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The First Cut is the Deepest, but the Second May be Actionable: Masson v. New Yorker Magazine, Inc. and the Incremental Harm Doctrine

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THE FIRST CUT IS THE DEEPEST, BUT THE SECOND MAY BE ACTIONABLE: *MASSON V. NEW YORKER MAGAZINE, INC.* AND THE INCREMENTAL HARM DOCTRINE

I. INTRODUCTION

The law of defamation[1] has undergone dramatic changes during the past thirty years, largely as a result of the landmark United States Supreme Court decision in *New York Times Co. v. Sullivan*.[2] That case recognized that huge libel awards threaten to undermine First Amendment[3] guarantees of freedom of speech and press.[4] The case marked the first step in an evolutionary process in which courts set up an elaborate set of rules aimed at balancing the interests of libel plaintiffs against the need to protect First Amendment values.[5]

An important step in this process involved the development of the "libel-proof plaintiff doctrine."[6] This doctrine asserts that a plaintiff's reputation may already be so damaged, either by prior unchallenged repetition of damaging statements[7] or by the plaintiff's prior criminal record,[8] that even if the plaintiff were successful in a libel action, any damages awarded would be minimal.[9] In this situation, courts have held that society's interest in protecting First Amendment values outweighs the plaintiff's interest in vindicating his or her reputation.[10]

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1. Defamation is "a false communication, either published or publicly spoken, that injures another's reputation or good name." BLACK'S LAW DICTIONARY 417 (6th ed. 1990).

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

3. The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The United States Supreme Court first applied the First Amendment through the Due Process Clause of the Fourteenth Amendment to the states in Gitlow v. New York, 268 U.S. 652 (1925).

4. The Court stated: "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *New York Times*, 376 U.S. at 278.

5. *See infra* notes 24-51 and accompanying text.

6. *See infra* notes 71-105 and accompanying text.

7. *See* Guccione v. Hustler Magazine, Inc., 800 F.2d 298 (2d Cir. 1986).

8. *See, e.g.*, Cardillo v. Doubleday & Co., 518 F.2d 638 (2d Cir. 1975).

9. *See infra* text accompanying notes 71-78.

10. *See infra* text accompanying note 72.

A branch of the libel-proof plaintiff doctrine, the incremental harm doctrine,[11] holds that a plaintiff is not entitled to burden a defendant with a libel suit if the statements challenged by the plaintiff damage his or her reputation far less than the unchallenged or nonactionable portion of the publication.[12] Courts developed this rule as a response to plaintiffs who disputed only relatively minor assertions in publications that were otherwise extremely negative or unflattering. Courts have offered various policy reasons to justify the rule, including judicial economy[13] and the desire to prevent a chilling effect on the press caused by suits filed to harass media defendants rather than to redress injuries.[14]

In *Masson v. New Yorker Magazine, Inc.*,[15] the United States Supreme Court held that this branch of the libel-proof plaintiff doctrine is not constitutionally mandated.[16] The Court held that the First Amendment does not require dismissal of an action as a matter of law when a statement has harmed a plaintiff's reputation by only a small increment beyond the harm caused by the nonactionable remainder of the publication.[17]

The Supreme Court's refusal to grant constitutional status to the incremental harm doctrine does not end the matter, however. Following *Masson*, the issue of how to treat cases in which a plaintiff challenges only a minor portion of an overall publication will be a matter for state courts.[18] State courts concerned about restricting use of the judicial sys-

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11. *See infra* notes 79-105 and accompanying text.

12. *See infra* notes 102-05 and accompanying text. This doctrine may be invoked at any stage of litigation, including summary judgment, judgment notwithstanding the verdict and jury instruction. Thus far courts have invoked the doctrine mainly at the summary judgment stage. *See, e.g.*, Herbert v. Lando, 781 F.2d 298 (2d Cir.) (reversing district court denial of summary judgment for defendant), *cert. denied*, 476 U.S. 1182 (1986); Crane v. Arizona Republic, 729 F. Supp. 698 (C.D. Cal. 1989); Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512 (Tex. Ct. App. 1987) (affirming grant of summary judgment for defendant); Simmons Ford, Inc. v. Consumers Union of United States, Inc., 516 F. Supp. 742 (S.D.N.Y. 1981) (granting defendant summary judgment). In Gannett Co. v. Re, 496 A.2d 553 (Del. 1985), the Delaware Supreme Court affirmed the trial court's denial of judgment notwithstanding the verdict, holding so on the basis that the accurate portion of the publication at issue had not rendered the plaintiff libel proof. *Id.* at 558.

13. *Finklea*, 742 S.W.2d at 517.

14. *Simmons Ford*, 516 F. Supp. at 750; *Finklea*, 742 S.W.2d at 517.

15. 111 S. Ct. 2419 (1991).

16. *Id.* at 2436.

17. *Id.*

18. *Id.* (stating that California remains free to adopt incremental harm doctrine). On remand, the Ninth Circuit held that the incremental harm doctrine is "not an element of California libel law." Masson v. New Yorker Magazine, Inc., No. 87-2665, 1992 U.S. App. LEXIS 6152 at *6 (9th Cir. Apr. 6, 1992). However, this represents only the Ninth Circuit's estimation of what the California Supreme Court would hold on the issue, because California state courts have yet to rule on the subject.

tem for possibly frivolous lawsuits and about the potential chilling effect such lawsuits can have on the press[19] may still find the doctrine useful.[20] This Note recognizes that these courts may find the doctrine justified by their own state constitutional or statutory free-speech and free-press guarantees.[21] But even disregarding possible state constitutional arguments, this Note argues that the incremental harm doctrine offers a way to analyze causation issues in defamation actions.[22] The incremental-harm analysis may lead a court either to dismiss a suit in which the challenged statements damage a plaintiff's reputation only a negligible amount over the rest of the publication or, at the very least, to limit damage awards in such suits, based on simple common-law tort principles.[23]

II. LIBEL LAW AND THE UNITED STATES CONSTITUTION

Several interests have been identified as underlying the First Amendment's guarantees of free speech and free press. Under the marketplace of ideas theory, the value of free speech lies in the search for truth.[24] Free speech also is viewed as necessary for self-government or to further the democratic process.[25] Freedom of speech also may be essential to an individual's self-fulfillment and self-realization.[26]

Defamation requires communication to a third party of something false that may affect the community's opinion of the plaintiff.[27] It en-

19. *See infra* notes 65-67 and accompanying text.

20. *See infra* notes 241-84 and accompanying text.

21. *See infra* notes 241-46 and accompanying text.

22. *See infra* notes 247-55 and accompanying text.

23. *See infra* notes 256-73 and accompanying text.

24. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."). For a similar view by Justice Brandeis, see Whitney v. California, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring).

25. *See* ALEXANDER MEIKLEJOHN, *Free Speech and Its Relation to Self-Government*, *in* POLITICAL FREEDOM 3 (1948); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-57; Alexander Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CAL. L. REV. 4, 12 (1961). This theory emphasizes the importance of "political speech" in the interpretation of the First Amendment, because the requirements of democratic systems are seen as twofold: access to information necessary to informed decision-making and the ability to communicate with elected representatives. Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 73 (1989).

26. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 55 (1982).

27. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984). At common law, truth was a defense in defamation actions, and the defendant had the burden of pleading and proving the truth of the publication at issue. *Id.* at 841. The Supreme Court's decision in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767

compasses both libel, which refers to written attacks on a person's reputation,[28] and slander, which involves oral attacks.[29] At common law, statements were per se libelous if they involved imputation of crime or of a loathsome disease, or if they affected the plaintiff in his or her business or trade.[30] In these situations, the plaintiff was not required to prove any actual damage to his or her reputation.[31]

In *Chaplinsky v. New Hampshire*[32] the Supreme Court held that defamatory communications were not to be afforded First Amendment protection because they "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[33] The law of defamation thus was essentially part of the tort law of "strict liability" or "liability without fault."[34] That changed, however, with the landmark case of *New York Times Co. v. Sullivan*.[35] *New York Times* involved a libel action by a city commissioner against the newspaper.[36] Sullivan sued over an advertisement that contained statements critical of a police action against student demonstrators that he said referred to him in his official duties.[37] The Court held that the Constitution prohibited a public official from recovering damages for a defamatory falsehood relating to his official conduct in the absence of proof from which a jury could find with convincing clarity that the defendant had published the defamatory statement with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[38]

The Court based its decision on what it saw as "a profound national commitment to the principle that debate on public issues should be unin-

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(1986), placed the burden of proving falsity on the plaintiff in certain cases. *See infra* notes 50-51 and accompanying text.

28. KEETON et al., *supra* note 27, § 111, at 771.

29. *Id.* Modern communications have blurred the distinction between libel and slander. Thus radio and television communications, although they involve the spoken word, are sometimes treated as libel, because of their ability "to widely disseminate the spoken word or to disseminate the spoken word with more permanency than does the traditional concept of slander." Miles v. Perry, 529 A.2d 199, 209 n.11 (Conn. App. Ct. 1987).

30. KEETON et al., *supra* note 27, § 112, at 788.

31. *Id.* This is known as the doctrine of presumed damages. Gertz v. Robert Welch, Inc., 418 U.S. 323, 329 (1974).

32. 315 U.S. 568 (1942).

33. *Id.* at 572.

34. LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION § 5, at 15 (1978).

35. 376 U.S. 254 (1964).

36. *Id.* at 256.

37. *Id.* at 256-58.

38. *Id.* at 279-80.

hibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[39] The Court later extended the actual malice standard to cases in which a plaintiff is any public figure, even if he or she is not a public official.[40]

In 1974 the Court in *Gertz v. Robert Welch, Inc.*[41] held that the First Amendment prohibits holding broadcasters or publishers of defamatory falsehoods strictly liable for defamatory publications.[42] Where the plaintiff is a private figure, however, the Court held that the *New York Times* actual malice standard does not apply.[43] Instead, the Court held that the plaintiff must prove something more than that the communication was made and that it was false.[44] Reiterating the principle that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters,"[45] the Court limited the recovery of damages to those situations in which the plaintiff could prove some "ac-

39. *Id.* at 270. There is some question as to how much of the holding in *New York Times* rested on the fact that the communication involved a "public issue." In some cases the Court has suggested that statements relating to "public issues" receive heightened protection under the Constitution. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) (plurality opinion) ("It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.' " (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978))). Allowing courts to determine what issues are of "public concern" carries its own dangers, however. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), Justice Powell, writing for the majority, stated: "We doubt the wisdom of committing this task [of determining what publications address issues of 'general or public interest'] to the conscience of judges." *Id.* at 346.

Similarly, it is unclear how much of the Court's decisions, including *New York Times*, can be attributed to the fact that the defendant is a member of the media. *See* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2706 (1990) ("[A] statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved."); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1985) ("We also have no occasion to consider . . . what standards would apply if the plaintiff sues a nonmedia defendant."); Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979) (stating Court has never decided question of whether *New York Times* standard applies to individual defendant rather than to media defendant).

40. Curtis Publishing Co. v. Butts, 388 U.S. 130, 154 (1967) (ruling athletic director at major university was as much public figure as public official in *New York Times*). In *Gertz*, the Court defined "public figures" and explained the rationale for imposing a higher burden on them as plaintiffs in libel actions. The Court explained that public figures are, generally, people who have "thrust themselves to the forefront of particular controversies" and who "invite attention and comment." *Gertz*, 418 U.S. at 345.

41. 418 U.S. 323 (1974).

42. *Id.* at 347.

43. *Id.* at 343.

44. *Id.* at 347 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

45. *Id.* at 341.

tual injury."[46] However, the Court did not define exactly what constituted "actual injury." It noted that this would not be limited to "out-of-pocket loss," but could include impairment of reputation and standing in the community, personal humiliation and mental anguish and suffering.[47]

The Court also held that in most situations, presumed damages are contrary to First Amendment principles.[48] By requiring plaintiffs to show fault, the Court thus continued a theme of striking a balance between the interests of defamation plaintiffs and the constitutional guarantee of freedom of the press.[49]

The Supreme Court recently reinforced its commitment to the principles of *New York Times* in a case involving a private-figure plaintiff. In *Philadelphia Newspapers, Inc. v. Hepps*[50] the Court held that where a newspaper publishes speech of public concern about a private figure, the private-figure plaintiff bears the burden of proving that the statements at issue are false.[51]

Although these developments have constitutionalized much of the law of defamation, they have left many gaps that have been filled by lower courts. The result has been a patchwork that has developed around the law of defamation as conflicts have arisen over these areas that the Court has left open. Several of these areas of libel law and First Amendment doctrine are implicated by the incremental harm doctrine,

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46. *Id.* at 349.

47. *Id.* at 350.

48. The Court noted:

> The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. . . . The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.

Id. at 349.

Nevertheless, the Court has not entirely eliminated the doctrine of presumed damages. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (plurality opinion), the Court held that if the plaintiff is a private figure and the publication's content is of purely private concern, then presumed damages are constitutionally permissible. *Id.* at 753.

49. *See* Comment, *The Libel Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909, 1914-16 (1985).

50. 475 U.S. 767 (1986).

51. *Id.* at 777. In its discussion, the Court noted that "the need to encourage debate on public issues" is also of concern in suits by private individuals because such actions may deter speech. *Id.*

> Because such a "chilling" effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant.

Id.

including the actual injury requirement and the availability of nominal and punitive damages in defamation actions.

A. The Actual-Injury Requirement

The *Gertz* Court's refusal to define "actual injury" has led to disagreement over whether injury to reputation is a constitutional prerequisite to a defamation recovery, or whether such recovery can be based on other types of injury such as emotional distress.[52] The issue is essential in any discussion of the incremental harm doctrine, because it goes to the heart of what the purpose of libel law is or should be.[53] If vindication of the plaintiff's good name, or of the damage done to his or her dignity,[54] is a permissible purpose of such an action,[55] then perhaps such suits should be sustainable even if a plaintiff stands a chance of winning only nominal damages at most. If the tort of defamation is designed to compensate for damage to reputation, then perhaps, in the interest of safeguarding First Amendment freedoms, a libel plaintiff should be required to show some actual damage to his or her reputation as a prerequisite for maintaining a libel action.

