The Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian Knot" Syndrome

Joseph H. King Jr.
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I. INTRODUCTION

The Polish poet and philosopher, Zbigniew Herbert, has written a spirited essay decrying the misplaced lessons often derived from the euhemerism of The Gordian Knot.1 The setting, according to Herbert’s apocryphal rendition,2 finds Alexander the Great in Gordian in Asia Minor, awaiting replacements from Greece for his uncertain campaign against the Persians.3 His soothsayer, Aristander, advised Alexander that it was time for a heroic awe-inspiring gesture to assure the troops that the coming slaughter was divinely inspired.4 Aristander settled on the war chariot of the legendary monarch of Thrace, King Midas, and more particularly upon the insoluble knot fastened to the chariot’s shaft.5 Aristander declared a prophecy: “He who unties the Gordian Knot will

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2. See id. at 34.
3. See id.
4. See id. at 35.
5. Id.
become the Master of Greece.”

Trouble was, of course, that the knot mocked Alexander’s efforts to untie it. “And then it happened. Alexander drew his sword and sliced the knot in half with a single stroke.”

The “Gordian knot” entered the metaphorical treasury as a symbol of “[a] cunning strategem, intellectual courage, the lightning-swift transformation of idea into action, or the supremacy of spirit over matter.” Not so fast, says Herbert:

Inconceivable blindness caused [Alexander] to introduce an element of force into the process of thinking. How could he overlook the fact that the untangling of knots and problems is not an athletic display but an intellectual process, and this assumes trial and error, helplessness in the face of the tangled material of the world, wonderful human uncertainty, and humble patience.

Defendants in defamation cases have sometimes argued that the reputation of a plaintiff has already become so sullied that the plaintiff is “libel proof,” or that the “incremental harm” caused by the defamatory statement was only minimal when compared to the nonactionable portions of the publication. Under either gambit, defendants urge that the trial judge dismiss the plaintiff’s defamation claim. What does the “Gordian knot” have to do with these doctrines? The libel-proof plaintiff and incremental harm doctrines represent, I believe, just the kind of simplistic expedients that Herbert condemns in his essay. Rather than undertake the painful process of working through the core elements, potential privileges, and damages rules that govern defamation claims, some courts and commentators have increasingly turned to the facile libel-proof plaintiff and incremental harm doctrines as comfortable

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6. Id. (capitalization omitted).
7. See id. at 36.
8. Id.
9. Id. at 38. On a more basic level, the “Gordian knot” (as compared to its solution) has come to represent a symbol for complex problems. For a sampling of such use of the term in the legal context, see, State v. Kinchen, 707 A.2d 1255, 1264 (Conn. 1998) (referring to “Gordian knot-like problem[s]”); 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 10.1, at 10-1 (3d ed. 2000) (discussing damages issues in defamation law and saying “the knots are Gordian”).
11. See, e.g., Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 299 (2d Cir. 1986) (“Guccione’s claim fails as a matter of law . . . because Guccione was ‘libel-proof’ with respect to an accusation of adultery.”).
12. See, e.g., Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227-29 (7th Cir. 1993) (“If falsehoods which do no incremental damage to the plaintiff’s reputation do not injure the only interest that the law of defamation protects.”).
expedients for bypassing established elemental principles of defamation law. And, more ominously, these classificatory doctrines neatly mask and serve to avoid the difficult societal conditions from which so-called libel-proof members of society came.

In the sections that follow I will briefly examine the problematic underpinnings of the libel-proof plaintiff and incremental harm doctrines. My purpose here is not to comprehensively survey the case law nationally or of any particular state. Thus, I will not attempt to retrace case-by-case the convoluted paths of all of the cases. I will then review some of the manifold arguments that have been advanced in support of the doctrines, as well as various critical appraisals of the doctrines. I will next explain my thesis that the doctrines be eliminated from the defamation nomenclature.

My opposition to the libel-proof and incremental harm doctrines, as discrete defenses to defamation claims, should not be interpreted as a lack of sympathy for the goals commonly associated with the doctrines. Those goals, including the conservation of judicial resources and enhancing freedom of press and expression, have their place and I support them in principle. It is not the aims of the libel-proof plaintiff and incremental harm doctrines to which I object. Rather, it is the use of the libel-proof plaintiff and incremental harm doctrines by the courts to attempt to achieve their goals.

I object to the libel-proof plaintiff and incremental harm doctrines for two reasons. First, on an instrumental level, I oppose the doctrines because they bypass the recognized elements, damages rules, and privileges-defenses of defamation law, or at least operate independently of those established elemental principles. Far from rationalizing and streamlining the litigation process, I believe the doctrines add uncertainty and complexity to an area already overburdened with common law artifacts and modern complex constitutional overlays. Many cases ostensibly relying on the libel-proof plaintiff or incremental harm doctrines can be (and often, through an alternative holding, have been) better explained and rationalized on the basis of the recognized elements and privileges, without the need to invoke the libel-proof or incremental-harm lingo. The libel-proof plaintiff and incremental harm doctrines, by providing easy hooks with which the courts may kill a defamation case, preempt thoughtful analysis of the underlying issues of the nature of reputational harm, the effect of the plaintiff's preexisting

reputation on his claim, and the operation of causation and other elements. The libel-proof plaintiff and incremental harm doctrines do little more than jostle and obfuscate the elements of defamation law. I contend that defamation claims should be determined exclusively within the framework of the elements, damages rules, and privileges-defenses of defamation law. If those foundational components are in need of change, then that process should occur directly and thoughtfully, rather than obliquely through doctrinal expedients.

Secondly, on a different level, the libel-proof plaintiff doctrine and to some extent the incremental harm doctrine are based on faulty premises. Moreover, the effects of this specious reasoning are compounded by the way the doctrines operate. The doctrines depend on a view of an individual’s nature and reputation that is static rather than dynamic. They are also premised on a view of reputation that is monolithic rather than multifaceted. These premises are then applied in doctrines that operate in a binary and classificatory manner. Some plaintiffs are deemed to fall into a defamation untermenschen and are precluded from proceeding with their claims. Others are allowed to pursue theirs. The classificatory approach here is emblematic of a broader tendency to use “unworthiness” classifications as easy (and perhaps disingenuous) solvents for complex social problems, masking and thereby avoiding the felt need to address underlying causes. Classifying persons as libel-proof, or criminals, or unworthy poor, neatly resects their plight from the legal vista. These “Gordian knots” are cavalierly severed. But, like the brooms of the Sorcerer’s Apprentice, other knots will quickly take their place. And, we are no closer to real solutions for untying the gnarled twisted knots that have ensnared so many poor and imprisoned persons for so long. The doctrines also place our judges in a position they have usually assiduously avoided—that of deciding who is and who is not characteristically worthy of legal respect and protection from defamatory attack.

Hopefully, it is not too late to get these misbegotten genies back into their bottle. I realize that without the libel-proof plaintiff and incremental harm doctrinal expedients, the courts and counsel will have to wade into the elemental thickets that have ensnared many an unwary analyst. I also acknowledge that the scope of this Article leaves many,

14. “Untermenschen is the German word for inferior peoples,” also known as “groups beyond normal human concern,” and was applied by the Nazis to “non-Aryan people in Europe.” Joan Vogel, Biological Theories of Human Behavior: Admonitions of a Skeptic, 22 VT. L. REV. 425, 432 & n.36 (1997).
15. See STORIES FROM WALT DISNEY’S FANTASIA (1940).
perhaps most, of the questions of elemental law reform of defamation law to others or another day. One step at a time is acceptable here. As J. R. Lucas admonished, "the best is the enemy of the possible."16

II. ELUSIVE UNDERPINNINGS

A. Origins

Defamation is the tort theory that provides a civil remedy for communications that harm a victim's reputation. The required elements for a defamation claim are: (a) a statement or communication; (b) a defamatory meaning;17 (c) publication;18 (d) reference to the plaintiff;19 (e) causal connection between the defamatory statement and the harm to the plaintiff's reputation;20 (f) liability-supporting state of mind of the defendant with respect to the truth or falsity of the statement (at least on matters of public concern);21 (g) special damages when required (in some jurisdictions);22 (h) falsity;23 and (i) a statement of fact or one implying

17. See 1 SACK, supra note 9, § 2.4.1, at 2-8. A statement "is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977).
18. "Publication" is a term of art that means that the allegedly defamatory statement was communicated to at least one person (recipient) other than or in addition to the plaintiff. See Ball v. White, 143 N.W.2d 188, 190 (Mich. Ct. App. 1966).
20. See RESTATEMENT (SECOND) OF TORTS §§ 575, 622A cmt. b; 2 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 7.2(7), at 279, § 7.2(9), at 284 (2d ed. 1993) (referring to the requirement of "show[ing] that defamation is a but-for cause of reputational harm"); 1 SACK, supra note 9, § 10.5.3, at 10-44. This element is especially complex in defamation law. For example, to the extent that a plaintiff may, under applicable state and federal constitutional law, be entitled to presumed damages, the causal connection may, at least in some respects, be deemed established merely from the nature of the statement. In such circumstances and to that extent, the need for direct proof of causation may largely be obviated. The causation element is discussed later in Part III.B.2. See infra notes 190-269 and accompanying text.
22. See ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS § 2.1.4, at 66, § 8.3.2, at 488 (2d ed. 1994 & Supp. 1998). Special damages, for the purposes of this element, consist of something having pecuniary value. They must result from the reaction of recipients of the defamatory communication. Under the traditional rule, the fact that the plaintiff suffers emotional distress is alone not enough to satisfy this element, when required. See RESTATEMENT (SECOND) OF TORTS § 575 cmt. b.
"undisclosed defamatory facts" (rather than "pure" opinion). Moreover, even when all of the elements are established, recovery may be constitutionally limited to actual damages for matters of public concern, at least in the absence of proof of knowledge or reckless disregard.

Every potential defamation plaintiff brings with him or her a certain amount of reputational baggage that preexisted the publication of the alleged defamation. In addition to potentially mitigating damages, sometimes a plaintiff's preexisting reputation is deemed to have a more definitive effect on reputation. The idea that a plaintiff's reputation has already become sufficiently besmirched (at least on some matters) so that he or she should not be permitted to proceed further with a defamation claim has produced two doctrines. The first, which I will refer to here as the libel-proof plaintiff doctrine, has an open-universe

23. See 1 SACK, supra note 9, § 2.1.1, at 2-3; infra Part III.B.1 (discussing the burden of proof on the truth or falsity issue). The requirement that the plaintiff prove that the defamatory statement was false is constitutionally mandated, at least with respect to statements involving matters of public concern. See Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986).


