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Privacy, Emotional Distress, and the Limits of Libel Law Reform

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Assessing a congressional tax reform proposal several years ago, a leading expert warned: "The tax bar is the repository of the greatest ingenuity in America, and given the chance, those people will do you in."¹ This warning serves as a useful reminder that the real world has a nasty habit of frustrating even the most carefully crafted legal arrangements.² The whole body of criminal law bears stark witness to the inability of formal rules to eliminate antisocial conduct. Similarly, despite numerous judicial decisions and civil rights statutes, large socioeconomic differentials between blacks and whites persist. The moral of these observations is not that efforts to reform the law are unavailing, but rather that single-minded focus upon one problem may obscure interrelationships with other factors that must also be taken into account in order for legal reform to succeed.

The subject of libel exemplifies this phenomenon. The law in this field represents a complex effort to accommodate the competing societal interests in protecting individual reputation and in preserving freedom of

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² For an acclaimed discussion of the difficulty of achieving desired goals through planned change, see Merton, The Unanticipated Consequences of Purposive Social Action, 1 Am. Soc. Rev. 894 (1938).
speech. Over the past generation, that law has been pervasively transformed and refined. Despite the doctrinal ferment, no one appears satisfied with the result, least of all the press, which seemed to be the principal beneficiary of the new legal rules. Consequently, suggestions for reform, advanced primarily by those who believe that the media require more stringent protection against libel suits than current law affords, now abound.

The preceding discussion implies, however, that tinkering with defamation law, or eliminating the tort altogether, will not save the press from those who believe that even the current legal regime is insufficiently hospitable to the claims of victims of journalistic irresponsibility. In particular, it seems likely that further attempts to restrict the ability of plaintiffs to recover for libel will encourage the filing of claims denominated as false-light invasion of privacy, intentional infliction of emotional distress, or both, because the courts have been slow to apply first amendment principles to those torts. Yet the same considerations which have made it more difficult for many plaintiffs to recover for libel ought to make it equally difficult for them to recover under theories of privacy and emotional distress.

I. Libel

The Supreme Court ruling in New York Times Co. v. Sullivan, according to Alexander Meiklejohn, was "an occasion for dancing in the


The Court recently has suggested that, in addition to protecting individual reputation, states have a legitimate interest in protecting their citizens from falsehoods. That interest may be sufficient to support at least some criminal libel statutes. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777 & n.6 (1984) (dictum).

4. This Article is concerned with the law of libel as it affects the press. Most of the judicial decisions that will be considered involved media defendants. The Supreme Court has not formally resolved whether the constitutional principles enunciated in libel cases against the press apply equally to defamation claims against other types of defendants. Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979). Indeed, the Court recently declined to decide this question, although the parties had been directed to address the significance of the media-nonmedia distinction in supplemental briefs. See Dun & Bradstreet, Inc. v. Greenmoss Bldrs., Inc., 472 U.S. 749, 753 (1985). Five members of the Court, in separate opinions in that case, rejected the distinction. Id. at 773 (White, J., concurring in the judgment); id. at 781-84 & 782 n.6 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting).

The wisdom, utility, and constitutionality of treating the press differently from other defamation defendants are beyond the scope of this Article. In any event, the resolution of these issues does not affect the analysis that follows.

streets." In one fell swoop, the Court transformed defamation from a relatively isolated backwater of the law of torts into a core element of constitutional law. Of particular significance, the opinion implied a fundamental rethinking of first amendment doctrine to suggest that the offense of seditious libel—the imposition of legal sanctions for criticism of public officials or government policy—was incompatible with the constitutional guarantee of freedom of speech.

The predicted demise of seditious libel appeared closer to reality when *New York Times* was extended soon afterward to criminal libel actions brought by public officials and then to civil suits filed by candidates for public office. Moreover, the prospective end of virtually all important libel actions seemed imminent when the Court applied the *New York Times* rule to suits brought by public figures.

Of course, things were never so simple. From the outset, it was clear that *New York Times* had not outlawed all libel actions, even by public officials. The majority opinion expressly declined to go so far, holding only that a public official could not prevail in an action for libel without showing that the defendant had published a defamatory falsehood "with

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7. See id. at 192. While defamation may have been a somewhat peripheral aspect of the common law of torts, it was also an unusually complex one:
   
   It contain[ed] anomalies and absurdities for which no legal writer ever has had a kind word, and it [was] a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm.

8. Kalven, supra note 6, at 204-10. The idea that the framers intended to abolish seditious libel when they adopted the first amendment has generated a lively academic controversy. Compare Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 18-30 (1941) (arguing that the principal purposes of the first amendment included rejection of seditious libel) with L. LEVY, THE EMERGENCE OF A FREE PRESS 220-81 (1985) (arguing that the framers did not mean to reject seditious libel). Nevertheless, the *New York Times* opinion suggests the unconstitutionality of seditious libel by its express repudiation of the Sedition Act, which expired by its own terms in 1801. See 376 U.S. at 273-76.
'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Further, only three members of the Court were willing to extend the actual-malice requirement to defamation actions filed by private-figure plaintiffs over statements involving matters of public concern. Then, beginning with *Gertz v. Robert Welch, Inc.*, the Court consistently adhered to a narrow definition of the class of public figures to whom the stringent *New York Times* fault standard applied. The *Gertz* decision reflected the Court’s ambivalence over the relationship between defamation and the first amendment. In one sense, that case represented something of a retreat from *New York Times* because it restricted the category of public figures who must prove actual malice in order to recover damages for libel. On the other hand, *Gertz* for the first time required private-figure libel plaintiffs to show some minimum level of fault on the part of the defendant in order to recover actual damages. This repudiation of strict liability as a basis for defamation effectively "revolutionize[d] the law of libel." Subsequent rulings underscored the judicial uncertainty in this area. For example, the Court held that the requirement of a showing of fault as a predicate for liability necessarily entitled plaintiffs to inquire into the thought processes and editorial judgments of defendants. While this holding was logically correct, it had the ironic effect of creating at least marginal disincentives for aggressive inquiry into subjects of public importance, which was precisely the reason that the Court in *New York Times* and *Gertz* had substituted constitutionally based fault standards for the strict-liability rule that had prevailed at common law. There also were mixed signals on the propriety of summary judgment in libel litigation. At first, the Court implied that the existence of actual malice was