The proposition that injury to reputation should be a threshold requirement in libel actions has roots both in the common law[56] and in

52. The Supreme Court has held that the *New York Times* protections apply in emotional distress actions as well as in libel actions. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

53. For a discussion of the interests protected and the types of injuries compensable by defamation law, see *infra* notes 256-69 and accompanying text.

54. For a discussion of "dignitary" injuries in libel actions, see *infra* notes 261-73 and accompanying text.

55. Defamation is a tort, and as such is based on the concept of compensation for injury. But one of the driving forces behind many defamation suits is the plaintiff's desire to have the falsity of the defamatory publication recognized in court—i.e., to vindicate his or her view of the truth. See, for example, Randall P. Bezanson et al., *The Economics of Libel: An Empirical Assessment*, *in* THE COST OF LIBEL 21 (Everette E. Dennis et al. eds., 1989), which discusses selected findings of the Iowa Libel Research Project. The project, based on analyses of defamation cases and interviews with libel plaintiffs and news organizations, found that most plaintiffs, once they have decided to litigate, are motivated by a desire to restore their reputation or to punish the media. *Id.* at 25. The author concludes that the legal system's focus on monetary compensation is inconsistent with libel plaintiffs' interest in "curing alleged falsity." *Id.*

One alternative to the compensation-based model that has been suggested is allowing plaintiffs to sue for declaratory judgments. *See, e.g.*, Marc A. Franklin, *New Perspectives in the Law of Defamation: A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809 (1986). Such a remedy would obviate the libel-proof plaintiff doctrine, because damage to the plaintiff's reputation would be irrelevant. Others have suggested, however, that courts may be an improper forum for ascertainment of "truth." *See* Henry R. Kaufman, *Trends in Damage Awards, Insurance Premiums and the Cost of Media Libel Litigation*, *in* THE COST OF LIBEL, *supra*, at 1, 10.

56. *See* BLACK'S LAW DICTIONARY 417 (6th ed. 1990) (defamation is "that which tends

Supreme Court precedent.[57] In the wake of *Gertz*, other courts and commentators have supported this proposition,[58] although state and federal courts remain divided.[59]

B. Punitive Damages

The Court in *Gertz v. Robert Welch, Inc.*[60] also held that punitive damages require proof of actual malice.[61] Some commentators since

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to injure reputation"); Comment, *supra* note 49, at 1914 ("The common law recognizes a tort of defamation in order to compensate plaintiffs for injuries to reputation.").

57. *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 275 (1971) ("Damage to reputation is . . . the essence of libel."); Time, Inc. v. Hill, 385 U.S. 374, 391 (1967) (stating that libel involves "state interest in the protection of the individual against damage to his reputation"). *But see* Time, Inc. v. Firestone, 424 U.S. 448, 459-61 (1976) (holding that state's decision to permit recovery for other injuries, without regard to any injury to reputation, did not violate *Gertz* requirement that compensatory awards be supported by competent evidence concerning injury).

58. *See, e.g.*, Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512, 516 (Tex. Ct. App. 1987).

> While injury to reputation is but one of several elements of general damage that the jury may consider in the assessment of damages in defamation, the others, such as personal humiliation, mental anguish and suffering, are those that presumably result from injury to reputation. Therefore, defamation claims must be predicated upon injury to reputation . . . .

Id.; *see also* Dresbach v. Doubleday & Co., 518 F. Supp. 1285, 1293 (D.D.C. 1981) (stating that injury to reputation must be shown to sustain libel claim); Martin v. Municipal Publications, 510 F. Supp. 255, 257 (E.D. Pa. 1981) (stating that determination of defamation action's merits requires inquiry into whether defendant has harmed plaintiff's reputation within meaning of Pennsylvania law); Gobin v. Globe Publishing Co., 649 P.2d 1239, 1243 (Kan. 1982) (holding that under Kansas law, damage to reputation is "essence and gravamen" of action for defamation); France v. St. Clare's Hosp. & Health Ctr., 441 N.Y.S.2d 79, 82-83 (App. Div. 1981) (holding that absent harm to reputation, plaintiff cannot recover on defamation claim unless he or she can prove actual malice, and that emotional distress claim is not compensable without concomitant loss of reputation); Salomone v. MacMillan Publishing Co., 429 N.Y.S.2d 441, 442-43 (App. Div. 1980) (holding that claim for mental anguish is compensable only when coupled with loss of reputation).

59. For cases holding that damage to reputation is not required for defamation recovery, see Rennier v. State, 428 So. 2d 1261, 1264 (La. Ct. App. 1983) (holding that under state law, defamation damages may be based on evidence of personal humiliation, embarrassment and mental anguish and suffering); Hearst Corp. v. Hughes, 466 A.2d 486, 494-95 (Md. 1983) (holding that to recover compensatory damages in negligent defamation actions, actual impairment of reputation need not be proved); International Brotherhood of Electrical Workers, Local 1805 v. Mayo, 379 A.2d 1223, 1226-27 (Md. 1977) (finding that where it is found that defamatory statement was published with actual malice, plaintiff's failure to prove injury to reputation does not bar libel recovery).

60. 418 U.S. 323 (1974).

61. *Id.* at 350. This rule applies to private-figure plaintiffs as well as public figures. *Id.* Justice Powell wrote for the majority: "Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions." *Id.* Justice Marshall suggested

have suggested that punitive damages in the libel context may be unconstitutional because of their potential to become an instrument for punishing unpopular views and because of their "especially severe inhibiting effect upon expression."[62]

C. *Nominal Damages*

Another issue that bears directly on the incremental harm doctrine is whether plaintiffs should be allowed to sustain libel actions in which the most they can hope to win is nominal damages.[63] As with the issue of injury to reputation, the Supreme Court has left open this issue.[64] Some courts and commentators have concluded that in at least some circumstances, suits that seek only nominal damages are antithetical to the First Amendment's protection of free speech.[65] Given the skyrocketing costs of defending against libel actions,[66] and given that the essence of

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that punitive damages should be abolished altogether in the defamation context. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 84 (1971) (Marshall, J., dissenting) ("Threats to society's interest in freedom of the press that are involved in punitive and presumed damages can largely be eliminated by restricting the award of damages to proved, actual injuries."). While not going that far, Justice Scalia has indicated that he does not disagree with the *Gertz* Court's limitation of punitive damages:

> [T]he principle I apply today does not reject our cases holding that procedure demanded by the Bill of Rights—which extends against the States only *through* the Due Process Clause—must be provided despite historical practice to the contrary. Thus, it does not call into question the proposition that punitive damages, despite their historical sanction, can violate the First Amendment.

Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1054 (1991) (Scalia, J., concurring).

62. BRUCE W. SANFORD, LIBEL AND PRIVACY 435 (2d ed. 1991); *see also* LOIS G. FORER, A CHILLING EFFECT 110 (1987) ("The requirement of proof of damages and the abolition of punitive damages except in cases of personal spite or ill will (the common law definition of malice) would probably result in the reasonable verdicts returned by juries in other kinds of cases.").

63. Traditionally, remedies for libel actions have been compensatory, nominal and punitive damages. SHELDON W. HALPERN, THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS" 155 (1988).

64. *See* Lakian v. Globe Newspaper Co., 504 N.E.2d 1046, 1048 n.6 (Mass. 1987) ("The Supreme Court of the United States has not decided whether the protection of First Amendment rights bars recovery of nominal damages against a newspaper by a public-figure plaintiff who proves publication of a false, defamatory communication with actual malice but fails to prove that he sustained any actual injury.").

65. *See* Schiavone Constr. Co. v. Time, Inc., 646 F. Supp. 1511, 1518-19 (D.N.J. 1986) (holding that as matter of federal constitutional law, nominal damages may not be recovered against media defendant where public figure plaintiff fails to prove any actual injury), *aff'd in part, rev'd in part*, 847 F.2d 1069 (3d Cir. 1988); Jackson v. Longcope, 476 N.E.2d 617, 619-20 (Mass. 1985) ("[W]e accept the principle that a libel-proof plaintiff is not entitled to burden a defendant with a trial in which the most favorable result the plaintiff could achieve is an award of nominal damages.").

66. The increasingly heavy costs on defendants of defending libel suits has been extensively chronicled in Kaufman, *supra* note 55, at 1. Kaufman states that about 75% of motions for

libel actions is damage to reputation, the interests of plaintiffs who have suffered no serious damage to their reputations may be outweighed by the First Amendment interests upon which such suits may ultimately infringe.[67]

Also relevant in any discussion of the libel-proof plaintiff doctrine is judicial preference for disposing of libel cases at the summary judgment stage when possible.[68]

III. DEVELOPMENT OF THE INCREMENTAL HARM DOCTRINE

The libel-proof plaintiff doctrine, which encompasses the incremental harm doctrine, seems to have arisen as courts groped for a basis in logic and law for dismissing suits that seemed intuitively groundless.[69]

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summary judgment are granted in favor of the libel defendant. *Id.* at 6-7 (citing LIBEL DEFENSE RESOURCE CENTER BULLETIN No. 16, Mar. 15, 1986, at 15). Kaufman notes that despite this fact, there has been an "explosion" of litigation costs for libel plaintiffs and defendants because of the complexity of the legal standards involved in such actions, even where the complaint is ultimately dismissed. *Id.* at 8. Kaufman recommends that courts "devise methods to assure that the money, time, and energy of all parties is not wasted on fruitless litigation." *Id.* at 9; *see also* FORER, *supra* note 62, at 81 ("The fear of substantial verdicts often induces media defendants to pay large sums in settlement of libel suits even when it was reasonably clear that the plaintiff had not suffered any provable damages."); Alex S. Jones, *Libel Study Finds Juries Penalizing News Media*, N.Y. TIMES, Sept. 26, 1991, at A28 (stating study found news organizations increasingly likely to lose libel suits that go to jury, and face multimillion dollar damage judgments; libel judgments have proven so potentially devastating that many news organizations now settle with plaintiffs rather than risk loss on appeal).

67. *See* HALPERN, *supra* note 63, at 155:

> [T]he damage remedy has sometimes proved to be unfair to the defendant. Defamation actions have not infrequently been brought—or jury verdicts have been rendered, irrespective of the plaintiff's motivation in bringing the action—not to compensate for actual pecuniary loss or to vindicate the plaintiff, but instead to cudgel the defendant and to mulct him for substantial damages that may be like a windfall to the plaintiff. It is cases of this sort that have helped to persuade the Supreme Court to intervene and set restrictions and standards that will protect the country's commitment to free speech and free press.

Id.

68. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 510-11 (1984) (holding that appellate courts in defamation actions must evaluate independently of trier of fact whether evidence is sufficient to meet constitutional requirements); Crane v. Arizona Republic, 729 F. Supp. 698, 701 (C.D. Cal. 1989) ("[T]here is a strong federal policy of disposing of libel cases by motion rather than trial where possible."); Gintert v. Howard Publications, Inc., 565 F. Supp. 829, 831 (N.D. Ind. 1983) (summary judgment is "peculiarly appropriate in libel cases . . . 'where considerations of constitutional freedoms arise' " (quoting Schuster v. U.S. News & World Report, Inc., 459 F. Supp. 973, 975 (D. Minn. 1978))). The United States Supreme Court has stated that dismissal before trial of suits brought by public figures is proper when the plaintiff fails to produce clear and convincing evidence of actual malice. Liberty Lobby, Inc. v. Anderson, 477 U.S. 242, 255-56 (1986).

69. A good example of such a case is Jackson v. Longcope, 476 N.E.2d 617 (Mass. 1985). The allegedly libelous news article said that Jackson had been convicted of murder, kidnapping, rape and robbery; indicted for the slaying of two other young women in which all the

The libel-proof plaintiff doctrine includes two branches—the issue-specific libel-proof plaintiff doctrine and the incremental harm doctrine.[70]

A. The Issue-Specific Libel-Proof Plaintiff Doctrine

The libel-proof plaintiff doctrine first arose in *Cardillo v. Doubleday & Co.*,[71] in which the Second Circuit held as a matter of law that a plaintiff who challenged published statements that he had participated in numerous specific crimes was "libel proof, i.e., so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages as to warrant dismissal of the case, involving as it does First Amendment considerations."[72]

As other courts applied the libel-proof plaintiff doctrine, they limited it to plaintiffs who had tarnished reputations with respect only to particular issues.[73] For example, in *Wynberg v. National Enquirer, Inc.*[74] the defendant newspaper published an article stating that the plaintiff had used his relationship with Elizabeth Taylor for financial gain.[75] The court cited plaintiff's numerous convictions for criminal offenses involving women as evidence of a "reputation for taking advantage of women generally, and of Miss Taylor specifically."[76] The court stated that an "individual who engages in certain anti-social or criminal behavior and suffers a diminished reputation may be 'libel-proof' as a matter of law, as [the alleged libel] relates to that specific behavior."[77] Courts have continued to limit the libel-proof plaintiff doctrine to the issue-specific

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victims were raped and strangled; and convicted of crimes associated with a shoot-out with the Cambridge police "during a stolen car chase." *Id.* at 618. Jackson claimed that he was libeled because not all the victims were raped and strangled and the shoot-out had not occurred during a "stolen car chase." *Id.* at 618-19. The court detailed the plaintiff's extensive history of convictions for murder and rape. *Id.* at 620-21. In addition, the court noted that the plaintiff had challenged only certain details of the article, but had conceded the truth of the events detailed in the story. *Id.* at 621. The court concluded that Jackson was libel-proof. *Id.*

70. The two specific branches were first identified and canvassed in Comment, *supra* note 49, at 1910-14.

71. 518 F.2d 638 (2d Cir. 1975).

72. *Id.* at 639. In support of its finding that the plaintiff was a "habitual criminal," the court cited the plaintiff's long history of criminal activity, including his prior convictions and indictment for various acts that were similar to those described in the challenged publication. *Id.* at 640.

73. *See, e.g.*, Ray v. United States Dep't of Justice, 508 F. Supp. 724, 726 (E.D. Mo.), *aff'd*, 658 F.2d 608 (8th Cir. 1981); Ray v. Time, Inc., 452 F. Supp. 618, 622 (W.D. Tenn. 1976), *aff'd per curiam*, 582 F.2d 1280 (6th Cir. 1978).