26. See infra notes 230-41 and accompanying text.

27. See, e.g., 2 DOBBS, supra note 20, § 7.2(9), at 286; C. Robert Gage Jr. & Christopher P. Conniff, The Libel-Proof Plaintiff Doctrine, N.Y. L.J., Feb. 23, 1994, at 1; Kevin L. Kite, Note, Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine, 73 N.Y.U. L. REV. 529, 530 (1998); Eliot J. Katz, Annotation, Defamation: Who Is "Libel-Proof," 50 A.L.R. 4th 1257, 1259 (1986 & Supp. 2000). This doctrine is sometimes referred to as the "issue-specific" application or branch of the libel-proof plaintiff doctrine, a tendency begun by an influential law review note. See Note, The Libel-Proof Plaintiff Doctrine, 98 HARV. L. REV. 1909, 1910-12 (1985); see also James A. Hemphill, Note, Libel-Proof Plaintiffs and the Question of Injury, 71 TEX. L. REV. 401, 405-06 (1992); David Marder, Note, Libel Proof Plaintiffs—Rabble Without a Cause, 67 B.U. L. REV. 993, 999-1003 (1987). Hemphill notes that "[t]he term 'issue-specific' acknowledges that a libel suit necessarily involves the plaintiff's reputation regarding a specific issue." Hemphill, supra, at 406. But that terminology is confusing since both the libel-proof plaintiff and the incremental harm doctrines are most commonly limited in their application to prior reputational factors that relate to the same issue (thus, issue-specific) as in the alleged defamation. See Note, supra, at 1910-11. In fact, if anything, the incremental harm branch is probably more issue-specific than the libel-proof plaintiff doctrine, since it essentially depends on the extent of the overlapping of the impact from the actionable and nonactionable portions of the publication. Whereas, the libel-proof plaintiff doctrine may occasionally be applied broadly to situations in which the plaintiff's prior reputation and the alleged defamation may not be similar or issue-specific. See Ray v. Time, Inc., 452 F. Supp. 618, 622 (W.D. Tenn. 1976) (applying Tennessee law in barring a claim by the convicted assassin of Dr. Martin Luther King, Jr. in which he alleged that he was libeled by a statement referring to "him as a 'narcotics addict and peddler' and . . . robber" because the court found him to be libel-proof as a habitual criminal) (quoting the alleged libelous Time magazine article), aff'd, 582 F.2d 1280 (6th Cir. 1978); 2 DOBBS, supra note 20, § 7.2(9), at 288-89 (indicating some disagreement among authorities as to whether the doctrine should apply in

http://scholarlycommons.law.hofstra.edu/hlr/vol29/iss2/1
perspective in that it considers the entire reputational trail of the plaintiff that predated the defendant’s publication. This rule holds that in some circumstances the prior reputation of the plaintiff has already become so tarnished that, with respect to the imputation in the defendant’s statement, the plaintiff is libel-proof, and therefore a court should dismiss or at least ultimately deny his defamation claim. The origins of this Gothic doctrine are usually traced to the Second Circuit case of Cardillo v. Doubleday & Co., Inc. A book entitled My Life in the Mafia suggested that the plaintiff had “taken part in various criminal enterprises.” But the plaintiff denied participating in a robbery mentioned, fixing a race (for which he was indicted but not tried), and

...
participating in numerous other crimes referred to in the book. The court of appeals nevertheless held that "as a matter of law," the plaintiff was "libel-proof,... 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." The court noted that the plaintiff was serving twenty-one years for federal felonies related to stolen securities and bail jumping, conspiracy, and interstate transportation of stolen securities. He was previously convicted of receiving stolen property, admitted associating with the author of the book, and there was evidence indicating that he frequented an establishment where the mob hung out.

The origin of the libel-proof plaintiff doctrine in Cardillo was an inauspicious and precarious beginning. First, to support its rule, the court relied on two federal cases applying a federal in forma pauperis statute where the issue was whether the plaintiff should be precluded from proceeding under the statute because the claim was deemed frivolous. That statute was not involved in Cardillo. Second, the court did not undertake to address state law in the context of its libel-proof plaintiff holding, despite the fact that state law would presumably govern the plaintiff's common law libel claim. Third, the court's evaluation of the facts that supposedly rendered the plaintiff libel-proof seemed superficial and conclusory. And finally, the court also apparently rested

32. See id. at 640.
33. Id. at 639.
34. See id. at 640.
35. See id.
37. See Cardillo, 518 F.2d at 639-40; see also Serra, supra note 28, at 2-5 (discussing the court's use of precedent in Cardillo); Kite, supra note 27, at 549 & n.81 (commenting that the doctrine was born in federal court and "rooted only shallowly in state law" because the court relied on cases which in turn dealt with the narrow question of the operation of the federal in forma pauperis statute). The Cardillo court relied on two federal district court decisions addressing the in forma pauperis statute. See Urbano v. Sondern, 41 F.R.D. 355, 357 (D. Conn.), aff'd, 370 F.2d 13 (2d Cir. 1966); Mattheis v. Hoyt, 136 F. Supp. 119, 124-25 (W.D. Mich. 1955). Interestingly, in affirming the lower court decision in Urbano, the court of appeals held on alternative grounds that the action would also be precluded under the falsity element and under the privilege to report on official proceedings. See Urbano v. Sondern, 370 F.2d 13, 14 (2d Cir. 1966). Thus, the analysis later relied on in support of the libel-proof plaintiff doctrine was not really needed in Urbano.
38. See Kite, supra note, 27 at 549 & n.81 (noting that the Cardillo holding "was rooted only shallowly in state law").
39. The court did summarize negative details in the plaintiff's background. See Cardillo, 518 F.2d at 640; see also supra notes 34-35 and accompanying text. But it seemed to apply the libel-proof rule in conclusory fashion with little explanation. It simply held that the plaintiff's "record
its decision at least in part on a belief that there was a constitutional basis compelling adoption of the libel-proof plaintiff doctrine as a discrete rule.\(^9\) The Supreme Court, however, has since largely put that idea to rest.\(^{10}\)

The second doctrine (or branch), which I shall refer to here as the incremental harm doctrine,\(^{42}\) is similar to its libel-proof-plaintiff sibling, except that it operates within a narrower frame of reference.\(^{43}\) Basically, the incremental harm doctrine provides that if the potentially actionable parts of a publication do not add significantly to the adverse reputational impact beyond that attributable to the nonactionable portions of the same publication,\(^{44}\) then the defamation claim should, to that extent, be

and relationships or associations" led the court to divine that it could not "envisage any jury awarding, or court sustaining, an award under any circumstances for more than a few cents' damages, even if" the plaintiff were to otherwise prevail on the merits. Cardillo, 518 F.2d at 640.

40. See Cardillo, 518 F.2d at 639. The court stated that the plaintiff's life as a habitual criminal "warrant[ed] dismissal of the ease, involving as it does First Amendment considerations." Id.

41. See discussion infra Part II.B.1.

42. The incremental harm language seems to be the commonly accepted terminology. See Erin Daly, The Incremental Harm Doctrine: Is There Life After Masson?, 46 ARK. L. REV. 371, 372 (1993); Hemphill, supra note 27, at 406; Kite, supra note 27, at 530; Pey3ton, supra note 13, at 185. Some courts misuse the incremental harm terminology when they apparently mean to refer to the libel-proof plaintiff doctrine. See, e.g., Sargeant v. Serrani, 866 F. Supp. 657, 666 & n.13 (D. Conn. 1994) (applying Connecticut law in rejecting the libel-proof plaintiff doctrine, but misnaming it the incremental harm theory); Lee v. City of Rochester, 663 N.Y.S.2d 738, 749 n.l (Sup. Ct. 1997) (using incremental harm terminology to refer to the libel-proof plaintiff rule); Maguire v. Journal Sentinel, Inc., 605 N.W.2d 881, 888 (Wis. Ct. App. 1999) (rejecting the libel-proof plaintiff doctrine, but misnaming it the incremental harm theory), appeal denied, 2000 WII 36, 612 N.W.2d 732.

43. See Note, supra note 27, at 1912 (stating that "[t]he incremental [harm] doctrine involves an examination of the challenged communication rather than a finding of a previously damaged reputation"); Hemphill, supra note 27, at 406.

44. There may be a variation on the incremental harm theme, where the same defendant makes nonactionable statements, but in a different publication. Some authorities seem to assume that for some reason the doctrine would not operate in that context. See Mardar, supra note 27, at 1013-14. It would seem, however, that the doctrine still might operate there, but it would be more of a hybrid of the two doctrines. See Barker v. Huang, No. CIV.A.90C-05-250, 1994 WL 682566, at *5 (Del. Super. Ct. Oct. 28, 1994). Here there were separate statements at different times, but by the same defendant—statements made in a prior case that were not actionable, and a subsequent statement made to a newspaper reporter. See id. at *3. The court seemed to distinguish the instant case from the typical incremental harm scenario because the two statements occurred at different times (and in different publications). See id. at *5. Then, the court articulated its decision in favor of the defendant in terms of causation principles, saying: "There simply is no evidence of additional harm done to Barker by Huang's statement at that time." Id. Therefore, there was no actionable claim because the court found that the defendant's allegedly actionable "statement caused no additional injury." Id. On the question of the effect of prior publication of a defamatory statement, see infra note 235 and accompanying text.
dismissed or at least ultimately denied. Thus, if nonactionable statements were capable of causing most of the reputational harm, so that the negative effect of the actionable statements is (and here the terminology varies) "minimal," "minor," "negligible," "incremental," "nominal [and] incremental," "far less," "nominal or nonexistent," or of "no significant damage," then the case should be dismissed. One writer summarized the doctrine with the metaphor that "having decided we must allow a tempest, it is futile to punish a squall." Judge Preska offers the most insightful judicial guidance on deciding whether to apply the doctrine, stating: "Since this analysis is

45. For background on the incremental harm doctrine, see 1 SACK, supra note 9, § 2.4.18, at 2-62 to 2-68 (describing "the principle that where true statements accompany a false one and the 'incremental harm' done by the falsity is negligible, recovery is . . . forbidden"); Thomas B. Kelley & Steven D. Zansberg, Why Courts Should Require Plaintiffs Claiming Losses to Prove That Falsity Caused Them, COMM. LAW., Fall 1997, at 8, 9; Serra, supra note 28, at 2 (stating that "[i]f the effect of nonactionable statements outweighs the damage done by the challenged statements, then the action is dismissed on the basis that the challenged statements could not have done the plaintiff any further harm"); Note, supra note 27, at 1909 (stating that it "bars libel awards when an article or broadcast contains highly damaging statements, but the plaintiff challenges only a minor assertion in the communication as false and defamatory"); Jay Framson, Comment, The First Cut Is the Deepest, but the Second May Be Actionable: Masson v. New Yorker Magazine, Inc. and the Incremental Harm Doctrine, 25 LOY. L.A. L. REV. 1483, 1484 (1992) (describing the doctrine as "hold[ing] that a plaintiff is not entitled to burden a defendant with a libel suit if the statements challenged . . . damage his or her reputation far less than the unchallenged or nonactionable portion"); Hemphill, supra note 27, at 406 (stating that "[i]f the challenged statement harms the plaintiff's reputation far less than the true (or nonactionable) portions of the statement, the incremental harm branch may be applied"); Kite, supra note 27, at 542-43 (stating that where "a significant portion of" challenged statements in a defendant's publication is "nonactionable," and "the remaining potentially actionable statements do no incremental harm to the plaintiff's reputation in light of the harm caused by the nonactionable statements," the court will dismiss); Marder, supra note 27, at 993 (describing doctrine where "a judge may dismiss the action when nonactionable statements within an article or group of statements challenged damage a plaintiff's reputation to such a degree that the incremental harm caused by the actionable statements is only minimal"); Peyton, supra note 13, at 183 (stating that under the doctrine "[i]f the court finds that the actionable statements cause the plaintiff no appreciable harm beyond that caused by the non-actionable statements, the court may dismiss the case"); Katz, supra note 27, at 1259.