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12. 376 U.S. at 280.
15. Wolston v. Reader’s Digest Ass’n, Inc., 443 U.S. 157 (1979) (person convicted of contempt of court for refusing to testify before grand jury investigating Soviet espionage in the United States held to be a private figure); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (scientist who was on staff of state hospital, served as adjunct professor at state university, and had successfully solicited in excess of $500,000 in federal research grants held to be a private figure); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (socially prominent plaintiff involved in divorce case that had aroused great public interest held to be a private figure).
16. 418 U.S. at 347. Even private plaintiffs, however, were required to demonstrate actual malice in order to recover punitive damages. Id. at 349-50. The apparent clarity of the *Gertz* rules would prove to be somewhat illusory. See infra notes 22 & 74-79 and accompanying text.
17. 418 U.S. at 390 (White, J., dissenting).
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not an appropriate question for summary disposition. A decision last term, however, suggested that trial judges should be more willing to dispose of libel cases before trial. Finally, the Court has held that appellate review of libel judgments must be unusually rigorous to assure that the requisite degree of fault has been shown, but also, in apparent contradiction of Gertz, that the states may continue to impose strict liability for defamatory statements about private figures when the subject at issue is not a matter of public concern.

In short, during the 1960s, the Supreme Court strongly emphasized the importance of promoting free expression. Since the mid-1970s, however, the Court has shown greater concern for the harms that may result from defamatory statements. These developments have generated widespread uncertainty and confusion. At present, libel litigation tends to focus more upon the fault of the defendant than upon the falsity of the statement at issue. Regardless of the outcome, such litigation has tended to become costlier to conduct and take longer to complete than ever before.

At the same time, a more aggressively individualistic social and cultural ethos has emerged. Transformations in the structure and role of the news media, along with some much-publicized journalistic derelictions, have helped to fan public distrust of the press. These developments, in turn, have encouraged expensive and potentially ruinous lawsuits against publishers and broadcasters. Further, jurors too often seem unable or

24. See, e.g., R. Smolla, SUING THE PRESS 9 (1986); Lewis, supra note 11, at 609-12.
26. R. Smolla, supra, note 24, at 15; Smolla, supra note 25, at 36-47.
unwilling to follow the complex legal rules that apply to libel suits. In addition, increasingly large jury verdicts in defamation cases seem to confirm fears of widespread public hostility toward the media. Indeed, there is reason to suspect that this lack of sympathy for the press extends to some segments of the judiciary.

The unsettled state of libel law has prompted the ultimate heresy: suggestions that New York Times be reconsidered.28 While hardly anyone has advocated a complete return to the common law regime which that landmark ruling supplanted, various reforms designed to protect the press against the uncertainty and expense of defamation litigation have been proposed. Possible changes include forbidding any form of recovery entirely apart from actual or potential damage awards, the expense of libel litigation is staggering. The cost of the Westmoreland case alone is estimated at up to $10 million, and CBS has spent nearly $4 million defending itself against a suit by ex-Colonel Anthony Herbert which is now in its fifteenth year. R. SMOLLA, supra note 24, at 75.


29. R. SMOLLA, supra note 24, at 13; Smolla, supra note 25, at 4-7. The propensity of juries to return large verdicts may account for the willingness of many plaintiffs to file suit even though the vast majority of libel suits result in judgment for the defendant. Bezanson, supra note 23, at 229; Smolla, supra note 25, at 7.


In addition, a prominent academic commentator recently has suggested that the common law of libel, with some adjustments, would be more protective of the press than the system that has evolved in the wake of the Times case. Epstein, Was New York Times Wrong?, 53 U. CHI. L. REV. 782, 801-17 (1986).
for criticism of governmental officials concerning matters of public policy,\(^\text{33}\) limiting compensatory damages to actual pecuniary loss,\(^\text{34}\) eliminating punitive damages altogether,\(^\text{35}\) assessing the attorney's fees incurred by the prevailing party against the loser,\(^\text{36}\) and substituting the remedy of retraction for that of damages in at least certain types of libel actions.\(^\text{37}\)

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33. See, e.g., Lewis, supra note 11, at 620-21.
34. See, e.g., Dun & Bradstreet, 472 U.S. at 711-72 (White, J., concurring in the judgment); Anderson, Reputation, Compensation, and Proof, 25 WM. & MARY L. REV. 747, 756-73 (1984); Lewis, supra note 11, at 615. Cf. R. Smolla, supra note 24, at 242 (proposing limitation of compensatory damages to actual pecuniary loss when defendant issues “a prompt and complete retraction in a manner calculated to reach the same audience [that saw, heard, or read the defamatory statement] with the same impact [as that statement]”; advocating in other cases a restriction of general damages not supported by evidence of actual pecuniary loss to a fixed ceiling).
36. See, e.g., R. Smolla, supra note 24, at 239-41.
37. See, e.g., M. Franklin, CASES AND MATERIALS ON MASS MEDIA LAW 292-99 (3d ed. 1986); R. Smolla, supra note 24, at 241, 242. The Iowa Libel Research Project, which is discussed elsewhere in this symposium, also proposes a new cause of action to “set the record straight.” Under this approach, a court would determine only the truth or falsity of the statement in question; the fault of the defendant in publishing a defamatory falsehood would be irrelevant.