74. 564 F. Supp. 924 (C.D. Cal. 1982).

75. *Id.* at 928.

76. *Id.*

77. *Id.* The court granted summary judgment for the National Enquirer both because the plaintiff was held to be "libel-proof as a matter of law," and because the report was "substan-

situation.[78]

B. The Incremental Harm Doctrine

The incremental harm branch of the libel-proof plaintiff doctrine was first applied in *Simmons Ford, Inc. v. Consumers Union of United States, Inc.*[79] The plaintiff sued the publisher of Consumer Reports magazine over an article about an electric car the plaintiff manufactured.[80] The car was rated "Not Acceptable," based on a number of safety problems relating to the car's construction and speed.[81] The plaintiff did not contest most of the findings about the car,[82] challenging only a portion of the article relating to mandatory federal safety standards that did not yet exist at the time.[83] Given the complexity of the standards at

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tially true." *Id.* at 927. For a discussion of the substantial truth defense, see *supra* notes 116-22 and accompanying text.

78. *See* Logan v. District of Columbia, 447 F. Supp. 1328, 1332 (D.D.C. 1978) (applying District of Columbia law); Urbano v. Sondern, 41 F.R.D. 355, 357 (D. Conn.) (applying Connecticut law), *aff'd*, 370 F.2d 13 (2d Cir. 1966), *cert. denied*, 386 U.S. 1034 (1967), *and aff'd sub nom.* Urbano v. Fawcett Publications, Inc., 370 F.2d 14 (2d Cir. 1966); Jackson v. Longcope, 476 N.E.2d 617, 619-21 (Mass. 1985); Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512, 517-18 (Tex. Ct. App. 1987). In Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), the Second Circuit refused to expand the doctrine beyond its application to plaintiffs with criminal histories. *Id.* at 889. The court held that William F. Buckley, despite having spent most of his life as a spokesman for controversial conservative viewpoints, was not "libel-proof" as a matter of law. *Id.* at 888-89. The publication in question labeled Buckley as "a 'fellow traveler' of 'fascism,' " a " 'deceiver' " who abused his position as a journalist to propagate ideas from " 'openly fascist journals' " under the guise of responsible conservatism, and a person who practiced libelous journalism. *Id.* at 887. The court stated that the libel-proof doctrine enunciated in *Cardillo* "is a limited, narrow one, which we will leave confined to its basic factual context" in which the plaintiff is a habitual criminal. *Id.* at 889.

79. 516 F. Supp. 742 (S.D.N.Y. 1981).

80. *Id.* at 743-44. Although the plaintiff sued on a theory of product disparagement, the court held that "First Amendment considerations require application of the actual malice standard to product disparagement suits, at least when the plaintiff is a public figure." *Id.* at 744 n.4. As the court noted, the "label" of product disparagement versus defamation is irrelevant when the constitutional standards are the same. *Id.* at 743. In Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 492-93 (1984), the United States Supreme Court applied the *New York Times* actual malice standard in a product disparagement case involving a media defendant.

81. *Simmons Ford*, 516 F. Supp. at 744. The article concluded that based on its testing, the car suffered from poor acceleration, low top speed, poor braking, poor handling, poor ride, poor comfort and generally negative performance. *Id.*

82. *Id.* at 745.

83. *Id.* The article claimed that under federal safety standards, conventional vehicles must provide life-saving protection to occupants in a 30-mile-per-hour barrier crash, a 30-mile-per-hour rollover and a 20-mile-per-hour side impact from another car. *Id.* The article then stated: "We believe any such crash would imperil the lives of persons inside these tiny, fragile, plastic-bodied vehicles." *Id.* at 744-45 (citing *Two Electric Cars*, 40 CONSUMER REP. 596, 596 (1975)). The plaintiff alleged that the article was false because the mandatory requirements

issue, the District Court for the Southern District of New York held that "no reasonable jury could find with convincing clarity on the facts here presented that defendant acted with actual malice."[84]

The district court, outlining one version of what would become known as the incremental harm doctrine, extended the libel-proof doctrine that had been enunciated by the Second Circuit in *Cardillo*.[85] The court held that given the many other reasons stated in the article for finding the car unsafe, the article's mischaracterization of the applicability of the federal safety guidelines was not actionable as a matter of law.[86]

The Second Circuit adopted a seemingly similar approach in *Herbert v. Lando*.[87] In *Herbert* the plaintiff, a retired Army officer, challenged eleven statements made about him in a weekly television news program.[88] Herbert claimed the Army had mistreated him because he had charged his superiors with failing to investigate reports he had made about war crimes and atrocities committed by the 173rd Airborne Brigade in Vietnam.[89] Lando produced a segment on the CBS newsmagazine "60 Minutes" titled "The Selling of Col. Herbert" casting doubt on the validity of Herbert's charges.[90] Lando later wrote an article in the

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did not exist as described by the article, and because the article had asserted that the electric cars were temporarily exempt from "this allegedly nonexistent regulation." *Id.* at 745.

84. *Id.* at 747. The court granted the defendant's motion for summary judgment. *Id.* at 744.

85. As the court summarized the doctrine, "*Cardillo* is one of a series of cases in which a libel claim by a plaintiff with an extensive criminal record was dismissed when the allegedly false accusation launched against him is the commission of yet another crime." *Id.* at 750.

86. The court wrote:

> Here, . . . the portion of the article challenged by plaintiffs, could not harm their reputations in any way beyond the harm already caused by the remainder of the article. It may be acknowledged the reputation of the CitiCar was damaged by defendant's finding that CitiCar was "Not Acceptable." However, the blunt fact is that, in light of defendant's extensive and detailed testing procedures, if the article had made no reference to federal safety standards, or to the CitiCar's exemptions from them, the opinions expressed therein upon which the defendant concluded the car was "Not Acceptable" would not give rise to any actionable claim in plaintiffs' favor. Given the abysmal performance and safety evaluations detailed in the article, plaintiffs could not expect to gain more than nominal damages based on the addition to the article of the misstatement relating to federal safety standards. As defendant notes, "at the time the article was prepared, there was ample basis in fact to reach an opinion that the CitiCar was unsafe and 'Not Acceptable,' even apart from the specific safety standards in question." Given this background, plaintiffs' reputational interest in avoiding further adverse comment regarding the safety and performance of CitiCar is minimal when compared with the First Amendment interests at stake.

Id. at 750-51 (quoting *Two Electric Cars*, 40 CONSUMER REP. 596, 596 (1975)).

87. 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986).

88. *Id.* at 304.

89. *Id.* at 303.

90. *Id.*

Atlantic Monthly about his investigation into Herbert's charges.[91] The article criticized not only Herbert but also the press, for accepting Herbert's charges against the Army at face value.[92] Herbert then filed a defamation action against CBS, Lando, reporter Mike Wallace and the *Atlantic Monthly*.[93]

The district court granted summary judgment as to nine statements in the article and broadcast challenged by Herbert, finding no evidence they had been made with actual malice.[94] As to the other two statements, the district court refused to apply the incremental harm branch of the libel-proof plaintiff doctrine.[95] The court distinguished *Simmons Ford, Inc. v. Consumers Union of United States, Inc.*[96] on the basis that Herbert, "unlike the plaintiff in *Simmons Ford*, challenged not just one, but many statements" in the publication.[97] The court ruled that a plaintiff who could not produce evidence of actual malice as to certain statements was not necessarily conceding their truth, and therefore it would be inequitable to preclude Herbert from producing evidence of actual malice with respect to the remaining statements.[98]

On appeal, Judge Kaufman, writing for the Second Circuit, discussed the incremental harm doctrine, but declined to apply it.[99] However, the court ruled:

> [I]f the appellees' published view that Herbert lied about reporting war crimes was not actionable, other statements—even those that might be found to have been published with actual malice—should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery.[100]

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91. *Id.* at 304.

92. *Id.*

93. *Id.*

94. Herbert v. Lando, 596 F. Supp. 1178, 1226 (S.D.N.Y. 1984), *aff'd in part, rev'd in part*, 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986).

95. *Herbert*, 781 F.2d at 311.

96. 516 F. Supp. 742 (S.D.N.Y. 1981).

97. *Herbert*, 781 F.2d at 311.

98. *Id.*

99. *Id.* at 311 n.10 ("Some may view our holding today as a variation of the 'libel-proof' doctrine, but we need not so characterize it."). Though the court insisted that it was not applying the incremental harm doctrine, the case has been cited regularly by subsequent courts and commentators discussing the doctrine. *See, e.g.*, Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1541 n.5 (9th Cir. 1989) ("Although the *Herbert* court denied that it was applying the *Simmons* 'incremental harm' doctrine, it recognized that the test was very possibly another variation of the 'libel proof' doctrine.").

100. *Herbert*, 781 F.2d at 312. The Second Circuit reversed the district court and ordered summary judgment as to the remaining two statements at issue. *Id.*

The court further noted:

> [This holding] is thus limited to those cases in which statements allegedly made with knowing falsity or reckless disregard give rise to defamatory inferences that are only supportive of inferences that are not actionable. For Herbert to base his defamation action on subsidiary statements whose ultimate defamatory implications are themselves not actionable, we believe, would be a classic case of the tail wagging the dog.[101]

The incremental harm doctrine, in its broadest application, applies when the challenged statement is *not* subsidiary to the unchallenged portions.[102] This "core"[103] version of the incremental harm doctrine holds that summary judgment is appropriate if the harm caused by a chal-

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101. *Id.* (footnote omitted). For purposes of this Note, this explication of the doctrine will be labeled the "subsidiary statement" version of the incremental harm doctrine. This version essentially deems a statement nonactionable if the statement is merely one of several other damaging statements that support the ultimate proposition of the communication, which is not challenged or is not actionable.

In another characterization of this approach, "the untrue and unprivileged statement is merely a piece of evidence that would tend to prove a true and more damaging statement." KEETON et al., *supra* note 27, § 116A, at 118 (5th ed. Supp. 1988). Keeton illustrates the *Herbert* rule with the following hypothetical:

> The libel is that plaintiff bought burglary tools and committed a burglary. The plaintiff did in fact commit a burglary but did not buy or use burglary tools. The untruth of the statement about tools seems irrelevant when its only function would be as evidence of the burglary—which was true.

Id. at 119 n.49.45.

102. *See* Comment, *supra* note 49, at 1912-13 (defining incremental harm doctrine simply in terms of whether challenged statement "harms a plaintiff's reputation far less than the unchallenged statements in the same article or broadcast"). That Comment did not distinguish situations in which the challenged statement is on a different topic than the remainder of the article from those in which the challenged statement is merely "subsidiary" to other statements. However, the Comment did cite Simmons Ford, Inc. v. Consumers Union of United States, Inc., 516 F. Supp. 742 (S.D.N.Y. 1981), as the source of the rule. Arguably, however, *Simmons Ford* involved an application of the subsidiary-statement version of the rule. As the court noted, " 'at the time the article was prepared, there was ample basis in fact to reach an opinion that the CitiCar was unsafe and "Not Acceptable," even apart from the specific safety standards in question.' " *Id.* at 750-51 (quoting Affidavit of Robert D. Knoll, paragraph 31). In effect, the reference to safety standards was "subsidiary" to the conclusion that the car was "unsafe and 'Not Acceptable.' " Thus the *Simmons* decision, although it is commonly cited as the primogenitor of the incremental harm doctrine, in fact was the forerunner of *Herbert*, which disavowed the incremental harm doctrine and elucidated the alternative "subsidiary-statement" rationale. *Herbert*, 781 F.2d at 311 & n.10.

103. This broad application of the doctrine will be labeled the "core" version for purposes of this Note, to distinguish it from the subsidiary-statement variant, and because this definition, or some variation of it, is generally offered by courts discussing the incremental harm doctrine. *See, e.g.*, Sharon v. Time, Inc., 575 F. Supp. 1162, 1168 (S.D.N.Y. 1983); *Simmons Ford*, 516 F. Supp. at 750; Gannett Co. v. Re, 496 A.2d 553, 557 (Del. 1985); Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512, 516-17 (Tex. Ct. App. 1987); Langston v. Eagle Publishing Co., 719 S.W.2d 612, 622 (Tex. Ct. App. 1986).

lenged statement—even one on a topic different from the unchallenged statements—is trivial compared with the amount of harm caused by the unchallenged or nonactionable portion of the publication.[104] In *Herbert* the Second Circuit declined to decide whether it would apply the incremental harm doctrine where the challenged statement addresses a different subject than other damaging statements in the same publication.[105]

C. *Criticism of the Incremental Harm Doctrine*

1. *Liberty Lobby, Inc. v. Anderson*

The libel-proof plaintiff doctrine (including the incremental harm branch) has not met with universal acceptance. Both branches of the doctrine were rejected by the District of Columbia Circuit in *Liberty Lobby, Inc. v. Anderson*.[106] The case arose from a series of articles that appeared in the October 1981 issue of *The Investigator*.[107] The articles conveyed an impression of Willis Carto, founder of Liberty Lobby, a non-profit corporation, as a racist, fascist, anti-Semite and neo-Nazi.[108] They also conveyed the impression that Liberty Lobby had been created to pursue his goals.[109] Carto and Liberty Lobby sued, charging that the

104. For approval of application of the incremental harm doctrine in such situations, see Comment, *supra* note 49, at 1925 ("When a plaintiff challenges statements that damage his reputation substantially less than that caused by other, unchallenged statements in the same communication, common sense . . . requires dismissal of the suit."). That Comment cited as the "easiest" case for a libel defendant to make under this version of the doctrine a communication calling the plaintiff a murderer, a rapist and a reckless driver, where the plaintiff challenges only the last statement. *Id.* Examples of hard cases would include determining whether a statement calling a plaintiff a "child molester" in addition to a "rapist" causes significant or only incremental damage to the plaintiff's reputation. *Id.*

105. *Herbert*, 781 F.2d at 312. Although the court carefully limited its holding, one commentator has attacked the *Herbert* subsidiary-statement version of the rule, asserting that in *Herbert*, "the Second Circuit adopted an expansive form of the incremental branch." David Marder, Comment, *Libel Proof Plaintiffs—Rabble Without a Cause*, 67 B.U. L. REV. 993, 1004 (1987).