46. Marder, supra note 27, at 993; Peyton, supra note 13, at 192.

47. Note, supra note 27, at 1909.

48. 1 SACK, supra note 9, § 2.4.18, at 2-63.


50. Kelley & Zansberg, supra note 45, at 9 (quoting Herbert v. Lando, 781 F.2d 298, 310 (2d Cir. 1986)).

51. Hemphill, supra note 27, at 406.


53. Daly, supra note 42, at 372.

54. Kite, supra note 27, at 558.
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addressed to increments, it is appropriate to examine questions of kind, degree and nature."

_Simmons Ford, Inc. v. Consumers Union of United States, Inc._ is usually credited with starting the incremental harm doctrine. A _Consumer Reports_ article had stated that an electric-powered vehicle failed to meet mandatory federal regulations, when in fact those supposedly mandatory regulations described in the article were not in existence at the relevant time. In an alternative holding, the court held that the incorrect statement in the defendant’s article regarding the vehicle’s status with respect to federal safety standards was not actionable. The court reasoned that the adverse effect of the inaccurate portion of the article could not harm the plaintiffs’ reputations beyond the harm already caused by the remainder of the article, “given the abysmal performance and safety evaluations detailed in the [nonactionable portions of the] article.”

The libel-proof plaintiff and incremental harm doctrines are similar in the sense that they both treat reputation as static and monolithic. The only difference is a functional one relating to the frame of reference considered in determining the preexisting nature of the plaintiff’s reputational interest. And indeed, the two doctrines may even “arise in the same case.”

55. Jewell v. NYP Holdings, Inc., 23 F. Supp. 2d 348, 395 (S.D.N.Y. 1998) (applying New York law in recognizing the doctrine in principle, but finding it inapplicable to the instant case). In deciding not to apply the doctrine in the instant case, the court relied on the difference between the otherwise actionable and nonactionable statements with respect to their source (attributable to law enforcement sources versus other sources), their number (eleven versus a total of thirty-three), and their nature (characterizing the plaintiff as responsible for the bombing versus being merely a “prime” suspect). _See id._ at 396.


57. _See Note, supra note 27, at 1913. Although the incremental harm doctrine is said to have originated in Simmons Ford, Inc. v. Consumers Union of United States, Inc., 516 F. Supp. 742 (S.D.N.Y. 1981), it was apparently given its current nomenclature by the above 1985 Note. The terminology was reportedly first used in an appellate opinion by Judge Irving R. Kaufman in Herbert v. Lando, 781 F.2d 298 (2d Cir. 1986), who referred to it as “the incremental harm branch of the libel-proof doctrine.” _Id._ at 310; _see also_ 1 SACK, supra note 9, § 2.4.18, at 2-65 & n.290.


59. The court’s primary ground for granting summary judgment for the defendant was the plaintiff’s failure to satisfy the state of mind element—in other words, a failure to prove that the defendant acted with the required level of fault with respect to the truth or falsity of the statement in question. _See id._ at 743-44, 747.

60. _See id._ at 747.

61. _Id._ at 750.

62. _See Daly, supra note 42, at 387-89.

63. _Note, supra note 27, at 1924.
Both doctrines may be attractive to judges and defense attorneys. They offer a way of short-circuiting the litigation process by summary judgment or dismissal. Another advantage of these doctrines over merely mitigating damages is that dismissal will usually preclude nominal, presumed, punitive, and mental distress damages for defamation based on the statement that is the subject of the dismissal. Courts can simply hold as a matter of law that the plaintiff is libel-proof and end it. That short-circuiting also may obviate the need to parse through the details of a lengthy publication, examining each part for its defamatory potential and falsity, and deciding whether it was made with the required fault-based state of mind. Another appeal of these doctrines may also stem from the fact that they typically arise in a claim by a person with a criminal record, sometimes a prison inmate. Prisoners are obvious candidates for the libel-proof classification. They are marginalized citizens. They may also be perceived as posing a special threat of litigation given their sheer numbers and free time.

For a number of years, the libel-proof plaintiff and incremental harm doctrines have been confusing works-in-progress, mostly for the federal courts, bereft of sound jurisprudential underpinnings. They have hung out there twisting in the rarified air, emanating somewhere between Erie-educated guesses on the future direction of state law, stealthy expressions of federal common law, and (especially early in the doctrines’ evolutions) First Amendment rules of constitutional law (or at least substantive torts principles influenced by First Amendment sensitivities). Despite their tentative beginnings, the doctrines have slowly begun garnering more widespread support. Thus, the libel-proof plaintiff doctrine has become more representative of existing state law in some jurisdictions, and has been approved by a number of decisions in

64. See infra notes 213-18 and accompanying text.
65. See Kite, supra note 27, at 538; Weaver, supra note 27, at 422 (referring to criminal convictions as “a tangible benchmark of prior damage to reputation”).
66. See infra notes 303-04 and accompanying text.
67. See Urbano v. Sondem, 41 F.R.D. 355, 358 (D. Conn.) (noting a variety of possible motivations for some prisoners to bring lawsuits, including “[a] desire to harass officials, a hope for a quick windfall by way of nuisance settlement, or simply a discovery of a new way to pass the monotonous hours of incarceration”), aff’d, 370 F.2d 13 (2d Cir. 1966).
69. See Serra, supra note 28, at 8 (discussing the application of state substantive law in federal courts exercising diversity jurisdiction).
70. See discussion infra Part II.B.1.
both state and federal court (applying state law). The doctrine has also been supported by a number of commentators, but opposed by others.

71. See, e.g., Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1074 (5th Cir. 1987) (applying Louisiana law in seeming to approve the doctrine in principle, but then arguably narrowing its potential effect by holding that a jury question was presented as to whether the plaintiffs were in fact libel-proof); Guccone v. Hustler Magazine, Inc., 809 F.2d 298, 299, 303-04 (2d Cir. 1986) (applying New York law in noting that with respect to the statement that the plaintiff "is married and also has a live-in girlfriend, Kathy Keeton," the plaintiff's "reputation regarding adultery rendered him libel-proof on [that] subject") (quoting a 1983 issue of Penthouse); Prester & Gamble Co. v. Amway Corp., 80 F. Supp. 2d 639, 662-63 (S.D. Tex. 1999) (applying Texas law in approving the doctrine in principle, but finding that defendant did not prove that plaintiff was libel-proof here); Cerasani v. Sony Corp., 991 F. Supp. 343, 354 (S.D.N.Y. 1998) (applying New York law in holding that the plaintiff who sued for allegedly being depicted in the movie Donnie Brasco as having committed brutal beatings and vicious murders was "libel-proof as a matter of law"); Partington v. Bugliosi, 825 F. Supp. 906, 914-15 (D. Haw. 1993) (applying Hawaii law in implicitly approving the libel-proof plaintiff doctrine in principle, but finding that in the instant case the defendants had not shown that the plaintiff's reputation had been reduced to a level where he was libel-proof), aff'd, 55 F.3d 1147 (9th Cir. 1995); Wynberg v. Nat'l Enquirer, Inc., 564 F. Supp. 924, 928 (C.D. Cal. 1982) (applying California law in stating that "[a]n 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") (citing Cardillo v. Doubleday & Co., Inc., 518 F.2d 638, 639 (2d Cir. 1975)); Ray v. United States Dep't of Justice, 505 F. Supp. 724, 726 (E.D. Mo.) (applying the doctrine in granting a motion to dismiss), aff'd on other grounds, 688 F.2d 603 (8th Cir. 1981); Ray v. Time, Inc., 452 F. Supp. 618, 622 (W.D. Tenn. 1976) (applying Tennessee law in holding that the plaintiff who alleged that he was libeled by a statement referring to "him as a narcotics addict and peddler and . . . robber" was libel-proof as a habitual criminal) (quoting the alleged libelous Time article), aff'd, 582 F.2d 1280 (6th Cir. 1978); Cofield v. Advertising Co., 486 So. 2d 434, 435 ( Ala. 1986) (applying the doctrine and holding that the defendant was entitled to summary disposition); Jackson v. Longcope, 476 N.E.2d 167, 621 (Mass. 1985); Kevorian v. Am. Med. Ass'n, 602 N.W.2d 233, 239 (Mich. Ct. App. 1999) (stating that, with respect to the issue of assisted suicide, plaintiff is virtually 'libel-proof') (citing Brooks v. Am. Broad. Cos., 932 F.2d 495, 500 (6th Cir. 1991)); DaWitt v. Outlet Broad., Inc., No. C.A. NC 98-0196, 1999 WL 1334932, at *5 (R.I. Super. Ct. Dec. 17, 1999) (applying the doctrine); Coker v. Sundquist, No. 01A01-9805-BC-00318, 1998 WL 736655, at *4 (Tenn. Ct. App. Oct. 23, 1998) (stating "that the claimant is a convicted murderer worthy of death[. . . .] and therefore, neither his reputation nor his character could be impaired by the [alleged] language," and therefore was deemed libel-proof as a matter of law); Rogers v. Jackson Sun Newspaper, No. CIV.A.C-94-301, 1995 WL 383000, at *1 (Tenn. Cir. Ct. Jan. 30, 1995) (holding that the "[p]laintiff's reputation in the community at the time of the article's publication was so severely tarnished, he is 'libel-proof'); McBride v. New Brunfels Herald-Zeitung, 894 S.W.2d 6, 10-11 (Tex. App. 1994) (recognizing the doctrine in principle, but finding it not applicable because there was "no evidence of the publicity," and the plaintiff's "criminal history [was not] so extreme that no reasonable person could find further damage to his reputation by the false accusation of a new robbery"); Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512, 518 (Tex. App. 1987) (holding that the plaintiff was "'libel-proof' as to that area of his character touched by the challenged communications")).

