INCREMENTAL IDENTITIES: LIBEL-PROOF PLAINTIFFS, SUBSTANTIAL TRUTH, AND THE FUTURE OF THE INCREMENTAL HARM DOCTRINE

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INTRODUCTION

Libel suits can impose huge costs on media defendants. In jury trials, media defendants are apt to lose, even though appellate courts frequently reverse verdicts and awards.[1] The litigation costs to the defendant are high, the discovery process is unusually intrusive, and the threat of astronomical jury awards disrupts the defendant's normal operations.[2]

The 1995 litigation settlement between tobacco company Phillip Morris and American Broadcasting Companies, Inc. (ABC) provides a good illustration of libel suit costs.[3] ABC had broadcast a story on its television news magazine *Day One* which accused United States tobacco companies of "manipulating" nicotine levels in their cigarettes.[4] In response, Philip Morris brought a ten billion dollar libel suit against ABC. ABC decided to settle, agreeing to apologize publicly to Philip Morris for the broadcast and to pay Phillip Morris's legal costs, even though ABC's lawyers were convinced that ABC

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1 See, e.g., Doreen Carvajal, Defamation Suit Leaves Small Publisher Near Extinction, N.Y. Times, Oct. 8, 1997, at D1 (describing tribulations of small publisher who was found liable by jury for three million dollars in libel damages and quoting libel experts predicting verdict would be reversed on appeal).

2 See, e.g., Susan Hansen, A Look Back at Big Suits, Am. Law., Mar. 1994, at 109, 110 (reporting that discovery in 1984 litigation between General William Westmoreland and Central Broadcasting Company cost $10 million and produced 300,000 documents and 12,000 pages in depositions).

3 For extended descriptions and discussions of the Philip Morris/ABC litigation, see Alison Frankel, Blowing Smoke, Am. Law., July/Aug. 1995, at 68, 69-77 (describing *Day One* investigation, events leading up to libel action, and litigation itself); Steve Weinberg, Smoking Guns: ABC, Philip Morris and the Infamous Apology, Colum. Journalism Rev., Nov./Dec. 1995, at 29, 36-37 (describing settlement process between Philip Morris and ABC and ABC's decision to apologize publicly for airing *Day One* story).

4 See Day One (ABC television broadcast, Feb. 28, 1994).

would eventually win in court—if not at the trial level, then on appeal.[5] The outcome of this situation highlights a significant problem with libel jurisprudence: long and costly libel suits may leave libel defendants, and other members of the media, overly cautious.

Defenses that bring libel actions to a fair and efficient disposition at an early stage can help to reduce these media-chilling effects without depriving meritorious libel claims of vindication.[6] Part I of this Note discusses three such defenses: the substantial truth doctrine, the libel-proof plaintiff doctrine, and the incremental harm doctrine. The substantial truth doctrine is one of the most fundamental and traditional of defenses: the defendant cripples the plaintiff's prima facie case and achieves dismissal or summary judgment by demonstrating the allegedly libelous statements it has published are in fact substantially true. The second defense, the libel-proof plaintiff doctrine, is a controversial and relatively new doctrine. It bars a plaintiff's suit when the suit is premised on allegedly libelous statements related to past crimes committed by the plaintiff: the plaintiff is deemed to be "libel-proof" with respect to publications discussing his or her prior convictions. The incremental harm doctrine bars a plaintiff's libel claim when the plaintiff's potentially actionable claims cause no incremental harm to the plaintiff's reputation compared to the effect of the remaining, nonactionable portions of the publication: under these circumstances, the court may bar the plaintiff's claims in the interests of judicial efficiency and protection of the media's First Amendment interests.

Part II of the Note discusses the difficulties the incremental harm doctrine has encountered during its development. Two characteristics of the doctrine in particular have rendered its development a curious one. First, the doctrine was conceived in a federal court.[7] This federal pedigree has clouded the doctrine's underlying rationale and author-

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[5] See Weinberg, supra note 3, at 37 ("[ABC's] lawyers believed the only danger [in defending the suit] was a jury hostile to the media in general. But, they predicted, even a runaway jury would be only a temporary setback; an appeals court would almost certainly overturn a verdict of libel, as appeals courts tend to do.").

[6] State libel law contains many doctrines—defenses, privileges, and exceptions—that can defeat a libel claim. See generally Rodney A. Smolla, Law of Defamation § 8 (1996) (describing defenses, privileges, and exceptions to libel). This Note addresses only four of them: the constitutional requirement of fault and the substantial truth, libel-proof plaintiff, and incremental harm doctrines. The existence of other doctrines, however, is relevant because if other doctrines render a majority of the plaintiff's claims nonactionable, the incremental harm doctrine can render the remaining causes of action nonactionable as well. See infra Part I.C. In this way, the incremental harm doctrine cooperates with other libel doctrines in disposing of libel claims at an early stage.

[7] See Simmons Ford, Inc. v. Consumers Union of the United States, Inc., 564 F. Supp. 742, 750-51 (S.D.N.Y. 1981) (applying for first time incremental harm doctrine).

ity. Second, at least in part because of conceptual similarities, courts and commentators have closely associated the incremental harm doctrine with both the libel-proof plaintiff doctrine[8] and the substantial truth doctrine.[9] Criticisms launched against the libel-proof plaintiff doctrine were brought to bear against the incremental harm doctrine, without discussion as to whether those criticisms applied to the incremental harm doctrine. On the other hand, courts purporting to apply

[8] For example, some courts refer to the incremental harm analysis as "the libel-proof plaintiff doctrine." See, e.g., Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1568-69 (D.C. Cir. 1984) (criticizing and rejecting incremental harm doctrine under name of "libel-proof"), vacated on other grounds, 477 U.S. 242 (1986); Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 927-28 (C.D. Cal. 1982) (applying incremental harm doctrine under name of "libel proof"); *Simmons Ford*, 516 F. Supp. at 750-51 (granting defendant summary judgment under "libel-proof" doctrine).

In addition, some commentators refer to the incremental harm analysis as "the incremental libel-proof plaintiff doctrine." See, e.g., Note, The Libel-Proof Plaintiff Doctrine, 98 Harv. L. Rev. 1909, 1924-26 (1975); C. Robert Gage, Jr. & Christopher P. Conniff, The Libel-Proof Plaintiff Doctrine, N.Y. L.J., Feb. 23, 1994, at 1 (suggesting distinction between "incremental libel-proof plaintiff doctrine" and "issue specific libel-proof plaintiff doctrine" is unnecessary).

Other courts and commentators have referred to the incremental harm analysis as merely a branch of the libel-proof plaintiff doctrine. See, e.g., Brooks v. American Broad. Cos., 932 F.2d 495, 500 n.3 (6th Cir. 1991) (reporting Ninth Circuit had adopted "'incremental harm branch' of the libel-proof doctrine"); Herbert v. Lando, 781 F.2d 298, 310-12 (2d Cir. 1986) (applying incremental harm analysis but declining to "characterize" holding as application of "novel theory" of "incremental harm branch of the libel-proof doctrine"); Schiavone Constr. Co. v. Time, Inc., 646 F. Supp. 1511, 1515, 1516 & n.5 (D.N.J. 1986) (granting summary judgment by relying in part on "'incremental harm' aspect of the [libel-proof plaintiff] doctrine"), aff'd in part, rev'd in part, 847 F.2d 1069, 1072-73 (3d Cir. 1988) (reversing summary judgment and remanding several issues for consideration, including whether plaintiffs were libel-proof as matter of law); Guccione v. Hustler Magazine, Inc., 632 F. Supp. 313, 324 (S.D.N.Y.) (considering, but declining to apply, "incremental or subsidiary harm variations of the libel proof doctrine"), rev'd, 800 F.2d 298 (2d Cir. 1986) (holding for defendant on substantial truth and libel-proof grounds and considering incremental harm analysis part of "libel-proof plaintiff doctrine"); Herbert v. Lando, No. 74 Civ. 434-CSH, 1985 WL 506, at *1-*3 (S.D.N.Y. Apr. 4, 1985) (applying "incremental harm" approach of "the doctrine of the 'libel-proof' plaintiff"); Brite Metal Treating, Inc. v. Schuler, No. 62360, 1993 WL 158256, at *6 (Ohio Ct. App. May 13, 1993) (granting summary judgment to defendant under "'incremental harm branch' of the 'libel-proof' doctrine"); Langston v. Eagle Publ'g Co., 719 S.W.2d 612, 622-24 (Tex. Ct. App. 1986) (writ refused no reversible error) (declining to apply "incremental branch of the libel-proof doctrine"); James A. Hemphill, Note, Libel-Proof Plaintiffs and the Question of Injury, 71 Tex. L. Rev. 401, 405-06 (1992) (distinguishing between "issue-specific" and "incremental harm" branches of "libel-proof plaintiff doctrine").

[9] See, e.g., Desnick v. American Broad. Cos., 44 F.3d 1345, 1350 (7th Cir. 1995) (describing incremental harm analysis and stating that "[t]he doctrine that we have been describing goes by the name of 'substantial truth'"); Moldea v. New York Times Co., 22 F.3d 310, 319 (D.C. Cir. 1994) (performing incremental harm analysis under guise of substantial truth); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1228-29 (7th Cir. 1993) (applying incremental harm analysis under name of "substantial truth"); Smolla, supra note 6, § 5.08[3] (characterizing "incremental harm doctrine" as "simply another variation" of substantial truth).

the substantial truth doctrine implicitly employed an incremental harm analysis, distorting the contours of the substantial truth doctrine and depriving the incremental harm doctrine of reasoned examination and explicit precedential authority. Consequently, discussion of the incremental harm doctrine has been wavering and unclear.

Finally, in Part III, this Note argues state courts should recognize and adopt the incremental harm doctrine as an independent doctrine because it promotes judicial efficiency, protects the First Amendment interests of a free press, and protects the reputational interests of the libel plaintiff. Recognition of the doctrine as an independent doctrine would also provide needed clarification in the field of libel jurisprudence. Furthermore, explicit state court approval of the incremental harm doctrine would clear the way for its application in federal courts, where many of the most complex and litigious libel battles are waged. Even if widely recognized as an independent doctrine, however, the incremental harm doctrine would not replace the substantial truth doctrine, the libel-proof plaintiff doctrine, or other libel defenses, but rather would work in unison with them to bring libel litigation to a fast and fair disposition, thus reducing the chill costs to media defendants that usually attend libel litigation.

I
MEET THE DOCTRINES

Libel is governed predominantly by state law,[10] and the elements of libel vary by jurisdiction. In general, a person commits libel by publishing false and defamatory information about another person.[11] To be defamatory, a statement must tend to lower the plaintiff in the esteem of the community.[12] The defamatory element reflects libel

[10] Defamation law was the exclusive province of the states until 1964, when the Supreme Court began the process of partial federalization in New York Times Co. v. Sullivan, 376 U.S. 254, 265-92 (1964) (holding, under First and Fourteenth Amendments, state cannot award damages to public officials for defamation when remarks relate to official position without showing of "actual malice"). As late as 1942, the Supreme Court had explicitly rejected the idea defamation posed any federal or constitutional issue. See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . the libelous . . . ."). For a discussion of the interaction between state law and federal law in libel jurisprudence, see infra Part I.D.