The constitutionality of any form of compelled retraction or right of reply in defamation cases is unclear. Compare Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating state law conferring mandatory right of reply upon political candidates who are attacked by newspapers) with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding administrative regulation providing right of reply to persons attacked in broadcasts concerning matters of public importance). Neither of these cases concerned defamatory statements, however. Several states have enacted libel statutes that restrict the availability of damages but do not eliminate liability if a timely and adequate retraction is published. See generally M. Franklin, supra, at 151-53. The Supreme Court has never considered the merits of any of these laws and has expressly declined to intimate any view on the constitutionality of mandatory retraction as a remedy in libel cases. See Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1565 n.4 (1986); Tornillo, 418 U.S. at 258-59 (Brennan, J., joined by Rehnquist, J., concurring); Gertz v. Robert Welch, Inc., 418 U.S. 323,
The wisdom of these proposals has stimulated growing debate. But, even if any of these changes were desirable and worked exactly as expected—matters that are beyond the scope of this Article—the press would not necessarily find its position improved. These reforms address only the rules and procedures that apply to defamation claims. Increasingly, however, plaintiffs have relied upon other theories as predicates for redress against the media. Failure to consider this development could vitiate any added protection that the media would enjoy as a result of changes in the law of libel.

II. PRIVACY

One of the principal alternative grounds for litigation against the press has been invasion of privacy. Although originally conceived as a means for affording relief against what was viewed as scandalous newspaper gossip about the affairs of the socially prominent, the privacy tort has come to be seen as encompassing four distinct violations of a plaintiff’s interests: (1) unreasonable publicity that places one in a false light; (2) unreasonable publicity that discloses embarrassing private facts; (3) unreasonable publicity that is highly offensive to a reasonable person; and (4) publication of private facts that would be highly offensive to a reasonable person, and knowledge or acting in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

For further discussion of the standard contained in paragraph (b) of this section, see infra notes 60-82 and accompanying text.

41. Prosser, supra note 39, at 392-98. See also Restatement (Second) of Torts § 652D (1976):

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if

(a) would be highly offensive to a reasonable person, and
sonable intrusion upon seclusion;⁴² and (4) improper appropriation of the name or likeness of another.⁴³

Taken together, the four varieties of invasion of privacy significantly expand both the number of legal theories available to those aggrieved by media reporting and the range of stories that might give rise to litigation. Three of these varieties—embarrassing-facts, intrusion, and appropriation—permit recovery for truthful publications. This significantly broadens the risk to the press because these doctrines could require the media to defend against, and perhaps to pay damages for, complaints over entirely correct reports. In contrast, libelous statements must, by definition, be false.⁴⁴

The other species of privacy—false-light—bears a striking resemblance to libel. Under the false-light approach, any erroneous statement that portrays someone in a highly offensive way could form the predicate for a lawsuit, even if the statement is not defamatory.⁴⁵ This, in turn, poses several new dangers to the press. For example, by broadening the definition of actionable false statements, this doctrine could facilitate a substantially larger number of suits against the media, many of the nuisance variety.⁴⁶ Even if the false-light theory were limited to defamatory statements, however, the press still would face significant additional risks. Allowing plaintiffs to sue over defamatory statements under the alternative theories of libel and false-light privacy could permit double recovery in some cases. Moreover, permitting plaintiffs to denominate a defamation claim as one for false-light privacy could lead to the circumvention of first amendment protections that the Supreme Court has established in its libel jurisprudence.

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(b) is not of legitimate concern to the public.

Only this type of invasion of privacy was contemplated by the inventors of the tort. Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 LAW & CONTEMP. PROBS. 326, 330 (1966).

42. Prosser, supra note 39, at 389-92. See also RESTATEMENT (SECOND) OF TORTS § 652B (1976):

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

43. Prosser, supra note 39, at 401-07. See also RESTATEMENT (SECOND) OF TORTS § 652C (1976):

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

44. See Kalven, supra note 41, at 333.


46. See Kalven, supra note 41, at 338-40; Prosser, supra note 39, at 401.
Before we consider these issues in greater detail, it would be useful to note an important analytical relationship between some privacy theories and the law of defamation. Many grievances against the press could be characterized as either defamation or invasion of privacy; some situations could give rise not only to claims for libel, but also to several different privacy counts. A concrete example will clarify the point:

A national magazine prints a photograph of a famous cinematic leading man on its cover to call attention to a supposedly exclusive story about the actor's romantic adventures. The story suggests that, following a heated argument with his long-time female companion, the actor spent two torrid weeks with a younger woman at a ski resort; now, having made amends with the first woman, he finds himself torn between the two, who are themselves fiercely competing for his affections.47

In response, the actor might well sue the magazine for libel. In order to succeed on his defamation claim, however, he would have to establish two things: (1) that all or part of the story was false, and (2) that the magazine acted with the requisite degree of fault. Proving falsity in this instance might not be too difficult. The fault issue could well be more challenging, though. As a successful movie star, the plaintiff almost certainly would be regarded as a public figure. That, in turn, would require that he show the existence of actual malice on the part of the magazine to prevail. Even if the actor surmounted these hurdles, he might obtain a disappointingly small recovery since the false statements about his romantic affairs might not harm his reputation. After all, the suggestion that a prominent leading man finds himself the object of the passionate desires of two women is unlikely to detract from his public image.

The actor therefore might seek to avoid the necessity of proving fault by relying upon privacy theories. Assuming the falsity of at least some particulars of the story, he could seek damages for a false-light invasion of privacy. The essence of this claim would be that the magazine had portrayed him in an inaccurate and highly offensive, but not defamatory, fashion. Further, the actor also could assert that the magazine had appropriated his name and photograph for its own commercial advantage. In substance, he would contend that the magazine published an inaccurate and unauthorized story in order to enhance its sales and profits, thereby unjustly enriching itself at his expense. Alternatively, if the story were true in every detail, the actor could argue that entirely accurate discussion of his romantic and sexual affairs was not of legitimate public con-

cern. Here he could maintain that the story improperly disclosed purely private, and possibly embarrassing, facts about his personal life.