72. See, e.g., Gage Jr. & Conniff, supra note 27; Note, supra note 27, at 1926; Hemphill, supra note 27, at 408.

73. See, e.g., Magnetti, supra note 28, at 336, 345; Marder, supra note 27, at 994 (rejecting the doctrines as "an unjustified over-expansion of [F]irst [A]mendment protections at the expense of victims of conscious and malicious falsehoods"); Peyton, supra note 13, at 180 (rejecting the doctrine on due process and equal protection grounds).
Nevertheless, the libel-proof plaintiff doctrine continues to engender ambivalence in the courts. Some courts caution or imply that the libel-proof plaintiff doctrine is a narrow one. Others, while ostensibly approving the doctrine in principle, nevertheless find it inapplicable in the instant case. Still others take pains to avoid deciding whether or not

74. See, e.g., Zerangue, 814 F.2d at 1074 (applying Louisiana law in seeming to approve the libel-proof plaintiff doctrine in principle, but then arguably narrowing its potential effect by holding that a jury question was presented as to whether the plaintiffs were in fact libel-proof); Marcone v. Penthouse Int’l Magazine For Men, 754 F.2d 1072, 1079 (3d Cir. 1985) (applying Pennsylvania law in stating that the doctrine was a narrow one and refusing to apply it here, and noting that while the evidence suggested that the plaintiff’s “reputation was sullied before the article was published,” the court could not “say as a matter of law that [the plaintiff] was libel proof”); Broome v. Biondi, No. 96 CIV. 0805 RLC., 1997 WL 83295, at *4 (S.D.N.Y. Feb. 10, 1997) (applying New York law in recognizing the doctrine in principle, but refusing to apply it to the instant facts); Finklea, 742 S.W.2d at 516 (noting “that the doctrine should have only a limited application which presents the difficult problem of defining its scope,” that “[i]f there are few so impure that cannot be traduced,” and “[a]lthough a person’s general reputation may be so bad as to render him libel proof on all matters, ordinarily even the public outsider’s remaining good reputation is entitled to protection”); Langston v. Eagle Publ’g Co., 719 S.W.2d 612, 623 (Tex. App. 1986) (implying a limited scope for the doctrine by giving Adolph Hitler or Charles Manson or persons “with an equally despicable reputation” as examples of libel-proof persons); Note, supra note 27, at 1924 (cautioning that the doctrine should apply “[o]nly if a judge finds that the challenged statement describes activity neither significantly different in degree nor altogether different in kind from the plaintiff’s reputed activities”). In Zerangue, the court noted that the jury would decide whether the plaintiff was libel-proof, and would have to consider whether, as the plaintiffs contended, “passage of six years had allowed them to improve their standing.” Zerangue, 814 F.2d at 1074. Moreover, the court noted that whether the plaintiffs had improved their standing involved “credibility questions” for which summary judgment was not appropriate. See id. Additionally, it has sometimes been suggested that evidence that the plaintiff’s reputation has been diminished as a result of prior publications should not be sufficient to support the libel-proof plaintiff doctrine. See Marder, supra note 27, at 1014 (noting that “[f]alse allegations in other articles are insufficient to render a plaintiff libel proof”); infra note 235.

75. See Zerangue, 814 F.2d at 1074 (applying Louisiana law in seeming to approve the libel-proof plaintiff doctrine in principle, but then narrowing its potential effect by holding that a jury question was presented as to whether plaintiffs were in fact libel-proof, and specifically stating that the jury would have to consider whether, as plaintiffs contended, “the passage of six years had allowed them to improve their standing,” a question that involved “credibility questions” for which summary judgment was not appropriate); Froster & Gamble Co., 80 F. Supp. 2d at 663 (applying Texas law in approving the doctrine in principle, but finding that the defendant did not prove that the plaintiff was libel-proof here); Partington, 825 F. Supp. at 915 & n.7 (applying Hawaii law in implyingly approving the libel-proof plaintiff doctrine in principle, but finding that in the instant case the defendants had not shown that the plaintiff’s reputation had been reduced to a level where he was libel-proof); McBride, 894 S.W.2d at 10-11 (finding the doctrine inapplicable because there was no evidence of publicity of the plaintiff’s reputation and the court could not find “his criminal history . . . so extreme that no reasonable person could find further damage to his reputation by the false accusation of a new robbery”); cf. Brooks v. Am. Broad. Cos., 932 F.2d 495, 502 (6th Cir. 1991) (applying Ohio law in holding, without approving or disapproving the libel-proof doctrine in principle, that the doctrine was not applicable unless prior dissemination reached the same audience as the allegedly defamatory statement, and was coterminal with the alleged defamation, noting that “no popular nationwide television program or other publicity had portrayed [the plaintiff] as a
to adopt the doctrine even in principle.\(^7\)

Finally, some have explicitly rejected or refused to approve the doctrine.\(^7\)

The incremental harm doctrine has also slowly been gaining adherents in the courts,\(^7\) although some cases approving the doctrine have limited its application,\(^7\) and others have rejected the doctrine.\(^7\)

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\(^6\)See, e.g., Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069, 1072, 1080 (3d Cir. 1988) (applying New Jersey law); Marcone, 754 F.2d at 1079 (applying Pennsylvania law).

\(^7\)See Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1568 (D.C. Cir. 1984) (Scalia, J.) (applying District of Columbia law in stating that "we cannot envision how a court would go about determining that someone's reputation had already been 'irreparably' damaged—i.e., that no new reader could be reached by the freshest libel"), vacated on other grounds, 477 U.S. 242 (1986); Sargeant v. Serrani, 866 F. Supp. 657, 666 & n.13 (D. Conn. 1994) (applying Connecticut law in rejecting the libel-proof plaintiff doctrine, but misnaming it the incremental harm theory); Maguire v. Journal Sentinel, Inc., 605 N.W.2d 881, 888 (Wis. Ct. App. 1999) (rejecting the libel-proof plaintiff doctrine, although misnaming it the incremental harm theory), appeal denied, 2000 WI 36, 612 N.W.2d 732.

\(^76\) See Jewell v. NYP Holdings, Inc., 23 F. Supp. 2d 348, 390-96 (S.D.N.Y. 1998) (applying New York law in recognizing the doctrine in principle, but finding it inapplicable to the instant case); Jones v. Globe Int'l, Inc., No. 3:94-CV-102, 1995 WL 819177, at *9 (D. Conn. Sept. 26, 1995) (applying Connecticut law); Desnick v. Capital Cities/ABC, Inc., 851 F. Supp. 203, 312-13 (N.D. Ill. 1994) (applying Illinois law in stating that since "significantly greater opprobrium" would not result from the" allegedly false portions of the publication, the defamation count was dismissed), aff'd in part and rev'd in part sub nom. Desnick v. Am Broad. Cos., 44 F.3d 1345, 1351 (7th Cir. 1995) (refusing to apply the doctrine at that stage of the proceedings); Tonnessen v. Denver Publ'g Co., 5 P.3d 959, 965 (Colo. Ct. App. 2000) (approving and defining the incremental harm doctrine to mean that "when unchallenged or nonactionable parts of a particular publication are damaging, another statement, though maliciously false, may not be actionable because it causes no harm beyond the harm caused by the remainder of the publication"); Gannett Co. v. Re, 496 A.2d 553, 558 (Del. 1985) (recognizing the incremental harm doctrine in principle, but finding it inapplicable because at least a jury question was presented as to whether the allegedly actionable statement "caused the real damage to [the plaintiff's] reputation"); Brite Metal Treating, Inc. v. Schuler, No. 62360, 1993 WL 158256, at *6 (Ohio Ct. App. May 13, 1993) (approving the incremental harm doctrine). For factual variations on the incremental harm theme, see infra Part III.B.3.

\(^79\) In Tonnessen, a newspaper was sued for reporting the in-court statements by the plaintiff's former wife accusing him of marital rape, and reporting out-of-court statements by the wife's sister to the effect that the wife had told the sister essentially that the plaintiff had forced his wife to have sex with him. See Tonnessen, 5 P.3d at 962, 964. Reporting the wife's accusations were privileged under the privilege to report official proceedings, the court held that the report of the sister's remarks, even if not privileged, was subject to the incremental harm doctrine and therefore not actionable. See id. at 964-65. The court reasoned that "[i]f [the newspaper] was genuinely interested in ensuring that the plaintiff's reputation was not marital rape, the plaintiff would have had no difficulty in objecting to adoption of the doctrine even in principle."
the most notable opinion opposing the incremental harm doctrine, then Judge Antonin Scalia called it "a fundamentally bad idea." Commentators also disagree on the wisdom of the incremental harm doctrine, with a number of commentators supporting the doctrine, and a few opposing it.

B. Groping for a Rationale

A number of rationales have been posited in an attempt to justify the libel-proof plaintiff and incremental harm doctrines. None of them seem up to the task. These ostensible rationales for the doctrines are summarized below.

1. First Amendment

Early in their development, the doctrines were variously tied to a constitutional foundation in the First Amendment, aimed at protecting freedom of expression. Indeed, the early federal cases where the doctrines originated seemed to assume the doctrines were mandated by the First Amendment. The view of the doctrines as directly compelled

the sister's words about what the wife had told her did not do more than convey the same allegation contained in the privileged, non-actionable statement.

Id.

80. See Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 899 (9th Cir. 1992) (refusing to adopt the incremental harm doctrine as a matter of California law, and viewing the Supreme Court decision in Masson as "severely undermin[ing] the case authority that generated the doctrine in the first place"); Liberty Lobby, Inc., 746 F.2d at 1568-69 (applying District of Columbia law in stating that "the theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety," and rejecting the theory as "a fundamentally bad idea").

81. Liberty Lobby, Inc., 746 F.2d at 1569. For more on the court's reasoning in Liberty Lobby, Inc., see infra notes 159-62 and accompanying text.