[11] Generally, a plaintiff must prove falsity and defamation separately. See, e.g., Moldea v. New York Times Co., 15 F.3d 1137, 1142-43 (D.C. Cir.) (discussing separate elements of defamation and falsity required under District of Columbia law), modified, 22 F.3d 310 (D.C. Cir. 1994). If, prior to trial, the plaintiff fails on either prong, or both, then the court must dismiss the claim or grant summary judgment for the defendant.

[12] The specific formulation varies from jurisdiction to jurisdiction. Some definitions provide for an economic view of reputation, whereas others embrace a purely personal

law's concern with protecting individual reputations, a concern supported by a long line of social and legal precedent,[13] spanning many cultures,[14] including biblical authority.[15] Perhaps because of this long tradition, libel plaintiffs usually have not needed to show actual injury to their reputations to bring libel actions to trial. Once at trial, the jury determines whether a libel plaintiff's reputation has been injured.[16]

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concept of reputation. Compare id. at 1142 ("[A] statement is defamatory 'if it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community.'" (quoting Afro-American Pub'g Co. v. Jaffee, 366 F.2d 649, 654 (D.C. Cir. 1966))), with Kolegas v. Heftel Broad. Corp., 607 N.E.2d 201, 206 (Ill. 1992) ("A statement is considered defamatory if it tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with him.").

[13] See, e.g., Milkovich v. Lorain Journal Co., 497 U.S. 1, 11 (1990) (noting English common law has afforded cause of action for defamation since sixteenth century). The *Milkovich* court even cited Shakespeare to support the claim of a long tradition of libel protections:

> In Shakespeare's Othello, Iago says to Othello:
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> "Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash;
> 'Tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed." Act III, scene 3.

Id. at 12 (quoting William Shakespeare, Othello, act 3, sc. 3). But cf. Smolla, supra note 6, § 1.01:

> This great tradition of reverence for reputation, however, has never been matched with consistency or clarity in the legal system's protection of reputation. The words of Baron Pollock still apply: "No branch of the law has been more fertile of litigation than this (whether plaintiffs be more moved by a keen sense of honor, or by the delight of carrying on personal controversies under the protection and with the solemnities of civil justice), nor has any been more perplexed with minute and barren distinctions." As the Prosser treatise on torts explains, "[i]t must be confessed at the beginning that there is a great deal in the law of defamation which makes no sense."

Id. (alteration in original) (footnotes omitted) (quoting Sir Frederick Pollock, Law of Torts 243 (13th ed. 1929); W. Page Keeton et al., Prosser and Keeton on Torts § 111, at 771 (5th ed. 1984)).

[14] See, e.g., 1 Raymond E. Brown, The Law of Defamation in Canada 4 (1987) ("Some form of legal or social constraints on defamatory publications 'are to be found in all stages of civilization, however imperfect, remote, and proximate to barbarism.'" (quoting Henry C. Folkard, The Law of Slander and Libel 7 (5th ed. 1891))).

[15] See, e.g., Proverbs 22:1 ("A good name is rather to be chosen than great riches.").

[16] In some jurisdictions, the desire to protect reputations has been so great as to make libel a strict liability tort: the libel defendant was held liable if the defamatory statement was false, regardless of whether the defendant knew it was false.

> There was some suggestion that the defendant published the portrait by mistake, and without knowledge that it was the plaintiff's portrait or was not what it purported to be. But the fact, if it was one, was no excuse. If the publication

As defenses to a libel suit, the substantial truth and libel-proof plaintiff doctrines attack specific elements of the libel plaintiff's prima facie claim. The substantial truth doctrine provides a defense to the falsity prong, while the libel-proof plaintiff doctrine provides a defense to the defamation prong. Therefore, both doctrines operate within the scope of the premises underlying the substantive law of libel. The incremental harm doctrine, however, attacks one of the basic premises of libel law: that *any* harm to an individual's reputation deserves a judicial forum, even if the plaintiff is entitled only to nominal damages. If nothing else, the successful libel plaintiff awarded only nominal damages earns public vindication from the libel. The incremental harm doctrine contravenes this premise by dismissing meritorious claims that, although viable, are otherwise insignificant when viewed in relation to the harm caused by other nonactionable libel claims in the same action.

This Part defines the substantial truth, libel-proof plaintiff, and incremental harm doctrines, primarily by using hypothetical examples and illustrative cases to delineate the conceptual boundaries between them.[17] This Part then concludes by briefly examining the interaction between federal constitutional law and state libel law. These discussions provide a foundation for Part II, which examines the complex interactions of the three doctrines and the difficulties that have plagued the incremental harm doctrine's development.

A. Disposition by Lack of Falsity: The Substantial Truth Doctrine

The substantial truth doctrine is a traditional and fundamental defense to libel that, when applicable, cripples the plaintiff's libel claim.[18] Courts have viewed the substantial truth doctrine alterna-

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was libellous the defendant took the risk. As was said of such matters by Lord Mansfield, "Whatever a man publishes he publishes at his peril."

Peck v. Tribune Co., 214 U.S. 185, 189 (1909) (quoting The King v. Woodfall, 98 Eng. Rep. 914, 916 (K.B. 1909)).

[17] The discussions of the doctrines do not attempt to provide authoritative doctrinal definitions because the contours of the doctrines differ from state to state. Authoritative definitions for the libel-proof plaintiff and incremental harm doctrines are even harder to come by given the instability and confusion that have attended their development.

[18] American libel law generally does not provide a cause of action for the publication of true statements, no matter how badly those statements may damage a person's reputation. This immunity for true statements is a function of how the tort is defined: to be actionable, statements must be both false *and* defamatory. Absolute truth, which is more than the *substantial* truth doctrine requires, has always been a complete defense to libel. However, Professor Smolla notes, in the past, the truth defense was a somewhat risky endeavor because common-law libel carried a presumption of falsity. A defendant therefore faced a high burden of proof when employing the truth defense, and failure to meet that burden was "disastrous" because some jurisdictions permitted juries to find the defendant had reiterated the defamation by pursuing the defense and to consider the reiteration in aggra-

tively as either a bar to the plaintiff's claim rendering the defendant's statements nonactionable, or as a complete defense to the plaintiff's claim justifying a judgment for the defendant.[19]

For a defendant's statements to gain the protection provided by the doctrine, the statements need not be *completely* accurate or correct—they need only be *substantially* so. In determining whether challenged statements are substantially true, the doctrine instructs a court to look beyond the denotation of the challenged statements and evaluate whether their connotation is accurate. If the statements contain incorrect factual assertions about the plaintiff, but nonetheless present the plaintiff in a "truthful" light, then the court may find the statements to be substantially true. The "gist" or "sting" test, which is frequently applied in the substantial truth context, captures this distinction: "Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'"[20] Perhaps the clearest example of the substantial truth doctrine—what I will call the Burglary Example[21]—is a hypothetical case used by Judge Scalia, sitting on the D.C. Circuit at the time, to critique the incremental harm doctrine.[22] Imagine a local paper has reported that a per-

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vation of damages. See Smolla, supra note 6, § 5.13[1]. However, the plaintiff's burden of proof respecting falsity and the modern fault rules imposed by cases such as Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and New York Times Co. v. Sullivan, 376 U.S. 254 (1964), see infra notes 58-63 and accompanying text, have largely shifted the burden of proof to the plaintiff, giving the libel defendant a "legal and psychological edge." Smolla, supra note 6, § 5.13[3]. Under current jurisprudence, if the defendant fails to prove truth to the jury, the jury may nonetheless feel the defendant had good reasons for believing the libel to be true, thereby creating a victory for the defendant resulting from an absence of the requisite level of fault. See id. § 5.13[3]-[6] (discussing advantages and disadvantages of truth defense).

19 The "bar" theory views the truth as a fatal attack on a vital element of the plaintiff's cause of action that disables the entire claim, rendering it "nonactionable." See, e.g., Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1568-69 n.6 (D.C. Cir. 1984) (reasoning where report is false only by virtue of minor inaccuracy, it is not actionable because whatever derogatory implication statement may have is "correct" and plaintiff has therefore "not been libeled"), vacated on other grounds, 477 U.S. 242 (1986). The "defense" theory views the publication of defamatory truths as a "protected" act. See, e.g., McGarry v. CBS, Inc., No. 91-4638, 1991 U.S. Dist. LEXIS 18151, at *4 & n.4 (E.D. Pa. Dec. 26, 1991) (reporting Pennsylvania statutory law classifies substantial truth as "'justification'" that must be accepted as complete defense because, if substantially true, "'the publication . . . is proper for public information and investigation'" (quoting 42 Pa. Cons. Stat. Ann. § 8342(a) (West 1991))).

20 Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) (quoting Heuer v. Kee, 59 P.2d 1063, 1064 (Cal. Ct. App. 1936)).

21 Judge Scalia did not use the term "substantial truth" in his discussion of the following example. Nonetheless, other courts applying the substantial truth doctrine have adopted the terms used in the Burglary Example, and the example itself. See, e.g., Moldea v. New York Times Co., 22 F.3d 310, 319 (D.C. Cir. 1994) (citing example); Herbert v. Lando, No. 74 Civ. 434-CSH, 1985 WL 506, at *3 (S.D.N.Y. Apr. 4, 1985) (same).

22 See *Anderson*, 746 F.2d at 1568 n.6.

son—let's call him Boris—has committed thirty-five burglaries, although he has committed actually only thirty-four. The report, Scalia argued, although factually incorrect, nonetheless would be nonactionable because "the essentially derogatory implication of the statement ('he is an habitual burglar') is correct."[23] In this example, the court would construe the "gist" of the report as an accusation of habitual burglary. Whether the paper reports a burglary count of thirty-four or thirty-five is insignificant; the report portrays Boris accurately in either case, even though it uses inaccurate information to create the portrayal.

One more important facet of the substantial truth doctrine merits attention here. Where there is no dispute regarding the underlying facts—for example, where the defendant admits making the statements at issue and admits to the factual inaccuracies contained therein—substantial truth is usually a matter of law and therefore determined by the court.[24] This aspect of the doctrine allows a court to reach an early disposition of the dispute. But the ability to bring a libel claim to an early resolution carries with it an inherent trade-off: given the admitted vagueness of the substantial truth standard, the judge enjoys a wide latitude within which to evaluate the merits of the plaintiff's claim, a latitude which increases the risk that the plaintiff's claim will be judged not by the standards of the community (as seen by the jury), but by the standards of a single judge.[25] This characteris-

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[23] Id.

[24] See, e.g., Waring v. William Morrow & Co., 821 F. Supp. 1188, 1190 (S.D. Tex. 1993) ("Where, as here, the underlying facts are undisputed, any variance regarding minor items can be disregarded and substantial truth can be determined as a matter of law."). This is also true of the libel-proof plaintiff and incremental harm doctrines. See, e.g., Desnick v. American Broad. Cos., 44 F.3d 1345, 1350 (7th Cir. 1995) (noting incremental harm doctrine would be matter of law if facts were undisputed, but remanding for further discovery); Logan v. District of Columbia, 447 F. Supp. 1328, 1331-32 (D.D.C. 1978) (granting summary judgment for defendants on plaintiff's libel claims because plaintiff was libel-proof as matter of law). Because this Note is concerned mainly with those instances where the three doctrines discussed can contribute to swift adjudication, much of the discussion throughout the Note contemplates circumstances where the underlying facts are undisputed and the court is free to apply any relevant doctrine as a matter of law.

