on when or why the substantive restrictions of *New York Times* would apply. Indeed, even as plaintiffs began to use other traditional speech torts, the Court, despite urging from the media, wavered on whether to adopt the substantive strictures that *New York Times* had imposed in libel actions. For instance, when confronted with claims based in privacy (most prominently for the publication of private facts), the Court rejected the analogy to libel, although it did, on a case by case basis, fashion a First Amendment limit on recovery.48

With a third wave of torts to hit the lower courts (those based on publication but abandoning the traditional speech torts in favor of actions for intentional infliction of emotional distress, negligence, or promissory estoppel), the Court issued seemingly conflicting decisions

44. See supra notes 6 & 7. The most sophisticated version of this solution is Easton's, supra note 2, at 1135. Professor Easton proposes that the actual malice standard be modified to "bad faith" or "outrageous behavior," and then applied to limit liability for newsgathering torts.

45. See *Time, Inc.* v. Hill, 385 U.S. 374 (1967) (holding false light was subject to the actual malice requirement).

46. See *Cantrell* v. Forest City Publ'g Co., 419 U.S. 245, 251-52 (1972) (applying actual malice to the false light tort when brought by a public figure).


48. For instance, in *Cox Broadcasting Co.* v. Cohn, 420 U.S. 469, 489-90 (1975), the Court recognized that "in defamation actions" the message of *New York Times* required proof of falsity and actual malice, but refused to require that truth be recognized as defense to every privacy action. Instead, it announced a narrower rule—that the State could not impose sanctions for the accurate publication of the name of a rape victim obtained from a public record. See *Cox*, 420 U.S. at 49-90. See also *Florida Star v. B.J.F.*, 491 U.S. 524, 530 n.5 (1989) (citing, but not applying, the *New York Times* line of cases).
on whether the restrictions of New York Times would apply. In Hustler, the Court said that they did, but in Cohen, said they did not.

The difficulty is even more pronounced when the suit focuses on the media's activities in gathering the news. The "simple solution" of adding actual malice and falsity to the elements of the tort seems nonsensical. Because "publication" is not the focus of these newsgathering torts, how can a requirement that the publication be made with actual malice and be false make any sense? To illustrate, if the media is sued for trespass (the intentional entry on to the land of another without permission), as it was in Food Lion, how can we ask if the media's trespass is "false" or with "actual malice"?

The lower courts faced with this quandary have often simply rejected the analogy to libel. Thus the Food Lion court, in upholding the pro-plaintiff verdicts for trespass and breach of duty of loyalty, rejected the idea that plaintiffs must prove fault and falsity to state a claim. Liability for newsgathering torts did not depend on the plaintiff meeting the substantive strictures of New York Times. In sum, while the early response to plaintiffs' use of torts other than libel was to import the substantive requirements of New York Times, the court of appeals in Food Lion shied away from this approach when facing newsgathering torts.

B. Procedural Requirements of New York Times

Another reaction to the use of newsgathering torts against the media has been to transfer, not the substantive requirements of New York Times, but its procedural protections. Of most significance is the adoption of the doctrine of independent appellate review. Suggested in New York


50. See Cohen, 501 U.S. at 669.

51. Cf. Easton, supra note 2, at 1135 (proposing that the actual malice standard be modified to "bad faith" or "outrageous behavior").

52. See Food Lion, 194 F.3d at 520-22 (rejecting a defense argument that the First Amendment limited liability for the torts of trespass and breach of duty of loyalty).

53. See id. In another recent case, Veilleux v. NBC Co., 206 F.3d 92 (1st Cir. 2000), the First Circuit held that the First Amendment imposes substantive limitations; rather than applying the standards of New York Times, it rejected a claim of misrepresentation, citing in part the "constitutional prohibition of vagueness" which it found to be "well established" in "the realm of defamation." Veilleux, 206 F.3d at 122.

54. See Anderson, supra note 13, at 1510 (noting that use of procedural limits is the "most potent of all the techniques" available to courts).
Times,\textsuperscript{55} and spelled out two decades later in Bose Corp. v. Consumers Union of United States, Inc.,\textsuperscript{56} this doctrine requires appellate courts to independently review the record to ascertain if First Amendment requirements have been met.\textsuperscript{57} While standards of review often seem a mere shibboleth, New York Times' independent appellate review requirement has proved a near impenetrable shield for libel defendants. One study reported that seventy percent of defense appeals see pro-plaintiff trial verdicts reversed, remanded, or modified.\textsuperscript{58} Some lower courts have applied this procedural requirement, a stringent standard of appellate review, beyond libel cases.\textsuperscript{59}

This issue did not arise in Food Lion, presumably because the court saw the issues before it as involving only "questions of . . . law."\textsuperscript{60} It, therefore, applied a de novo standard of review to the questions of law\textsuperscript{61} and had no need to consider whether the Bose standard would apply to review of the facts or the application of law to facts. However, some lower courts have applied the Bose standard not just to libel, but to a wide range of actions against the media. For example, in Veilleux, a recent First Circuit opinion, the court of appeals noted that "this court, like other courts of appeal, has extended the independent review rule well beyond defamation claims,"\textsuperscript{62} and then applied the heightened standard to plaintiffs' misrepresentation, intentional infliction of emotional distress, and privacy claims.\textsuperscript{63} This approach is so flexible because, unlike the substantive reforms of New York Times which are wedded to its requirement of publication, procedural reforms can be applied in any case where First Amendment issues are at stake.\textsuperscript{64}

\textsuperscript{55} See New York Times, 376 U.S. at 284-86.
\textsuperscript{57} For a discussion of the scope of independent review, see Gilles, supra note 39, at 1772 nn.70-71 (1998).
\textsuperscript{58} See id. at 1776-79 (reviewing studies of reversal rates under Bose).
\textsuperscript{59} See id. at 1772 n.70 (citing a series of cases applying Bose outside the libel area).
\textsuperscript{60} Food Lion, 194 F.3d at 512.
\textsuperscript{61} See id.
\textsuperscript{62} Veilleux v. NBC Co., 206 F.3d 92, 106 (1st Cir. 2000).
\textsuperscript{63} See id. at 107.
\textsuperscript{64} Indeed, courts have applied independent review in a wide variety of settings. See Gilles, supra note 40, at 1722 n.70 (discussing the application of independent review outside the libel area).
C. Damages Limitations of *New York Times*

A third possibility is to impose a First Amendment limit on the 
damages a plaintiff may recover. In *New York Times* itself, the Supreme 
Court noted the record level of damages awarded by the jury and posited 
that such awards would silence debate, although it did not specifically 
announce any limitation on damage awards in libel cases. However, in 
*Gertz*, the Court, led by Justice Powell, directly addressed damages, 
holding that only actual damages could be recovered unless the plaintiff 
proved actual malice. Thus, in libel suits on matters of public concern, 
presumed or punitive damages are unavailable unless the plaintiff makes 
a heightened showing of fault. Under this approach, the First 
Amendment limits the remedy: certain types of damages (usually 
actual, presumed and punitive damages) are prohibited unless a heightened 
showing is made. Thus we can conceive of a First Amendment 
restriction, not in terms of process or substantive law, but in terms of a 
constitutionally mandated limitation on damages.