82. See Daly, supra note 42, at 372-73; Note, supra note 27, at 1925; Framson, supra note 45, at 1485; Hemphill, supra note 27, at 408; Kite, supra note 27, at 560-62.

83. See Marder, supra note 27, at 1013-14.

84. See Gage Jr. & Conniff, supra note 27; Hemphill, supra note 27, at 408-13; Kite, supra note 27, at 540 nn.33-34, 543 n.45; Marder, supra note 27, at 999-1002. Kite elaborates that the rules inspired by the First Amendment prior to adoption of the libel-proof and incremental harm doctrines do not afford enough protection for the press (because of the costs of fact-finding in litigation under the rules). See Kite, supra note 27, at 546-47. Therefore, according to Kite, we still need "judicial tools allowing for the fast, fair, and efficient disposition of fruitless libel suits" in order to "conserve[e] scarce judicial resources and reinforce[e] First Amendment free speech interests." Id. at 547-48.

by the First Amendment has now largely been foreclosed by a combination of two Supreme Court cases that leave the matter up to the states. In Masson v. New Yorker Magazine, Inc., the Court stated unequivocally that "we reject any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech." And although the Court was addressing the incremental harm doctrine, its reasoning would seem to be equally applicable to the libel-proof plaintiff doctrine. Viewing the scope of First Amendment restriction somewhat narrowly, the Court reasoned that "[t]he question of incremental harm does not bear upon whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not." It could have made the same statement about the libel-proof plaintiff doctrine, which is likewise not derived from the state of mind element. Thus, it would appear that neither the incremental harm nor the libel-proof plaintiff doctrines are constitutional imperatives. Accordingly, although there was, in the Court's mind, no indication whether California accepted the incremental harm doctrine, "it remains free to do so." Not to be denied a constitutional rationale, some courts have attempted to extrapolate from the Gertz v. Robert Welch, Inc. holding to come up with a credible constitutional basis for the doctrines. Gertz held that recovery in defamation cases was constitutionally limited to

"plaintiff's reputational interest in avoiding further adverse comment" on his electric car was "minimal when compared with the First Amendment interests at stake").

87. Id. at 523.
88. Id.
89. Id.
91. See Schiavone Constr. Co. v. Time, Inc., 646 F. Supp. 1511, 1519 (D.N.J. 1986) (applying New Jersey law), rev'd on other grounds, 847 F.2d 1069, 1072 (3d Cir. 1988) (holding on appeal that the libel-proof plaintiff doctrine did not apply under the facts presented and therefore the court of appeals did not have to address the question of the availability, in the absence of a showing of compensable injury to reputation, of nominal and punitive damages); McBride v. New Braunfels Herald-Zeitung, 894 S.W.2d 6, 10 (Tex. App. 1994); infra notes 105-09 (discussing Schiavone). Extrapolating from Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the court in McBride reasoned that Gertz, in the absence of showing of actual malice, limits recovery to actual injury. See McBride, 894 S.W.2d at 10. And actual injury, the argument goes, is impossible "[w]hen the reputation of a plaintiff cannot, as a matter of law, have suffered from a libel." Id. The court added that "[d]efendants who have prevailed under the libel-proof plaintiff doctrine have essentially negated, as a matter of law, the element of damages in the plaintiff's libel action." Id. The problem with the court's analysis is that it is unclear whether the Gertz rule is an "element," or perhaps more likely simply a limitation on damages. The McBride analysis may also overlook the limitations on Gertz and the effect of Time, Inc. v. Firestone, 424 U.S. 448 (1976). See infra text accompanying notes 94-98.
"actual injury," at least in matters of public concern and in the absence of a showing that the defendant acted with knowledge or reckless disregard of the statement's truth or falsity. Drawing a constitutional mandate for the doctrines from the preceding language seems problematic, however. In the first place, the Court later in *Time, Inc. v. Firestone* held that states may award damages for mental distress in a defamation claim without additional objective proof of harm to reputation. And *Gertz* specifically held that actual injury includes "personal humiliation, and mental anguish and suffering." Moreover, the *Gertz* rule limiting damages does not apply unless the defamatory statement was about a matter of public concern. And, even when the statement does concern a matter of public concern, the *Gertz* rule does not apply if the plaintiff can prove that the defendant acted with knowledge or reckless disregard of the truth or falsity of the statement. Additionally, there is a question whether the small supposedly de minimis reputational losses that are ignored under libel-proof and incremental harm doctrines would ipso facto not be deemed "actual injury." Therefore, it seems doubtful that the *Gertz* actual-injury language constitutionally compels adoption of the libel-proof plaintiff or incremental harm doctrines.

2. Judicial Resources

A second rationale commonly advanced in support of the doctrines is that they preserve judicial resources. Thus, one court noted that since

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95. *See id.* at 460. Thus, in *Firestone* the fact that the plaintiff had withdrawn her claim for damages to reputation did not prevent her from claiming damages for emotional distress. *See id.* Thus, objectively measurable damages from harm to reputation were apparently not constitutionally compelled here. *See id.* The Court added that "[t]his does not transform the action into something other than an action for defamation as that term is meant in *Gertz*." *Id.*
96. 418 U.S. at 350.
99. *See Note, supra note 27, at 1917; Hemphill, supra note 27, at 417-18; Kite, supra note 27, at 562; Marder, supra note 27, at 993 (discussing but rejecting this rationale for present purposes). Hemphill also argues that even self-restraint from what he calls the "[e]conomic rationality" (of avoiding the costs of litigation) does not work well here because of the tendency to overestimate chances of success and to try for punitive damages. *See Hemphill, supra note 27, at 418. Of course, rather than promote the libel-proof plaintiff and incremental harm doctrines, a better response would be to directly address the elements and damages rules, such as by eliminating punitive damages altogether.

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individuals with "despicable reputation[s]" could not be damaged, "a a 
court's time and resources should not be expended in litigating their 
spurious libel claims."\textsuperscript{100} The appeal of the doctrine can be illustrated by 
cases like \textit{Jackson v. Longcope}.\textsuperscript{101} There, the plaintiff who was serving a 
life sentence for first-degree murder, sued for libel based on a \textit{Boston 
Globe} story.\textsuperscript{102} He alleged that a report of a shoot-out "involv[ing] a 
stolen car chase"\textsuperscript{103} was erroneous because the car was not stolen, and 
that a report about "the 'hitch-hike murders'" was erroneous because not 
all the victims were raped nor were all strangled.\textsuperscript{104} The court simply 
held that the plaintiff was libel-proof.\textsuperscript{105}

The judicial-resources rationale, however, is questionable. It seems 
to assume that merely because a claim might be dismissed under the 
doctrines it necessarily translates into significant judicial savings. This 
may not be a valid assumption. Application of either doctrine inevitably 
inspires lengthy appeals. Most cases will also have already undergone 
years of pretrial investigation and discovery. Consider \textit{Schiavone 
Construction Co. v. Time, Inc.},\textsuperscript{106} which is all too typical of the pattern in 
cases in which the libel-proof plaintiff or incremental harm doctrines 
figure centrally. There, the trial court granted the defendant's motion for 
summary judgment, holding that the plaintiff was libel-proof.\textsuperscript{107} 
Thereafter, the court of appeals reversed without deciding whether to 
approve the libel-proof plaintiff doctrine even in principle, and held 
instead that the doctrine, whatever its standing in principle, did not apply 
to the facts of the instant case.\textsuperscript{108} The case was finally settled after six 
years of litigation.\textsuperscript{109} Far from conserving judicial resources, the libel-
proof and incremental harm doctrines, adrift as they are from the 
traditional elements of defamation law, add uncertainty to a legal picture 
already sinking under the weight of historical baggage and constitutional 
modification. The injection of these doctrines into a case almost assures a 
l prolonge appellate process.

\textsuperscript{100} Langston v. Eagle Publ'g Co., 719 S.W.2d 612, 623 (Tex. App. 1986).
\textsuperscript{101} 476 N.E.2d 617 (Mass. 1985).
\textsuperscript{102} See id. at 618.
\textsuperscript{103} Id. at 621.
\textsuperscript{104} See id.
\textsuperscript{105} See id.
\textsuperscript{106} 847 F.2d 1069 (3d Cir. 1988).
New Jersey law), rev'd in part and aff'd in part, 847 F.2d 1069, 1093 (3d Cir. 1988) (reversing 
the district court's application of the libel-proof plaintiff doctrine under the facts presented).
\textsuperscript{109} See Weaver, supra note 27, at 411 n.54; Alexander Stille, \textit{Libel Law Takes on a New 
The second problem with this argument is that the same could be said for any theory of liability.\(^{110}\) If we apply it here, then why not to any loss? Some cases approving the incremental harm doctrine have gone so far as to espouse and articulate a balancing test of sorts.\(^{111}\) Application of the doctrine should, it is contended, depend on whether "the damages that flow from the non-actionable portions of a statement merit the expense of defending against a libel action where the harm caused by the actionable portions is incremental."\(^{112}\) That test is stated somewhat differently as "whether society is better off permitting such suits to go forward in light of the costs of defending such suits."\(^{113}\) Such a balancing approach is arbitrary in that it is imposed on some victims in defamation lawsuits, but not others, and is not imposed on most claimants in other types of torts at all. Its application is also problematic. How does one estimate the costs saved? Does the defendant or its insurer improve its chances for invoking the doctrine by retaining higher-priced lawyers, thereby raising the cost side of a balancing equation?

3. The First Amendment-Lite

A third rationale is an amalgam of the first two. Without deriving a mandatory rule of constitutional law, it nevertheless looks to the interest in freedom of expression for direction.\(^{114}\) Thus, one recent case stated that the libel-proof plaintiff doctrine was needed "so that the costs of defending against the claim of libel, which can themselves impair vigorous freedom of expression, will be avoided."\(^{115}\) This rationale is simply a variation of a balancing of interests analysis—protection of an already diminished reputation against costs of litigation and potential liability—with the interests of freedom of expression added to the calculus. But, once the Supreme Court determined that constitutional (First Amendment) principles do not compel adoption of the doctrines as

\(^{110}\) One commentator makes the point with the following hypothetical illustration:

If person X has $100 in her wallet and person Y steals $99, X can sue Y for conversion. If X has $2 in her wallet and Y steals $1, X can still sue Y for conversion.

The courts do not deny X a remedy simply because X had little to steal.

Peyton, supra note 13, at 213.


\(^{112}\) Id. at 392.

\(^{113}\) Id. at 393.