[25] This risk is inherent in the way courts apply the doctrine. Before a court can apply the substantial truth test, it must characterize the "gist" or "sting" of the publication. The doctrine provides almost no guidance for making this determination, implicitly presuming that the "gist" of the publication will be self-evident to the court. The substantial truth doctrine is therefore susceptible to abuse—a judge may use the doctrine to formulate a particular "gist" of the publication to justify a decision the judge has already reached regarding the publication's truth or falsity. When judges use the doctrine in this manner, the scope of the substantial truth test is not determined by any stable legal standard, but by how far a defendant can stretch the truth before a judge's individual libel alarm goes off—a process akin to Justice Stewart's "I know it when I see it" test for hard-core pornography. See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (declining to de-

fine "hard-core pornography" but concluding motion picture considered in that case "is not that"). Whether it is possible to avoid such idiosyncratic application of the doctrine, the desirability of such flexibility is debatable.

Consider, for example, the following three cases. In two of these cases, the court's treatment of the "gist" determination reflected the court's disdain for the libel claims; in one, the court seemed determined to allow the suit.

In Blanchett v. Wal-Mart Stores, Inc., No. 93-1530, 1994 U.S. App. LEXIS 462, at *2 (4th Cir. Jan. 12, 1994), the plaintiffs had been fired from their jobs at Wal-Mart after admitting they had consumed, without paying, less than five dollars' worth of coffee; a sausage dog ordered but later refused by a customer; a few pieces of popcorn; a chip with cheese; a few nachos; and "perhaps an 'old weenie.'" Id. at *2 n.1. The store operations manual referred to this prohibited conduct as "grazing." See id. at *2. After the firings, management told the remaining employees the plaintiffs had been fired for grazing, which it equated with "stealing." See id. at *3. The plaintiffs sued for defamation, arguing they had been fired not for "stealing," but for "grazing": the plaintiffs felt the term "grazing" did not imply the same criminality as the term "stealing." See id. at *7. The court declined to make such nice distinctions:

> It is unquestionable that the word "stealing" has a powerfully negative connotation. The appellants prefer to characterize their actions as "sampling," "tasting," or even "grazing" (which has an unpleasant connotation of its own) .... The district court stated that "[o]bviously, when you take something, without authorization, belonging to another party with the intent to deprive that party of its use, that could be defined as stealing." We entirely agree.... The appellants brought this suit alleging that Wal-Mart defamed them by, in essence, saying "to-may-toe." Wal-Mart defended on the ground that it instead said, if anything, "to-mah-toe." We affirm the district court's decision to call the whole thing off.

Id. at *7-*8.

In Fendler v. Phoenix Newspapers, Inc., 636 P.2d 1257, 1260 (Ariz. Ct. App. 1981), the plaintiff argued a newspaper had defamed him following his conviction by reporting he was *imprisoned* pending appeal, when in fact he had been *released on bond* pending appeal. The court's treatment of the plaintiff's claim was somewhat ridiculing in its tone and declined to see a distinction between being released on bond and being incarcerated. See id. at 1262 ("There is little doubt that [the plaintiff] personally found it highly meaningful that he had been released on bond rather than being incarcerated in prison pending his appeal."). The court's opinion did not relate the details of the plaintiff's argument. If, however, the plaintiff argued a person's release on bond pending appeal connotes less culpability and finality than imprisonment, then the court should not have disregarded the argument so lightly because it provides strong grounds for finding the sting of the inaccuracy varied significantly from the sting of the truth. The *Fendler* court, however, found the "sting" of the report was the fact of conviction at the trial level, irrespective of the status of an appeal, and therefore "the substantial 'sting' is the same, whether [the plaintiff] had started his prison term or will never actually spend time in prison." Id.

Compare *Fendler* and *Blanchett* with Da Silva v. Time Inc., 908 F. Supp. 184 (S.D.N.Y. 1995), where the court was presented with a more sympathetic plaintiff. *Time* magazine had published a photograph of the 23-year-old plaintiff and identified her as a prostitute. See id. at 186. Although the plaintiff had been a prostitute from age 12 to 18, she had since reformed, ceased prostitution, moved to a new community, and started a new life. See id. In addition to these signs of reform, the plaintiff was pregnant at the time the photograph was published. See id. The court refused to find the photograph to be substantially true as a matter of law and allowed the suit to go to trial. See id. at 187. It is intriguing to ask on these facts whether *Time*'s use of the single adjective "former" before the noun "prostitute" would have crippled the plaintiff's claim.

tic is not unique to the substantial truth doctrine: all three of the doctrines discussed in this Note are similarly susceptible.[26]

In sum, then, the substantial truth doctrine allows courts to bring certain libel actions to an early resolution by allowing the court to determine whether the statements at issue, although false, create a true picture of the plaintiff. Where the defendant's portrayal of the plaintiff is substantially justified by the true facts, the court may dismiss the action, even though the underlying statements are factually incorrect. As a conceptual matter, the substantial truth doctrine may be viewed as attacking the "falsehood" prong of the plaintiff's case—the defendant's factually false statements, although clearly likely to cause harm to the plaintiff's reputation, are determined to be "true" as a matter of law, thereby removing a necessary element of the plaintiff's case.

B. Disposition by Lack of Reputation Harm: The Libel-Proof Plaintiff Doctrine

If the substantial truth doctrine may be viewed as crippling the falsehood prong of the plaintiff's claim, the libel-proof plaintiff doctrine may be viewed as crippling the defamation prong. The libel-proof plaintiff doctrine applies primarily in cases where the plaintiff has a record of criminal activity and the defendant's allegedly libelous statements have incorrectly reported the facts associated with those convictions.[27] Of course, a criminal record does not automatically

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[26] This susceptibility, therefore, cannot, by itself, serve as a reason for rejecting the incremental harm doctrine. See infra note 124 and accompanying text.

[27] The facts of the seminal case, Cardillo v. Doubleday & Co., 518 F.2d 638 (2d Cir. 1975), provide a good example of the genus. Cardillo alleged that the defendant had libeled him by publishing a book identifying Cardillo as a high-ranking figure in organized crime who had taken part in various criminal enterprises; Cardillo subsequently became a government witness and published his story. See id. at 639. Citing the fact Cardillo had been convicted of an assortment of federal felonies and a handful of lesser state offenses, the court upheld the lower court's summary judgment on the grounds that Cardillo could expect no more than nominal damages and therefore the suit was not worth the risk it posed to First Amendment interests. See id. at 639-40.

Cardillo was the first case to apply this reasoning, and the Second Circuit quickly attempted to limit the reasoning to the general contours of its facts: a criminal plaintiff, complaining of slight inaccuracies with respect to his or her criminal record, provided the inaccurate depiction is materially related to the plaintiff's actual record. See Buckley v. Littell, 539 F.2d 882, 888-89 (2d Cir. 1976) (rejecting argument plaintiff William F. Buckley could be libel-proof based on his controversial political positions and noting "[t]he doctrine of 'libel-proof' defendants [sic] that . . . *Cardillo* . . . enunciated is a limited, narrow one, which we will leave confined to its basic factual context"); see also Sharon v. Time Inc., 575 F. Supp. 1162, 1168-72 (S.D.N.Y. 1983) (refusing to apply libel-proof plaintiff doctrine in political context where article published in *Time* magazine allegedly accused former Israeli Minister of Defense Ariel Sharon of permitting and encouraging murder of Palestinian refugees); Jackson v. Langcope, 476 N.E.2d 617, 619 (Mass. 1985) (accepting libel-proof

close the courts to such plaintiffs for the purpose of libel suits, rendering these plaintiffs "defamation outlaws."[28] Rather, courts applying the doctrine generally only find a plaintiff libel-proof with respect to a particular kind of criminal conduct,[29] on the ground "there are few so impure that [they] cannot be traduced" and "even the public outcast's remaining good reputation is entitled to protection."[30] Some courts, however, have implied a willingness to find certain plaintiffs libel-proof for all matters.[31]

However they apply the libel-proof plaintiff doctrine, courts will dismiss the plaintiff's claim when they deem the plaintiff's reputation to be so damaged already by the criminal conduct at issue that the plaintiff would be unable to obtain anything more than nominal damages:

> [T]here comes a time when the individual's reputation for specific conduct, or his general reputation for honesty and fair dealing is sufficiently low in the public's estimation that he can recover only nominal damages for subsequent defamatory statements.

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plaintiff principle and noting it "might apply to a habitual criminal, or to a criminal notorious for one criminal act" (citations omitted)); Lyons v. New Mass Media, Inc., 453 N.E.2d 451, 458 (Mass. 1983) (rejecting suggestion plaintiff should be considered libel-proof based on repeated involvement in other defamation cases).

[28] This vivid phrase was coined in Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1228 (7th Cir. 1993):

> We must be careful, however, that we are not construing the gist of the allegedly defamatory statements so broadly as to invite defendants to commit, in effect, a further but privileged libel, by bringing to light every discreditable act that the plaintiff may have committed, in an effort to show that he is as "bad" as the defamatory statements depict him. This would strip people who had done bad things of any legal protection against being defamed; they would be defamation outlaws.

See also Schiavone Constr. Co. v. Time, Inc., 646 F. Supp. 1511, 1516 (D.N.J. 1986) ("[The libel-proof plaintiff] doctrine does not . . . prevent the imposition of liability merely because the person allegedly defamed already has a bad reputation. In order to be shielded from liability, the statement [at issue] must deal with the same matters upon which the person's bad reputation is founded."), aff'd in part, rev'd in part, 847 F.2d 1069, 1081 (3d Cir. 1988) (declining to find plaintiffs libel-proof under facts of case and noting doctrine cannot apply if alleged defamatory statement does not relate to same subject as basis for plaintiffs' bad reputation).

[29] See, e.g., *Cardillo*, 518 F.2d at 639-40 (noting prisoners may seek redress for wrongs such as libel so long as such claims are of different type than those for which such persons have been found to be libel-proof).

[30] Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512, 516 (Tex. Ct. App. 1987) (dismissing writ without judgment).

[31] See, e.g., Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 928 (C.D. Cal. 1982) ("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 it relates to that specific behavior. By extension, if an individual's general reputation is bad, he is libel proof on all matters." (citations omitted)).

> First Amendment considerations of free press and speech, promoting society's interest in uninhibited, robust, and wide-open discussion, must prevail over an individual's interest in his reputation in such cases.[32]

The doctrine, drawing upon First Amendment principles for its justification,[33] terminates the action at an early stage because the potential recovery is slight and the costs imposed on media defendants are large.[34] The doctrine does not rely exclusively upon First Amendment grounds, however, and may be justified in terms of the main interests of libel law: it is presumed the plaintiff's criminal activity already has so harmed his or her reputation that any harm resulting from the libelous statements will be so inconsequential as to fall outside libel law's interest in protecting private reputations from harm.[35] In effect,

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[32] Id. at 928; accord Brooks v. American Broad. Cos., 737 F. Supp. 431, 443 (N.D. Ohio 1990) (identifying principle behind libel-proof plaintiff doctrine as "the need to balance the rights of persons who are informing the public under the protection of the first amendment against the privacy rights of individuals"), aff'd in part, vacated in part, 932 F.2d 495 (6th Cir. 1991); *Jackson*, 476 N.E.2d at 619 (noting that First Amendment rights "predominat[e]" in libel-proof plaintiff cases); *Finklea*, 742 S.W.2d at 517 ("More than judicial economy argues for the invocation of the [libel-proof plaintiff] doctrine. The United States Supreme Court has warned that the First Amendment forbids granting defamation plaintiffs 'gratuitous awards of money damages far in excess of any actual injury.'" (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974))); see also Gage & Conniff, supra note 8, at 1:

> Nonetheless, the defense of [libel actions brought by subjects whose reputations are damaged by inclusion in reality-based television programs] places a significant financial burden on the defendant. The Second Circuit has expressly recognized that in such cases the action should be dismissed because the cost of defending against the libel claim, by itself, impairs vigorous freedom of expression.