The court of appeals in *Food Lion* focused on damages. Although 
it upheld the pro-plaintiff verdicts on trespass and breach of duty of 
loyalty, it ruled that the Constitution severely limited the damages 
which the plaintiff could recover. According to the *Food Lion* court, the 
plaintiff “could not bypass the *New York Times* standard if it wanted 
publication damages.” Thus one way to view this opinion is that it

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65. For a detailed proposal of how such a First Amendment damage limitation 
could work in newsgathering cases, see Andrew B. Sims, *Food for the Lions: Excessive 
Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 
78 B.U. L. REV. 507, 530 (1998). An interesting alternate approach is to use the 
common law to limit damages. See Logan, *supra* note 2, at 192 et seq. (arguing that 
common law offers a more flexible and nuanced alternative to First Amendment limits 
and setting out proposed limitations on damages in newsgathering cases).


67. See *Gertz*, 418 U.S. at 350 (holding that private figures may only collect actual 
is a private figure and the matter is one of private concern).

68. See *Gertz*, 418 U.S. at 350.

69. Moreover, the Court has now announced that even where the First Amendment 
is not implicated, the Fourteenth Amendment limits the award of punitive damages. 

70. See *Food Lion*, 194 F.3d at 522-24.

71. *Id.* at 524. This idea was expressly adopted by the First Circuit in the *Veilleux* 
decision. Citing *Food Lion*, the *Veilleux* court held that “the type of damages sought 
bears on the necessity of constitutional safeguards.” *Veilleux*, 206 F.3d at 127-28. Both 
courts of appeal concluded that an attempt to recover “defamation-type damages” 
without satisfying *New York Times* was barred by Supreme Court precedent. *See id.* at
advocates that the First Amendment restrictions on damages recognized in *Gertz* be applied to tort actions against the media for their activities in gathering the news. While *Gertz* focused on presumed and punitive damages, the *Food Lion* court took aim at reputational and emotional distress damages.\(^2\) Such an approach is appealing, and as some authors have suggested, it may be that constitutionally mandated damage limitations are the most effective legacy of *New York Times*.\(^3\)

However, what is interesting about the *FoodLion* court's discussion of damages is not that it recognized that the Constitution may mandate a limit on damages, but rather that it applied these First Amendment limits to torts committed while gathering the news. Why does the court think that newsgathering torts even trigger First Amendment scrutiny? The innovation of *Food Lion*, thus, is not about the type of protection we should impose, but about when First Amendment protections are triggered. *Food Lion* uses damages as the trigger for First Amendment scrutiny.

### III. THE TRIGGER

When should First Amendment scrutiny apply to limit a plaintiff's recovery? The fascinating answer offered by *Food Lion* is that First Amendment scrutiny is not triggered simply because plaintiff sues and recovers for newsgathering torts, but is triggered when the plaintiff requests publication damages flowing from those very same torts.\(^7\) Why?

First, let us look at a couple of triggers the *Food Lion* court considered and rejected (the identity of the defendant and newsgathering activity), and then we will examine two possible interpretations of the more sophisticated trigger designed by the *Food Lion* court.

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128; *Food Lion*, 194 F.3d at 522-24.
72. See *Food Lion*, 194 F.3d at 522-24.
73. See, e.g., Sims, *supra* note 65, at 530 (proposing that in newsgathering cases no reputational damages and no punitives be allowed unless certain First Amendment prerequisites are met, and that actual damages only be allowed based on "competent evidence").
74. As we have already discussed, an equally important question is what First Amendment protections should look like when triggered. See Anderson, *supra* note 13, at 1508-10 (reviewing varying First Amendment standards utilized in speech cases). The Fourth Circuit presumes that it looks like a prohibition of certain damages unless the *New York Times*’s actual malice standard is met. See *Food Lion*, 194 F.3d at 522-24. I will use the phrase "First Amendment scrutiny" to denote some form of heightened protection, be it the substantive, remedial or procedural protections of *New York Times* (discussed previously), or some other form of First Amendment scrutiny.
A. The Identity of the Defendant as Trigger: Immunity for the Media?

Obviously, the fact that the media is a defendant (even if we could define who "the media" is) should not always trigger First Amendment safeguards. For instance, if you are flattened crossing the road by a New York Times delivery truck, no one contends that your negligence lawsuit should be subjected to additional First Amendment requirements (be they substantive, procedural, or remedial) simply because the New York Times is a defendant. While such defendant-based protections are not unknown to the law, the principal example being the immunity granted the government as defendant, no one has advocated that the First Amendment grant similar immunity to the media.75 Noting the strength of this authority, the Food Lion court joined the chorus and reiterated that "the media have no general immunity from tort or contract liability."76

B. Protection for All Newsgathering Activities?

Another option would be to hold that newsgathering is a protected activity: whenever the media is engaged in newsgathering, First Amendment limitations (of some variety) would apply. While this solution has been favored by many academics,77 it has not found favor with the United States Supreme Court78 and seems unlikely to do so.79 Once again, the Food Lion court, while acknowledging the conflicting dicta, rejected the argument that newsgathering activity automatically triggers First Amendment restrictions.80

75. Indeed, the Court has repeatedly noted that the media is not immune from liability. See, e.g., Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) (noting that the "publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.").

76. Food Lion, 194 F.3d at 520 (quoting Desnick v. American Broad. Cos., Inc., 44 F.3d 1345, 1355 (7th Cir. 1995)).

77. See, e.g., Easton, supra note 2, at 1135 (advocating a modified actual malice standard be triggered in all tort suits against the media for newsgathering activities); Sims, supra note 65, at 507 (advocating that newsgathering activities be granted First Amendment protection in the form of limitations on damages).


79. See, e.g., Easton, supra note 2, at 1135 (acknowledging that a general protection for newsgathering is the "least likely conclusion"); Sims, supra note 65, at 515 (characterizing any media claim to First Amendment immunity for newsgathering as "dubious").

80. See Food Lion, 194 F.3d at 520.
C. The Mystery of Generally Applicable Laws

As the *Food Lion* court noted, the closest the Supreme Court has come to explaining when First Amendment protections are triggered was in *Cohen*, where the Court evoked the phrase "generally applicable laws" to describe those laws which did not trigger First Amendment protection. In *Cohen*, the Court refused to extend any First Amendment protection when a campaign worker filed a promissory estoppel action against several newspapers for their reports naming him as the source of a smear campaign against the opposing candidate. The reporters had promised Cohen anonymity, yet his name was published in breach of this promise. The Supreme Court held that an action for promissory estoppel was a "law of general applicability" and thus the First Amendment limits recognized in its libel and privacy cases were "not controll[ing]." Rather the case was governed by the "equally well-established line of decisions holding 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." Thus *Cohen* suggests that the key to whether a cause of action will trigger First Amendment protection is whether the law is one of "general applicability."