\(^{114}\) See Hemphill, supra note 27, at 411; Weaver, supra note 27, at 412.

mandatory restraints on the range of doctrinal options available to state courts, we are left with the question of why already marginalized persons should be automatically categorically excluded from the process of seeking vindication of their reputations.

4. Interest Analysis

Some commentators have focused on "the main interest[7] served by defamation law, namely protection of reputation, as justification for the doctrines. The libel-proof plaintiff doctrine, it is argued, is consistent with this interest analysis because the reputations of some people have already been so diminished "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." This rationale simply begs the question; whether a person has suffered harm from a false statement really depends on the core elements defining the cause of action for defamation, on the rules determining the measure of damages, and on how one perceives the reputational interests at stake. The libel-proof plaintiff and incremental harm doctrines mask the failure of the courts to address and analyze the difficult elemental and remedial defamation questions.

5. Distrust of Juries

Another impetus for the doctrines, though seldom acknowledged as such, is the perceived need to bridle jury discretion. The influence of First Amendment concerns are also evident here, with the libel-proof and incremental harm doctrines seen as tools "to maintain the constitutionally mandated level of supervision over factfinders in libel cases." And driving this concern is the possibility that the jury will award damages "in excess of actual injury." There are a number of problems with this purported rationale. It is doubtful that either the libel-proof plaintiff or incremental harm doctrine is constitutionally compelled. Moreover, distrust of juries could be argued against

117. Kite, supra note 27, at 540.
118. Id.
119. See Note, supra note 27, at 1917.
120. Id.
121. Id. Some commentators, while acknowledging that eschewing the doctrines would leave juries with a good deal of latitude, still favor eliminating the doctrines so as not to deny plaintiffs a remedy. See Marder, supra note 27, at 1016-17.
122. See discussion supra Part II.B.1.
virtually any theory of tort liability in which damages are the principle remedy.

6. Denunciatory Goals

"The denunciatory feature of"^{123} criminal law has also been suggested as a justification for the doctrines. Accordingly, some view the libel-proof plaintiff doctrine as a sensible way of serving the public's interest in reporting criminal activity and denouncing crime by subjecting criminals to "public shame."^{124} The problem with this justification is that a previously convicted person has already been punished by the criminal law, and in that way has already been publicly denounced for his crimes. Where is the public interest in licensing false reports of additional crimes, at least beyond the latitude inherent in the rigorous elements for defamation and accorded by the traditional privilege to report on official proceedings?^{125}

7. Declining Importance of Reputation

Occasionally, a sort of "so what" argument is thrown in for good measure to justify the doctrines. Essentially, the argument is that reputation in general is less important today.^{126} People no longer live in small communities, and in any event they have less respect for media, thereby lessening the potential impact of defamatory falsehoods.^{127} Others note that, in general, "[t]he mobility and anonymity of modern society make rehabilitation much easier[,]"^{128} thereby lessening the need to some extent for legal redress. Several responses to all of these observations come to mind. One danger in viewing reputation as a debased currency is that it becomes a self-fulfilling prophecy. And in any event, modification of the remedial scheme should be effectuated by addressing the legal principles governing the elements and damages rules of defamation law, and thoughtfully exploring the contours of the underlying interest generally.

123. Kite, supra note 27, at 552.
124. Id.
125. See discussion infra Part II.C.3.
126. See Kite, supra note 27, at 560.
127. See id.
8. Equities

There has also been a suggestion of an equitable (or perhaps even an estoppel-type) rationale for the doctrines. The response to a person whose reputation is serially damaged by adverse publicity is that the plaintiff should not have waited so long to address the problem, and presumably should have sued earlier. Thus, one commentator opined that "[a] plaintiff whose reputation has been repeatedly and extensively damaged should not be allowed to select one, late-coming commentary on which to stake his revival." This type of equitable-estoppel justification, however, ignores the fact that many, perhaps most, people are not litigious by nature. In fact, undertaking a lawsuit for any purpose usually carries with it considerable psychological upheaval. This rationale also seems circular in the present context. One of the drivers for the libel-proof plaintiff doctrine has, I believe, been a concern that prison inmates, with all that free time on their hands, should not be allowed to develop too much of a taste for litigation, especially for communicative torts. It seems inconsistent to say on the one hand that we do not want prisoners to waste the legal system's time by suing for defamation and therefore we need the libel-proof plaintiff doctrine, and then turn around and say that the rationale for denying them legal redress (and by extension for the libel-proof plaintiff doctrine) is because they should have sued earlier.

9. The Dark Side

There is another rationale, seldom articulated, although one I suspect is never far from the surface. It is that libel-proof plaintiffs categorically are different from the rest of us. They are imperfect souls, damaged goods. It is not hard to imagine why this ground is not acknowledged as such. The very idea that a category of persons should

129. See generally Note, supra note 27, at 1923-24.
130. Id. at 1924; cf. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 870 (1992) (O'Connor, J., plurality opinion) (explaining why the line determining the point before which a woman has the right to choose to terminate her pregnancy should be drawn at viability, saying that "[t]he viability line... has, as a practical matter, an element of fairness" because "[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child").
131. See Urbano v. Sondem, 41 F.R.D. 355, 358 (D. Conn.) (noting a variety of possible motivations for some prisoners to bring lawsuits, including "[a] desire to harass officials, a hope for a quick windfall by way of nuisance settlement, or simply a discovery of a new way to pass the monotonous hours of incarceration"), aff'd, 370 F.2d 13 (2d Cir. 1966); supra notes 65-67 and accompanying text.
132. See discussion infra Part III.C.
be written off as forever lost is, as will be explained, inconsistent with our notions of a society of dynamic freedoms and self-realization.

C. Common Criticisms of the Doctrines

Although some version of the doctrines has begun to increasingly appear in the cases, this development has not gone without some criticism. These criticisms are identified below.

1. Vindication of Reputation

The most straightforward criticism is that the doctrines, by short-circuiting the plaintiff’s lawsuit, thereby preclude vindication of the plaintiff’s reputation, at least vindication through the judicial process. Supporters of the doctrines answer this criticism with the argument that any costs to victims are outweighed by the interest of judicial economy.

2. Redress for Emotional Distress

Some commentators have noted that an increasingly important role for the defamation cause of action is not only to redress diminution of the plaintiff’s reputational standing as such, but also to compensate for the emotional distress the plaintiff suffered because his or her reputation has been sullied. To the extent that the libel-proof or incremental harm doctrine terminates a plaintiff’s defamation lawsuit, those doctrines also preclude recovery for the plaintiff’s emotional distress under the defamation cause of action. Therefore, the doctrines could be subject to criticism on that basis. Defenders of the doctrines answer that emotional distress should only be recoverable under a defamation cause of action if there is first proven to be actual harm to reputation.

133. See discussion infra Part III.C.
134. See Hemphill, supra note 27, at 417-18 (noting this criticism, but arguing in favor of the doctrines that the interest of judicial economy outweighs it); Marder, supra note 27, at 994; Peyton, supra note 13, at 205, 208.
135. See Hemphill, supra note 27, at 417-18 (noting this criticism, but arguing in favor of the doctrines that the interest of judicial economy outweighs it).
136. See Rodney A. Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. PA. L. REV. 1, 19 (1983) (noting in the context of defamation law generally “that the bulk of the money paid out in damage awards in defamation suits is to compensate for psychic injury, rather than to compensate for any objectively verifiable damage to one’s community standing”).
137. See generally Hemphill, supra note 27, at 420.
138. See id.
Proponents of the libel-proof plaintiff and incremental harm doctrines may miss the mark here. Perhaps plaintiffs should not be permitted to recover in defamation for emotional distress without adequate proof of sufficiently demonstrable harm to reputation. But that does not mean that the libel-proof plaintiff and incremental harm doctrines are the appropriate vehicles for achieving that policy preference. This issue should be resolved and clarified directly and forthrightly by the courts. Trying to address it obliquely through the expedients of the libel-proof plaintiff and incremental harm doctrines is not the way.

3. Well-Informed Public

Another possible criticism is that, by failing to redress otherwise actionable defamatory falsehoods, the doctrines prevent defamation law from fully promoting accuracy in the dissemination of information. Of course, the rejoinder is that a vigorous First Amendment and a reasonably uninhibited press and public are even more crucial than unrestricted overly aggressive defamation litigation in facilitating the accurate flow of information.

4. Deterrence

A related criticism of the doctrines is that by restricting defamation claims, they thereby undermine the deterrent effects of defamation law, and thus abet dissemination of false and hurtful information. The response to this criticism is that although defamation claims deter on the one hand, they also chill freedom of expression on the other.

5. Nonactionable Parts

The incremental harm doctrine has been singled out for criticism out of concern that conceptually, if the doctrine were broadly applied, it could operate to preclude a plaintiff in situations where the nonactionable part of the publication was nonactionable for reasons other than its truthfulness. For instance, parts of a publication might be false and very injurious, but still nonactionable not because they were

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139. See id. at 423 (discussing the argument, but rejecting it and endorsing the doctrines).
141. See Peyton, supra note 13, at 208.
143. See Marder, supra note 27, at 1004.
true, but because the plaintiff could not prove that the defendant acted with the required fault-based state of mind with respect to his or her belief as to the truth or falsity of the statement.\textsuperscript{144}

Commentators have also worried that the challenged portions of the publication that are insulated from liability by the incremental harm doctrine might thereby serve to potentiate or validate the nonactionable parts. Thus, it is argued that otherwise actionable parts may do damage by "add[ing] a note of validity to the main proposition advanced by the entire article."\textsuperscript{145}

The problem with this debate is that focusing on the incremental harm doctrine buries the underlying issue. That issue is how we are to define causation for the purposes of defamation law. The debate here should be about the elements, particularly causation.

6. Arbitrariness

The libel-proof plaintiff and incremental harm doctrines have also been called arbitrary. Various illustrations have been used to make this point. For example, one writer contrasts the operation of the libel-proof plaintiff doctrine with a hypothetical conversion claim.\textsuperscript{146} Why, she asks rhetorically, should a victim who had only one dollar stolen still have a right to sue for conversion, but victims whose characters have been libeled be denied "an opportunity to present their case to a jury simply because a judge subjectively decides the plaintiffs have little or no reputation to lose."\textsuperscript{147}

The incremental harm doctrine has also been decried as arbitrary. One commentator illustrates this criticism with a hypothetical example involving two victims, each libeled.\textsuperscript{148} Victim X is attacked in ten false statements appearing in a publication, but the court dismisses the action because it finds nine of the statements nonactionable.\textsuperscript{149} Victim Y was also attacked by ten statements, but those are written by separate authors in separate articles, nine by one author and one by another.\textsuperscript{150} If the nine statements by one author are nonactionable, but the one statement by the other author is actionable, then in this example, the incremental harm

\textsuperscript{144}. See id.
\textsuperscript{145}. Id. at 1013. For a case involving this type of scenario, see Herbert v. Lando, 781 F.2d 298, 310 (2d Cir. 1986) (applying New York law).
\textsuperscript{146}. See Peyton, supra note 13, at 213.
\textsuperscript{147}. Id.
\textsuperscript{148}. See Marder, supra note 27, at 1013-14.
\textsuperscript{149}. See id.
\textsuperscript{150}. See id.
doctrine would not apply. And that, so the argument goes, is arbitrary.