One court has even required the alleged libel to be published in "an effort to inform the public" before the libel-proof plaintiff doctrine can be invoked, presumably to reinforce the First Amendment justifications underlying the doctrine's application. See *Brooks*, 737 F. Supp. at 442-43.

[33] See, e.g., *Cardillo*, 518 F.2d at 639 (introducing libel-proof plaintiff doctrine and justifying it on First Amendment grounds); *Finklea*, 742 S.W.2d at 515-18 (applying doctrine and stressing importance of protecting media defendants from "stifling" costs of litigating "meritless claim").

[34] See, e.g., *Cardillo*, 518 F.2d at 639 ("[W]e consider as a matter of law that appellant is . . . 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.").

[35] See, e.g., McBride v. New Braunfels Herald-Zeitung, 894 S.W.2d 6, 9 (Tex. Ct. App. 1994) (writ denied) (defining libel-proof plaintiff as "one whose reputation on the matter in issue is so diminished that, at the time of an otherwise libelous publication, it could not be further damaged"). This particular justification has not proved popular with many courts primarily because of their reluctance to characterize anyone's reputation as so poor that it cannot be damaged further. See, e.g., Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1568 (D.C. Cir. 1984) (rejecting "assumption that one's reputation is a monolith, which stands or falls in its entirety"), vacated on other grounds, 477 U.S. 242 (1986).

the defendant's statements, although clearly false, are deemed nondefamatory.

For example, imagine a person—let's call her Natasha—has been convicted of a potpourri of federal crimes—receiving stolen property, interstate transport of stolen securities, bail-jumping, and conspiracy—as well as an assortment of minor state infractions.[36] Natasha has admitted in court documents she frequently has been in the company of Boris and knows him to be the habitual burglar that he is. Imagine Rocky, an investigative reporter, writes a book stating Natasha frequently associates with numerous organized crime figures and was involved in a robbery and a race-fixing scheme. Courts applying the libel-proof plaintiff doctrine[37] are likely to dismiss Natasha's libel claim. The doctrine presumes Natasha's multiple convictions have so damaged her reputation that even were she to prevail on her claim, she would receive only nominal damages from a jury. The doctrine also presumes the costs to the media defendant would be too great to justify allowing the claim to proceed.[38] A court applying the libel-proof plaintiff doctrine without limiting it to criminal conduct[39] will justify barring the claim on the ground Natasha's reputation is so tarnished already by her own actions that further damage to her reputation is either impossible to achieve, or so slight that whatever harm is inflicted on her reputation is not worth the burdens a libel action would impose on either the courts or the defendant. Most courts, however, have not applied the libel-proof plaintiff doctrine outside the criminal context, but rather have limited its application to those cases in which the plaintiff is a convicted criminal complaining of inaccuracies in reports of his or her criminal conduct.[40]

Placing the libel-proof plaintiff doctrine within the theoretical framework of libel is not without its conceptual difficulties. One might say the doctrine is simply an extension of the substantial truth doctrine and the allegedly libelous statements to which the doctrine applies are true if one looks at them from a higher level of generality:

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[36] The facts of this hypothetical are based on those of *Cardillo*, 518 F.2d at 639, the case first applying the libel-proof plaintiff doctrine.

[37] Jurisdictions place varying limits on the reach of the libel-proof plaintiff doctrine. See supra notes 27-31 and accompanying text.

[38] See *Cardillo*, 518 F.2d at 640 (holding Cardillo's libel claim should be dismissed because "[w]ith Cardillo himself having a [criminal] record and relationships or associations like these, we cannot envisage any jury awarding, or court sustaining, an award . . . for more than a few cents damages, even if Cardillo were to prevail on the difficult legal issues with which he would be faced").

[39] See supra note 31 and accompanying text.

[40] See, e.g., Buckley v. Littell, 539 F.2d 882, 889 (2d Cir. 1976) (confining libel-proof plaintiff doctrine to "its basic factual context" as established in *Cardillo*).

because the plaintiff has committed many crimes, inaccurately reporting the commission of other, similar crimes does not present a false picture of the plaintiff. Indeed, some courts and commentators have taken this view of the doctrine.[41] Equating the libel-proof plaintiff doctrine with substantial truth, however, is only possible if one ignores the origin of the doctrine and the explicit justifications normally advanced for it—the doctrine is tenable because the plaintiff can hope to achieve only nominal damages and the costs to the media defendant are great. With the plaintiff's inability to recover significant damages driving this doctrine, even in light of the inaccurate report, it makes greater theoretical sense to view the doctrine as operating on the defamatory prong of the plaintiff's case. The allegedly libelous statement is nonactionable not because it is true, or even substantially true, but rather because it is unlikely the plaintiff will be able to prove the statement is capable of reducing her reputation any further—the defamatory content of the statement is de minimis.

The libel doctrines discussed to this point, both the substantial truth doctrine and the libel-proof plaintiff doctrine, operate independently on one of the two prongs of libel's elements. In contrast, the incremental harm doctrine operates on neither prong. Rather, the doctrine works in conjunction with the two former doctrines, and other libel doctrines, in allowing a court to decide whether to deny a plaintiff's claim.

C. Disposition by Efficiency: The Incremental Harm Doctrine

The incremental harm doctrine has suffered from an identity crisis since its inception. Courts and commentators have equated (or confused) it with both the substantial truth doctrine and the libel-proof plaintiff doctrine. This confusion and the need for clearer boundaries between the three are discussed more fully in Part II. This Part sketches out a paradigmatic definition of the incremental harm doctrine to serve as a foundation for the discussion in Part II.

The incremental harm doctrine applies in those cases where the plaintiff has challenged numerous statements in a defendant's publication and the court has determined that a significant portion of those statements is nonactionable.[42] The protected statements may be nonactionable for any number of reasons—constitutional defenses, sub-

[41] See, e.g., Smolla, supra note 6, § 5.08[3] ("[T]he incremental harm doctrine . . . 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.").

[42] See, e.g., Herbert v. Lando, 781 F.2d 298, 311 (2d Cir. 1986) ("[The incremental harm] branch of the 'libel—proof' doctrine thus measures the incremental harm inflicted by the challenged statements beyond the harm imposed by the rest of the publication. If

stantial truth defenses, privileges allowed by state statute—without affecting the application of the incremental harm doctrine.[43] If the remaining potentially actionable statements do no incremental harm to the plaintiff's reputation in light of the harm caused by the nonactionable statements, a court applying the doctrine will dismiss the claims addressing the potentially actionable statements, even though they may contain false and defamatory statements for which the plaintiff otherwise might be entitled to damages.[44] Courts often have justified the doctrine by reference to First Amendment interests (as represented by the litigation costs to the media defendant) to be protected in such cases.[45] The plaintiff's interest in protecting his or her reputation in these contexts is viewed as significantly diminished in light of the nonactionable harm caused by the defendant's statements.

The incremental harm doctrine, which requires a particular procedural posture, perhaps is exemplified best, not by a hypothetical example, but rather by the case that first applied it, *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*[46] Simmons Ford, an automobile manufacturer, produced an electric car, known as the Citi-Car. Consumers Union published an unfavorable review of the car in

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that harm is determined to be nominal or nonexistent, the statements are dismissed as not actionable.").

[43] See id. at 305-07, 312 (finding nine of 11 statements to be nonactionable because they either were literally accurate or were not published with actual malice, and dismissing remaining two statements on incremental harm grounds).

[44] See, e.g., Church of Scientology Int'l v. Time Warner, Inc., 932 F. Supp. 589, 593 (S.D.N.Y. 1996) ("The incremental harm doctrine reasons that when unchallenged or nonactionable parts of a particular publication are damaging, another statement, though maliciously false, might be nonactionable on the grounds that it causes no harm beyond the harm caused by the remainder of the publication.").

[45] Although the incremental harm doctrine cases do not clearly identify the chilling effect of litigation costs as the specific First Amendment interest to be protected, the inference is readily drawn, as the cost of litigation is cited frequently as a primary First Amendment concern in libel litigation. See, e.g., Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 303 (2d Cir. 1986) ("[I]n those instances where an allegedly libelous statement cannot realistically cause impairment of reputation . . . , the claim should be dismissed so that the costs of defending against the claim of libel, which can themselves impair vigorous freedom of expression, will be avoided."); McBride v. Merrell Dow & Pharmaceuticals Inc., 717 F.2d 1460, 1466 (D.C. Cir. 1983) ("Libel suits, if not carefully handled, can threaten journalistic independence. Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship."); Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512, 517 (Tex. Ct. App. 1987) (writ dismissed without judgment) ("Recognizing that the cost of a successful libel defense against a meritless claim is itself a burden stifling the exercise of First Amendment rights, the Supreme Court has said that judges must independently evaluate libel cases and summarily dispose of illegitimate claims." (citing Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984))); see also infra notes 68 and 71 and text accompanying note 69.

[46] 516 F. Supp. 742 (S.D.N.Y. 1981).

its magazine *Consumer Reports*.[47] The review reported the results of a number of performance tests, concluding the car was "extremely dangerous and unsafe" and rating the car "Not Acceptable."[48] In addition, the review suggested the vehicle did not conform to certain federal safety standards mandatory for all conventional vehicles.[49] The standards cited by the article did not exist, and conventional vehicles were not required to meet them. Simmons Ford sued[50] Consumers Union based upon the false suggestion regarding the federal safety standards, but did not challenge the review's conclusions or Consumers Union's testing procedures.[51]

The district court found Consumers Union's conduct during testing and publication did not rise to the level of actual malice and granted it summary judgment.[52] However, the court provided a separate, "independent"[53] ground for its holding focusing on the unchallenged portion of the publication:

> [T]he 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. . . . 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.[54]

The *Simmons* court did not say the plaintiff's claim was fatally flawed or was incapable of being proved; rather, it simply rejected the plaintiff's interest in pursuing the claim as "minimal" in light of the potential abridgment of the media defendant's First Amendment interests.[55] This is the hallmark of the incremental harm doctrine in its purest form—it renders nonactionable a plaintiff's normally actionable claim because it does not raise a reputational harm weighty enough to justify imposing the costs of continuing the action on either the court, in

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47 See id. at 744-46.

48 Id. at 744.

49 See id. at 745.

50 There was some uncertainty about exactly what sort of action *Simmons* involved. The plaintiffs referred to their claim as one for "disparagement of product," and the defendants referred to it as an "action for defamation controlled by the principles of *New York Times v. Sullivan*." Id. at 743. Because both claims (within the context of *Simmons*) required actual malice and the court found the plaintiffs had failed to show actual malice, the court declined to decide which sort of claim was presented. See id.