The *Food Lion* court adopted this approach in the liability section of its opinion and noted that "the key inquiry in [Cohen] was whether promissory estoppel was a generally applicable law." ABC argued that before it could be held liable for trespass or breach of duty of loyalty arising from newsgathering, First Amendment scrutiny must be applied. The Fourth Circuit rejected this call for First Amendment

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81. *See id.*
83. *See id.* at 665-67.
84. *See id.* at 666.
85. *Id.* at 669.
86. *Id.*
87. *See id.* For an alternate reading of *Cohen*, see Logan, *supra* note 2, at 191 (construing *Cohen* to apply a two part test: "whether the claim pursued by the plaintiff arises out of the newsgathering process (as opposed to the content of the publication) and whether the law imposes an 'incidental burden on the press'.")
88. *Food Lion*, 194 F.3d at 521. Since the court of appeals held that the plaintiff had not proven either fraud or unfair trade practices under state law, it only applied its First Amendment analysis to the remaining claims—breach of duty of loyalty and trespass. *See id.* at 514, 520.
89. *See id.* at 521 ("ABC argues that even if state tort law covers some of [the reporters'] conduct, the district court erred in refusing to subject *Food Lion*’s claims to any level of First Amendment scrutiny.").
Citing *Cohen*, it concluded that trespass and breach of duty of loyalty are "law[s] of general applicability," requiring no such scrutiny. What then did the *Food Lion* court think the nebulous phrase "laws of general applicability" meant?

1. **General Applicability: Causes of Action Not Targeting the Media?**

At first the *Food Lion* court seemed to read *Cohen* as holding that any law which does not single out the media is a law of general applicability, and is thus immune from First Amendment scrutiny. This reading is certainly supported by the language in *Cohen*. The Supreme Court in *Cohen* noted that the promissory estoppel action at issue there did "not target or single out the press," but was instead "generally applicable to the daily transactions of all the citizens of Minnesota." The Fourth Circuit in *Food Lion* picked up on this language and suggested that actions for breach of the duty of loyalty and trespass do not trigger First Amendment protection because "[n]either tort targets or singles out the press. Each applies to the daily transactions of the citizens of North and South Carolina." Is this then the test for First Amendment scrutiny—only actions which single out the media trigger First Amendment safeguards?

While the *Food Lion* court flirted with this reading of "generally applicability," it ultimately rejected it, concluding, I think correctly, that such a reading is at odds with the Supreme Court's jurisprudence. While it is true that a law that singles out or targets the media is subject to First Amendment scrutiny, it has never been true that a law is immune from scrutiny simply because it affects everyone. Indeed, *New York Times* itself proves that such an assertion is erroneous. The action at stake in *New York Times* was libel. Libel does not target the media, it punishes *anyone* who makes a false statement be they a newspaper or a

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90. See id. at 521-22.
91. Id.
92. See id. at 521.
94. *Food Lion*, 194 F.3d at 521.
95. The *Food Lion* court cites to the conflict with *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), where the Supreme Court appeared to apply some form of heightened scrutiny to a ban on nudity despite the fact that it applied equally to all. See *Food Lion*, 194 F.3d at 521-22.
member of the public, yet libel law is subject to First Amendment scrutiny. 98

2. General Applicability as Conduct?

The Food Lion court then considered a distinction between laws which target speech and those that target conduct: perhaps "laws of general applicability" are laws that do not seek to punish speech, but rather to target conduct. 99 This reading of the phrase "generally applicable laws" is borne out by most of the examples the Cohen Court gives at the start of its analysis: laws of general applicability are laws on breaking and entering into homes and offices, on responding to subpoenas, on labor law, on antitrust, and on tax. 100 The Cohen Court did seem to see promissory estoppel as one more regulation of how the media does business, which not only does not regulate speech but has only a minimal impact on newsgathering. 101

The Fourth Circuit in Food Lion seemed to ultimately adopt this speech-versus-conduct distinction to explain Cohen. Seeking to distinguish Barnes v. Glen Theatre (which applied First Amendment scrutiny to a ban on nudity), the Food Lion court stated: "The cases are consistent, however, if we view the challenged conduct in [Cohen] to be the breach of promise and not some form of expression." 102 Since the torts

98. See id.
99. The speech/conduct distinction is a familiar one in constitutional law. In the O'Brien line of cases, the Court has recognized that conduct, like burning a draft card, can sometimes be a form of expression. See United States v. O'Brien, 391 U.S. 367 (1968). This line of case law seeks to give some degree of protection to expressive conduct.

The problem in newsgathering is distinct. The conduct at issue—newsgathering—is not expressive conduct: The ABC reporters did not trespass to send a message, but to gather information. However, we might still want to subject a lawsuit based on such conduct to First Amendment scrutiny either because we believe that newsgathering should be protected, see supra note 77, or, as I will suggest infra, because we believe that the plaintiff is seeking to collect damages for the resulting publication (speech), not for the underlying conduct.

100. See Cohen, 501 U.S. at 669. The one example cited by the Court which could be seen as targeting speech, not conduct, is copyright. See id. The Cohen Court may regard this as a regulation of property, not of speech. For a discussion of the Court's confused treatment of property claims based on speech, see Diane L. Zimmerman, Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights, 33 WM. & MARY L. REV. 665 (1992).


102. Food Lion, 194 F.3d at 522 (emphasis added). The court continued: "In Glen Theatre, on the other hand, an activity directly covered by the law, nude dancing, necessarily involved expression, and heightened scrutiny was applied." Id.
at issue before the *Food Lion* court (trespass and breach of duty of loyalty) were based on conduct, not speech, the Fourth Circuit con-
cluded that liability could be upheld without meeting the restraints of *New York Times*.103

I agree with the Fourth Circuit in *Food Lion* that the *Cohen* Court
would have held that claims based on conduct, such as trespass and
breach of duty of loyalty, are not subject to First Amendment scrutiny.
The *Cohen* Court’s dicta, that imposing liability on the media for
breaking and entering does not trigger First Amendment scrutiny, seems
to close the door to any such argument.104 Moreover, as the *Food Lion*
court notes, and we have discussed above, the Court has consistently
rejected claims that newsgathering activities trigger First Amendment
review.105