One reason the doctrines are vulnerable to a charge of arbitrariness is that they appear to operate selectively. The solution, as I will show, is to eschew the doctrines, and instead, address the relevant policy concerns through thoughtful development of the elements and damages rules.

7. Federal Courts

One author has criticized the doctrines based on their origins in the federal courts. Basically, he is concerned about application of the doctrines in federal cases applying state law where the state’s relevant substantive law has not yet been developed by the state courts. Absent a more explicit foundation in state law, he says, “we are left with what looks like what was decried in *Erie* and its progeny: an impermissible species of federal common law, bound to encourage forum-shopping among litigants.”

As previously noted, the days when the doctrines were addressed almost exclusively by federal courts in diversity cases are becoming a relic of the past. Increasingly, state appellate courts are evaluating the doctrines. In any event, to the extent that there is validity to the concern that federal courts may be a little too creative in their *Erie*-educated guesses on future directions in state law, one answer would be to eschew the libel-proof plaintiff and incremental harm doctrines. The policy concerns that inspired the doctrines would then be animated by thoughtful analysis of the elements and damages rules governing defamation law.

151. It may be at least theoretically possible that the plaintiff’s claim might still be barred by the libel-proof plaintiff doctrine, depending on how much harm the other publication had already done to the plaintiff’s reputation before the second article, and also on the standing and scope of the doctrine in the jurisdiction in question. But the court might also have to contend with the “prior publication” rule. See infra notes 235-37 and accompanying text.

152. See Marder, *supra* note 27, at 1013-14.

153. See *id*. One author has taken this tack a step further, even arguing that the doctrines should be declared unconstitutional on equal protection or due process grounds. See Peyton, *supra* note 13, at 198.


155. See discussion *infra* Part III.A.


157. See *id*. at 18.

158. *Id*. at 17.
8. Reputation as a Monolith

Perhaps the most sentient judicial criticism of the doctrines appears in then-Judge Scalia’s opinion in *Liberty Lobby, Inc. v. Anderson*. In rejecting the libel-proof plaintiff doctrine, he said: “we cannot envision how a court would go about determining that someone’s reputation had already been ‘irreparably’ damaged—*i.e.*, that *no* new reader could be reached by the freshest libel.” And, later, in discussing and rejecting the incremental harm doctrine, the court explained that “the theory must be rejected because it rests upon the assumption that one’s reputation is a monolith, which stands or falls in its entirety.” Another critic asked, “[w]hat of the criminal who has been rehabilitated and wants to start a new life?”

Another potential shortcoming of the doctrines is that they operate on the plaintiffs in sort of a “‘kick ’em when they’re down” way. The doctrine could “seem unduly harsh ... [in] a society ... committed to equal justice under law.”

Thus, some critics have contended that the libel-proof plaintiff doctrine arbitrarily creates an “outlaw” class. To these criticisms, proponents of the doctrines respond that the doctrines should be applied broadly, and not limited “to murderers and other scoundrels.” This kind of rejoinder in defense of the doctrines is, however, hardly reassuring. The fact that the class of persons to be reputationally written off is (or as the doctrines’ proponents argue should be) enlarged, does not make it any less repugnant. The Social Darwinism inherent in the libel-proof plaintiff doctrine does not disappear simply by enlarging the blade of the doctrinal scythe used for winnowing the irrevocably unfit members of society from the “fittest.”

Of the preceding criticisms, the last comes closest to identifying one of the central flaws in the doctrines—that they are premised on a

160. Id. at 1568.
161. Id.
162. Marder, supra note 27, at 1013.
163. Hemphill, supra note 27, at 430 (noting this potential shortcoming, but rejecting it because “there is no reason to limit the application of the principles behind the doctrine to murderers and other scoundrels”).
164. Id. (noting this potential shortcoming, but rejecting it).
165. Peyton, supra note 13, at 201.
166. Hemphill, supra note 27, at 430.
167. See discussion infra Part III.C.
monolithic view of reputation. But, the problems with the doctrines go deeper than that, and relate to the doctrines both structurally as a matter of substantive defamation law, and philosophically, in terms of their static and one-dimensional premises and their binary classificatory methodology. These matters are discussed in the next section.

III. ELEMENTS, STASIS, AND FALSE SIMPLICITY

A. Thesis

I believe that the libel-proof plaintiff and incremental harm doctrines should be eliminated. This thesis is based primarily on two grounds. First, the doctrines have been conceived and applied as stand-alone, self-contained defenses, operating independently of the traditional elements, privileges, and damages rules of defamation law. I believe that such an approach is ill-advised. If the doctrines could be rationally integrated into and deemed a part of the elements, then we would simply not need the two doctrines. They add unnecessary complexity to a field already shuddering under enormous historical, substantive, and modern constitutional baggage. Contrariwise, if the libel-proof plaintiff and incremental harm doctrines cannot be logically conceived within the elements of defamation law, then we should reexamine the policy justifications for the doctrines. If they are unsound, the doctrines should be rejected on that basis. If their ends have some merit, then we should consider whether the elements and damages rules of defamation law should be appropriately tailored to better accommodate those policy ends.

The libel-proof plaintiff and incremental harm doctrines, by providing easy hooks with which the courts may kill a defamation case, preempt thoughtful analysis of underlying issues of the nature of reputational harm, the effect of the plaintiff's preexisting reputation on his or her claim, and the operation of causation and other elements. The libel-proof plaintiff and incremental harm doctrines have done little more than jostle and obfuscate the elements of defamation law. Any appropriate clarification and change to the foundational component elements of defamation law should occur directly and thoughtfully,


rather than obliquely through some ill-defined and ill-considered expedients like the libel-proof plaintiff and incremental harm doctrines.

Second, the libel-proof plaintiff and incremental harm doctrines suffer from several inherent flaws. The first is that the doctrines are premised on a static view of reputation, and more broadly, on a static view of human nature. The second flaw is that the doctrines are premised on a monolithic, rather than a multifaceted concept of reputation. And, finally, the doctrines are binary and classificatory in their operation and methodology.

My two objections to the libel-proof plaintiff and incremental harm doctrines are discussed in greater detail below.

B. Return to Core Elements and Damages Rules

The libel-proof plaintiff and incremental harm doctrines have not been housed in or consistently tied to a single element for defamation. Sometimes the application of the doctrines seems, to varying degrees, to overlap with one or more of the elements, especially the falsity and causation elements. At other times, the doctrines seem more discrete, as though they occupied some special space in defamation law, operating as freestanding defenses seemingly propelled by little more than their facile nomenclature. These nice-ringing doctrines remind one of Lord Shaw's observation about res ipsa loquitur, that "[i]f that phrase had not been in Latin, nobody would have called it a principle." The doctrines seem to waver somewhere between cousins to the elements and separate defenses, based on a sense that some plaintiffs' preexisting reputations have crossed some invisible Rubicon beyond which their rights to pursue the judicial process in protecting their reputations are lost.

A number of elements bear some conceptual similarity to the doctrines. Moreover, in some cases addressing the doctrines, various elements have been relied on by the defendants or courts as alternative doctrinal bases to the libel-proof plaintiff or incremental harm doctrines. Those elements with the most kinship to the libel-proof plaintiff and incremental harm doctrines are discussed below. And, it is those

170. See discussion infra Part III.C.
171. See Liberty Lobby, Inc., 746 F.2d at 1568.
172. Thus, elusive underpinnings of the doctrines can be seen in the simplistic observation of one case that "[a] kernel of truth and common sense underlies the libel-proof doctrine." Langston v. Eagle Publ'g Co., 719 S.W.2d 612, 623 (Tex. App. 1986).
173. Ballard v. N. British Ry. Co., 1923 A.C. 68, 79 (H.L., appeal taken from Scot.) (Lord Shaw). Lord Shaw continued: "The expression need not be magnified into a legal rule; it simply has its place in that scheme of and search for causation upon which the mind sets itself working." Id.
elements that should be considered as the appropriate instruments for tailoring the foundational contours of the defamation theory of liability.

1. Falsity and Substantial Truth

The falsity of the statement bearing the defamatory sting is an inherent characteristic of defamation. Moreover, the Constitution requires that falsity be an element of defamation cases, at least with respect to matters of public concern. And even when proof of falsity is not a constitutionally compelled element on which the plaintiff bears the burden of proof, the truth-or-falsity issue will still be outcome determinative and fatal to the plaintiff’s case if it is determined that the subject statement was substantially true.

There is some similarity between the falsity requirement (substantial truth defense) and the libel-proof plaintiff and incremental harm doctrines. The absence of falsity (or proof of substantial truth) has sometimes been invoked along with the libel-proof plaintiff doctrine to support a decision in favor of the defendant in a defamation case.