51 See id. at 744-45.

52 See id. at 749.

53 Id. at 750.

54 Id. at 750-51.

55 See id.

terms of the judicial resources required to adjudicate the claim,[56] or the media defendant, in light of the litigation costs likely to be imposed.

The incremental harm doctrine, therefore, directs a court to turn its back on an individual whose reputation has in fact been harmed, a result apparently contrary to the normal thrust of libel law. The *Simmons* court justified its dismissal of the plaintiff's claim through application of the incremental harm doctrine by pointing to the First Amendment. Because federal constitutional values figure prominently in the principles underlying these libel defense doctrines,[57] this Part concludes by examining the interplay between state libel law and the federal Constitution.

D. Libel Law and the Constitution

Over the last twenty-five years, the Supreme Court has spread a thin, but important, quilt of constitutional protections over state libel law. Federal First Amendment doctrine now limits the traditionally broad liability for libel provided by state common law in several important respects, each designed to promote the First Amendment interest in vigorous public debate. For instance, the First Amendment bars public official and public figure plaintiffs from recovering damages for libel unless they show that the defendant's falsehood was published with actual malice.[58] When a private plaintiff sues on the basis of defamatory statements dealing with matters of public concern,

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[56] Courts applying the incremental harm doctrine do not explicitly justify the doctrine's application by reference to the conservation of judicial resources, although this Note argues such a consideration is a valid one, properly considered by state courts in deciding whether to adopt the incremental harm doctrine. The conservation of judicial resources has been recognized by the Supreme Court as a valid state interest in the libel context:

> New Hampshire also has a substantial interest in cooperating with other States, through the "single publication rule," to provide a forum for efficiently litigating all issues and damages claims arising out of a libel in a unitary proceeding. This rule reduces the potential serious drain of libel cases on judicial resources. It also serves to protect defendants from harassment resulting from multiple suits.

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777 (1984) (footnote and citation omitted).

[57] Recall that courts also refer to the First Amendment in justifying application of the libel-proof plaintiff doctrine. See supra notes 32-34 and accompanying text.

[58] See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (requiring states to impose actual malice standard upon plaintiffs who are public officials); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (extending actual malice requirement to public figures). To show "actual malice," a plaintiff must present "clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). The Supreme Court slowed its forward march of constitutional protection in *Gertz* by refusing to extend the actual malice standard to suits involving private plaintiffs libeled by falsehoods related to a matter of public concern. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749,

her recovery is limited by the Constitution to actual damages,[59] and she is required to show some measure of fault (such as negligence or actual malice) on the part of the defendant.[60] Because "[u]nder the First Amendment there is no such thing as a false idea,"[61] *all* libel plaintiffs must show the challenged statements are factually false or based on provably false assertions, and are not wholly opinion.[62] These federal constraints on state libel law sometimes make libel suits a tug-of-war at the border between state and federal law: the plaintiff's right to sue is grounded in and governed by applicable state law, but the constitutional limitations imposed by federal law may protect the defendant's publication and prevent recovery on the state law claim.[63]

Some commentators argue these constitutional mandates ironically have undermined the First Amendment interests they were forged to protect.[64] Because the defendant's state of mind—what the defendant knew and when he or she knew it—is a central feature of the applicable constitutional protections, libel suits may require a fair degree of fact-finding by the jury and may not be readily amenable to dismissal or summary judgment on constitutional grounds.[65] Libel

761 (1985), the Supreme Court declined to extend the actual malice standard to cases not involving at least a matter of public concern.

59 See *Gertz*, 418 U.S. at 350 ("In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.").

60 See id. at 347 (holding states must not impose liability without fault in defamation suits involving matters of public concern). The actual level of fault required in libel cases involving matters of public concern has been left to the discretion of the states. See id. ("[S]o 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.").

61 Id. at 339.

62 See, e.g., Moldea v. New York Times Co., 15 F.3d 1137, 1144 (D.C. Cir.), modified, 22 F.3d 310 (D.C. Cir. 1994).

63 See, e.g., Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1077 (3d Cir. 1985) ("A court [adjudicating a defamation case] must determine: '(1) whether the defendants have harmed the plaintiff's reputation within the meaning of state law; and (2) if so, whether the First Amendment nevertheless precludes recovery.'" (quoting Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 270 (3d Cir. 1980))).

64 For an extended, scholarly argument on this point, see Doe v. Daily News, L.P., N.Y. L.J., July 24, 1995, at 30 (unedited version of Doe v. Daily News, L.P., 632 N.Y.S.2d 750 (Sup. Ct. 1995)).

65 The actual malice test—the highest constitutional standard—requires "sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.'" Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989) (alteration in original) (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)). Even low fault standards, such as a simple negligence standard, will hinge on whether the libel defendant, given the circumstances, knew or should have known of the possibility of falsehood.

suits that do proceed to trial frequently result in large jury verdicts that are subsequently reversed at the appellate level, largely on constitutional grounds.[66] However, ultimate vindication for libel defendants is of little comfort, given the costs associated with libel litigation, such as extensive and protracted discovery, high libel insurance premiums, the threat of high damages awards, and the tendency for media defendants to over-editorialize subsequent publications.[67] Some libel plaintiffs may even bring libel actions purely for purposes of harassment.[68]

To the extent these criticisms are true, they suggest current constitutional libel doctrine contributes to the very evil against which it was designed to protect. This line of argument prompted one New York trial judge to call for total immunity for the press in libel actions because

> the practical effect of the rule in [*New York Times Co. v. Sullivan*] is to permit plaintiffs to sue but rarely to permit them to succeed. The net result has been much expensive and pointless litigation, the threat of which imperils less wealthy publishers and works to undo the rights [*Sullivan*] professes to recognize.[69]

This judge is not alone in his criticism of the current tendency of libel law to produce fruitless, protracted, and expensive litigation. For this reason, one commentator has suggested "honesty and efficiency demand that we abolish the law of libel" altogether.[70]

Under these circumstances, judicial tools allowing for the fast, fair, and efficient disposition of fruitless libel suits perform the dual

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66 For example, a Libel Resource Defense Center Study conducted in the 1980s showed media defendants lost 90% of the time in libel suits decided by juries, but won reversals at a rate of 64%. See Seth Goodchild, Note, Media Counteractions: Restoring the Balance to Modern Libel Law, 75 Geo. L.J. 315, 323-24 (1986) (reporting Libel Resource Center Study results).

67 See id. at 321-25 (discussing costs associated with libel litigation).

68 Consider, for example, how the D.C. Circuit characterized a libel suit involving a *Wall Street Journal* article about an author associated with the conservative activist organization Liberty Lobby:

> This suit epitomizes one of the most troubling aspects of modern libel litigation: the use of the libel complaint as a weapon to harass. Despite the patent insufficiency of a number of appellant's claims, it has managed to embroil a media defendant in over three years of costly and contentious litigation. The message to this defendant and the press at large is clear: discussion of Liberty Lobby is expensive. However well-documented a story, however unimpeachable a reporter's source, he or she will have to think twice about publishing where litigation, even to a successful motion for summary judgment, can be very expensive if not crippling.

Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1303 (D.C. Cir. 1988).

69 Doe v. Daily News, L.P., N.Y. L.J., July 24, 1995, at 30 (unedited version of Doe v. Daily News, L.P., 632 N.Y.S.2d 750 (Sup. Ct. 1995)).

70 David A. Anderson, Is Libel Law Worth Reforming?, 140 U. Pa. L. Rev. 487, 489 (1991).

function of conserving scarce judicial resources and reinforcing First Amendment free speech interests.[71] As early as its first application in the Southern District of New York,[72] the incremental harm doctrine was recognized as just such a tool and conceived of as a balance between the plaintiff's reputational interests on the one hand and the interests of judicial efficiency and protection of First Amendment interests on the other.[73] Despite the doctrine's capacity to regulate these competing interests, its federal pedigree has threatened to inhibit its growth. In addition, the similarities among the substantial truth, libel-proof plaintiff, and incremental harm doctrines have hindered judicial acceptance of the incremental harm doctrine. Part II discusses these problems in more detail.

II
STALKING THE DOPPELGÄNGERS

A. The Incremental Harm Doctrine and the Interplay of State and Federal Law

Under the *Erie* doctrine, federal courts sitting in diversity to hear state libel claims must apply the substantive state law under which the libel claim is brought, subject only to the limitations imposed by the Constitution in general and by the First Amendment in particular.[74] When state law is silent as to a particular issue, federal courts must rule as they believe the state's highest court would rule.[75] Two aspects of the incremental harm doctrine's history have made it vulnerable in light of the *Erie* doctrine: (1) the doctrine was created in, and largely developed by, federal courts under the aegis of the First Amendment,

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[71] Such judicial tools prove especially popular at the trial level. See, e.g., Hickey v. Capital Cities/ABC, Inc., 792 F. Supp. 1195, 1199 (D. Or. 1992) ("Summary judgment is the preferred means of dealing with first amendment cases due to the chilling of first amendment rights inherent in expensive and time-consuming litigation."), aff'd, 999 F.2d 543 (9th Cir. 1993).

[72] See Simmons Ford, Inc. v. Consumers Union of the United States, Inc., 516 F. Supp. 742 (S.D.N.Y. 1981).

[73] See id. at 750:

> Here, by contrast, 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. . . . Given this background, plaintiffs' reputational interest . . . is minimal when compared with the First Amendment interests at stake. Summary judgment thus must be granted on this ground as well.

[74] See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").

[75] See Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967) ("If there be no decision by [the state's highest] court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State.").

and yet (2) in *Masson v. New Yorker Magazine, Inc.*,[76] the Supreme Court stripped the incremental harm doctrine of its First Amendment pedigree.[77] These two developments, at times, have appeared to cripple the doctrine's validity and viability.

1. *Development of the Incremental Harm Doctrine in Federal Courts*

The incremental harm doctrine was created by a federal court in *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*[78] The *Simmons* court placed heavy weight on the First Amendment interests at stake in the case,[79] and the authority upon which the court relied for creating the doctrine—*Cardillo v. Doubleday & Co.*[80]—was federal authority. *Cardillo* itself was rooted only shallowly in state law,[81] and the authorities cited by the *Cardillo* court did not mention First Amendment concerns at all. As a result, the incremental harm doctrine had no firm footing in state law, while the weightiest justification for the doctrine seemed to be the protection of First Amendment interests. This curious pedigree gave some federal courts pause. The Sixth Circuit characterized the doctrine as a "loose-woven legal conception of the federal courts,"[82] noting the D.C. Circuit had "implied that [it was] not firmly attached to the loom of state law."[83] Nevertheless, the Sixth Circuit did not reject the doctrine.[84] Other federal courts rejected the doctrine due to the absence of applicable state law authority.[85]

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[76] 501 U.S. 496 (1991).

[77] See id. at 522-23 (striking down Court of Appeals's application of incremental harm doctrine).

[78] 516 F. Supp. 742 (S.D.N.Y. 1981).

[79] See id. at 750-51 (holding plaintiffs' reputational interests did not outweigh First Amendment interests at stake).

[80] 518 F.2d 638 (2d Cir. 1975).