106. 746 F.2d 1563 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986).

107. The first article was written by Jack Anderson; the other two were written by Charles Bermant, a staff writer. *Id.* at 1566.

108. *Id.* at 1567.

109. *Id.* The plaintiffs alleged that 28 specific statements from the three articles, plus two illustrations, were defamatory. *Id.* at 1567-68. The circuit court, in its opening discussion, discussed several of them. One article stated that following the death of Francis Parker Yockey, a lawyer and author who took his own life in 1960, Carto was able to " 'pick up the torch [of racism] and fan it into a prairie fire.' " *Id.* at 1567. Carto's strategy " '[t]o capture political power' was 'to put a benign face on his operation. . . . Thus Carto called his base organization Liberty Lobby.' " *Id.* Another article asked rhetorical questions such as whether " 'Carto's opinions march goosesteps beyond the pale of responsible American conservatism?' " *Id.* The article also repeated claims that Carto was " 'the leading anti-Semite in the

articles had libeled them.[110]

The District Court for the District of Columbia granted summary judgment in favor of the defendants.[111] The court found that based on the thoroughness of the research and the number of sources relied upon in the articles, there was an insufficient showing of actual malice to sustain a libel suit.[112] The court declined to decide whether Carto and Liberty Lobby were libel proof, either under the incremental harm or the libel-proof plaintiff doctrine.[113]

Judge Scalia, writing for the Court of Appeals, commented that the incremental harm doctrine has been applied where "the unchallenged portions of these articles attribute to the appellants characteristics so much worse than those attributed in the challenged portions, that the latter cannot conceivably do any incremental damage."[114] The court, however, rejected the doctrine, stating:

> This apparently equitable theory loses most of its equity when one realizes that the *reason* the unchallenged portions are unchallenged may not be that they are true, but only that appellants were unable to assert that they were willfully false. In any event, the theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us—or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse. It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity. So also here. Even if some of the deficiencies of philosophy or practice which the appellees' articles are lawfully permitted to attribute to the appellants (which is not necessarily to say they are true) are in fact much more derogatory than the statements under challenge, the latter cannot be said to be harmless. Even the public outcast's remaining good reputation, limited in scope though it

country.' " *Id.* Both in words and illustrations, the article claimed that Carto " 'resembled and emulated the mannerisms of Hitler.' " *Id.*

110. *Id.*

111. Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201, 204 (D.D.C. 1983), *aff'd in part, rev'd in part*, 746 F.2d 1563 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986).

112. *Id.* at 209.

113. *Id.* at 209 n.12.

114. *Liberty Lobby*, 746 F.2d at 1568.

may be, is not inconsequential.[115]

2. The substantial truth defense

Somewhat related to the incremental harm doctrine is the substantial truth defense. This defense allows a defendant to maintain that an allegedly defamatory statement, "although not literally true in every detail, is substantially true in its implication."[116] It holds that a publication may be substantially true despite minor inaccuracies, and thus not actionable, if the "gist" or "sting" of the publication is true.[117] It has been asserted that the incremental harm doctrine is essentially the same as the substantial truth defense, and that the incremental harm doctrine is thus redundant and irrelevant.[118]

It is true that there is some overlap between the subsidiary-statement version of the incremental harm doctrine and the substantial truth doctrine. Thus, when challenged statements "merely imply the same view"[119] as statements in the same publication that are true and therefore nonactionable, the challenged statements may be said to be nonactionable because they are "subsidiary" to the other statements,[120] or because the publication is "substantially true."[121] However, a different situation occurs when both the challenged and unchallenged statements are false, with the sole difference being that the plaintiff cannot prove actual malice as to the unchallenged statements. In this case, the challenged statements might still be "subsidiary" to the unchallenged statements, and therefore potentially nonactionable under the subsidiary-statement vari-

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115. *Id.*

116. Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 927 (C.D. Cal. 1982); *see also* Gannett Co. v. Re, 496 A.2d 553, 557 (Del. 1985) (discussing doctrine of substantial truth).

117. *Gannett*, 496 A.2d at 557; KEETON et al., *supra* note 27, § 116, at 842.

118. Marder, *supra* note 105, at 1015-16. Another commentator has essentially equated the two doctrines, writing that:

> [W]hile the incremental harm doctrine has been cited as a branch of libel-proof plaintiff doctrine, in fact it is closely related to the issue of substantial truth, and is indeed simply another variation of the principle that liability of defamation cannot exist when the "gist" or "sting" of the defamatory statement is not actionable.

RODNEY A. SMOLLA, LAW OF DEFAMATION § 5.08[3], at 5-17 (Release No. 5, 1992). However, Smolla cites only Herbert v. Lando, 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986) and Masson v. New Yorker Magazine, Inc., 881 F.2d 1452 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991) in his discussion of the incremental harm doctrine. SMOLLA, *supra*, § 5.08[3], at 5-17; *id.* § 5.11[2], at 5-22 to 5-22.1. At the time, *Masson* was the only circuit court decision that had adopted the incremental harm doctrine. The *Herbert* court adopted only the subsidiary-statement variant. Arguably, only the subsidiary statement variant overlaps significantly with the substantial truth doctrine. *See infra* notes 119-22.

119. *Herbert*, 781 F.2d at 312.

120. *Id.*

121. *See, e.g.*, *Wynberg*, 564 F. Supp. at 927.

ant of the incremental harm rule. But the publication could not be said to be "substantially true."

Finally, when the challenged statements are on a different subject than the unchallenged or nonactionable statements, there is never any overlap with the substantial truth doctrine.[122]

D. Other Courts' Discussion of the Incremental Harm Doctrine

Invocation of the incremental harm doctrine has been relatively rare. Among the federal circuits, prior to the Supreme Court's decision in *Masson v. New Yorker Magazine, Inc.*,[123] only the Ninth Circuit had formally adopted the incremental harm branch of the doctrine.[124]

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122. The substantial truth defense rests on an assumption that a minor detail can be wrong if the overall thrust of the article as a whole supports the implication of the challenged statement. *See, e.g., id.* at 924. This is also true in subsidiary-statement situations. *See Herbert*, 781 F.2d 298 at 311; *see also* Simmons Ford, Inc. v. Consumers Union of United States, Inc., 516 F. Supp. 742, 750 (S.D.N.Y. 1981) (holding article supported car's "Not Acceptable" rating regardless of falsity of statements at issue). But it is not true in core incremental-harm situations. For example, in Crane v. Arizona Republic, 729 F. Supp. 698 (C.D. Cal. 1989), the two plaintiffs were the subject of a House of Representatives probe into their alleged ties to organized crime. *Id.* at 699. The plaintiffs sued over an article that contained two sets of allegedly libelous statements: the first involved reports about the investigation, *id.* at 703-07, and the second contained statements by the plaintiffs denying knowledge of the investigation, *id.* 707-08. The plaintiffs claimed that the second set of statements, without explanatory information, created a libelous implication that one of them was lying about his knowledge of the investigation. *Id.* at 707. The court granted the newspaper summary judgment as to the first set of statements, finding they were a fair and true report of an official public proceeding. *Id.* at 708. The court noted that such a report need only be substantially true, not true in every detail, to be protected by the privilege. *Id.* at 704. The court granted the newspaper summary judgment as to the second set of statements under the incremental harm doctrine, stating that "[t]he possible inference that may be drawn by the reader that either Henderson or Crane was lying about his knowledge of the investigation does not impugn either plaintiff's reputation beyond the damage already suffered as a result of the privileged report of the House Select Committee proceedings." *Id.* at 707. In this core incremental-harm situation, a finding that the first set of statements is substantially true would have no bearing on whether the *second* set of statements is potentially actionable.

In some situations the challenged and unchallenged statements may be on seemingly different topics and yet still imply the same view. This can happen in two ways—first, when the article taken as a whole conveys a defamatory implication that the separate statements alone do not convey. For example, one statement states that the plaintiff was on the corner of Main and Elm at noon on January 1, and also states that a robbery was committed at Main and Elm at noon on January 1. The two statements are on seemingly different subjects, yet the overall implication could be that the plaintiff was somehow involved. In the second scenario, the two statements might be on the same or different issues, depending on the level of abstraction at which they are interpreted. For instance, statements that a person is a rapist and a child molester might be on different topics; or they might both convey the impression of the person as a sexual criminal. Because of this problem, the subsidiary-statement variant is theoretically open to a certain amount of manipulation.

123. 111 S. Ct. 2419 (1991).

124. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535 (9th Cir. 1989) *rev'd*, 111 S. Ct.

Aside from *Liberty Lobby, Inc. v. Anderson*,[125] the incremental harm doctrine has been discussed in only fourteen other cases.[126] Of these, eleven were subsequent to *Liberty Lobby*:[127] seven were federal cases, representing four jurisdictions,[128] and the other four were state-court cases.[129]

In three reported decisions after *Liberty Lobby*—one federal and two state—the incremental harm doctrine was invoked to dismiss some or all of the plaintiff's libel claims.[130] In addition, one unreported case has relied on the doctrine to dismiss claims.[131] Two of these cases were applications of the subsidiary-statement version of the doctrine;[132] one

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2419 (1991). This tabulation does not include the Second Circuit's holding in *Herbert*. The Second Circuit in that case asserted that it was not applying the incremental harm doctrine. *Herbert*, 781 F.2d at 311 n.10.

125. 746 F.2d 1563, 1568-69 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986). For a discussion of *Liberty Lobby* see *supra* notes 107-16 and accompanying text.

126. This number includes *Masson* and *Herbert*.

127. The three cases that were decided prior to *Liberty Lobby* were Sharon v. Time, Inc., 575 F. Supp. 1162 (S.D.N.Y. 1983), Simmons Ford, Inc. v. Consumers Union of United States, Inc., 516 F. Supp. 742 (S.D.N.Y. 1981), and Turner v. Harcourt, Brace, Jovanovich, 5 Media L. Rep. (BNA) 1437, 1437-39 (W.D. Ky. 1979). Discussions of the libel-proof plaintiff doctrine after *Liberty Lobby* are significant because this was the first case to offer criticism of the doctrine, and as such it changed the terms of the discussion. It is noteworthy that a few courts have continued to accept and apply the doctrine.

128. The cases, grouped by jurisdiction, were: (1) in the Southern District of New York, Galu v. SwissAir, No. 86 Civ. 5551, 1987 U.S. Dist. LEXIS 12628 (S.D.N.Y. Aug. 3, 1987); Guccione v. Hustler Magazine, Inc., 632 F. Supp. 313 (S.D.N.Y.), *rev'd*, 800 F.2d 298 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987); and Herbert v. Lando, No. 74 Civ. 434-CSH slip op. (S.D.N.Y. April 4, 1985), *rev'd*, 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986); (2) in the District of New Jersey, Schiavone Constr. Co. v. Time, Inc., 646 F. Supp. 1511 (D.N.J. 1986), *aff'd in part, rev'd in part*, 847 F.2d 1069 (3d Cir. 1988); (3) in the Northern District of California, Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1397 (N.D. Cal. 1987), *aff'd*, 895 F.2d 1535 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991); and (4) in the Central District of California, Dorsey v. National Enquirer, Inc., No. CV 89-0209, 1990 U.S. Dist. LEXIS 6084 (C.D. Cal. Feb. 6, 1990); and Crane v. Arizona Republic, 729 F. Supp. 698 (C.D. Cal. 1989). In *Guccione* the district court held that the incremental harm doctrine was not applicable to the case. *Guccione*, 632 F. Supp. at 323-24. The Second Circuit, in reversing the district court's refusal to grant judgment notwithstanding the verdict, held that the plaintiff was libel proof and that the article at issue was substantially true. *Guccione*, 800 F.2d 298, 303-04 (2d Cir. 1986).

129. Gannett Co. v. Re, 496 A.2d 553 (Del. 1985); Jackson v. Longcope, 476 N.E.2d 617 (Mass. 1985); Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512 (Tex. Ct. App. 1987); Langston v. Eagle Publishing Co., 719 S.W.2d 612 (Tex. Ct. App. 1986).

130. *See Crane*, 729 F. Supp. at 707; *Jackson*, 476 N.E.2d at 621; *Finklea*, 742 S.W.2d at 517-18. Although the *Jackson* court did not explicitly invoke the incremental harm branch of the libel-proof plaintiff doctrine, it implicitly applied it by suggesting that by ignoring the statements made in the larger portion of the article, the plaintiff had "concede[d]" their truth.

131. *Dorsey*, 1990 U.S. Dist. LEXIS 6084, at *14-15.

132. *Id.* at *15; *Finklea*, 742 S.W.2d at 518.

cited *Herbert v. Lando*[133] but did not actually involve the subsidiary statement rule.[134] In three cases—one federal and two state—the court found both the issue-specific and incremental harm branches of the libel-proof plaintiff doctrine applicable.[135]

E. Definitions of the Incremental Harm Doctrine

The incremental harm doctrine has suffered from a lack of clearness. Although definitions of the doctrine vary only slightly from court to court, even these slight differences reveal a lack of clarity about the rule. One commentator defined the doctrine as barring libel awards "when an article or broadcast contains highly damaging statements, but the plaintiff challenges only a minor assertion in the communication as false and defamatory."[136]

In *Gannett Co. v. Re*[137] the Delaware Supreme Court defined the rule as follows: "The question of whether a particular defendant is libel proof is resolved by an examination of whether or not the faulty portion of the article complained of can be said to have damaged plaintiff's reputation beyond the harm already inflicted by the remainder of the article."[138] In *Langston v. Eagle Publishing Co.*[139] the court stated that under the incremental harm doctrine, "[w]hen the plaintiff challenges certain statements in a communication, which damage his reputation *far less* than the damage necessarily inflicted on his reputation by other unchallenged statements in the same communication, the incremental libel-proof doctrine bars his libel claim."[140] Similarly, in *Finklea v. Jackson-*

133. 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986).