While it is possible to conceive other hypothetical examples involving all four types of invasion of privacy, the two most closely analogous to defamation are the embarrassing-facts and false-light varieties. For present purposes, however, false-light claims pose the greatest obstacle to the success of legal changes designed to protect the press from a widely perceived upsurge in libel claims. This is so because the statement giving rise to a false-light suit is incorrect, whereas the predicate for embarrassing-facts litigation is a wholly accurate report.

As noted earlier, two different categories of untrue statements could give rise to false-light claims. For instance, many erroneous but non-libelous statements are actionable under the false-light theory. From the perspective of an editor or publisher, this raises the specter of a lawsuit over every inaccuracy that finds its way into print.

It may well be that press concern over the prospect of vast numbers of nuisance suits under the false-light rubric is considerably exaggerated. In order to prevail in such a case, the plaintiff must show that the false light resulting from even a nondefamatory, but nonetheless incorrect, statement would be highly offensive to a reasonable person. Therefore, minor or unimportant factual mistakes that do not reflect adversely upon the plaintiff are not actionable.

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48. See, e.g., Prosser, supra note 39, at 408 n.199 (defendant breaks into plaintiff's home, steals an intimate photograph of the plaintiff, and later publishes the picture in an advertisement containing false statements about the plaintiff).

49. Wade, Defamation and the Right of Privacy, 15 Vand. L. Rev. 1093, 1120 (1962). One leading commentator contended that the analogy between false-light and defamation is incorrect. According to this view, false-light is more closely related to embarrassing-facts privacy. In either situation, the plaintiff claims injury not to reputation, as in libel, but rather to peace of mind. Whether the statement at issue is true or false, the resulting injury cannot be cured by more speech. Therefore, such statements should not come within the protection of the first amendment. Nimmer, The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Calif. L. Rev. 935, 961-64 (1968). Even this commentator recognized, however, that some claims could be brought under both false-light and defamation theories. He would have applied the fault principles used in libel cases to such claims so as to prevent circumvention of those principles through artful pleading. Id. at 964-65. For further discussion of the grounds for accepting the analogy between false-light and libel suggested in the text and for rejecting Professor Nimmer's position, see infra notes 73 & 80-82 and accompanying text.

50. For this reason, the discussion in the text is confined to false-light privacy claims. For a brief consideration of issues relating to embarrassing-facts complaints, see infra note 70.


concern may be exaggerated is not to say that it is unfounded. The difficulty of winning libel suits does not seem to have discouraged aggrieved plaintiffs from filing claims. There is no logical reason to suppose that stringent rules limiting the prospects for recovery will, by themselves, more effectively deter false-light litigation.

Other incorrect reports could elicit claims for both defamation and false-light invasion of privacy. The threat to the press in such situations would be twofold. First, the media could face the prospect of double recovery by plaintiffs. Second, unless constitutional rules of the sort that apply in libel actions were also to govern false-light claims, some plaintiffs, such as the actor in the earlier example, might recover for invasion of privacy even though the first amendment precluded them from recovering for defamation.

The risk of double recovery is enhanced by the uncertainty over precisely what interest the false-light privacy tort serves. Some authorities believe that this theory of privacy, like the law of libel, protects against harm to reputation. Those following this approach focus upon the likely reaction of third persons to the objectionable communication. Others suggest that the goal of false-light, like other privacy claims, is to protect against the mental distress attendant upon unwanted and inappropriate public exposure. Adherents to this view thus focus upon the response of the victim of the controversial message rather than upon the reaction of the potential recipient. If false-light claims arise from injury to reputation, plaintiffs might be able to obtain duplicative damages under separate counts denominated 'libel' and 'invasion of privacy.' If, by contrast, such claims arise from harm to the psyche occasioned by untrue statements, juries still may have difficulty disentangling those injuries which are compensable from those which are not. Hence, the likelihood of overlapping compensation awards may be reduced, but it might not be eliminated.

Analytically, the issue of double recovery in false-light actions does not present novel questions. Current libel law already allows prevailing plaintiffs to obtain compensation for both the harm to their good name and

53. See supra notes 23-30 and accompanying text.
55. See, e.g., Prosser & Keeton, supra note 7, § 117, at 864; Wade, supra note 49, at 1094, 1120-22.
56. See RESTATEMENT (SECOND) OF TORTS § 559 comment d (1976).
57. See, e.g., Time, Inc. v. Hill, 385 U.S. 374, 385 n.9 (1967); Van Alstyne, supra note 47, at 811.
their own mental distress resulting from the publication of defamatory statements. 68 Thus, whether false-light actions protect reputation or promote inner peace, permitting aggrieved parties to pursue claims for both defamation and false-light invasion of privacy appears not to pose significant additional danger of duplicative compensation awards. Indeed, there is reason to believe that courts can prevent double recovery in at least some cases brought under both theories. 69

More troubling is the possibility that recognition of this type of privacy claim could allow plaintiffs to circumvent the constitutional limitations that apply to libel actions. The Supreme Court has decided only two false-light privacy cases, neither of which directly addressed this problem. Both decisions, however, applied the New York Times actual-malice standard to the false-light claims at issue. Nevertheless, factual and procedural peculiarities in each case render uncertain the extent to which this standard might apply in other false-light situations.