[81] The cases *Cardillo* relied on, Urbano v. Sondern, 41 F.R.D. 355 (D. Conn.), aff'd, 370 F.2d 13 (2d Cir. 1966), and Mattheis v. Hoyt, 136 F. Supp. 119 (W.D. Mich. 1955), disposed of their issues on analysis of a federal statute allowing the court to refuse to authorize, or dismiss, an action in forma pauperis if satisfied that the action is frivolous and highly unlikely to be successful. See *Urbano*, 41 F.R.D. at 358; *Mattheis*, 136 F. Supp. at 124-25. Both cases involved libel suits by criminals serving life sentences. See *Urbano*, 41 F.R.D. at 356; *Mattheis*, 136 F. Supp. at 121.

[82] Brooks v. American Broad. Cos., 932 F.2d 495, 500 (6th Cir. 1991).

[83] Id. at 501.

[84] See id. at 500-01. The court found there might be state law to support the doctrine in the Sixth Circuit, but remanded the case because genuine issues of material fact remained to be resolved. See id. at 501-02.

[85] See, e.g., Dostert v. Washington Post Co., 531 F. Supp. 165, 168 n.11 (N.D. W. Va. 1982) (refusing to adopt Judge Weinfeld's reasoning in *Simmons* because "[i]n this Court's estimation, it is unlikely that the West Virginia Supreme Court of Appeals would adopt the *Simmons* court's holding that an article which is true and damaging in many respects can-

Federal court wariness of the incremental harm doctrine was appropriate in light of *Erie*. There was no justification for a federal court (which must sit as a state court while trying libel actions) to limit a libel plaintiff's recovery based on a doctrine lacking a state law ground, unless the limitation could be justified by some constitutional constraint. Without a state law leg to stand on, the weight of the incremental harm doctrine rested solely on the First Amendment. In *Masson v. New Yorker Magazine, Inc.*,[86] the Supreme Court cut the doctrine's First Amendment leg out from under it as well.

2. Masson v. New Yorker Magazine, Inc.

In *Masson*, the plaintiff brought a number of libel claims against the defendant for allegedly placing quotation marks around, and attributing to the plaintiff, words which were not the plaintiff's exact words, but were based on material obtained in an interview with the plaintiff.[87] The district court granted summary judgment for the defendants on all of the plaintiff's claims.[88] While affirming the district court's ruling, the Ninth Circuit, sua sponte, noted that one of the plaintiff's claims had been properly dismissed under the incremental harm doctrine,[89] even though neither party had raised nor relied on the doctrine.[90] Judge Kozinski dissented vigorously on this issue, arguing that the incremental harm doctrine had no basis in California state law and characterizing it as a "stillborn" doctrine because it had not yet been adopted by any federal court.[91] The case was appealed

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not be libelous as a matter of law, notwithstanding that parts of it may be knowingly false").

86 501 U.S. 496 (1991).

87 The defendant's reformulation of the plaintiff's words was, at times, quite extensive. See id. at 502-08 (comparing published statements with tape recordings of conversations on which published statements were based). For example, the defendant quoted the psychoanalyst plaintiff as saying: "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." Id. at 502. On the recordings, the plaintiff actually said:

> They liked 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.

Id. at 503.

88 See Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1407 (N.D. Cal. 1987) (holding "alleged defamatory statements [were] either nondefamatory, substantially true, or a rational interpretation of ambiguous conversations"), aff'd, 895 F.2d 1535 (9th Cir. 1989), rev'd, 501 U.S. 496 (1991).

89 See Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1541 (9th Cir. 1989) (applying incremental harm doctrine), rev'd, 501 U.S. 496 (1991).

90 See id. at 1565 (Kozinski, J., dissenting) (noting doctrine had not been mentioned by either party or adopted by any California state court).

91 See id. at 1566 (Kozinski, J., dissenting).

to the Supreme Court largely on other grounds,[92] but the Court paused to consider the Ninth Circuit's disposition with respect to the incremental harm issue.[93] The Court rejected the Ninth Circuit's use of the doctrine because the appellate court had not specified whether it was applying the doctrine under the authority of state law or constitutional law.[94] The Court emphasized the appellate court, on remand, could not apply the doctrine solely under authority of the First Amendment: "Here, we reject any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech. . . . As a question of state law, on the other hand, we are given no indication that California accepts this doctrine, though it remains free to do so."[95]

On remand, in an opinion written by Judge Kozinski, the Ninth Circuit firmly rejected the incremental harm doctrine:

> 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.[96]

Although the Ninth Circuit's conclusion on remand was certainly proper, the scope and impact of the Supreme Court's ruling in *Masson*, beyond its facts, need not be as dramatic as the Ninth Circuit interpreted it to be. In *Masson*, the Court merely concluded the incremental harm doctrine is not compelled by the First Amendment. The Court did not pass on the merits of the doctrine and did not suggest that the doctrine was inconsistent with the interests of the First Amendment. On the contrary, the Court indicated states are perfectly free to adopt the doctrine.

One way a state may adopt the doctrine is by interpreting the protections of its constitution more broadly than the Supreme Court interprets the First Amendment's protection. In such circumstances, a

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92 The Court was concerned mainly with determining whether "the requisite falsity [used to show knowledge of falsity or reckless disregard as to truth or falsity] inheres in the attribution of words to the petitioner which he did not speak." *Masson*, 501 U.S. at 513. The Court concluded that "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co.* v. *Sullivan*, and *Gertz* v. *Robert Welch, Inc.*, unless the alteration results in a material change in the meaning conveyed by the statement." Id. at 517 (citations omitted).

93 See id. at 523.

94 See id. ("[T]he Court of Appeals provided no indication whether it considered the incremental harm doctrine to be grounded in California law or the First Amendment.").

95 Id.

96 Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 899 (9th Cir. 1992).

state court may find that although the *federal* Constitution does not require the incremental harm doctrine, the *state* constitution does. A state court, however, need not go as far as finding that the state constitution requires adoption of the doctrine. Rather, it may find adoption of the doctrine is a desirable, as opposed to necessary, method of protecting federal or state constitutional principles. Furthermore, where it is reasonably clear that the highest court of a state would adopt one of these approaches, the *Erie* doctrine *requires* a federal court to adopt that approach. Clearly, although *Masson* took the federal constitutional wind out of the incremental harm doctrine's sails, it did not dash the doctrine upon the rocks; the doctrine itself remains seaworthy.

Nevertheless, the incremental harm doctrine has faced a further bar to judicial acceptance: a general confusion and lack of clarity as to its contours, domain, and justifications. This confusion is the result of the incremental harm doctrine's close association with its doppelgängers, the substantial truth and libel-proof plaintiff doctrines. Parts II.B. and II.C. discuss the problems courts and commentators have created by muddling the distinctions between the incremental harm doctrine and each of the other two doctrines.

B. Guilt By Association: The Incremental Harm Doctrine and the Sins of the Libel-Proof Plaintiff Doctrine

As discussed in Part I.B, the libel-proof plaintiff doctrine operates within a relatively narrow context. When applied within proper limits, the libel-proof plaintiff doctrine is a coherent, if controversial, doctrine. Criminal convictions are matters of public record, and one aspect of public conviction is a resulting impairment of the individual's reputation. Indeed, the denunciatory feature of public shame is an important element of the criminal law.[97] Given the public's interest in receiving reports of criminal activity, and the understandable (perhaps even desirable) impairment of the individual's reputation caused by his or her conviction,[98] it is reasonable to view summary judgment under the libel-proof plaintiff doctrine as a rational effort to

[97] See, e.g., Joshua Dressler, Understanding Criminal Law § 2.03[D] (2d ed. 1995) ("Denunciation . . . serves to stigmatize the offender for his offense. By denunciation society announces that the wrongdoer deserves to be punished, and expresses its feelings of hostility toward the offender.").

[98] See, e.g., Fendler v. Phoenix Newspapers, Inc., 636 P.2d 1257, 1262 (Ariz. Ct. App. 1981) ("Damage to reputation flows not from being in a prison facility per se, but from the fact that the person has been adjudged guilty of a crime by a court of law.").

protect First Amendment interests in the face of what society may well consider to be only nominal reputational interests.[99]

The libel-proof plaintiff doctrine, however, has been severely criticized, with the most pointed objections based on a concern for the reputational interests at stake and a rejection of the idea that one's good name could be so sullied as to be irredeemable.[100] Analysis of the incremental harm doctrine frequently was tagged to discussions of the libel-proof plaintiff doctrine, with some participants in the debate denying any difference existed between the two doctrines.[101] As a result, the incremental harm doctrine rarely has been discussed in its own right. Many of the courts distinguishing between the incremental harm and libel-proof plaintiff doctrines balked at the idea the incremental harm analysis could be applied properly outside the criminal context, generally reasoning a person's reputation could not be so tarnished by noncriminal behavior as to make the person a "defamation outlaw."[102] By focusing on these connotations of the term "libel-proof," courts frequently lost sight of the incremental harm concept

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99 Recall what is frequently at stake for a media defendant is not the eventual damage award, but the costs of mounting a defense to a libel action. See supra notes 1-5 and accompanying text.

100 See Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1568 (D.C. Cir. 1984) (rejecting incremental harm doctrine), vacated on other grounds, 477 U.S. 242 (1986). The *Anderson* court reasoned as follows:

> 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 a shame 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.

Id. at 1568; see also David Marder, Libel Proof Plaintiffs—Rabble Without a Cause, 67 B.U. L. Rev. 993 (1987):

> Even if [the libel-proof plaintiff doctrine] is limited to past convictions, what is to be done when a plaintiff's community does not know of the past convictions? What of the criminal who has been rehabilitated and wants to start a new life? These are questions that go to the very heart of our justice system and should not be decided by a lone judge at the summary judgment stage.

Id. at 1013 (footnote omitted).

101 See, e.g., Gage & Conniff, supra note 8, at 1 (noting although distinction between incremental harm and issue-specific branches of libel-proof plaintiff doctrine "can be a helpful framework, it tends to suggest a certain rigidity in applying the libel-proof plaintiff doctrine which is inconsistent with the inherently flexible, common sense approach of the doctrine").

102 The leading case in this regard is *Anderson*, which includes a scathing critique of the libel-proof plaintiff and incremental harm doctrines by Judge Scalia, who was concerned primarily with inequitable infringement of the plaintiff's reputational interests. See *Anderson*, 746 F.2d at 1568 ("[T]he 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 blow to the libel-proof plaintiff and incremental harm doctrines as a result of Judge Scalia's critique was dramatic. See Note, The Libel-Proof Plaintiff Doctrine, supra note 8, at 1912

itself.[103] It took years for the courts to abandon the inaccurate and confusing variations of the "libel-proof" name, but even this happy event did not occur before the incremental harm doctrine succumbed to a fresh identity crisis, as courts began to associate the incremental harm doctrine with the substantial truth doctrine.

C. Looking For Another Home: The Substantial Truth Doctrine and the Incremental Harm Doctrine

The substantial truth and incremental harm doctrines operate in starkly different manners. When a plaintiff's libel claim is dismissed on the ground of substantial truth, the dismissal is justified because the plaintiff has failed to establish a fundamental and essential element of her claim—she has failed to show the statement of which she complains is false. In contrast, a plaintiff whose claim is dismissed under the incremental harm doctrine *has* established a prima facie

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n.20 ("Before *Liberty Lobby*, virtually every court that had discussed the libel-proof plaintiff doctrine had approved of its existence.").