134. *Crane*, 729 F. Supp. at 707. The statements at issue—which implied that one of the two subjects of the article was lying about his knowledge of an investigation into the pair's alleged ties to organized crime—were different from the subject of the overall article, which was about the investigation itself. *Id.* at 700-01. The statements dismissed under the incremental harm doctrine therefore were not "subsidiary" to the other parts of the article deemed nonactionable.

135. *See Schiavone*, 646 F. Supp. at 1515; *Jackson*, 476 N.E.2d at 619-21; *Finklea*, 742 S.W.2d at 516-17.

136. *See* Comment, *supra* note 49, at 1909.

137. 496 A.2d 553 (Del. 1985).

138. *Id.* at 557. Under the court's definition, the incremental harm doctrine would not bar a suit if the challenged portion of the communication damaged the plaintiff's reputation even a scintilla beyond the unchallenged portion—a narrow reading of the incremental harm doctrine.

139. 719 S.W.2d 612 (Tex. Ct. App. 1986).

140. *Id.* at 622 (emphasis added). Under this broader reading of the rule, a plaintiff may sustain some actual injury beyond that sustained because of the nonactionable portion of the publication, yet still be barred from bringing suit. The *Langston* court also incorporated the "issue specific" branch of the libel-proof plaintiff doctrine: "Repeated, untested and widely-distributed negative publicity about the plaintiff, regarding the same subject or issue as the

ville Daily Progress[141] the court noted that courts have applied the incremental harm doctrine

> when the plaintiff challenges statements *substantially less* damaging to his reputation than other unchallenged statements in the same communication. By implicitly conceding the truth of the overwhelmingly derogatory portion of the statements, the plaintiff himself conclusively demonstrates that he had no remaining reputation in the matters touched on by the challenged statement.[142]

These variations suggest, at the least, that courts have not yet agreed on whether the doctrine applies when the challenged statement damages the plaintiff substantially less than the nonactionable statements, or when the challenged statement cannot be said to damage plaintiff's reputation at all beyond the damage done by the nonactionable portion. Although it is a seemingly subtle distinction, it reveals a certain level of confusion about the exact meaning of the rule and its underlying rationale. It was against this somewhat murky backdrop that the Ninth Circuit became the latest proponent of the doctrine.

IV. *MASSON V. NEW YORKER MAGAZINE, INC.*

A. Factual Background

In 1983 Janet Malcolm published a two-part article in *The New Yorker* magazine about Jeffrey M. Masson.[143] Masson had been fired from his position as Projects Director of the Sigmund Freud Archives.[144] The article was based largely on Malcolm's tape-recorded interviews with Masson.[145]

Malcolm described the struggle between Masson and other board members of the Archives, including Dr. Kurt Eissler and Dr. Anna Freud (Sigmund Freud's daughter), over Sigmund Freud's abandonment of the "seduction theory."[146] This theory assumes that certain mental illnesses originate in sexual abuse during childhood.[147] Malcolm wrote

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challenged communication, will bar his libel action under the issue-specific branch of the doctrine." *Id.* at 621.

141. 742 S.W.2d 512 (Tex. Ct. App. 1987).

142. *Id.* at 516-17 (emphasis added) (footnote omitted).

143. Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1397 (N.D. Cal. 1987), *aff'd*, 895 F.2d 1535 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991).

144. *Id.*

145. *Id.*

146. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1536 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991).

147. *Id.*

about Masson's claim that his contract with the Archives had been terminated because he "went public" with his views that Freud abandoned the seduction theory simply to further his career and placate his colleagues.[148] The articles were later published as a book by Alfred A. Knopf, Inc.[149] According to the United States Supreme Court, the articles portrayed Masson in "a most unflattering light."[150]

On November 29, 1984, Masson filed a diversity action in federal court against Malcolm, *The New Yorker* and Knopf.[151] Masson contended the defendants had libeled him in violation of Section 45 of the California Civil Code.[152]

Masson sued over several specific passages from the articles that purported to quote statements made by him during the interviews.[153] During the course of discovery, Masson amended his complaint several times, concentrating on various passages, dropping some and adding others.[154]

The case was unique because Masson was challenging not the words of another person *about* him, but his *own* (purported) words, as reported by Malcolm. Masson claimed that the statements had been published with actual malice[155] because Malcolm had "deliberately fabricat[ed] quotations ascribed to him."[156] As evidence of the deliberate fabrication, Masson presented evidence that several quotations attributed to him did not appear in the tape recordings of his conversations with Malcolm, that Malcolm herself had altered quotations, and that he had alerted the staff at *The New Yorker* that the quotations had been altered before publica-

148. *Id.*

149. *Id.*

150. Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2425 (1991).

151. *Masson*, 895 F.2d at 1536.

152. The statute states: "Libel is a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which has a tendency to injure him in his occupation." CAL. CIV. CODE § 45 (West 1982).

153. Masson claimed that the article's misquotations falsely portrayed him as " 'unscholarly, irresponsible, vain, [and] lacking impersonal [sic] honesty and moral integrity.' " *Masson*, 895 F.2d at 1536.

154. The Supreme Court explained: "The tape recordings of the interviews demonstrated that [Masson] had, in fact, made statements substantially identical to a number of the passages, and those passages are no longer in the case." *Masson*, 111 S. Ct. at 2425.

155. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court held that to sustain a libel action, public officials must show that a statement was made with "actual malice," defined as "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. This standard was later extended to public-figure plaintiffs in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). *See supra* notes 35-40 and accompanying text.

156. *Masson*, 895 F.2d at 1537.

tion.[157] Masson challenged ten quotations[158] in the article.

First, Malcolm quoted Masson as stating that he had changed his middle name from Lloyd to Moussaieff because " 'it sounded better.' "[159] On the tape recordings, Masson stated that he changed his middle name to Moussaieff because, among other things, he " 'just liked it.' "[160]

Masson was quoted as stating that Freud's " 'entire theory after he abandoned seduction was the product of moral cowardice.' "[161] On the transcript, Masson merely said that he felt Freud had " 'lost his courage.' "[162]

Malcolm quoted Masson as stating that had he been allowed to live in Anna Freud's house in London, the house would not only have been "a place of scholarship, but it would also have been a place of sex, women, [and] fun."[163] In the transcripts, there were passages in which Masson said that the police would be called every time he gave a party and that he "could have had some fun." In other passages, he boasted about his sexual prowess.[164]

Malcolm quoted Masson as predicting that after the release of a book he had written, analysts would say "after Freud, [Masson's] the greatest analyst who ever lived."[165] Those precise words did not appear in the taped interviews; however, the interviews did include statements such as " 'for better or for worse, analysis stands or falls with me now. . . . [I]t's me and Freud against the rest of the analytic world . . . .

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157. *Id.*

158. These statements are presented in the order used in the Ninth Circuit decision. In a previous ruling, the district court granted summary judgment on four other statements that Masson had challenged. Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1397 (N.D. Cal. 1987), *aff'd*, 895 F.2d 1535 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991).

159. *Masson*, 895 F.2d at 1539-40.

160. *Id* at 1540. The district court held that the discrepancy between Masson's words on the tape and those attributed to him in the article was "not [enough] to raise a triable [issue] of fact on the issue of actual malice." *Masson*, 686 F. Supp. at 1399. The Ninth Circuit agreed, stating that it could not "perceive any substantive difference" between the two phrases, and that Malcolm had not altered the "substantive content" of the statement. *Masson*, 895 F.2d at 1540.

161. *Masson*, 895 F.2d at 1541.

162. *Id.* Again, the district court and the Ninth Circuit found that the phrase "moral cowardice" was a "rational interpretation" of Masson's comments. *Masson*, 686 F. Supp. at 1402; *Masson*, 895 F.2d at 1541. According to the circuit court, Malcolm had not altered the "substantive content" of the quote. *Masson*, 895 F.2d at 1542.

163. *Masson*, 686 F. Supp. at 1404.

164. *Masson*, 895 F.2d at 1542. The district court held that the disputed passage of the publication was substantially true because "the sting of the passage is the same as that of undisputed tape-recorded passages." *Masson*, 686 F. Supp. at 1405. The Ninth Circuit affirmed, finding that there was not sufficient proof of malice. *Masson*, 895 F.2d at 1542.

165. *Masson*, 686 F. Supp. at 1405.

Not so, it's me. It's me alone.' "[166]

During the interviews, Masson told Malcolm about a paper he had delivered at an analyst's convention "in which he criticized Freud for the alleged 'sterility of psychoanalysis.' "[167] In the article, Masson was quoted as stating: " 'That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in.' "[168] Again, the exact quotation was not in the taped interviews.[169]

In a complex discussion of what Freud knew at the time he wrote a case study of a man named Daniel Schreber, Malcolm quoted Masson as referring to " 'my discovery about the Schreber case.' "[170] These words did not appear in the taped interviews.[171] Masson claimed that most informed readers would know that the discoveries were made by another analyst.[172] Thus, the fictionalization of this quotation made it appear that he was taking credit for someone else's discovery, when in fact he had only claimed to be taking the discovery one step further.[173]

Malcolm quoted Masson in the article as stating that " '[t]here aren't too many interpretations possible of [my] discovery,' " and that " '[Dr. Kurt] Eissler would have admitted . . . [I] was right' " in his belief about Freud's knowledge in the Schreber case.[174] Masson claimed that his statement that there were not too many interpretations possible of his discovery had been taken out of context. He also denied saying that Eissler would have admitted he was right and claimed that the passage

166. *Id.* Given the "many egotistical and boastful statements" made by Masson, the district court held that a reasonable jury could not find evidence that Malcolm "entertained serious doubts about the accuracy of the passage." *Id.* at 1406. The Ninth Circuit affirmed, saying that "[t]he purportedly fictionalized quotation actually reflects the substance of Masson's self-appraisal." *Masson*, 895 F.2d at 1542.

167. *Masson*, 686 F. Supp. at 1403.

168. *Id.*

169. *Id.* Given other statements Masson had made, however, the district court held that the passage was a "rational interpretation" of Masson's comments. *Id.* The Ninth Circuit affirmed, holding that "the words attributed to Masson did not alter the substantive content" of Masson's statements. *Masson*, 895 F.2d at 1543.

170. *Masson*, 686 F. Supp. at 1401.

171. *Id.*

172. *Id.*

173. *Id.* The district court found that Malcolm clearly indicated in the article the aspect of the "discovery" for which Masson was taking credit. The court further held that a reasonable jury could not "find by clear and convincing evidence that Malcolm entertained serious doubts about the truth of the printed material." *Id.* The Ninth Circuit again affirmed, holding that Malcolm's quotation had not altered the substance of Masson's comments. *Masson*, 895 F.2d at 1544.

174. *Masson*, 686 F. Supp. at 1402.

" 'furthered the false image of Masson as a vain egotist.' "[175]

Malcolm quoted Masson as declaring, " 'Denise worries too much' " in response to his girlfriend's complaint that he did not feel the " 'pain' " that he had caused Dr. Eissler.[176] Masson contended that Malcolm had fabricated this response, and that the passage made Masson appear careless and indifferent to the feelings of those he loved.[177] The tape showed that Masson actually had responded to his girlfriend's complaint by stating that he was not personally "close" to Eissler.[178]

One disputed passage made it appear that Masson had asserted that Eissler " 'had the wrong man' " if he expected Masson to do something honorable.[179] Although the actual quote was accurate, part of the quote had been deleted, thus altering the meaning of the passage.[180]

Malcolm quoted Masson as stating, in discussing an affair with a graduate student:

> "She [the graduate student] said, 'Well, it is very nice sleeping with you in your room, but you're the kind of person who should never leave the room—you're just a social embarrassment anywhere else, though you do fine in your own room.'

175. *Id.* The district court noted that certain conversations on the tapes were "ambiguous" and that the quoted passage was a "rational interpretation" of those conversations. *Id.* at 1403. The Ninth Circuit affirmed, holding that the passage was a "rational interpretation" of Masson's ambiguous remarks. *Masson*, 895 F.2d at 1544.

176. *Masson*, 686 F. Supp. at 1404.

177. *Id.*

178. *Masson*, 895 F.2d at 1544. The district court granted Malcolm summary judgment, because Masson failed to present "clear and convincing evidence that Malcolm entertained serious doubts about the truth" of the allegedly fictionalized response. *Masson*, 686 F. Supp. at 1404. The court also noted that Masson admitted he had expressed the belief in the past that his girlfriend worried too much. *Id.* The district court concluded that Masson's allegation concerning the passage was "triviality to the highest degree." *Id.* The Ninth Circuit affirmed, on the grounds that "the purported fictionalization . . . did not constitute a substantive alteration of the response Masson claims he made." *Masson*, 895 F.2d at 1544.

179. *Masson*, 686 F. Supp. at 1400.

180. Malcolm wrote that Eissler had put pressure on Masson to keep quiet about his discoveries about Freud because of their potential effects on Anna Freud. *Id.* at 1399. After quoting Masson recounting how Eissler had told Masson that he should keep quiet because " 'it is the honorable thing to do,' " Malcolm quoted Masson as stating, " 'Well, he had the wrong man.' " *Id.* at 1400. Masson contended that "the quoted passage suggests that he was unwilling to remain silent in order to do the honorable thing; when, in fact, he meant that he was unwilling to remain silent in the hopes of getting his position back." *Id.* The district court held that the way Malcolm had quoted the discussion on the tapes was "a proper exercise of literary license." *Id.* The court held that although there was an issue of triable fact as to the quotation's "substantial truth," "no question of fact exists on the issue of actual malice." *Id.* The Ninth Circuit found that Masson's remarks were ambiguous, and the statement as it appeared in the article was a "rational interpretation" of Masson's remarks. *Masson*, 895 F.2d at 1546.