The first of these cases was Time, Inc. v. Hill. 60 This litigation resulted from a magazine article about a play that was inspired by an incident in which the Hill family had been held hostage by three escaped prisoners. The play did not use the family’s name and contained a number of scenes that had not actually occurred. The article, however, did identify the Hills and incorrectly described the play as a reenactment of their harrowing encounter. A judgment in favor of the family was set aside because the jury had not been instructed that liability must be premised upon a finding of deliberate or reckless falsehood on the part of the magazine. 61

Several factors raise doubt as to the breadth of the holding in Hill. First, this was not a true false-light case. The plaintiffs’ grievance was less the relatively minor inaccuracies in the article than the unwanted publicity about a frightening experience that they had sought to put behind them. 62 They brought their claim as a false-light case only because the state statute under which they sued precluded recovery for a fully accu-

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58. The Supreme Court has defined the actual injury for which a successful libel plaintiff may be compensated to include “personal humiliation, and mental anguish and suffering.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

59. See, e.g., Braun v. Flynt, 726 F.2d 245, 250-52 (5th Cir.), cert. denied, 469 U.S. 883 (1984); Wade, supra note 49, at 1107; see also Restatement (Second) of Torts § 652E comment b (1976).

60. 385 U.S. 374 (1967).

61. Id. at 391-97.

rate account. 63

Second, the Court’s reasoning rested upon the premise that the press has a constitutional privilege to report on any newsworthy subject. 64 In the defamation context, however, that premise never attracted majority support among the justices 65 and was expressly rejected in Gertz. 66 Indeed, that aspect of Gertz may have implicitly called into question the continuing vitality of Hill. 67

The Court’s only other false-light decision, Cantrell v. Forest City Publishing Co., 68 failed to resolve those doubts. This case concerned a follow-up newspaper story on the effects of a bridge collapse that resulted in several dozen deaths. Members of the family of one of the victims complained that the article contained numerous inaccuracies depicting them as impoverished, despondent, and slovenly. The most egregious of these was an account of an interview with Mrs. Cantrell that never took place. 69 Because the parties agreed that the New York Times actual-malice standard should govern and the record contained ample evidence that the article contained knowing falsehoods about the plaintiffs, the Court upheld a judgment in their favor but did not determine whether the standard announced in Hill was constitutionally required. 70

Despite the ambiguity of these decisions, they do permit a few general observations about the appropriate standard in false-light privacy cases. First, it is generally agreed, even by critics of the adoption of the actual-malice test in Hill, 71 that the first amendment principles that apply to libel should govern false-light claims arising from statements that are also de-

64. 385 U.S. at 387-91.
65. See supra note 13 and accompanying text.
66. 418 U.S. at 345-46. The newsworthiness criterion appears to have been resuscitated, at least to some extent, in Dun & Bradstreet, Inc. v. Greenmoss Bldrs., Inc., 472 U.S. 749 (1985). See infra notes 74-79 and accompanying text.
67. See, e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 498 n.2 (1975) (Powell, J., concurring); Restatement (Second) of Torts § 652E comment d (1977); Ashdown, supra note 62, at 781.
69. Id. at 248.
70. Id. at 250-53.
71. The Supreme Court has decided only one case raising what might be termed an embarrassing-facts privacy claim. In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-97 (1975), the Court held that no cause of action would lie for the accurate publication of the name of a rape victim when the media obtained the information from public judicial records. For criticism of that decision, see Hill, supra note 62, at 1264-68.
famatory in order to prevent circumvention of minimum constitutional safeguards for expression.\textsuperscript{71}

Second, there is reason to suspect that the Court will impose upon false-light claims the same rules that govern in defamation actions, whether the statement giving rise to the litigation is libelous or not. This suspicion arises from dictum in \textit{Cantrell} implying that a showing of actual malice might not be required as a predicate for liability in all false-light cases.\textsuperscript{72} Such an approach would recognize the substantial practical overlap between libel and false-light cases, and would reduce the likelihood of juror confusion in applying different legal standards to identical or functionally similar claims.\textsuperscript{73}

Applying the defamation standards to all false-light cases would have the virtue of conceptual symmetry. The seeming attractiveness of this approach might be considerably exaggerated, however, as a result of the recent decision in \textit{Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.}\textsuperscript{74} That decision revived the 'public concern' test, which apparently had been repudiated in \textit{Gertz}.\textsuperscript{75} Under the analysis of \textit{Dun & Bradstreet}, it becomes necessary to focus not only upon the status of the plaintiff—public official, public figure, or private figure—but also upon the nature of the issue—of public or private concern—in order to determine the appropriate standard of fault needed to support a finding of liability.\textsuperscript{76}

Imposing the \textit{Dun & Bradstreet} defamation logic upon false-light cases would leave intact the actual-malice requirement for public officials and at least those public figures who play significant roles in the debate over public policy. The Supreme Court has suggested that there are few, if any, matters about such persons that are of absolutely no relevance to the public.\textsuperscript{77}


\textsuperscript{72} In \textit{Cantrell}, the Court observed:

[This case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in \textit{Time, Inc. v. Hill} applies to all false-light cases. Cf. \textit{Gertz} . . . .

\textsuperscript{73} Hill, supra note 62, at 1274.

\textsuperscript{74} 472 U.S. 749 (1985).

\textsuperscript{75} Id. at 758-61; cf. 418 U.S. at 343-46.

\textsuperscript{76} 472 U.S. at 755-61.