Sharon v. Time Inc., 575 F. Supp. 1162, 1171 (S.D.N.Y. 1983), provides a further interesting and unusual gloss on the courts' discomfort with considering a plaintiff's reputation to be severely damaged outside the criminal context. In *Sharon*, *Time* magazine published an article reporting the Kahan Commission, a group appointed by the State of Israel to investigate the murders of Palestinians at two refugee camps, had found former Israeli Minister of Defense Sharon indirectly responsible for the murders. See id. at 1164. Sharon sued, alleging the article was libelous because it accused him of knowingly permitting or encouraging murder. See id. at 1163. Time Inc. argued Sharon was rendered libel-proof with respect to the incidents as a result of the Kahan Commission's findings. See id. at 1168. The court refused to apply the libel-proof plaintiff doctrine, citing the difference between criminal and noncriminal moral standards:

> [T]he effects on Sharon's reputation of determinations based on such premises cannot as a matter of law be equated with the effects normally imputed to verdicts in criminal cases. Verdicts rendered in criminal cases, that have led courts to find some convicted defendants libel proof to further claims of wrongdoing, rest upon the application of conventional standards of legal responsibility, rather than the standards, rooted in Deuteronomy and in the special sufferings of the Jewish people, which informed the Commission's perspectives.

Id. at 1171. For a similar concern, see Buckley v. Littell, 539 F.2d 882, 888-89 (2d Cir. 1976) (discussing impropriety of equating controversial reputation within political circles with reputation based on criminal convictions).

[103] See Erin Daly, The Incremental Harm Doctrine: Is There Life After *Masson*?, 46 Ark. L. Rev. 371 (1993):

> The incremental harm doctrine, as . . . applied in the *Simmons* case, is usually considered the second of two prongs of the libel-proof plaintiff doctrine. The inclination to confuse the doctrines and to consider the incremental harm doctrine as merely an adjunct of the libel proof doctrine is probably responsible to a significant degree for the former's failure to find judicial acceptance. If courts recognized it as a distinct doctrine, compelling an entirely independent analysis, it would undoubtedly be more appealing.

Id. at 381 (footnote omitted).

case—the statements of which she complains *are* false and defamatory. The incremental harm doctrine, however, bars progress of her claim, not because the claim is invalid, but because the harm caused by the nonactionable portion of the defendant's publication dwarfs the harm caused by the potentially actionable statements, rendering fine distinctions of reputational harm judicially futile. This distinction between the incremental harm and substantial truth doctrines has become muddled as courts have confused the seemingly similar, but conceptually different, doctrines.

The incremental harm doctrine was first associated with a substantial truth analysis in *Liberty Lobby, Inc. v. Anderson*,[104] where Judge Scalia, writing for the D.C. Circuit, rejected the doctrine.[105] In *Anderson*, the plaintiffs challenged only portions of the article upon which they based their libel claim, and the defendants urged the court to affirm summary judgment in their favor on an incremental harm theory, although the defendants and the court labeled the theory "libel-proof."[106] The court rejected the libel-proof concept wholesale,[107] and did not analyze the inchoate difference in theory suggested by the incremental harm concept. However, the court did pause briefly to recognize the incoherence of the doctrine as it was presented to the court,[108] and to suggest the incremental harm idea might hold water under a different set of facts, namely those of the Burglary Example. The court stated "[t]here may be validity to the proposition that at some point the erroneous attribution of incremental evidence of a character flaw of a particular type which is in any event amply estab-

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104 746 F.2d 1563 (D.C. Cir. 1984), vacated on other grounds, 477 U.S. 242 (1986).

105 See id. at 1569. The case was heard before District Judge Harris and Circuit Judges Edwards and Scalia. Both Scalia and Edwards have dealt with the incremental harm doctrine in subsequent cases—Scalia in Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991), and Edwards in Moldea v. New York Times Co., 22 F.3d 310 (D.C. Cir. 1994).

106 See *Anderson*, 746 F.2d at 1568 (noting defendants' argument that "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").

107 See id. The court rejected the idea a plaintiff's reputation was "a monolith" or that it could ever be completely destroyed: "[W]e cannot envision how a court would go about determining that someone's reputation had already been 'irreparably' damaged .... Even the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential." Id. The court concluded the incremental harm doctrine was a "fundamentally bad idea" and refused "to assume that it is the law of the District of Columbia; nor is it part of federal constitutional law." Id. at 1569.

108 See id. at 1568 (arguing "[t]his 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").

lished by the facts is not derogatory."[109] The court added that the statement implicated in the Burglary Example would not be actionable, "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."[110] In this way, the court dismissed the incremental harm doctrine's faults by praising the substantial truth doctrine's virtues. This approach avoided discussion of the incremental harm doctrine on its own terms and further intertwined the two doctrines.

The D.C. Circuit's two opinions in *Moldea v. New York Times Co.*,[111] however, showed such confusion could resurrect the incremental harm doctrine, as well as extinguish it. In its first pass at the plaintiff's claim, the court confused the incremental harm and substantial truth doctrines and rejected the defendant's proffered incremental harm defense.[112] The court failed to recognize the logic behind the defendant's incremental harm defense and viewed it solely as a misapplication of the substantial truth doctrine: "We therefore must consider whether the Times can avoid potential liability on the ground that some of its factual claims are true."[113] The court reversed the district court's dismissal of the plaintiff's libel claim and remanded the case for further proceedings.[114]

On reconsideration, however, the court held the remaining two statements should be dismissed because they were "substantially true."[115] In reaching this conclusion, the court paused to discuss the incremental harm doctrine: "Application of the 'substantial truth' test when 'incremental harm' is not tolerated can be conceptually confusing. However, on reconsidering the instant dispute, we believe *Moldea (I)* read this court's rejection of the incremental harm rule much too broadly, and that *Anderson's* proscription is not applicable in this case."[116]

This, of course, is a confusing passage, because *Anderson* does not proscribe the use of substantial truth; rather, it rejects the incre-

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109 Id. at 1568 n.6.

110 Id.

111 In Moldea v. New York Times Co., 15 F.3d 1137, 1150-51 (D.C. Cir.) [hereinafter *Moldea (I)*], modified, 22 F.3d 310 (D.C. Cir. 1994), the court remanded two of the six statements in the plaintiff's libel claim for further proceedings. In its subsequent consideration, Moldea v. New York Times Co., 22 F.3d 310, 319-20 (D.C. Cir. 1994) [hereinafter *Moldea (II)*], the court dismissed the remaining two statements in the plaintiff's libel claim.

112 See *Moldea (I)*, 15 F.3d at 1149-50 (arguing D.C. Circuit had traditionally rejected incremental harm defense but generally accepted substantial harm doctrine).

113 Id. at 1149.

114 See id. at 1151.

115 *Moldea (II)*, 22 F.3d at 319.

116 Id.

mental harm doctrine. The *Moldea (II)* court therefore did not need to distinguish *Anderson* to apply the substantial truth doctrine, but did need to distinguish *Anderson* to apply the incremental harm doctrine.[117] The *Moldea (II)* court's analysis and reasoning, however, melded the incremental harm and substantial truth doctrines together, making unclear the basis or authority for the court's holding and further blurring the actual objection to the incremental harm doctrine. This intimate association and confusion between the two doctrines have plagued other courts as well.[118] As these cases show, separation of the incremental harm and substantial truth doctrines would help to bring greater clarity to the substantial truth domain, as well as contribute to the development of a coherent, clear incremental harm doctrine.

III
THE NEED FOR A SEPARATE DOCTRINE

As Parts I and II have shown, the incremental harm doctrine is conceptually distinct from the substantial truth and libel-proof plaintiff doctrines. Dismissal of a libel claim on the ground of substantial truth is justified because the statements of which the plaintiff complains are true, not false, and the plaintiff therefore has failed to establish an essential element of her libel claim—falsity. Dismissal of a libel claim on the ground the plaintiff is libel-proof is justified because the plaintiff's reputation has been so damaged prior to publication of the alleged libel that the plaintiff is incapable of demonstrating an essential element of her libel claim—the defamatory nature of the publication at issue. In contrast, a libel claim dismissed pursuant to the

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117 Moldea, who was an investigative journalist, based his libel complaint on a *New York Times* review of his book. See id. at 312. Moldea objected primarily to a statement in the review which claimed Moldea's book suffered from "too much sloppy journalism." See id. The two remaining challenged statements supported this assertion, but the *Moldea (II)* court found them nonactionable:

> The review offered at least six observations to support the charge of "sloppy journalism": the five challenged passages, plus the unchallenged claim that Moldea made several spelling errors. At least five of these observations could not be proved false at trial, either because they are true, are supported opinion, are reasonable interpretations, or are not challenged in this suit. Moldea is left with only the "sinister meeting" passage as a possible basis for his defamation claim, and this is a very weak basis indeed.

Id. at 318. In short, the court found the harm inflicted by the substantially true and nonactionable statements rendered Moldea's surviving defamation claim inconsequential.

118 See, e.g., Desnick v. American Broad. Cos., 44 F.3d 1345, 1350 (7th Cir. 1995) (describing incremental harm analysis and stating that "[t]he doctrine that we have been describing goes by the name of 'substantial truth'"); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1228-29 (7th Cir. 1993) (applying incremental harm analysis under name of "substantial truth").

incremental harm doctrine is *not* fatally flawed—the statements of which the plaintiff complains *are* false and *are* defamatory. However, dismissal under the incremental harm doctrine is justified when the reputational harm caused by the nonactionable portion of the publication greatly outweighs the reputational harm of the potentially actionable portion, because the fine determinations of reputational harm required are judicially futile: having decided we must allow a tempest, it is futile to punish a squall. This aspect of the incremental harm doctrine is the doctrine's special contribution to libel law and renders it distinct from both the substantial truth and libel-proof plaintiff doctrines. As Part II showed, however, recognition of the incremental harm doctrine's unique perspective has been hampered by conceptual confusion. This Part rebuts the strongest objections to the doctrine, describes the potential benefits of more widespread doctrinal application, and urges the state courts to adopt the incremental harm doctrine, thereby enabling removal of the conceptual confusion in which the doctrine is shrouded.

A. Clarifying the Field

As Parts I and II have shown, the incremental harm doctrine's conceptual kinship to the substantial truth and libel-proof plaintiff doctrines has led to significant confusion in this area of libel law. Cases like *Moldea v. New York Times Co.*[119] and *Desnick v. Capital Cities/ABC, Inc.*,[120] which apply an incremental harm analysis while purporting to apply the substantial truth doctrine, typify the confusion. The problem is particularly apparent in *Moldea (II)*,[121] where the court, while purporting to apply the substantial truth doctrine, conducted a distorted and confused analysis to arrive, in essence, at an incremental harm result.[122] One might argue clarification in this field is unnecessary, since the courts are naturally moving towards an incremental harm analysis (albeit under the name of substantial truth), and that courts have no great need to recognize the doctrine explicitly. There are, however, three major reasons to work towards an explicit clarification in this area. Clarification (1) is helpful in and of itself, particularly in the muddled arena of libel law; (2) allows the doctrine to be discussed on its own merits; and (3) permits the incremental harm doctrine to reach its fullest potential.

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119 793 F. Supp. 335 (D.D.C. 1992), aff'd, 22 F.3d 310 (D.C. Cir. 1994).

120 851 F. Supp. 303 (N.D. Ill. 1994), aff'd in part, rev'd in part sub nom. Desnick v. American Broad. Cos., 44 F.3d 1345 (7th Cir. 1995).