> *And, you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They like me well enough 'in my own room.' They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public.*"[181]

The court noted that the italicized portion of the quote did not appear in the tape recordings, though it did appear in Malcolm's interview notes.[182] Masson contended that the notes were fabricated.[183] The district court assumed for the purposes of summary judgment that Masson had not referred to himself as an "intellectual gigolo."[184] The court noted, however, that the tapes contained the following comment:

> [Eissler and Anna Freud] felt, in a sense, I was a private asset but a public liability. They like[d] me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.[185]

The district court found that "Malcolm's use of the descriptive term 'intellectual gigolo' was a rational interpretation of [these] comments."[186] As a result, the court found that malice could not be inferred from the quote.[187] The Ninth Circuit affirmed, holding that "[w]hile it may be true that Masson did not use the words 'intellectual gigolo,' Malcolm's interpretation did not alter the substantive content of Masson's description of himself as a 'private asset but a public liability' to Eissler and Anna Freud."[188]

However, the Ninth Circuit went further than the district court, holding that this quotation was not even defamatory. It reasoned that "a fair reading of the quotation shows author Malcolm is portraying Mas-

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181. *Masson*, 895 F.2d at 1540.

182. *Id.*

183. *Masson*, 686 F. Supp. at 1400.

184. *Masson*, 895 F.2d at 1540.

185. *Id.* In a footnote, the Ninth Circuit noted that other portions of the taped interviews revealed that Masson had "repeatedly boasted of his ability to seduce or 'charm' the senior analysts, including Kurt Eissler and Anna Freud." *Id.* at 1540 n.4. The court also noted that although the phrase "intellectual gigolo" had sexual connotations, which, according to Masson, his taped comments did not, "it also appears that on at least one occasion Masson himself employed sexual metaphors to describe his and other young analysts' relationships with Eissler." *Id.*

186. *Masson*, 686 F. Supp. at 1400-01.

187. *Id.*

188. *Masson*, 895 F.2d at 1541.

son as reporting Kurt Eissler's and Anna Freud's opinions about him. As such, it is difficult to perceive how the quotation is defamatory."[189]

The majority then found, alternatively, that the quotation was "non-defamatory under the 'incremental harm branch' of the 'libel-proof' doctrine."[190]

The court held that "[g]iven the general tenor of the article and the many provocative, bombastic statements indisputably made by Masson and quoted by Malcolm, the additional harm caused by the 'intellectual gigolo' quote was nominal or nonexistent, rendering the defamation claim as to this quote non-actionable."[191]

B. The Supreme Court Decision

Masson appealed the Ninth Circuit's dismissal of his suit regarding five of the challenged statements—"Intellectual Gigolo," "Sex, Women, Fun," "It Sounded Better," "I Don't Know Why I Put It In," and "Greatest Analyst Who Ever Lived."[192] The United States Supreme Court rejected the lower courts' application of the "rational interpretation" test.[193] Instead, Justice Kennedy, writing for the majority, created

189. *Id.* In dissent, Judge Kozinski wrote that "[f]or an academic to refer to himself as an intellectual gigolo is such a devastating admission of professional dishonesty that a jury could well conclude that it is libelous." *Id.* at 1551 (Kozinski, J., dissenting).

190. *Id.* at 1541. The circuit court invoked the incremental harm doctrine despite the fact that neither party had argued the issue. *Id.* at 1565 (Kozinski, J., dissenting). The defendants, in their brief in opposition to certiorari to the Supreme Court, did maintain that the doctrine was part of California law, relying on Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 690 P.2d 610, 208 Cal. Rptr. 137 (1984), *cert. denied*, 478 U.S. 1009 (1986). Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 28, Masson v. New Yorker Magazine, Inc., 895 F.2d 1535 (9th Cir. 1989) (No. 89-1799), *rev'd*, 111 S. Ct. 2419 (1991).

In his dissent in *Masson*, however, Ninth Circuit Judge Kozinski asserted that the trend in California cannot be reconciled with the incremental harm doctrine. *Masson*, 895 F.2d at 1565 (Kozinski, J., dissenting). Judge Kozinski relied on a California Supreme Court case stating that to decide whether a statement is one of fact or opinion, a court must consider the publication in its entirety and not treat each portion of the publication as a separate unit. *Id.* (Kozinski, J., dissenting) (citing Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 261, 721 P.2d 87, 91, 228 Cal. Rptr. 206, 209-10 (1986), *cert. denied*, 479 U.S. 1032 (1987)).

191. *Masson*, 895 F.2d at 1541. Under the court's definition, the incremental harm doctrine "measures the incremental reputational harm inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication; if that 'incremental harm' is determined to be nominal or nonexistent, the statements are dismissed as non-actionable." *Id.* (citing Herbert v. Lando, 781 F.2d 298, 310-11 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986); Simmons Ford, Inc. v. Consumers Union of United States, Inc., 516 F. Supp. 742 (S.D.N.Y. 1981)).

192. Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2425-29 (1991). The Supreme Court granted certiorari in October 1990. Masson v. New Yorker Magazine, Inc., 111 S. Ct. 39 (1990).

193. *Masson*, 111 S. Ct. at 2433.

a new test to be used when defendants are accused of altering quotations: "[A] deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement."[194] Applying this test, the Court held that "the evidence creates a jury question whether Malcolm published the statements with knowledge or reckless disregard of the alterations."[195]

As to the "intellectual gigolo" quotation, the Court disagreed with the Ninth Circuit, holding that the quote was actionable.[196] The Court stated that the passage could be defamatory because "[a]n admission that two well-respected senior colleagues considered one an 'intellectual gigolo' could be as or more damaging than a similar self-appraisal."[197]

Turning to the Ninth Circuit's alternative "incremental harm" holding, the Court, quoting the Ninth Circuit dissent, held that "the most 'provocative, bombastic statements' quoted by Malcolm are those complained of by petitioner, and so this would not seem an appropriate application of the incremental harm doctrine."[198] Further, the Court rejected "any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech."[199] The Court left the matter to state tort law, noting that "state tort law doctrines of injury, causation, and damages calculation might allow a defendant to press the argument that the statements did not result in any incremental harm to a plaintiff's reputation."[200]

C. *The Decision on Remand*

On remand, Judge Kozinski, writing for the Ninth Circuit, considered whether the incremental harm doctrine applied as a matter of state law.[201] The court cited *Herbert v. Lando*[202] for its definition of the core incremental harm doctrine.[203] The court stated that "California courts

194. *Id.*

195. *Id.* at 2437.

196. *Id.* at 2439.

197. *Id.* at 2437-38.

198. *Id.* at 2436 (quoting Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1566 (9th Cir. 1989) (Kozinski, J., dissenting), *rev'd*, 111 S. Ct. 2419 (1991)).

199. *Id.*

200. *Id.*

201. Masson v. New Yorker Magazine, Inc., No. 87-2665, 1992 U.S. App. LEXIS 6152, at *4-6 (9th Cir. Apr. 6, 1992).

202. 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986).

203. *Masson*, 1992 U.S. App. LEXIS 6152, at *4 (citing Herbert v. Lando, 781 F.2d 298, 311 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986)).

have shown no interest in the incremental harm doctrine."[204] Citing Judge Scalia's opinion in *Liberty Lobby, Inc. v. Anderson*,[205] the unanimous court held:

> Because it is not required by the First Amendment, because the Supreme Court has severely undermined the case authority that generated the doctrine in the first place, because the California courts have never adopted it and because we believe the California Supreme Court would agree with Judge Scalia that it is a "bad idea," we conclude that the incremental harm doctrine is not an element of California libel law.[206]

V. APPLYING THE INCREMENTAL HARM DOCTRINE: APPROPRIATE AND INAPPROPRIATE CONTEXTS

Masson v. New Yorker Magazine, Inc.[207] ostensibly put an end to consideration of the incremental harm doctrine as a matter of First Amendment law.[208] In some ways, the incremental harm doctrine has been a phantom doctrine—frequently discussed, but rarely actually invoked.[209] Given the confusing state of the doctrine and the way it was applied by the Ninth Circuit,[210] the impact of the Supreme Court's holding is likely to be limited.

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204. *Id.* at *5. The court noted that only one California court had mentioned the doctrine. *Id.* (citing Weller v. American Broadcasting Cos., 232 Cal. App. 3d 991, 283 Cal. Rptr. 644 (1991)). In Weller v. American Broadcasting Cos., 232 Cal. App. 3d 991, 283 Cal. Rptr. 644 (1991) the appellate court declined to address the issue of whether the trial court erred in not instructing the jury on the doctrine, finding the issue had been waived. *Id.* at 1010, 283 Cal. Rptr. at 656. The court did not discuss Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 721 P.2d 87, 228 Cal. Rptr. 206 (1986), *cert. denied*, 479 U.S. 1032 (1987). Judge Kozinski pointed to *Baker* in his earlier *Masson* dissent as an indication that California leans in the "opposite direction" from the doctrine. *Masson*, 895 F.2d at 1565 (Kozinski, J., dissenting); *see supra* note 190.

205. 746 F.2d 1563 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986).

206. *Masson*, 1992 U.S. App. LEXIS 6152, at *6 (quoting Liberty Lobby, Inc., v. Anderson, 746 F.2d 1563, 1569 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986)). The Ninth Circuit granted summary judgment in favor of Knopf but remanded the case for trial as to Malcolm and *The New Yorker*. *Id.* at *19-20. The court offered no support for its contention that the California Supreme Court would agree with Judge Scalia's opinion in *Liberty Lobby*. Rather, the court used the California courts' silence to support its own preference for Judge Scalia's opinion. The circuit court did not analyze whether "state tort law doctrines of injury, causation, and damages calculation might allow a defendant to press the argument that the statements did not result in any incremental harm to a plaintiff's reputation." Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2436 (1991).

207. 111 S. Ct. 2419 (1991).

208. *Id.* at 2436.

209. *See supra* notes 124-36 and accompanying text.

210. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991).

The way the doctrine was handled, or mishandled, by the district and circuit courts in *Masson* offers an illustration of how courts have failed to come to terms with what the doctrine is, when it makes sense to apply it and in what context it should be applied. Further, the courts have failed to articulate how the different types of harm compensable by defamation law cause different potential problems of causation, and how the incremental harm doctrine, the substantial truth doctrine and the subsidiary statement rule fit into these problems. This section addresses these issues, and what role the incremental harm doctrine may still have to play.

A. The Problem of Context in Masson

It is perhaps unfortunate that the incremental harm doctrine came to the Court in the context of the *Masson* case, for as the Court itself recognized, this was not the most appropriate case for application of the doctrine.[211] An objective consideration by the Court of the incremental harm doctrine in this case would have been difficult because of the way the lower courts had applied it.

The district court cited *Herbert v. Lando*,[212] which approved of a separate analysis for each contested statement.[213] The court wrote that *Herbert* and *Masson* were similar in that "the defamatory impact of the publication as a whole is the same as the defamatory implication conveyed by each of the individual statements."[214] This analysis would imply that the court was in effect applying the *Herbert* court's subsidiary-statement approach. Yet the court never actually invoked the incremen-

211. "As noted by the dissent in the Court of Appeals, the most 'provocative, bombastic statements' quoted by Malcolm are those complained of by [Masson], and so this would not seem the most appropriate application of the incremental harm doctrine." *Masson*, 111 S. Ct. at 2436 (1991) (citing Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1566 (9th Cir. 1989) (Kozinski, J., dissenting)).

212. 781 F.2d 298, 307 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986). The court in *Herbert* distinguished between cases in which the overall impact of the article is defamatory even though each separate statement taken by itself might not be, and cases in which the defamatory implication of each statement and of the article as a whole is the same. *Id.*

213. Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1398 n.3 (N.D. Cal. 1987), *aff'd*, 895 F.2d 1535 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991). It is true, as *Herbert* recognized, that the defamatory impact of some publications is different than that of the separate statements. For an example of such a situation, see *supra* note 122. In such situations analyzing each statement separately may lead to the conclusion that the plaintiff has not been defamed, even though when taken together the statements create a defamatory inference. This type of publication poses trickier issues of apportioning causation of harm to the plaintiff's reputation between the different statements.

214. *Masson*, 686 F. Supp. at 1398 n.3. The district court found that the "defamatory impact" of the article as a whole, and of the individual statements, was that "Masson is a vain, arrogant egotist." *Id.*

tal harm doctrine, or its subsidiary-statement variant, concluding instead that there was no evidence of actual malice as to any of the statements.[215]

At the Ninth Circuit level, the incremental harm doctrine was explicitly invoked.[216] Although it cited *Herbert* and its subsidiary-statement rule,[217] the court apparently *applied* the core[218] version of the incremental harm doctrine.[219]

It is also unclear why the Ninth Circuit majority invoked the incremental harm doctrine *only* with regard to the "intellectual gigolo" comment.[220] It may indicate that the majority simply was unsure of whether the passage actually was a "rational interpretation" of Masson's comments, and thus did not involve actual malice. The dismissal of this passage under the incremental harm doctrine seems rather glib, since the court had not yet even discussed nine of the challenged statements. Furthermore, Masson calling himself an "intellectual gigolo" would have gone beyond mere bombast and provocativeness; this statement sounds like self-deprecation, whereas most of Masson's other "provocative" comments involved self-promotion.[221]

The imprecise invocation and application of the incremental harm

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215. *Id.* at 1399-1406. If the court had really been convinced that the case was like *Herbert* in that the defamatory implication of each statement was the same and that this defamatory impact was in turn the same as the defamatory impact of the article as a whole, the court might have taken a shortcut. Rather than analyze each statement separately, the court might have instead first concluded that, as in *Herbert* and Simmons Ford, Inc. v. Consumers Union of United States, Inc., 516 F. Supp. 742 (S.D.N.Y. 1981), there was ample evidence on which the author could have based her conclusion that Masson was a "vain, arrogant egotist." The court could then have simply discussed whether each of the challenged statements "merely imply the same view," *Herbert*, 781 F.2d at 312, as the defamatory implication of the article as a whole.

216. *Masson*, 895 F.2d at 1541. The court invoked the incremental harm doctrine even though neither party argued it on appeal. *Id.* at 1565 (Kozinski, J., dissenting).

217. *Id.* at 1541.

218. *See supra* notes 103-05 and accompanying text for a discussion of the core version of the doctrine.