However, I disagree with the *Food Lion* court that this is all *Cohen*
held. *Cohen* in fact is a more complex case than *Food Lion*. In *Food
Lion*, the complaint, on its face, was about newsgathering conduct, not
about publication. In contrast, the plaintiff in *Cohen* complained about
a publication—a newspaper article which included his name as the
source. Although he used a cause of action (promissory estoppel) that
is not a traditional speech tort, the activity he complained of was not
newsgathering, but rather publication of his name. *Cohen*, therefore,
holds that even when the lawsuit is based on a publication, sometimes
First Amendment protections do not apply.106 This is an issue which the
*Food Lion* court did not need to reach, since the question it faced in its
liability section is whether liability for newsgathering conduct is
dependent on meeting the standards set out in *New York Times*.107

Thus, as one commentator has noted, the *Cohen* Court views the breach of
promise as conduct, not speech, thus meriting no protection; and the nude dancing in
*Glen Theatre* as speech (expressive conduct) which does merit First Amendment
scrutiny. See David Bogen, *Generally Applicable Laws and the First Amendment*, 26 Sw.
U. L. Rev. 201, 223-32 (1997). The irony is that in the same year the Court applied
First Amendment scrutiny to dancing in bars, but not to limits on the media’s ability
to gather news. See id. The Supreme Court itself has now noted the conflict between
*Cohen* and *Glen Theatre*. In *Turner*, Justice Kennedy summed up the two cases in an
honest, if not very helpful, way: generally applicable laws “may or may not be subject
to heightened scrutiny.” *Id.* at 232 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S.
622 (1994)).

103. *See Food Lion*, 194 F.3d at 521, 522.
105. *See supra* note 78.
106. It is this broader holding which creates a conflict with *Hustler* as discussed
below.
107. *See Food Lion*, 194 F.3d. at 520 (phrasing the question before it as whether the
reporter’s newsgathering activities are subject to some form of First Amendment
short, the *Food Lion* court was correct to conclude that, under *Cohen*, liability for conduct (even conduct by the media while gathering the news) is not dependent on meeting *New York Times*, but it erred in implying that such a rule can explain the holding in *Cohen*.

IV. THE END-RUN TRIGGER

While the *Food Lion* court rejected the idea that claims based on the media’s newsgathering conduct triggers First Amendment scrutiny, it held that First Amendment scrutiny was triggered when the plaintiff sought to recover publication damages flowing from such torts. When, then, are newsgathering torts subject to First Amendment scrutiny? *Food Lion*’s answer is that First Amendment scrutiny will be triggered if the plaintiff is attempting an “end-run” around *New York Times*.108

The argument goes something like this: at the core of the Court’s First Amendment jurisprudence is its protection of the media from libel actions. A plaintiff cannot sue for libel unless she meets the First Amendment’s stringent requirements. If the plaintiff is allowed to circumvent these protections by simply disguising her libel claim as another tort, then *New York Times* would be eviscerated. Therefore, if we detect a disguised libel claim, First Amendment protections will be triggered. First Amendment scrutiny is required when the plaintiff sues for a traditional speech tort or when the Court determines that the plaintiff has elected to sue for a non-speech tort in an effort to circumvent *New York Times*’ restrictions. In more parochial terms: the trigger is a traditional speech tort or evidence of an “end-run.”

The idea that evidence of an “end-run” should trigger First Amendment scrutiny was suggested in *Cohen* as an explanation of the seeming conflict between the Court’s refusal to grant constitutional protection in *Cohen*, when it had extended such protection three years earlier in *Hustler*.109 In *Hustler*, plaintiff Falwell filed suit for libel and intentional infliction of distress based on a parody published in Hustler Magazine portraying him as an incestuous drunkard.110 The jury returned a pro-defense verdict on the libel claim, but a pro-plaintiff

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110. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 47-48 (1988). He also stated a claim for privacy, but this was dismissed by the trial court. *See id.*
verdict on intentional infliction of emotional distress claim.\textsuperscript{111} The Supreme Court applied First Amendment scrutiny and held that the \textit{New York Times} restrictions of falsity and actual malice barred recovery for intentional infliction of emotional distress.\textsuperscript{112} The case seemed to signal that any tort action based on a publication (even where the tort was not a traditional speech tort, but rather one where speech was not an essential element)\textsuperscript{113} would trigger First Amendment protection.

However, three years later in \textit{Cohen}, when the Court confronted a claim for promissory estoppel also based on a publication, the Court held that no First Amendment review was triggered.\textsuperscript{114} Both \textit{Hustler} and \textit{Cohen} involved publications, and both used causes of action not designed to punish speech, yet only \textit{Hustler} was held to trigger First Amendment review. One explanation the \textit{Cohen} Court offered to account for this seeming conflict, and the idea the Fourth Circuit picked up on in \textit{Food Lion}, was that First Amendment scrutiny was triggered in \textit{Hustler} because the plaintiff was attempting an “end-run test.”\textsuperscript{115} In \textit{Cohen}, the Supreme Court expressly noted that, unlike the plaintiff in \textit{Hustler}, Cohen was not attempting to use the promissory estoppel cause of action “to avoid the strict requirements for establishing a libel or defamation claim.”\textsuperscript{116} It is this evidence of an “end-run,” (not merely a suit based on a publication), which the Court implied triggered First Amendment scrutiny in \textit{Hustler}.\textsuperscript{117}

\textit{Food Lion} applied this “end-run” concept to newsgathering cases. Even if the plaintiff sued for newsgathering conduct, \textit{Food Lion} held that if an “end-run” is detected, First Amendment scrutiny must be applied.\textsuperscript{118} First the Fourth Circuit noted that “Food Lion acknowledges that it did not sue for defamation because its ‘ability to bring an action

\textsuperscript{111} See id.
\textsuperscript{112} See id. at 56.
\textsuperscript{113} \textit{Id.} at 55, n.3 (setting out the elements of the tort under Virginia law). See also \textit{Cohen}, 501 U.S. at 675 (Blackmun, J., dissenting) (noting, in his discussion of \textit{Cohen}, that “[t]here was no doubt that Virginia’s tort of intentional infliction of emotional distress was ‘a law of general applicability’ unrelated to the suppression of speech.”).
\textsuperscript{114} See \textit{Cohen}, 501 U.S. at 672.
\textsuperscript{115} See \textit{id.} at 671.
\textsuperscript{116} \textit{Id.} (expressly finding that Cohen was not seeking to evade the restrictions of \textit{New York Times}).
\textsuperscript{117} See \textit{id.}
\textsuperscript{118} See \textit{Food Lion}, 194 F.3d at 522. Similarly, in \textit{Veilleux}, one of the factors the Court of Appeals weighed in assessing whether First Amendment standards should apply was that “[u]nlike \textit{Hustler} and \textit{Food Lion} this is not a case where [the plaintiff] could avoid the strictures of a defamation claim by seeking ‘defamation-type’ damages under an easier common law standard.” \textit{Veilleux} v. National Broad. Co., 206 F.3d 92, 128 (1st Cir. 2000).
for defamation . . . required proof that ABC acted with actual malice." 119 The court reiterated this point: "It is clear that Food Lion was not prepared to offer proof meeting the New York Times standard under any claim that it might assert." 120