\textsuperscript{77} Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300-01 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 285, 273-76, 277 (1971). Both of these cases concerned candidates for elec-
those public figures not involved in political debate, although the Court has never indicated much interest in developing one.\textsuperscript{78}

With respect to private figures, the reasoning of \textit{Dun & Bradstreet} would apply the \textit{Gertz} principles only to false-light actions relating to matters of public concern. In this category of cases, the plaintiff would have to show that the defendant was at least negligent in order to prevail. If the false statement about a private figure did not relate to a matter of public concern, then presumably the defendant could be held strictly liable. This latter conclusion seems to accord with traditional privacy rules.\textsuperscript{79}

The foregoing discussion assumes that the Supreme Court will adjust the fault standard in false-light privacy cases to be consistent with that applicable in libel suits filed by plaintiffs of the same status over issues of the same degree of public concern. However accurate such an assumption may be, strong constitutional and policy arguments exist for retaining the actual-malice requirement in all false-light cases. That requirement, initially formulated in the defamation context, recognizes the inevitability of factual mistakes in free-wheeling debate but seeks to provide latitude for some of those errors in the interest of promoting first amendment rights.\textsuperscript{80}

The reasons for continuing to apply this requirement to false-light
claims stem from the relationship between these claims and those for defamation. Many false-light cases concern nondefamatory statements, which by definition are less harmful to the plaintiff than those that are libelous. It would be anomalous to make recovery easier for less serious injuries, since that would encourage precisely that self-censorship which the actual-malice standard was intended to prevent. As for those situations involving libelous statements, any plaintiff entitled to a lower fault burden presumably will prevail on the defamation claim. Since such persons are entitled to full compensation for their actual injuries regardless of how they denominate their claims, these persons can be made whole without relying upon a false-light theory.

Even if arguments of this sort were to prevail, and the retention of the actual-malice requirement established by Hill really discouraged actions for false-light invasion of privacy, the press still would face significant threats from a new quarter. Disgruntled plaintiffs recently have begun to sue the media for intentional infliction of emotional distress. To date, the Supreme Court has not considered a case presenting this issue. Accordingly, the relevance of the first amendment to emotional-distress suits remains ambiguous. Plaintiffs' initial success in these cases suggests that more will be filed. It is to this subject that we now turn.

III. EMOTIONAL DISTRESS

Until relatively recently, courts were reluctant to recognize an independent cause of action for the infliction of emotional distress. Judicial hostility stemmed primarily from concern that psychic harms were idiosyncratic, intangible, and ephemeral. Accordingly, recognition of such claims would open the door to a multitude of trivial, if not fraudulent, lawsuits. The predominant view was that, with respect to many of the slings and arrows of daily affairs, "a certain toughening of the mental hide is a better protection than the law could ever be." Exceptions were made for flagrant and intentional misconduct resulting in emotional harm and for negligence causing psychological injury under certain limited conditions.

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81. See Restatement (Second) of Torts § 652E comment d (1977).
82. It is not clear how much self-censorship the Court meant to discourage in New York Times, nor is it obvious that all forms of self-censorship are socially undesirable. Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 429 (1975); Sunstein, Hard Defamation Cases, 25 Wm. & Mary L. Rev. 891, 895 (1984).
83. See generally Prosser & Keeton, supra note 7, § 12, at 54-56.
85. See generally Prosser & Keeton, supra note 7, § 12, at 57-65.
86. See generally id., § 54, at 361-67. Traditionally, the plaintiff in a negligence action could not recover for mental disturbance unaccompanied by immediate physical injury.
Today, most jurisdictions recognize the tort of intentional infliction of emotional distress. This tort provides relief to victims of extreme and outrageous conduct that leads to severe psychic injury.\(^\text{87}\) Not surprisingly, plaintiffs have begun to invoke this theory against the press, typically in conjunction with claims for libel and invasion of privacy.\(^\text{88}\)

Emotional distress was compensable if there had been some impact, however slight, upon the person of the plaintiff. Bystanders have been allowed to recover for serious and foreseeable psychic harm to third parties, at least where the plaintiff is within the "zone of danger"; some cases have gone further and allowed bystanders to recover if they personally observe the accident and are closely enough related to the injured third party.

\(^{87}\) See *Restatement (Second) of Torts* § 46 (1963):

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

In addition, several courts have permitted recovery under a negligence rubric for the infliction of serious mental disturbance. *See generally Prosser & Keeton, supra note 7, § 54; Nolan & Ursin, Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos, 33 Hastings L.J. 583 (1982).*


In addition to intentional infliction of emotional distress, several recent cases have considered claims that press negligence has caused serious physical or psychic injury. Most of these have concerned incidents in which someone has imitated activity depicted in the media. These 'imitation' cases generally have failed because plaintiffs have not demonstrated that the defendant incited the behavior giving rise to the claim. In disposing of these claims, courts have emphasized the deleterious effect on first amendment values that would result from imposing liability in the absence of a showing of incitement. *See, e.g.,* Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 489, 178 Cal. Rptr. 888, 892 (1981), *cert. denied, 458 U.S. 1108 (1982)*; Walt Disney Productions, Inc. v. Shannon, 247 Ga. 402, 405-06, 276 S.E.2d 580, 583 (1981); DeFilippo v. National Broadcasting Co., 446 A.2d 1036, 1041 (R.I. 1982).

Other cases have concerned claims that media negligence resulted in the infliction of emotional distress. One particularly noteworthy example arose from a newspaper's publication of the name and address of a kidnapping victim while her assailant was still at large, following which the assailant terrorized her on several occasions. The decision holding that the victim had stated a cause of action against the newspaper, while at least arguably correct, accorded very little weight to first amendment values and failed almost completely to address the relevant competing interests implicated in the controversy. *See Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982), cert. denied, 459 U.S. 1226 (1983).*

Detailed consideration of such negligence cases is beyond the scope of this Article. For further discussion of this subject, see Drechsel, *Negligent Infliction of Emotional Distress: New Tort Problem for the Mass Media,* 12 Pepperdine L. Rev. 889 (1985); Linder, *When...
Suits against the media alleging intentional infliction of emotional distress are a distinctly contemporary phenomenon. There have been only a few reported decisions concerning such claims, and the press has prevailed in most of them. Significantly, however, most of these cases have been filed within the last few years. Moreover, the recent appellate ruling in Falwell v. Flynt, upholding a large damage award for intentional infliction of emotional distress in a highly publicized suit, promises to encourage even more such litigation unless it is overturned by the Supreme Court. For that reason, the Falwell case warrants detailed consideration.