219. The court concluded: "Given the general tenor of the article and the many provocative, bombastic statements indisputably made by Masson and quoted by Malcolm, *the additional harm caused by the 'intellectual gigolo' quote was nominal or nonexistent*, rendering the defamation claim as to this quote non-actionable." *Mason*, 895 F.2d at 154 (emphasis added). The court "apparently" applied the core version of the doctrine because the court offered the "core" definition of the incremental harm doctrine, then offered the *Herbert* subsidiary-statement version, then came to the above conclusion. The dissent treated the majority decision as an application of the core version of the doctrine. *Id.* at 1565 (Kozinski, J., dissenting) ("[T]he majority fundamentally misreads *Herbert*. *Herbert* scrupulously avoids holding that if incremental harm above nonactionable portions of a publication is only minimal, then the plaintiff cannot recover as a matter of law.").

220. *Id.* at 1541.

221. As the dissent saw it, the difference between Masson's actual statements and the intellectual gigolo statements as they appeared in the article was that "one suggests that Masson is

doctrine concepts in this case is typical of previous courts' and commentators' lack of rigor in defining the doctrine—particularly in failing to perceive the fundamental difference between the core incremental harm doctrine and the subsidiary-statement variation of it propounded by the Second Circuit in *Herbert*.[222]

Since the Ninth Circuit failed to provide a rationale for the rule, or to even explain whether it was rooted in common-law injury and causation requirements, the California Constitution or the United States Constitution, Judge Kozinski's strong dissent offered the Supreme Court a persuasive reason to reject the doctrine, at least as it was used in this case.

The Supreme Court in *Masson v. New Yorker Magazine, Inc.*[223] rejected "any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech."[224] Indeed, given the constitutional considerations that are intertwined with the incremental harm doctrine,[225] the Court could not have ruled otherwise without at the same time constitutionalizing principles relating to nominal damages and punitive damages.[226] This the Court has so far been unwilling to do.[227]

Given the Court's unwillingness to extend constitutional protection to the incremental harm doctrine, and by extension to these other areas on which there is disagreement, there are alternatives for courts concerned about limiting the potentially damaging effects of frivolous defamation actions. Notwithstanding federal disapproval, a better-defined incremental harm doctrine may still have a function to play at the state law level. The following sections address the scope of the doctrine, and how it ought to be applied.

B. The Incremental Harm Doctrine and the Subsidiary-Statement Variant: Two Different Rules

One of the impediments to a coherent development of the incremen-

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a young man with potential, the other makes him out to be a clown." *Id.* at 1552 (Kozinski, J., dissenting).

222. For a discussion of the difference between the core version of the incremental harm doctrine and the subsidiary-statement variant, see *infra* notes 228-40 and accompanying text.

223. 111 S. Ct. 2419 (1991).

224. *Id.* at 2438.

225. *See supra* notes 52-68 and accompanying text.

226. These were potential issues in the case, because had Masson been able to prove actual malice with regard to the "intellectual gigolo" quote, under Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), Masson could have received punitive damages, regardless of whether the actual injury was nominal.

227. *See supra* notes 52-68 and accompanying text.

tal harm doctrine has been a confusion between the subsidiary-statement variant of the rule enunciated by the Second Circuit in *Herbert v. Lando*[228] and the core version of the doctrine. Although the Second Circuit in *Herbert* insisted it was not applying the incremental harm doctrine,[229] courts and commentators have persisted in citing *Herbert* when discussing the doctrine.[230]

Yet should the subsidiary-statement rule even be described as a variant of the incremental harm doctrine? The court in *Herbert* did not think so.[231] And indeed the *Herbert* subsidiary-statement rule simply recognizes that when a court is faced with a false and potentially defamatory statement, the court must analyze whether the implication of the statement is the same as the implication of the statements the court has already found nonactionable.[232] Then-Judge Scalia also accepted this principle in a footnote to *Liberty Lobby, Inc. v. Anderson*.[233] Indeed, the Supreme Court has recognized the importance in certain situations of analyzing the *implication* of a challenged statement.[234]

The subsidiary-statement rule is thus a relatively uncontroversial rule. However, it is more closely related to the substantial truth doc-

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228. 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986).

229. *Id.* at 311 n.10.

230. *See, e.g.*, Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1541 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991); Dorsey v. National Enquirer, Inc., No. CV 89-0209, 1990 U.S. Dist. LEXIS 6084, at *14-15 (C.D. Cal. 1990); Crane v. Arizona Republic, 729 F. Supp. 698, 707 (C.D. Cal. 1989); Marder, *supra* note 105, at 1004-05.

231. *Herbert*, 781 F.2d at 311 n.10.

232. *Id.* at 312.

233. 746 F.2d 1563, 1568 n.6 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986). Judge Scalia wrote:

> If, for example, an individual is said to have been convicted of 35 burglaries, when the correct number is 34, it is not likely that the statement is actionable. That is so, however, not because the object of the remarks is "libel proof," but because, since the essentially derogatory implication of the statement ("he is an habitual burglar") is correct, he has not been libeled.

Id. The result would thus presumably be the same if the article contained true statements describing 34 convictions of the plaintiff for burglary, and a separate statement describing a 35th burglary that is, in fact, false.

Judge Scalia failed, however, to articulate how exactly his burglar hypothetical differs from Benedict Arnold being called a shoplifter. Theoretically, in the Arnold hypothetical, the shoplifting statement is on a different "subject" than the subject on which Arnold is libel-proof. But at another level of abstraction, it could be said that both statements impugn Arnold's honesty, or his reputation for not being a criminal. Conversely, perhaps the 35th burglary is on a different "subject" than the first 34—that is, each separate allegation of burglary is potentially libelous. After all, if "[t]he law proceeds on the optimistic premise that there is a little bit of good in all of us—or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse," *Liberty Lobby*, 746 F.2d at 1568, then a person who commits 35 burglaries is surely worse than a person who commits 34.

234. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2707 (1990).

trine[235] than to the incremental harm doctrine. For when false statements merely imply the same view as unchallenged statements, the publication might also be said to be substantially true.[236]

More controversial is the version of the rule applying to situations when the challenged and nonactionable portions of the publication are on "entirely different subjects."[237] When the incremental harm doctrine is invoked, it is sometimes not clear which version of the rule is being applied.[238] Courts should first analyze whether the incremental harm doctrine or the subsidiary-statement rule[239] is applicable. If the core version of the incremental harm doctrine could apply to the situation at bar, the question of *whether* the doctrine should be recognized under state tort principles or state constitutional protections for free speech depends on how the jurisdiction holds the balance between First Amendment interests on the one hand and, within constitutional parameters, the interests of defamation plaintiffs on the other.[240]

C. *Sources of Law*

The First Amendment is not the only possible source of tort-limiting doctrine. As the Supreme Court noted in *Masson v. New Yorker Magazine, Inc.*,[241] "state tort law doctrines of injury, causation, and damages calculation" might permit a plaintiff to prevail on an incremental harm theory.[242] If in fact state tort law doctrines of causation and injury are stringently applied in defamation actions, constitutionalizing the incremental harm doctrine may be unnecessary.

State statutes and constitutions offer a second source of protection for libel defendants from actions based on incrementally damaging statements. In some instances, state free-speech and free-press laws are as or more protective of freedom of speech than the First Amendment.[243]

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235. *See supra* notes 116-22 and accompanying text.

236. See *supra* notes 119-22 and accompanying text.

237. *See, e.g.*, *Liberty Lobby*, 746 F.2d at 1568. Again, it may be difficult for a court to tell when a statement is subsidiary to other statements and when it is on a different subject. Which analysis a court applies might depend on how the court defines the "subjects" of these statements. It is theoretically possible for a court to avoid applying the incremental harm analysis by defining both the nonactionable and the challenged statements at a high level of abstraction, in order to hold that one is merely "subsidiary" to the other.

238. *See supra* note 219 and accompanying text.

239. The substantial truth doctrine is a third possibility.

240. For a discussion of the types of interests protected by defamation laws, and what types of injuries are compensable, see *infra* notes 256-73 and accompanying text.

241. 111 S. Ct. 2419 (1991).

242. *Id.* at 2436.

243. The Supreme Court has held that where state law provides an adequate and independent basis for deciding an issue, "there is no need for decision of the federal issue." City of

The Court has been reluctant to trample on the states' rights to follow their own tort laws so long as they do not interfere with constitutional rights.[244] Because the Court has left the door open for states to institute their own rules relating to presumed, nominal and punitive damages (at least in some cases),[245] and declined to require proof of harm to reputation as a constitutional prerequisite to defamation recovery,[246] it was unlikely that the Court in *Masson* would confer First Amendment status on the incremental harm doctrine.

D. The Problem of Causation

Incremental harm situations require a court to analyze two basic causation issues. First, how much injury must a statement cause in order

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Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 294-95 (1982); *see also* Siler v. Louisville & Nash. R.R., 213 U.S. 175, 193 (1909) (holding that federal courts should avoid adjudication of issues when alternative state-law grounds are available).

California's Liberty of Speech Clause has been interpreted by California courts to provide more protection for expressive activity than does the First Amendment of the United States Constitution. California's Liberty of Speech Clause provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2(a). The California Supreme Court has stated that the protection afforded in the Liberty of Speech Clause is "more definitive and inclusive than the First Amendment." Wilson v. Superior Court, 13 Cal. 3d 652, 658, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472 (1975); *see also* Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899, 908, 592 P.2d 341, 346, 153 Cal. Rptr. 854, 859 (1979), *aff'd*, 447 U.S. 74 (1980) (noting past decisions testify to greater protections afforded liberty of speech under California Constitution than Federal Constitution).

All 50 states have free-speech and free-press guarantees in their constitutions. But as the California experience demonstrates, how much protection is afforded by a state's constitutional provision often is a matter of court interpretation. *See* Michael G. Allport & Steven C. Baldwin, *Defamation and State Constitutions: The Search for a State Law Based Standard After* Gertz, 19 WILLAMETTE L. REV. 665, 680-82 (1983) (discussing evolution of case law under Oregon constitutional free-speech guarantee); Peter P. Miller, *Freedom of Expression Under State Constitutions*, 20 STAN. L. REV. 318, 329-30 (1968) (citing state court decisions affording higher protection for speech than federal law as evidence of importance of maintaining state courts' independence in this area). *But see* Todd F. Simon, *Independent but Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 KAN. L. REV. 305, 337-39 (1985) (arguing that increase in state courts deciding free-speech cases on state-law grounds has led to lack of uniformity in development of state law in this area with resulting chilling effect on national press).

244. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("The legitimate state interest in the underlying law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose."); *id.* at 347 ("We hold that so long as they do not impose liability without fault, the States may decide for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

245. *See supra* notes 60-67 and accompanying text.

246. *See supra* notes 52-59.

to be actionable?[247] And second, how may a court determine how much of the overall injury from a large publication is attributable to a particular challenged statement?

Given a publication containing a number of damaging statements about a plaintiff, one group of which is challenged in a defamation action and one group of which is either unchallenged or nonactionable, there are, theoretically, three ways that the statements could interact to cause harm. The simplest scenario is one in which each statement adds a discrete amount of harm.[248]

In other scenarios, the harm caused by the two groups of statements might be identical; each would have caused by itself the same harm that was caused by the two statements together. This effect, known as "overdetermination,"[249] is relevant mainly in relation to the subsidiary-statement rule, and seems to be what courts are implying when they state that the challenged statements "merely imply the same view"[250] as the unchallenged statements. Thus, to take an easy example, a publication contains two different accounts of the same type of criminal activity by the

247. To a certain degree, the resolution of this issue by a particular court will depend on whether defamation suits in which the plaintiff is likely to recover only nominal damages are sustainable in the jurisdiction. But to a certain extent resolving the issue will also depend on how the court answers the question, what type of injury is compensable? The answer may determine whether a minimal "amount" of injury is enough. *See infra* notes 256-73 and accompanying text.

248. For example, if the statement is "Jack is a thief, and he cheats on his wife," the total reputational damage consists of Jack's being labeled a thief and an adulterer; if the marriage dissolves, his social damages might consist of the loss of his marital relationship; his actual (pecuniary) damage might encompass whatever pecuniary assistance his wife had provided, as well as lost employment or other business opportunities. For a discussion of the types of injuries that are compensable in defamation actions, see *infra* notes 256-65 and accompanying text.

249. Overdetermination is a problem that has been discussed in connection to the "but for" model of causation. See H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 125-29, 243-45 (1985), for a discussion of the common law's treatment of the causal overdetermination problem. As a result of this problem, the *Restatement (Second) of Torts* replaced the "but for" test with the "substantial factor" test. RESTATEMENT (SECOND) OF TORTS § 431 (1977). One variation of what Hart and Honore call the "anomaly" of overdetermination occurs when "two causes, each of them sufficient to bring about the same harm, are present on the same occasion." HART & HONORE, *supra*, at 123. The Restatement offers the following illustration:

> Two fires are negligently set by separate acts of the A and B Companies in forest country during a dry season. The two fires coalesce before setting fire to C's timber land and house. The normal spread of either fire would have been sufficient to burn the house and timber. C barely escapes from his house, suffering burns while so doing. It may be found that the negligence of either the A or the B Company or of both is a substantial factor in bringing about C's harm.

RESTATEMENT (SECOND) OF TORTS, *supra*, § 432 cmt. d, illus. 3.

250. Herbert v. Lando, 781 F.2d 298, 312 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986).

plaintiff—for example, involving petty theft[251]—and only the first account is true or otherwise privileged.[252] The aggregate effect of the two statements is to give the reader the impression that the plaintiff is a petty thief; yet each of the statements alone would have sufficed to cause the same harm to the plaintiff's reputation.

In a third scenario, the first two effects are combined. Here, the amount of damage caused by the two statements is different when made separately and when made in the same publication. For example, two separate articles—perhaps in different newspapers—contain false statements about a prominent person. One states that he had once taken a bribe; the second states that he had once bounced a check. Or, one states that the plaintiff has a drug problem; the second states that he had once attended a party at which it is widely known that illegal drugs were circulated freely. It is possible that, stated in separate publications, each statement could be equally damaging to the person's reputation and standing in the community. Yet if the two statements were published in the same article, the damage caused by the first statement might substantially overshadow the second statement.[253] The plaintiff's reputation might suffer the same amount of damage, but the amount of injury done by each separate statement is different. Alternatively, the second statement might have an insignificant effect on the plaintiff's reputation when made in a separate publication,[254] but by combining the statement in the same article as the first statement, its effect might be greatly magnified.[255]

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251. Accounts of two separate types of criminal activity—for instance, loan sharking and petty theft, where only one is potentially actionable—present a different problem. If the overall implication of the nonactionable statement is that the plaintiff is a petty criminal, then the second statement "merely implies the same view" and should also be nonactionable. But if the implication of the nonactionable statement is more narrowly construed, for example simply that the plaintiff is a loan shark, then the plaintiff's reputation may still have been damaged by the second statement. See *infra* notes 261-73 for a discussion of the problem of analyzing injury to a person's dignity.