Based on this admission, the court concluded that Food Lion was attempting an end-run: "What Food Lion sought to do, then, was to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim . . . such an end-run around First Amendment strictures is foreclosed by Hustler." 121 Thus the Fourth Circuit in Food Lion imposed First Amendment scrutiny because it detected an end-run. 122

A. Detecting End-Runs

The problem is how do you detect an "end-run"? Here Food Lion offers an interesting innovation. At first blush, the Supreme Court's analysis in Hustler and Cohen calls for an inquiry into the subjective motivation of the plaintiff. 123 This inquiry into motive seems either impossible or in danger of being easily evaded. A court can never know what truly motivates a plaintiff (or more accurately her lawyers) in selecting a cause of action. The only indicators of motivation that the Supreme Court had before it in either Cohen or Hustler were the pleadings, and at times it seems as if the Supreme Court simply presumed that a plaintiff who also filed, but lost, a libel claim (Falwell, for example) was really suing for libel. By contrast, Cohen, who had never included a claim for libel, was not seeking an end-run. 124 If the test is simply whether the lawsuit contains a failed libel count, then good plaintiffs lawyers will simply not state a claim for libel so their motives will never be called into question. 125

119. Food Lion, 94 F.3d at 522.
120. Id.
121. Id. (emphasis added).
122. The consequences of detecting an end-run could vary. For instance, the Hustler Court, having detected an end-run, applied New York Times to preclude any recovery, whereas the Food Lion court allowed recovery, but disallowed certain damages (those it saw as "defamation-type damages").
123. See Cohen, 501 U.S. at 671 (distinguishing Cohen and Hustler on the grounds that Cohen was not "attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel [action]").
124. See id.
125. See Sims, supra note 65, at 555-56 (rejecting "anti-circumvention" as a useful First Amendment principle because it remains "ill-defined and conceptually
More problematic is that we do know what motivates attorneys in selecting a cause of action. Attorneys state the causes of action which, on the merits, give the best chance of recovery for their clients. Of course plaintiffs seek an end-run around *New York Times*, because they are otherwise highly likely to lose. The test for First Amendment strictures cannot be whether the attorney is honest enough to admit (as the lawyers did in *Food Lion*) that they were seeking to sue for other torts because they could not win in libel, or lie and pretend that an action in libel had never occurred to them. If we are to take the end-run test seriously, the focus on the plaintiff's motivation seems a weak vehicle. Indeed, one scholar has rejected the test concluding it was too "ill-defined and conceptually troublesome" to be of use.

One way to read *Food Lion* is that it suggests a new way to detect an end-run: the damages sought. *New York Times* bars recovery in defamation actions without meeting First Amendment strictures. If a plaintiff seeks "defamation-type damages," we "know" they really wanted to sue in defamation, and thus are attempting an end-run. In this light, the damages sought act as a "scarlet letter" revealing the true nature of the plaintiff's suit regardless of the legal form it takes. If the plaintiff seeks defamation-type damages, this scarlet letter alerts the court to an attempted end-run. The Fourth Circuit put it this way: "What *Food Lion* sought to do . . . was to recover defamation-type troublesome" and seemingly turns on whether "the pleadings present an obvious nexus to defamation").

126. I am not suggesting that plaintiffs' attorneys pursue recovery without consideration of the merits, but rather that they select the strongest of possible claims open to their client.

127. The court of appeals noted that in its appellate brief, "Food Lion acknowledges that it did not sue for defamation because its 'ability to bring an action for defamation . . . required proof that ABC acted with actual malice.'" *Food Lion*, 194 F.3d at 522. In contrast, Professor Logan reports that Food Lion attempted to amend to add a defamation claim after the statute of limitations had run, arguing that ABC's failure to provide it with complete copies of the tapes had prevented it from initially pursuing such a claim. *See* Logan, *supra* note 2, at 141.

128. *See* Sims, *supra* note 65, at 514 (characterizing the test as little more than an inquiry into whether the "challenged speech . . . looks more like defamation").

129. *Id.* at 555-56.

130. As discussed more fully below, the *Food Lion* court (citing *Cohen* and *Hustler*) indicated that reputational damages and emotional distress damages are "defamatory-type damages." While it seems clear why reputational damages would be a good indicator that recovery for libel is really being sought, it is not so clear why emotional distress damages should also signal an attempt to evade *New York Times*. The *Food Lion* court did not have to face this issue since the plaintiff, a corporation, could not claim emotional distress.
damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim.”

The Food Lion court sees this distinction as explaining Hustler, where the plaintiff was seeking emotional distress damages and the Supreme Court applied First Amendment strictures; and Cohen, where the Supreme Court concluded that plaintiff was “not seeking damages for injury to his reputation or his state of mind,” and therefore rejected the call for First Amendment protection. Since the plaintiff in Food Lion was “claiming reputational damages from publication,” the Fourth Circuit concluded it was seeking to “bypass the New York Times standard” thereby triggering First Amendment scrutiny.

Thus scrutiny is triggered if the plaintiff sues for a traditional speech tort or seeks defamation-type damages (indicating an end-run). The First Amendment strictures then step in and limit recovery, and the end-run is prevented.

B. Evaluating the “Traditional Speech Tort or End-Run” Trigger

This creative solution, suggested by Food Lion, is appealing. Food Lion can sue for trespass and breach of duty of loyalty (or any other newsgathering tort) without meeting the strictures of New York Times, but as soon as it seeks defamation-type damages for those torts an end-run is suspected, and First Amendment restrictions are triggered. This reading seems to accommodate the Supreme Court’s conflicting desires: the Court wants to protect publication yet still punish the media for “everyday” torts committed in newsgathering. The Food Lion decision also seems to make sense of the conflict between the Court’s holdings in Cohen and Hustler (at least if we accept at face value the Court’s assertion that only the latter sought defamation-type damages creating a suspicion of an end-run).

131. Food Lion, 194 F.3d at 522 (emphasis added).
132. Id. at 523 (quoting Cohen).
133. Id. at 523-24 (emphasis added).
134. One can read the trigger in a slightly different way—that either suspect motive or defamation-type damage is sufficient to trigger strict scrutiny.
135. As noted supra note 122, the consequences of detecting an end-run could be to limit recovery or preclude it altogether.
136. See supra note 78 (discussing the Court’s conflicting dicta on protection for newsgathering). Neither of the approaches discussed in this article would recognize such protection; rather each would impose First Amendment scrutiny on liability for newsgathering only if certain damages were sought.
137. The Court in Cohen expressly concluded that it was not faced with a claim for reputational damages. See Cohen, 501 U.S. at 671. As discussed infra note 172, I do
The test also protects the media in a fairly concrete way because it effectively disallows damages for reputation and emotional distress, unless some heightened First Amendment showing is made. These are the hardest damages to quantify and the most likely to be the subject of large jury awards. To illustrate, in Food Lion, the plaintiff recovered only two dollars on its claims for breach of loyalty and trespass. The court of appeals refused to allow recovery of damages for loss of good will, lost sales, and decrease in Food Lion’s share value (estimated by the plaintiffs to be in the billions), labeling these as reputation-based damages, unless the plaintiff proved fault and falsity.