121 22 F.3d at 319.

122 See supra Part II.C.

First, clarity should be the hallmark of all adjudication. When judicial doctrines are defined clearly, plaintiffs and defendants alike can judge the merits of the claims and defenses against the likely outcome of actual litigation. To the extent the incremental harm doctrine is confused with substantial truth or the libel-proof plaintiff doctrine, and to the extent courts distort the substantial truth doctrine to achieve incremental harm results, the predictive value of libel jurisprudence is lost, encouraging litigation and increasing the costs for both libel plaintiffs and media defendants. Since the incremental harm doctrine continues to underlie some judicial decisions,[123] its explicit adoption and clarification will allow judges to grapple openly with the difficulties posed by the doctrine. Explicit consideration of the doctrine by courts will ensure the incremental harm doctrine, when applied, is applied in a manner fair to both plaintiffs and defendants.

Second, the tendency to confuse the incremental harm doctrine with the substantial truth and libel-proof plaintiff doctrines prevents discussion of the incremental harm doctrine on its own terms. Thus, in cases where the incremental harm doctrine might be applied appropriately, the doctrine is rebuffed based on strict adherence to the traditional contours of the substantial truth doctrine. Alternatively, the incremental harm doctrine is rejected due to characterizations and reservations emanating from the controversial libel-proof plaintiff doctrine. Doctrinal clarification would end this type of out-of-hand dismissal and would allow the doctrine to be discussed on its own merits.

Lastly, the incremental harm doctrine, if fully recognized and adopted, would apply to a realm of cases that cannot be reached with the substantial truth and libel-proof plaintiff doctrines—cases in which

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123 See, e.g., *Moldea (II)*, 22 F.3d at 319-20 (relying on incremental harm doctrine to find that "since the essentially derogatory implication of the statement . . . is correct, [the plaintiff] has not been libeled"); Desnick v. American Broad. Cos., Inc., 44 F.3d at 1350 (holding challenged portions of investigative television broadcast must cause incremental harm beyond unchallenged portions in libel suit); *Haynes*, 8 F.3d at 1228-29 (holding rule of "substantial truth" means damage to plaintiff's reputation is merely "incremental"); Crane v. Arizona Republic, 972 F.2d 1511, 1521 (9th Cir. 1992) (finding challenged comments "accurately convey the gist and substance" of allegations); Bressler v. Fortune Magazine, 971 F.2d 1226, 1229 & n.1 (6th Cir. 1992) (noting court should consider the "gist" of challenged statements); Pope v. Chronicle Publ'g Co., 891 F. Supp. 469, 474 (C.D. Ill. 1995) (holding that because challenged editorial was "substantially true," damage was incremental), aff'd, 95 F.3d 607 (7th Cir. 1996); Barker v. Huang, No. 90C-05-250, 1994 Del. Super. LEXIS 528, at *12-*13 (Del. Super. Ct. Oct. 26, 1994) (holding plaintiff's reputation could not be incrementally harmed by information already public); Brite Metal Treating, Inc. v. Schuler, No. 62360, 1993 WL 158256, at *18 (Ohio Ct. App. May 13, 1993) (noting no incremental harm could result if harm to reputation would not be changed by excusing defamatory portion of news article).

the plaintiff has shown that the defendant has in fact made false and defamatory statements, but where continuing the action will amount to nothing more than an attempt to harass or intimidate the media defendant. In these cases, the court's judicial resources are expended without any corresponding protection or rehabilitation of the plaintiff's reputation. Clarifying the doctrine will reduce the number of libel claims based on publications that are allowed by law despite potential damage to an individual's reputation.

B. The Rights of the Litigants

The incremental harm doctrine also has generated criticism on the ground it slights a plaintiff's interest in protecting his or her reputation. This objection is strengthened by the strong tradition of respect for reputational interests reflected in the common law of libel. The incremental harm doctrine's association with the libel-proof plaintiff doctrine has intensified these criticisms.

There are two potential responses to this criticism. First, the incremental harm doctrine applies best in situations where the harm encompassed by a plaintiff's claim with respect to a portion of a publication is relatively small when balanced against constitutional limitations, nonactionability, or truth of the rest of the publication. Under those circumstances, allowing the plaintiff to proceed with a libel suit in search of vindication for a minor reputation harm is an exercise in futility, fueled more, perhaps, by a desire to give the plaintiff a consolation prize than by an abiding interest in achieving justice. In short, the incremental harm doctrine does represent a loss to libel plaintiffs in that greater reputation harm is tolerated with the doctrine than without it. Libel plaintiffs with significant libel claims have little to fear, however, particularly if the doctrine is allowed to develop under its own name, with the courts eventually determining the appropriate doctrinal limits.

The second response, though unlikely to win many converts among the doctrine's detractors, is simply to say that the conditions of modern society have diminished the importance of reputational interests. The conditions that made reputation so important in the past—small communities in which most individuals were readily identifiable and their reputations were more or less known—have changed radically with the rise of the large metropolitan urban-suburban aggregations, within which most people lead relatively anonymous existences. In addition, the proliferation of informational sources and the general decline in public respect for the media reduces the likelihood that an insignificant falsehood will be heard and, if heard, believed. With the

rise in the sheer volume of litigation of all kinds, it may be time to wonder whether we can afford to pay the same respect to reputational interests that we have in the past.

Neither of these responses is likely to prove popular with those who sympathize with libel plaintiffs. Ideally, we would protect each individual's reputation scrupulously, but burgeoning court dockets and the rising cost of libel litigation to media defendants call for a certain measure of adjustment in our attitude towards the sanctity of reputational interests.

A related criticism might be advanced against the incremental harm doctrine. One might argue that the doctrine asks the judge to weigh the merits of the plaintiff's claim and determine whether the plaintiff's reputation has been damaged. In this sense, the incremental harm doctrine appears to be an intrusion into the role of the jury in the libel context. Traditionally, a jury has decided all the factual questions of harm to the plaintiff's reputation in reaching its verdict and determining damages. Though the incremental harm doctrine may intrude by casting the judge in a role traditionally left to the jury, such intrusion is not novel and should not by itself prove fatal to the doctrine's acceptance. The substantial truth and libel-proof plaintiff doctrines also allow the judge to make determinations affecting important aspects of the plaintiff's claim (e.g., falsity and defamatory content), which are usually left to the province of the jury.[124] Viewed in this light, the incremental harm doctrine is simply an extension of an already existing practice in libel law, and perhaps a harbinger of libel law's future.

C. The First Amendment

The First Amendment interests embodied in the incremental harm doctrine were readily accepted by the courts applying the doctrine until *Masson v. New Yorker Magazine, Inc.*[125] These interests are manifested in the great litigation costs that can be imposed by even an unsuccessful libel action. Such potential costs are likely to cow the media and unnecessarily inhibit media coverage of events and issues in the community. Although *Masson* made it clear the incremental harm doctrine is not *required* by any current constitutional standard, this does not mean that the doctrine cannot contribute to the protection of an important constitutional interest. Though the *Masson* decision proved fatal for the doctrine as a constitutionally compelled matter of federal law, the Supreme Court did note the

[124] See supra note 25 and accompanying text.
[125] 501 U.S. 496 (1991).

states remained free to adopt the incremental harm doctrine.[126] In the Seventh Circuit, where the incremental harm analysis had been applied, albeit under another name, *Masson* has not proved fatal to the doctrine's future.[127] There is no reason that free speech protections should be limited by federal court jurisprudence.[128] The states are free to take those interests into account when deciding whether to adopt the doctrine. Explicit adoption of the incremental harm doctrine will raise the litigation threshold for libel claims brought against media defendants; plaintiffs would no longer be able to bring libel claims simply because the defendant has made some small false and defamatory statements within the context of a publication imposing a greater, nonactionable harm upon the plaintiff's reputation. This would produce increased breathing room for the editorial discretion of the media.

D. Judicial Resources

The incremental harm doctrine allows a court to dismiss early in the proceedings libel actions that are unlikely to succeed in any meaningful way. As this Note has argued, current libel law can produce wasteful litigation, exemplified most dramatically, perhaps, by the routine reversal of libel suits which resulted in large jury awards at trial.[129] When a libel claim ultimately proves unsuccessful in this manner, it is more than a simple nullity. In bringing the action to eventual resolution in its favor, the media defendant will have incurred tremendous costs in both attorneys' fees and the intrusive nature of the discovery process. In these cases, where the incremental harm doctrine would be applicable but currently is not utilized, even if the plaintiff brings the action to a successful resolution in her favor, the ultimate

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126 See id. at 523 ("[W]e are given no indication that California accepts this doctrine, though it remains free to do so.").

127 The *Desnick* court applied the incremental harm doctrine after it noted that the Supreme Court's rejection of any constitutional requirement did not bar the states from adopting the doctrine. See Desnick v. Capital Cities/ABC, Inc., 851 F. Supp. 303, 312 (N.D. Ill. 1994), aff'd in part, rev'd in part sub nom. Desnick v. American Broad. Cos., 44 F.3d 1345 (7th Cir. 1995) (citing *Haynes*, 8 F.3d at 1222).

128 See, e.g., Charles N. Davis & Paul H. Gates, Jr., Superseding the Federal Constitution: The "New Federalism," State Constitutional Supremacy and First Amendment Jurisprudence, Comm. & L., Mar. 1995, at 27, 30-42 (describing impact of expansion of state constitutional protection of expression on libel law).

129 See, e.g., James C. Goodale, Has the Press Lost Its Nerve?, Nieman Reports, June 22, 1997, available in 1997 WL 15951312 (noting Libel Defense Resource Center study indicating appellants succeed in reducing or reversing libel judgments in 78 percent of cases). For anecdotal examples of the futility of litigating libel claims ultimately bound to fail, see supra notes 1-5 and accompanying text. For a more theoretical discussion of the phenomena, see Goodale, supra.

goals of libel law are not served: the plaintiff's reputation has not been protected, nor could it be, and even though a portion of the publication proved libelous, the plaintiff's reputation already will be sullied by the publication's nonactionable content. If the defendant had not included the statements ultimately found libelous, the damages to the plaintiff's reputation would not have differed significantly. The end result is that media actors, fearful of crossing the libel line, will draw far back behind it, choosing not to publish stories that, even under existing doctrine, would not prove libelous. It is a waste of judicial resources to allow actions that cannot protect a plaintiff's reputation to proceed, when the natural result is to chill the media.

CONCLUSION

It is not surprising that the incremental harm doctrine has proved more popular at the trial level than at the appellate level. Much of the doctrine's continuing vigor may be seen as trial court attempts to spare both the defendant *and* the plaintiff the pain and expense of ultimately fruitless litigation. However, because the incremental harm doctrine has been primarily a federal court phenomenon, and because the Supreme Court has made it clear that acceptance of the doctrine must be indicated by state courts, the future of the incremental harm doctrine lies in the courts of the states. Unless state courts indicate the incremental harm doctrine is both viable and desired, federal courts hearing libel suits may remain averse to applying the doctrine on their own. Those federal courts choosing to apply the incremental harm doctrine may well do so by further distorting both the incremental harm and the substantial truth doctrines. The states should adopt the incremental harm doctrine and allow it to develop in its own right, unburdened by confused associations with the libel-proof plaintiff and substantial truth doctrines.