252. A statement is constitutionally privileged, for example, if the plaintiff is a public figure and cannot show with convincing clarity that the statement was published with actual malice. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). At common law, privileges include reports on judicial proceedings and fair comment on matters of public concern. *See* KEETON et al., *supra* note 27, § 114, at 816, § 115, at 831. For a full discussion of privileges, see KEETON et al., *supra* note 27, §§ 114-115.

253. The attention aroused by the bribe or drug allegation could result in a less significant statement in the same article being virtually ignored by the public.

254. The check-bouncing statement could be made, for example, in a profile of the plaintiff that contained mostly positive information offset by some information critical of the plaintiff. Its effect might then be relatively mild.

255. For example, the check-bouncing allegation might take an added significance if combined with other statements about the plaintiff's alleged malfeasance. Another example of two statements' combined effect being different from their separate singular effects is the situation

E. Dignitary Interests Versus Social and Economic Harms

The future of the incremental harm doctrine is tied to how courts determine another central issue: what interests are protected by the tort of defamation and by free-speech doctrines? How these interests are defined is crucial in deciding whether any of the three doctrines discussed—the incremental harm doctrine, the subsidiary statement rule or the substantial truth defense—makes sense.

The interest protected by the tort of defamation is the individual's interest in his or her reputation and good name.[256] According to the *Restatement (Second) of Torts*, a communication is defamatory if it "tends to so harm the reputation of a person as to lower him in the estimation of the community or to deter other people from associating or dealing with him."[257]

Defining the interests protected by defamation law, however, is easier than defining what harms should be compensable. Injury to reputation is a difficult thing to measure, particularly in monetary terms.[258] But traditionally, the types of damages that may be compensable by defamation law can be divided into three broad categories: economic, social and dignitary.

Economic damages include lost business opportunities, contracts or employment.[259] Social damages include the lost society of friends and associates.[260] Dignitary damages may include wounded feelings, humiliation and embarrassment.[261]

Traditionally, at common law, social damages were not enough in themselves to sustain a cause of action, but were compensable as "para-

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previously discussed, in which a publication states that a robbery occurred at noon at Main and Elm, and that the plaintiff was at that intersection at noon on that day. *See supra* note 122. However, in this situation, the plaintiff is suing over the inference that arises from the two statements, and the publication must be evaluated as a whole in order to discern the defamatory inference. In the incremental harm situation, the alleged defamatory inference of each separate statement is at issue.

256. KEETON et al., *supra* note 27, § 111, at 771.

257. RESTATEMENT (SECOND) OF TORTS, *supra* note 249, § 559.

258. *See* KEETON et al., *supra* note 27, § 116A, at 843 ("Since some of the interests served by way of protecting a good reputation are of a peace-of-mind and dignitary nature rather than economic in character, such losses are not readily measurable in monetary terms.").

259. *Id.* § 112, at 794.

260. *Id.* at 796.

261. *Id.* at 794. In Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), the Supreme Court held that for public figures and public officials to recover for the tort of intentional infliction of emotional distress, they must show that the publication contains a false statement of fact that was made with "actual malice"—with knowledge that the statement was false or with reckless disregard as to whether or not it was true. *Id.* at 56.

sitic" damages once a loss of reputation was established.[262] If we measure the impact of a defamatory communication in terms of economic or even social damages, then in situations where specific statements, and not the overall import of a publication, are at issue, it is possible that some defamatory statements in a communication may have caused more damage than others. If some of those statements are not actionable as a matter of law, then a court should assess how much of the overall damage was done to the plaintiff's reputation by each statement, and subtract the damage deemed caused by the nonactionable statements.[263] This is important in order to protect the countervailing interests protected by the First Amendment and other free-speech laws.[264] These free-speech concerns are the basis for providing protection for true or privileged statements.[265]

If a court is lax in apportioning the ratio of harm caused by the challenged and the nonactionable statements in a publication, a jury might feel free to award damages engendered by its opinion of the nonactionable material. To the extent this happens, the protections afforded to the nonactionable remainder of the publication are essentially nullified.

On the other hand, if the interest protected by defamation law is defined as essentially the protection of one's dignity (a "dignitary" interest),[266] it is possible to reach a very different result. If this is the type of interest that is permissibly protected by defamation law, then arguably there can *never* be an overdetermination[267] effect in libel cases. This idea underlies Judge Scalia's statement in *Liberty Lobby, Inc. v. Anderson*[268] that "[i]t is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity."[269] This view implies that each violation of the tort harms one's dignity and is therefore compensable

262. KEETON et al., *supra* note 27, § 112, at 794-95.

263. *See supra* notes 248-55 and accompanying text for a discussion of different ways individual statements can combine within a publication to cause injury.

264. For a discussion of the interests underlying the First Amendment and other free-speech laws, see *supra* notes 24-26 and accompanying text.

265. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) (recognizing that "erroneous statement" must be protected in some cases to protect freedom of expression).

266. Dignitary torts include assault, battery, false imprisonment, malicious prosecution, intentional infliction of mental anguish, libel and slander, invasion of privacy and alienation of affections. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 7.1, at 509 (1973). These torts "involve some confrontation with the plaintiff in person or some indirect affront to his personality." *Id.*

267. For a discussion of the overdetermination problem, *see supra* note 249.

268. 746 F.2d 1563 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986).

269. *Id.* at 1568.

regardless of whether it causes separate measurable pecuniary harm. In effect, damages may be assessed for adding insult to injury.

Again, the problem with this approach is that a jury could assign all of the harm from a defamatory publication to the challenged statements, even when they seem relatively minor in comparison with the overall publication, which is constitutionally protected. For if a plaintiff is permitted to recover for each separate affront to his or her dignity, it may be possible for a plaintiff to convince a jury that even a very minor statement caused a large amount of psychic pain. Besides the incentive to exaggerate for a plaintiff trying to recover damages for such an immeasurable injury, there is a danger that juries will be influenced by the constitutionally protected material and will grant large awards for seemingly minor slights to a plaintiff's dignity. The constitutional protections would then be nullified.

The problem of how to treat dignitary injuries affects not only the incremental harm doctrine, but also the substantial truth doctrine[270] and the subsidiary-statement rule.[271] If each defamatory statement by definition adds a discrete and compensable amount of injury to a plaintiff's dignity, it makes no difference if the publication is "substantially true" or even if the statement merely "implies the same view" as the remainder of the publication. Each statement will necessarily be actionable in itself regardless of how it affects or is affected by the nonactionable remainder of the publication.[272]

An alternative to this approach to dignitary injuries is for a jury to first determine the overall harm caused to the plaintiff by the publication as a whole. The jury should next determine what proportion of that damage was reasonably caused by the statements at issue. There might still be some danger that the jury could award damages out of proportion to the causal effects of the statements at issue, thus potentially eroding the protection afforded to the nonactionable portions of the publication. But the danger would be greatly reduced if the jury were specifically instructed to apportion the damage done by the actionable and nonactionable statements.[273]

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270. *See supra* notes 116-22 and accompanying text.

271. *See supra* note 101.

272. *See supra* text accompanying note 115 for Judge Scalia's view of injury to reputation.

273. The alternative to allowing the jury to consider the publication as a whole would be to allow the jury to consider the effect of each statement by itself. This approach increases the chances of distorting the effects of the statements. When the jury is instructed as to apportionment of damage, however, it is provided with some guidelines to follow in ensuring that the damage award is proportionate to the damage caused. The analysis may also be helpful to a reviewing court attempting to assess whether a damage award is excessive.

F. A Restatement of the Incremental Harm Doctrine

The incremental harm doctrine flows from a concern for keeping libel law, which protects individual interests, strictly bounded by principles of tort causation in order to further free-speech principles.[274] Application of the rule will depend on how a jurisdiction treats the issues of nominal damages, punitive damages and the actual-injury requirement.[275] The rule should simply be that where a plaintiff challenges as defamatory only a minor statement in an otherwise extremely damaging publication, a court should either (1) dismiss the case (if the jurisdiction is one where suits in which a plaintiff can hope to win nominal damages at best must be dismissed),[276] or (2) instruct the jury as to the law of causation and damages to ensure that the jury awards damages only in proportion to the harm actually caused by the challenged statements in relation to the rest of the publication.[277]

As an illustration of how this rule should be applied, consider the facts of *Masson v. New Yorker Magazine, Inc.*[278] Suppose the Ninth Circuit had established that all of the fabricated quotes in Janet Malcolm's article were nonactionable because there was insufficient evidence from which a reasonable jury might infer actual malice, except for the "intellectual gigolo" quote.[279] The thrust of this statement is that Masson believes his peers see him as some kind of intellectual prostitute. The nonactionable remainder of the article,[280] by contrast, portrays Masson as a vain egotist.

To overcome summary judgment, Masson would be required to provide some detail as to what damage the statements at issue caused—for example, the loss of society, lost business opportunities, embarrassment

274. *See, e.g.*, Simmons Ford, Inc., v. Consumers Union of United States, Inc., 516 F. Supp. 742, 751 (S.D.N.Y. 1981) ("[P]laintiffs' reputational interest . . . is minimal when compared with the First Amendment interests at stake.").

275. *See supra* notes 52-68 and accompanying text.

276. *See, e.g.*, Schiavone Constr. Co. v. Time, Inc., 646 F. Supp. 1511, 1518-19 (D.N.J. 1986), *aff'd in part, rev'd in part*, 847 F.2d 1069 (3d Cir. 1988); Jackson v. Longcope, 476 N.E.2d 617, 619 (Mass. 1985).

277. Under Texas law, for example, "evidence of a previously tarnished reputation may be proved in mitigation of actual or exemplary damages." Langston v. Eagle Publishing Co., 719 S.W.2d 612, 622-23 (Tex. Ct. App. 1986) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 73.003 (West 1986)).

278. 111 S. Ct. 2419 (1991).

279. *See supra* note 181 and accompanying text. For the purposes of this discussion, the difference between the Ninth Circuit's "rational interpretation" test and the Supreme Court's "material alteration" test will be ignored.

280. For purposes of this hypothetical, the "nonactionable remainder" includes the other statements actually at issue in *Masson*. For a summary of these statements, *see supra* notes 159-80 and accompanying text.

and humiliation.[281] Once the court has narrowed the cause of action down to the one "intellectual gigolo" statement, it will then have to evaluate the evidence and determine whether the challenged statement has contributed more than a nominal amount of the overall damage that the plaintiff has allegedly suffered. The court thus must first weigh the overall damage done by the publication as a whole, and determine what proportion of that damage could reasonably be said to have been caused by the "intellectual gigolo" quote. If the court were to determine that no reasonable jury could find that the challenged statement caused more than a nominal amount of the overall damage done by the overall publication, then the court would either (1) grant a directed verdict for the defendant if nominal damages are not recoverable in a defamation action in that jurisdiction, or (2) allow the case to go to the jury with strict instructions that it must first determine how much damage was caused by the overall article, and then award damages for the "intellectual gigolo" quote only in proportion to the damage that statement actually caused.[282]

This analysis would also apply in the classic "core" incremental harm situation—for example, where a publication labels a plaintiff a murderer, a rapist and a reckless driver,[283] and the plaintiff challenges only the latter statement. Where, however, the publication includes statements asserting that the plaintiff had committed a burglary and had bought burglary tools,[284] and the first statement is true, the court may dismiss the action on the basis either that the second statement is subsidiary to the first and merely implies the same view (that the plaintiff committed the burglary), or that the publication was substantially true.

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281. *See supra* notes 259-61 and accompanying text. All of these types of damage are recoverable under California Civil Code section 48a. CAL. CIV. CODE § 48a (West 1982).

282. This analysis has obvious ramifications for the libel-proof plaintiff doctrine as well. For if Benedict Arnold were to challenge a defamatory publication that stated he was a shoplifter, a jury would have to weigh how much damage to a traitor's reputation is caused by a false allegation of shoplifting. This is true not because a person's reputation is a "monolith," Liberty Lobby v. Anderson, Inc., 746 F.2d 1563, 1568 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986), but simply because of tort principles of causation. Arnold's strongest claim, that each defamatory statement is a discrete insult to one's dignity, can be dispensed with by the observation that if one's standing in the community already is low because of a severely damaged reputation in one area, the amount of humiliation or righteous indignation that is likely to be caused by any further verbal assaults on one's dignity is slight. Society's interest in a free and robust press is stronger than such an individual's interest in redressing an injury to his or her dignity that any reasonable jury would be likely to see as trivial.

283. *See* Comment, *supra* note 49, at 1025.

284. *See supra* note 101.

VI. CONCLUSION

Although the Supreme Court in *Masson v. New Yorker Magazine, Inc.* concluded that the incremental harm doctrine is not mandated by the First Amendment, it considered the doctrine in the context of an inappropriate application by the Ninth Circuit. Given the uncertainty of the meaning of the Court's requirement of "actual injury" in libel contexts, the varying interpretations of whether libel actions for nominal damages are sustainable, and the varying manners in which state libel laws protect libel defendants, it is still possible for courts concerned with the chilling effects of libel litigation to apply a more rigorously defined incremental harm doctrine. Until a more fundamental reform of libel law is accomplished, this possibility offers one of the few tools available for dismissing lawsuits whose only purpose is to harass the defendant, rather than to redress a cognizable injury.

However, the incremental harm doctrine is useful not only as a possible bar to litigation, but as a means of identifying and carefully restricting a plaintiff's recovery. This Note has discussed how statements within a publication can interact to damage a plaintiff's reputation. If courts develop a more rigorous approach to analyzing causation issues in such cases, they will go a long way toward preventing nuisance libel suits even in the absence of a constitutional mandate.

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