Finally, the “no end-runs” approach may have considerable appeal to members of the Supreme Court. In the privacy area, the Supreme Court has been reluctant to declare broad rules, preferring to proceed on a case-by-case basis. Similarly, some of the Justices seem committed to the Court’s decision in New York Times, but unwilling to expand it into other areas. The “end-run” approach safeguards New York Times, without greatly expanding its reach. No new bright-line rules are adopted; rather, the accepted First Amendment limits on libel cases are simply extended to disguised libel cases. In sum, the court in Food Lion has devised an approach which seems a clever and workable innovation of the “no end-runs” trigger.

C. Complications Ahead

What damages act as a scarlet letter? In Food Lion the court only had a claim for reputational damage before it. If any damages clearly not think that this characterization is correct.

138. See Food Lion, 194 F.3d at 522.
139. See supra notes 32-33.
140. See, e.g., Florida Star v. B.J.F., 491 U.S. 524, 532 (1989) (eschewing reaching the ultimate question of the constitutionality of the privacy tort and instead electing to proceed on a case-by-case basis).
141. In particular, Chief Justice Rehnquist has frequently rejected additional substantive and procedural protections on the ground that sufficient protection already exists under New York Times. See, e.g., Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990) (concluding that “[w]e are not persuaded that, in addition to these protections, an additional separate constitutional privilege for ‘opinion’ is required to ensure the freedom of expression guaranteed by the First Amendment”); Calder v. Jones, 465 U.S. 783, 790 (1984) (noting that “the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits”).
142. See Food Lion, 194 F.3d at 523 (concluding that “Food Lion, in seeking compensation for matters such as loss of good will and lost sales, [was] claiming reputational damages from publication . . .”).
tell us that the plaintiff is attempting an end-run around libel, then they are reputational damages.

What about emotional distress damages? The Food Lion court did not face this question because the plaintiff was a corporation, but to be consistent with the Supreme Court’s decision in Hustler (where First Amendment scrutiny was applied when plaintiff sought emotional distress damages), the Food Lion court indicated that “defamation-type damages” include emotional distress damages. Yet, it is far from evident why emotional distress damages are indicative of an attempt to avoid the strictures imposed in libel cases.

Finally, I am not sure we would all agree about what constitutes reputational damages. The Supreme Court in Cohen concluded that Cohen’s claims for lost wages and lowered earning capacity were not damages for injuries to his reputation. Yet surely his earning capacity as a political consultant was lowered precisely because the publication gave him a reputation for using smear tactics and dirty tricks (or at least a reputation for being sloppy enough to get caught). In Food Lion, the court of appeals concluded that “matters such as loss of good will and lost sales” are reputational damages for a corporation. Yet lost sales seem to be the corporate equivalent of lower earnings, which the Cohen Court treated as non-reputational.

In sum, the Food Lion test of defamation-type damages as the indicator of an end-run may have some complications. However, even with these crinkles, it appears a far more workable test than the subjective motivation test apparently used by the Supreme Court in Cohen and Hustler.

V. A REVOLUTION IN DISGUISE: PUBLICATION DAMAGES AS A UNIVERSAL TRIGGER

Perhaps the Fourth Circuit’s announcement in Food Lion is more revolutionary than has thus far been implied. We have read Food Lion to refine the “libel or end-run” trigger: here, the defamation-type

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143. The court labeled the damages variously as “publication damages,” id. at 522, as “defamation-type damages,” id., and as “damages resulting from speech,” id. at 523.
144. See Cohen, 501 U.S. at 671 (observing that “Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages in excess of $50,000 for breach of a promise that caused him to lose his job and lowered his earning capacity.”).
145. Food Lion, 194 F.3d at 523.
damages tell the court that the cause of action was really libel seeking to pass under another name.

Now I want to suggest that *Food Lion* may be taking a more radical and more interesting approach to the trigger: First Amendment scrutiny is triggered by the damages sought.\(^{146}\) “Publication damages” are important not because they serve as an indicium that the underlying cause of action is libel, but because they themselves trigger First Amendment scrutiny.\(^{147}\) In this light, the ruling in *Food Lion* is about publication damages—not about any particular tort. It suggests a unifying constitutional principle for all actions against the media precisely because it treats the cause of action filed as irrelevant. First Amendment scrutiny is triggered if a plaintiff seeks damages based on publication.

While this trigger is broad—it protects the media regardless of the cause of action elected by the plaintiff—it is also narrow, because it does not trigger First Amendment scrutiny for newsgathering per se. Suits based on the media’s activities while gathering the news only undergo First Amendment scrutiny when publication damages are sought.

A. Is This What the *Food Lion* Court Is Doing?

I do not mean to suggest that the Fourth Circuit articulated any such broad new principle in *Food Lion*. But there are certain indicia that its decision was not simply about detecting subterfuge defamation actions. While the court did talk about “end-runs,” there is far broader language throughout the damages section of the opinion.\(^{148}\) The holding it

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\(^{146}\) I do not think that using damages as the trigger mandates that the resulting First Amendment restrictions also be limitations on damages. Once damages trigger First Amendment protection, we could employ any of the substantive, procedural, and/or remedial limitations suggested at the outset of this paper, or indeed any of a panoply of balancing tests that courts have enunciated in speech cases. The *Food Lion* court, as I have noted before, presumes that the substantive element of actual malice will be employed to bar recovery of publication damages.

\(^{147}\) To a certain extent the use of “publication damages” as a trigger is perhaps still acting as a scarlet letter—what it is revealing is that the suit attempts to punish speech. This is, after all, the activity protected by the First Amendment.

\(^{148}\) The *Food Lion* court dealt with the First Amendment twice. First, it asked whether the First Amendment precludes liability, and concluded it does not. *See Food Lion*, 194 F.3d at 520-22. Then the court turned to the second question of whether the First Amendment precludes the plaintiff from recovering “publication damages,” and concluded it does. *See id.* In this part of this article, I focus on the court’s language in the damages section of its opinion.

The separation of the liability and damages issues may reflect the court’s belief
announced, and declared a settled First Amendment principle, is a rule about limits on "publication damages:" "An overriding (and settled) First Amendment principle precludes the award of publication damages in this case."\textsuperscript{149}

Again it announced that "Food Lion could not bypass the New York Times standard if it wanted publication damages,"\textsuperscript{150} or, most broadly, "when a public figure plaintiff uses a law to seek damages resulting from speech covered by the First Amendment, the plaintiff must satisfy the proof standard of New York Times."\textsuperscript{151} Let us explore how a "no damages from publication without First Amendment scrutiny" rule would work.