The suit arose over an advertising parody involving the Reverend Jerry Falwell, a prominent evangelist and political commentator, in Hustler, a controversial magazine published by Larry Flynt. The parody in question satirized a series of double-entendre advertisements touting the "first time" that various celebrities drank a particular liqueur. In the Hustler version, Falwell purportedly describes his first sexual experience as an incestuous affair with his mother, and effectively admits to being a hypocrite and a drunkard. A disclaimer in small print appeared at the bottom of the page warning that this was an "ad parody—not to be taken seriously."

The evangelist sued for libel and intentional infliction of emotional distress. The jury rejected the libel claim, explaining that no reasonable person would believe that the parody was true, but returned a verdict of $200,000 in favor of Falwell on the emotional-distress count. The court of appeals affirmed the award.

The Falwell decision seems wrong both factually and legally. As to the

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89. Intentional Infliction, supra note 88, at 346-47. The pattern of results in these cases—plaintiffs generally have fared much better at the trial level than on appeal—closely resembles that in libel actions. See, e.g., Franklin, Suing the Media for Libel: A Litigation Study, 1981 Am. B. Found. Res. J. 795; Smolla, supra note 25, at 4-7.

90. Over 80 percent of the decisions analyzed in one recent study—29 of 35—were issued between 1978 and 1985. Intentional Infliction, supra note 88, at 346.


92. 797 F.2d at 1272; see also Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1150 (9th Cir. 1986). This item was listed in the magazine's table of contents under the heading, "Fiction: Ad and Personality Parody."

93. Falwell also sought damages under a Virginia statute, VA. CODE ANN. § 8.01-40 (1984), for unlawful appropriation of his name and likeness. The court of appeals affirmed the district court's dismissal of this invasion of privacy claim. 797 F.2d at 1278.

94. 797 F.2d at 1273. The award included $100,000 in compensatory and $100,000 in punitive damages.
former, the evidence that Falwell had suffered severe emotional distress was modest at best. The parody, according to his testimony, left him on the verge of tears, generated an urge to attack Flynt physically, and caused deep and long-lasting anger. The only other evidence cited by the court of appeals was the testimony of an associate that the evangelist's enthusiasm and optimism suffered to such an extent that Falwell had not been able to concentrate on the extensive administrative details of his ministry. This evidence falls far short of demonstrating "severe and debilitating emotional injury . . . of grave intensity and duration." Moreover, as disturbed and distracted as Falwell may have been, he did manage to disseminate approximately 1.3 million fundraising letters over his signature not long after the parody first appeared.

95. Under Virginia law, Falwell had to show that: (1) Flynt had acted intentionally or recklessly; (2) this conduct offended generally accepted standards of morality and decency; (3) the conduct caused Falwell's emotional distress; and (4) the emotional distress was severe. The Fourth Circuit ruled that Flynt's own deposition—in which he characterized Falwell as a "glutton," a "liar," and a "hypocrite," and expressed his wish to "assassinate" Falwell's integrity, established the first element, intentional or reckless conduct. The language of the parody, coupled with Flynt's republication of the piece after Falwell had filed suit, constituted the outrageousness required by the second element. 

96. The court of appeals quoted the following portion of Falwell's testimony concerning his reaction to the parody:

A. I think I have never been as angry as I was at that moment . . . . My anger became a more rational and deep hurt. I somehow felt that in all of my life I had never believed that human beings could do something like this. I really felt like weeping. I am not a deeply emotional person; I don't show it. I think I felt like weeping.

Q. How long did this sense of anger last?

A. To this present moment.

Q. You say that it almost brought you to tears. In your whole life, Mr. Falwell, had you ever had a personal experience of such intensity that could compare with the feeling that you had when you saw this ad?

A. Never had. Since I have been a Christian I don't think I have ever intentionally hurt anybody. I am sure I have hurt people but not with intent. I certainly have never physically attacked anyone in my life. I really think that at that moment if Larry Flynt had been nearby I might have physically reacted.

Id. at 1276.

97. Id. at 1277.

98. Nolan & Ursin, supra note 87, at 615.

99. Nearly 780,000 of those letters contained reproductions of the offending advertising parody. These letters generated approximately $717,000 in donations. In addition, Falwell displayed the parody on his television broadcasts, thereby eliciting an undetermined amount in further contributions. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1150 (9th Cir. 1986).

The magazine then unsuccessfully filed suit asserting that the unauthorized reproduction of the parody for fundraising purposes infringed its copyright. The defendants prevailed on grounds of fair use, although the majority of a divided appellate panel found this to be a
Even if a less rigorous criterion of mental disturbance were required,\(^{100}\) the weakness of the evidence of emotional distress, coupled with the obscure connection between that distress and the amount of the judgment, suggests that the verdict was designed to punish an unpopular speaker for an extraordinarily tasteless publication rather than to compensate a victim of serious psychic harm. That suggestion lends support to those who believe that principled adjudication of emotional-distress claims is impossible,\(^{101}\) which in turn suggests that the Falwell ruling was also legally incorrect. If cases of this sort are resolved simply on the basis of "situational justice,"\(^ {102}\) the first amendment interest in free expression is likely to be forgotten.\(^ {103}\) The uncertainty generated by such ad hoc balancing almost surely will deter some protected speech, a result plainly incompatible with the Supreme Court rulings discussed earlier.