B. Application

To understand this theory, perhaps it is helpful to review how it seemed to work in Food Lion. In its broadest sense, the rule means that any damages flowing from the publication, rather than from the allegedly wrongful conduct itself, would trigger First Amendment scrutiny.\textsuperscript{152} Thus, for the trespass tort, we could identify damages from the trespass itself (classically loss of enjoyment of the land—here, the Food Lion store) and those that flow from the publication of the film shot during the trespass (a loss in profits and a dive in public opinion after the program is aired). Under the Fourth Circuit's ruling the latter are "publication damages," and cannot be recovered without triggering First Amendment scrutiny.\textsuperscript{153} The same result applies to the breach of duty of loyalty claim: whereas the plaintiff can recover the damages that the damage inquiry raises a separate First Amendment principle. However, the court's bifurcated approach may simply reflect the fact that the issue of damages was raised as a cross-appeal by Food Lion, and thus is discussed separately from the issues appealed by ABC. See \textit{id.} at 522.

\textsuperscript{149} See \textit{id.}

\textsuperscript{150} \textit{id.} at 524 (emphasis added). If the court is simply suggesting a new litmus test to detect an end-run around libel actions, then the key should be reputational damages, since they show that the plaintiff "really wanted" to sue in libel. In contrast, the court repeatedly uses the phrase "publication damages." This suggests that a broader principle is being announced since it is hard to imagine that the presence of damages flowing from publication are a good indicator that the lawsuit is really a disguised libel action.

\textsuperscript{151} \textit{id.} at 523.

\textsuperscript{152} I will discuss how this principle fits with the Supreme Court's case law, in particular \textit{Hustler} and \textit{Cohen}, infra notes 159-172.

\textsuperscript{153} See \textit{Food Lion}, 194 F.3d at 521. Once again, it is worth noting that while the \textit{Food Lion} court elected the actual malice rule of \textit{New York Times}, the nature of the First Amendment standard is not the subject of this paper.
flowing from the breach (here, perhaps, the wages paid to the disloyal reporter-employees), if it seeks to recover for the harm caused to its image or its share price by the publication of the information gathered by the disloyal employees, First Amendment scrutiny is triggered.

Food Lion could sue and recover on any tort without First Amendment scrutiny so long as the damages were based on the media’s behavior, not on the publication. However, if it sought publication damages, that is, damages flowing from the publication, First Amendment scrutiny would be triggered regardless of the name of the tort. Any newsgathering tort is potentially subject to First Amendment scrutiny.154

This new principle may even make First Amendment scrutiny potentially applicable to all torts, and perhaps all contract and property actions. For instance, if the media is sued for negligence when its truck collides with a pedestrian, First Amendment scrutiny is not triggered. In contrast, if the media is sued for negligence because a reader is injured when the publisher’s mushroom guidebook misidentifies a poisonous mushroom as edible, First Amendment scrutiny must be applied because the damages sought flow from the publication.155 This article will, however, focus on the ramifications of such a rule for newsgathering actions.

C. But What are Publication Damages?

As I see it, the enigma presented by this rule, and indeed implicit in the Food Lion case, is what are “publication damages?” To some extent we can simply instruct the jury that they cannot award damages based on the publication, only on the underlying conduct. However, while leaving hard questions to the jury without any guidance may be a habit of tort law, it hardly seems an optimal solution to this constitutional dilemma.

I think that the inquiry should mirror the causation inquiry of tort law.156 Why not test for publication damages with a modified version

154. Another example would be suits for invasion of privacy by intrusion. If, for instance, the media entered the plaintiff’s home with cameras rolling as part of a media ride-along, an action for intrusion would not trigger First Amendment scrutiny, unless plaintiff sought publication damages from a later broadcast of the footage.

155. This example is loosely based on Winterv. G.P. Putnam's Sons, 938 F.2d 1033 (9th Cir. 1991). See MARC A. FRANKLIN & DAVID A. ANDERSON, MASS MEDIA LAW: CASES AND MATERIALS 424-58 (5th ed. 1995), for other examples of negligence, products liability, and fraud cases based on publication.

156. I propose a First Amendment test resembling the cause-in-fact inquiry of tort
of that old favorite, the "but for" test? If the damages claimed would not have occurred "but for" publication, the damages are "publication damages," and First Amendment scrutiny is triggered. If the damage would have occurred without the publication, then publication damages are not at issue. 157 Thus, in Food Lion, the damages of lost employee time (while the reporters were filming) are not publication damages because they occur regardless of whether publication ever occurs; in contrast, the drop in stock value is a publication damage because it would not have occurred but for the publication. Thus, whenever publication is a "but for" cause of the damages, we have "publication damages." 158

D. Does Such a Damages Rule Fit with Supreme Court Precedent?

Does this new damages principle have any support in the Supreme Court's jurisprudence? I would suggest that it does. First, while it is possible to read New York Times as simply about limiting recovery in libel actions, the reason the Court gave for applying First Amendment restrictions to libel was to prevent chilling speech. 159 The New York Times Court refused to allow recovery simply upon proof of common law libel because of the effect of such awards on the media. 160 Comparing libel to sedition, it noted: "The fear of damage awards under [common law] may be markedly more inhibiting than the fear of law. The common law doctrine of proximate cause could also limit damage awards in some cases. In fact, the district court in Food Lion ultimately rejected the award of publication damages based on proximate cause. See Food Lion, 194 F.3d at 522 (holding that Food Lion's claims for loss of good will, lost sales, and diminished share value "were the direct result of diminished consumer confidence in the store," and that this lack of confidence was not proximately caused by the tortious conduct proven, but by the accurate report of Food Lion's food handling practices themselves.) See also Logan, supra note 2 at 210-20 (arguing that common law principles can be used to limit damage awards without the need to resort to First Amendment limitations).

157. I will discuss how this proposed rule fits with the Supreme Court's case law, in particular Hustler and Cohen, infra notes 159-172.

158. Publication only needs to be a "but for" cause, not the only "but for" cause. For instance, in Food Lion, the decline in stock value would not have occurred "but for" publication, and would not have occurred "but for" the trespass (since without it there was no film to broadcast). But the presence of other "but for" causes (here, the trespass) is irrelevant. First Amendment scrutiny is triggered so long as publication is a "but for" cause of the claimed harm.


prosecution under a criminal statute.\textsuperscript{161} Newspapers might either fail to survive such judgments or cease to voice public criticism for fear of liability. \textit{New York Times} is about the dangers of self censorship flowing from high damage awards.\textsuperscript{162}

From this perspective, it is irrelevant what interest plaintiff seeks to vindicate or what cause of action it elects—sedition, libel, reputation, privacy, or the sanctity of land. The chill from publication damages is the same regardless of the injury plaintiff alleges or the route selected.\textsuperscript{163} My thesis is that any award of damages flowing from publication can chill publication, and that publication-based damages should therefore always be constitutionally suspect.

As an aside, I am not suggesting that the harm suffered by the plaintiff is irrelevant to First Amendment analysis, but rather that it should be irrelevant to whether First Amendment scrutiny is triggered. Most First Amendment protection is about balancing, and it may be that privacy, for instance, has a stronger claim to protection than reputation. But this should not be relevant to the initial issue of whether to even engage in First Amendment scrutiny. This must focus on speech, not the plaintiff’s claimed injury.

The “no publication damages without First Amendment scrutiny” rule has some support in the language of the Supreme Court’s cases. For instance, in \textit{Hustler}, the Court repeatedly emphasized that its goal was to protect publications, and to minimize the chilling effect the award of damages for a publication would create.\textsuperscript{164} The ruling, the Court emphasized, “reflects our considered judgment that such a standard is necessary to give adequate breathing space to the freedoms protected by the First Amendment.”\textsuperscript{165}

\begin{flushleft}
\textsuperscript{161} \textit{See id.}
\textsuperscript{162} \textit{See Logan, supra note 2, at 1165 (observing that the Court was especially troubled by the power of juries to award huge damages).}
\textsuperscript{163} \textit{See Cohen, 501 U.S. at 675 n.3 (Blackmun, J., dissenting) (commenting, “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. Certainly, our decision in Hustler recognized no such distinction.”).}
\textsuperscript{164} \textit{See Hustler, 485 U.S. at 46-57. The Court held that “public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications.” Id. at 56 (emphasis added). The Court also concluded that “for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here.” Id. at 57 (emphasis added).}
\textsuperscript{165} \textit{Id. at 56.}
\end{flushleft}
The "no publication damages without First Amendment scrutiny" rule also accounts for the Supreme Court's decisions. All the speech torts (libel, publication of private facts, false light) that inherently seek publication damages are subject to First Amendment scrutiny. The non-speech tort cases also seem to reflect this rule. In *Hustler* (a non-speech tort case), the basis of the award of damages was defendant's "publication of a caricature." In such instances, First Amendment scrutiny should apply, and was applied by the *Hustler* Court.

The principle could also explain the Court's repeated refusal to announce any protection for torts the media commits while gathering news. As long as no publication damages are sought, no scrutiny is triggered, and the media (as noted by Justice White in *Cohen*) is subject to liability if they "break and enter into an office or dwelling to gather news." *Cohen*’s declaration 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" can be read as a distinction between causes of action where the plaintiff seeks non-publication damages having an "incidental effect" on the media's ability to gather the news; and where the plaintiff seeks publication damages having a "direct effect" on the media's ability to communicate.

This principle also explains *Cohen*, at least if we take the Supreme Court at its word that *Cohen* is not an action where the plaintiff sought damages flowing from the publication, but rather from other conduct. In *Cohen*, the Court noted that

[Cohen] sought damages in excess of $50,000 for breach of a promise that caused him to lose his job and lowered his earning capacity. Thus, this is not a case like *Hustler* . . . , where we held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort . . . .

Thus if we agree with the Court that the damages in *Cohen* were not based on publication, it was correct to refuse to apply First Amendment scrutiny.

The problem in *Cohen* is that the loss of a job and a lowered earning capacity look to me like publication damages. "But for" the publication

166. *Id.* at 57.
167. See *supra* note 78.
169. See *id*.
170. *Id.* at 671.
of the article (which identified Cohen as engaged in smear tactics), he would not have lost his job and others would not have been skeptical about hiring him. His lost job and lowered earning capacity should, I think, have been classified as publication damages, and First Amendment scrutiny should have been triggered. Thus, while Cohen is consistent if we agree with the Court’s characterization of the damages, I think the result in Cohen is wrong because the majority erred in holding that the plaintiff was not seeking publication damages.

E. Implications for Existing Law of the “No Publication Damages Without First Amendment Scrutiny” Rule

On one level, the implications of adopting a “no publication damages without First Amendment scrutiny” rule are easily predicted. It will stop the guessing game about which causes of actions are subject to First Amendment scrutiny—we will have a unified trigger regardless of the name of the action at issue. Whether the claim is for trespass, fraud, breach of duty of loyalty, privacy, negligence, or any other tort, is irrelevant; the key inquiry will be whether publication damages are sought—if so, First Amendment scrutiny is mandated.

However, while the trigger may be clear, the possible First Amendment protections flowing from its activation are numerous, and ultimately, beyond the scope of this paper. As I suggested in Section II, some of the options include substantive requirements (such as the fault and falsity requirement of New York Times); procedural reforms (such as Bose’s appellate review); and limitations on remedies (most probably on damages).

The impact on current law of the adoption of a “publication damages trigger” will differ radically depending on the nature of the protection it is held to trigger. For instance, if seeking “publication damages” always triggers a requirement that the plaintiff prove falsity

171. Cohen may be a unique fact scenario. Because the promise involved an agreement not to publish, the breach was publication. If the newspaper had promised anything else—for instance in Food Lion the implied promise by reporters to be loyal employees—we can distinguish between the damages from the breach and damages from publication itself.

172. See Cohen, 501 U.S. at 675-76 (Blackmun, J., dissenting) (observing that “the publication of important political speech is the claimed violation. Thus, as in Hustler, the law may not be enforced to punish the expression of truthful information or opinion.”).

173. There will, of course, be debate about what constitutes publication damages. See supra notes 156-158.
(as in *New York Times*), such a standard guarantees that the media will never pay "publication damages" if they publish the truth. In contrast, if claims for "publication damages" only trigger a limit on the remedy available, then obviously the impact on current law would be far more minor.

VI. CONCLUSION

In sum, I have nothing but praise for the Fourth Circuit's opinion in *Food Lion*. At a minimum, it suggests a way to make the Court's "libel or end-run" test workable by suggesting that "defamation-type damages" are a useful indicator of an end-run. This analysis, based on an analogy to libel cases, will, I think, find favor with the Supreme Court.

In the alternative, the *Food Lion* opinion may point the way to a more radical and innovative approach to dealing with media liability. By calling on us to remember that in *New York Times*, the Court's fear was that damages can chill publication, it may be the first step away from a jurisprudence erroneously focused on which cause of action plaintiff elects and toward an analysis founded on damages sought.

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174. One advantage of using a "publication damages" rule is that it makes *New York Times* easy to apply. Instead of the disjunction that can occur when you try to apply *New York Times* to non-speech torts directly, the publication damages rule by definition is only triggered when there is a publication. There must be a publication, or the plaintiff cannot seek publication damages. Then the strictures of *New York Times*, which require a false publication made with fault, will make sense.