The constitutional arguments in Falwell drew heavily upon defamation jurisprudence. On this score, Flynt urged primarily that Falwell, as a public figure, had to satisfy the New York Times actual-malice standard in order to prevail on his emotional-distress count. The court of appeals rejected this proposition while simultaneously purporting to require Falwell to prove that Flynt had acted with a high degree of fault. This reasoning recognized the danger that plaintiffs otherwise could circumvent the protections for the press that New York Times had established.\(^ {104}\) The court added, however, that the first element of Falwell's emotional-distress claim—intentional or reckless conduct—was "precisely the level of fault that New York Times requires in an action for defamation."\(^ {105}\) Even if the court's analysis of culpability confounded Flynt's personal animosity toward Falwell with his fault in publishing the parody—a point which is not altogether clear from a careful reading of the opinion\(^ {106}\)—it is appar-

dose case. See id. at 1151-56. The merits of this decision are beyond the scope of this Article. But see id. at 1157-59 (Poole, J., dissenting) (rejecting the fair-use defense).

100. The American Law Institute defines severe emotional distress as that which is "so severe that no reasonable [person] could be expected to endure it," and emphasizes "[t]he intensity and the duration of the distress" as factors relevant to a finding of severity. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1963).


102. Id.


104. 797 F.2d at 1274.

105. Id. at 1275. In refusing to go further and require a showing of actual malice, the court reasoned that such a requirement would improperly add a new element to the emotional-distress tort. Id. Yet New York Times itself effectively added that element to common law defamation actions. See Blatty v. New York Times Co., 42 Cal. 3d 1033, 1047, 728 P.2d 1177, 1186, 232 Cal. Rptr. 542, 551 (1986).

106. The extensive quotations from Flynt's deposition demonstrating his undisguised
ent that Flynt knew that the statements in the parody were not true. Therefore, the evangelist probably could have established actual malice in this case. It seems somewhat curious, then, that Flynt placed so much weight upon this contention.

A more promising line of attack would have emphasized Falwell's status as a prominent public personage deeply involved in the debate over important political and moral issues, and the relationship between his claims for libel and for emotional distress. As a significant participant in public affairs, Falwell in effect assumed the risk that he would become the target of "vehement, caustic, and sometimes unpleasantly sharp attacks." To the extent that such attacks impugn his reputation, he may sue for defamation; to the extent that they portray him to the public in an inaccurate and highly offensive fashion, he may seek relief for false-light invasion of privacy. In this instance, the evangelist brought a libel suit. He lost. In effect, the jury determined that he had suffered no harm to his good name from Flynt's obnoxious satire. Had the court ruled in his favor, Falwell could have collected damages for his emotional distress. But to allow him to recover for that distress alone, unaccompanied by reputational injury, would, for practical purposes, outlaw "a staggering array of political statements." Many political criticisms, including almost all parody and satire, are intended to make their targets feel uncomfortable. Indeed, any system committed to "uninhibited, robust, and
wide-open” debate\textsuperscript{113} cannot accord much weight to the interest of public officials and public figures in emotional tranquility.\textsuperscript{114}

This suggests that the proper constitutional response to Falwell should have been some variant of President Truman’s famous epigram, “If you can’t stand the heat, stay out of the kitchen.” Because criticism that neither defames nor invades the privacy of political figures is part of the game, courts should not allow them to recover damages for the hurt feelings that follow from such criticism.

This observation implies a more general conclusion about the relationship between claims for libel and privacy on the one hand, and those for intentional infliction of emotional distress on the other. The emotional-distress tort was recognized in order to afford relief to those who, like the victim of an overbearing bill collector who repeatedly harasses a debtor on the telephone, otherwise would have had no remedy.\textsuperscript{118} This new cause of action protects the interest in freedom from mental disturbance. As noted earlier, however, both defamation and invasion of privacy actions permit recovery for psychic harm. Although emotional distress differs in certain respects from the other theories,\textsuperscript{116} there is no reason to allow plaintiffs—whether public officials, public figures, or private figures—who cannot or will not vindicate their interests through libel or privacy suits to circumvent whatever constitutional restrictions apply to such litigation by denominating their grievances as claims for intentional infliction of emotional distress.\textsuperscript{117}

\textsuperscript{113} New York Times, 376 U.S. at 270.

\textsuperscript{114} See 805 F.2d at 486-89 (Wilkinson, J., dissenting from denial of rehearing en banc); Note, First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress, 85 Colum. L. Rev. 1749, 1780-81 (1985).


\textsuperscript{116} See Intentional Infliction, supra note 88, at 350-55.

\textsuperscript{117} Id. at 359-60; Pedrick, supra note 115, at 21; cf. Hart v. E.P. Dutton & Co., 197 Misc. 274, 287-88, 93 N.Y.S.2d 871, 878-79 (Sup. Ct.) (plaintiff may not avoid statute of
In the end, while the outcome in *Falwell* raises disturbing questions, the unusual unattractiveness of the defendant and the special tastelessness of the statement in question may help to explain the result. At least the court accorded some, albeit not enough, weight to the constitutional issues at stake. A number of other judicial opinions ignore those issues altogether in addressing claims of intentional infliction of emotional distress.\(^{118}\) Nevertheless, until we develop "a sufficiently strong and general view of the first amendment,"\(^{119}\) and so long as inner peace remains a preeminent cultural value, the press must anticipate further litigation under this rubric.

IV. Conclusion

The unsettled state of libel law reflects a deeper ambiguity in our feelings about the press. The media play a central role in constraining abuses of authority, yet experience has taught us to distrust unchecked accumulations of power. Defamation law embodies our uneasiness with the notion that the press itself may not be called to account. If the current rules seem unsatisfactory, we can change them to make it more difficult, if not impossible, for plaintiffs to recover. Achieving that goal, however, will not insulate the press from other kinds of legal claims, because it will not resolve the underlying ambiguity.


\(^{119}\) Van Alstyne, *supra* note 47, at 817.