176. See 2 Dobbs, supra note 20, § 7.2(9), at 287.
177. See Daly, supra note 42, at 377, 378 (saying that the incremental harm doctrine is a “variation” of the substantial truth defense, and that the tests for the rules are “surprisingly similar”); Kelley & Zansberg, supra note 45, at 9-10; Marder, supra note 27, at 1015; see also Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1349-51 (7th Cir. 1995) (applying Illinois law). In Desnick, the trial court dismissed the case, holding that the alleged defamatory statement “did not significantly increase the damage to their reputations inflicted by the parts of the broadcast segment they do not challenge.” Id. at 1350. The court of appeals chooses to address this incremental-harm-type of situation solely in terms of substantial truth, and on that basis, refused to uphold dismissal at that preliminary stage with the record not sufficiently developed. See id. at 1351.
178. See Guccione v. Hustler Magazine, Inc., 800 F.2d 293, 299 (2d Cir. 1986) (applying New York law); Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512, 518 (Tex. App. 1987); see also 1 Sack, supra note 9, § 3.7, at 3-18 n.71 (stating that “[t]he ‘incremental harm’ and ‘substantial truth’ doctrines may be two ways of giving effect to the same idea: that, in light of the values of free speech that are implicated, a relatively minor defamatory inaccuracy does not, as a matter of law, do significant enough damage to the plaintiff’s reputation for the law to provide compensation for it”); cf. Dewitt v. Outlet Broad., Inc., No. C.A. NC 98-0196, 1999 WL 1334932, at *2-4 (R.I. Super. Ct. Dec. 17, 1999) (involving a case in which the court relied on the libel-proof plaintiff doctrine, and where the defendant had argued in the alternative for a decision based on substantial truth based on “the gist or sting of the publication”). In Guccione, for example, the court held that the plaintiff was libel-proof with respect to the statement that the plaintiff “is married and also has a live-in girlfriend, Kathy Keeton.” Guccione, 800 F.2d at 299, 303-04 (quoting a 1983 issue of Penthouse). In addition, the court held that “the extremely long duration of Guccione’s adulterous conduct, which he made no attempt to conceal from the general public, and the relatively short period of time since his divorce—make it fair to say that calling Guccione an ‘adulterer’ in 1983 was substantially true.” Id. at 302 (quoting a 1983 issue of Penthouse). Interestingly, the Urbano case, one of the cases relied on in Cardillo (the seminal libel-proof plaintiff case), was affirmed on appeal on alternative grounds, one of which was that the action would be precluded under the falsity element.
Notwithstanding their similarity, the libel-proof plaintiff and incremental harm doctrines and the falsity requirement (or truth defense) are not, technically, necessarily coterminous. The focus is different. The falsity element (or substantial truth defense) looks at the hurtful sting or gist of the statement, and examines whether it is in fact substantially true. The libel-proof plaintiff doctrine compares the plaintiff's reputation before and after the statement. Moreover, while a plaintiff's prior acts might, if sufficiently notorious, be relevant to the libel-proof plaintiff doctrine, such prior acts and past conduct would not usually be admissible to establish the truth of a defamatory accusation of other specific acts of misconduct. The incremental harm doctrine compares the effect on the plaintiff's reputation of the nonactionable portion of the publication with the effect of the otherwise actionable portion.

See Cardillo v. Doubleday & Co., Inc., 518 F.2d 638, 639-40 (2d Cir. 1975); Urbano v. Sondern, 370 F.2d 13, 14 (2d Cir.), aff'd, 41 F.R.D. 355, 357 (D. Conn. 1966); supra notes 65-67, 130 and accompanying text. And in the Liberty Lobby, Inc. case (one of the decisions most critical of the doctrines), although the court rejected the doctrines, it expressly held out the possibility that in some circumstances the substantial truth rule might operate to preclude liability. See Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1568 n.6 (D.C. Cir. 1984) (applying District of Columbia law, vacated on other grounds, 477 U.S. 242 (1986)).


180. See Hemphill, supra note 27, at 427; Kite, supra note 27, at 534-42.

181. See DOBBS, supra note 25, § 410, at 1147.

182. See Hemphill, supra note 27, at 427.

183. See DOBBS, supra note 25, § 410, at 1148 (stating that "[i]f the defamation charges specific conduct, the only admissible evidence of truth is specific evidence of that conduct or conduct substantially similar and carrying the equivalent sting"). A defendant might try to rely on the prior acts of the plaintiff in an attempt to establish substantial truth in two ways. One way would be to attempt to argue circumstantially that the fact of prior similar acts of misconduct make the truth of the specific defamatory accusations more likely to have been true. See Sharon v. Time, Inc., 103 F.R.D. 86, 91-92 (S.D.N.Y. 1984) (applying New York law in refusing to admit evidence of prior misconduct as circumstantial evidence to prove the truth of other conduct). See generally 1 MCCORMICK ON EVIDENCE §§ 186-189, at 649-58 (John W. Strong ed., 5th ed. 1999) (discussing in general the question of the admissibility of evidence of prior character, habit, and acts and conduct to prove specific conduct for various purposes). The second way would be to attempt to define the sting of the defamatory statement more broadly so as to encompass the prior acts, so that by proving them, the truth of the defamatory accusation is concomitantly proven. See, e.g., Sharon, 103 F.R.D. at 93. The admissibility of prior misconduct as direct evidence on the substantial truth issue would thus depend on the nature of the defamatory accusation and its specificity, as well as on how broadly the court defined substantial truth.

184. See Jewell, 23 F. Supp. 2d at 393-94 (applying New York law in distinguishing substantial truth idea and incremental harm, because the former relates to "an element"). The court in Jewell explained: "Thus, as their names imply, the substantial truth doctrine is concerned with truth (regardless of harm) and the incremental harm analysis is concerned with harm (regardless of truth)." Id. at 394.
Moreover, it is at least theoretically possible, depending on the scope of the doctrines, that a claim could still be barred by the libel-proof plaintiff or incremental harm doctrines despite the fact that even the preexisting or non-actionable information was not substantially true.\textsuperscript{185}

When, however, the preexisting reputation of the plaintiff or the nonactionable portions of the publication are believed to strongly militate against recovery by the plaintiff, that concern should be implemented through the traditional elements of defamation law. And, with respect to the element of falsity (or defense of substantial truth), the solution is to realistically define the substantial truth idea broadly in terms of the sting and gist of the statement, so that many of the cases in which courts might be tempted to consider the libel-proof plaintiff and incremental harm doctrines would be amenable to resolution under the substantial truth concept.\textsuperscript{185} One court had this to say:

There 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 established by the facts is not derogatory. If, for example, an individual is said to have been convicted of 35 burglaries, when the correct number is 34, it is not likely that the statement is actionable. That is so, however, not because the object of the remarks is “libel proof;” but because, since the

\textsuperscript{185} See Daly, supra note 42, at 377 (discussing the incremental harm doctrine). Thus, it is theoretically possible that the libel-proof plaintiff doctrine could still apply where the plaintiff’s prior bad reputation was undeserved because the prior conduct he or she was believed to have committed never occurred. Courts, however, usually do not apply the libel-proof plaintiff doctrine here and Dobbs argues against its application in this context, at least where “there is room to believe that [the plaintiff’s] reputation was made worse” or suspicions were intensified. 2 Dobbs, supra note 20, § 7.2(9), at 289. The incremental harm doctrine might apply, at least theoretically, to a false statement where the nonactionable portions of the publication were rendered nonactionable for reasons other than their truth. This possibility has been one of the targets of critics of the doctrine. See discussion supra Part II.C.5. One commentator who otherwise approves of the incremental harm doctrine recommends that it be applied only when the nonactionable statements are nonactionable because they are true. See Hemphill, supra note 27, at 425.

\textsuperscript{186} See Kelley & Zansberg, supra note 45, at 11. On a broadly defined concept of substantial truth that focuses on the sting or the gist of the statement, see Jewell, 23 F. Supp. 2d at 386 (applying New York law in articulating a gist focus that asks whether the allegedly defamatory statement would have made the reasonable reader react differently than the truth would have); Finkleya v. Jacksonville Daily Progress, 742 S.W.2d 512, 518 (Tex. App. 1987) (holding, in its third ground for the decision, that “considering the statements’ content and the appellant’s record, it is our opinion . . . that he has not been libeled because “the essentially derogatory implication of the statement . . . is correct” (quoting Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1568 n.6 (D.C. Cir. 1984), vacated on other grounds, 477 U.S. 242 (1986))); 1 Sack, supra note 9, § 3.7, at 3-15 (focusing on the “‘sting’ or “‘gist’”.

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essentially derogatory implication of the statement ("he is an habitual burglar") is correct, he has not been libeled.\textsuperscript{187}

The courts should also consider holding that the burden of proof is on the plaintiff in all defamation cases, without exception, to prove the falsity of the statement. This should afford potential defendants sufficient freedom of expression without the need to resort to the expediens of the libel-proof plaintiff and incremental harm doctrines.\textsuperscript{188}

If, notwithstanding a sedulously framed substantial truth concept and the universal placement of the burden of proof on the plaintiff, the statement is nevertheless still found to be false, then I would not bar it under either the libel-proof plaintiff or incremental harm doctrines. But, its validity would still depend on whether the statement could satisfy the remaining elements and defenses applicable to defamation, the clarification of some of which are suggested below. Additionally, the amount of damages might also be influenced by the state of the plaintiff's preexisting reputation.\textsuperscript{189}

2. Causation and Damages

The requirement of causation in defamation has always been clouded by uncertainty over exactly what it is that must have been

\textsuperscript{187} Liberty Lobby, Inc., 746 F.2d at 1568-69 n.6 (applying District of Columbia law).

\textsuperscript{188} For examples of cases applying a broadly conceived substantial truth concept, see, for example, Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1226 (7th Cir. 1993) (applying Illinois law); Koniak v. Heritage Newspapers, Inc., 499 N.W.2d 346, 348 (Mich. Ct. App.), appeal denied, 508 N.W.2d 500 (Mich. 1993). In Haynes, a book had stated that the plaintiff had left his children alone at night when he was supposed to be watching them and that he spent money on a car that he should have used to buy shoes for his children. See Haynes, 8 F.3d at 1225. In affirming a summary judgment for the defendants, the court held that the statements were substantially true. See id. at 1227. The court relied on the facts that the plaintiff had walked out on his wife and four children and had repeatedly flouted child support orders, as well as on other unspecified, but "uncontested facts" in the book. See id. at 1227-28. The facts relied upon, however, did not relate specifically to the conduct detailed by the plaintiff. See id. at 1228. The court reasoned that when compared to the unchallenged facts, the alleged falsehoods paled and would not "have altered the picture that the true facts paint." Id. In Haynes, the substantial truth concept was instrument enough for the court without need to invoke the libel-proof plaintiff and incremental harm doctrines. See id. In Koniak, an article said that the plaintiff had allegedly sexually assaulted his stepdaughter thirty to fifty times, when she had testified that he had "assaulted her only eight times." Koniak, 499 N.W.2d at 348. In affirming a summary judgment for the defendant, the court found that the article "was close enough to the truth about the nature of the criminal sexual conduct charges to justify summary disposition." Id. The court added, "whether plaintiff assaulted his stepdaughter once, eight times, or thirty times would have little effect on the reader." Id. The substantial truth idea was an adequate mechanism to deal with a claim by a plaintiff accused by his stepdaughter of sexual assault when that plaintiff sought to sift through an article in hope of parsing out of such a setting a neatly mathematical defamatory falsehood. See id.

\textsuperscript{189} See infra notes 194-202 and accompanying text.
caused by the defendant's false statement, and how that harm must be proven.\textsuperscript{193} Part of the confusion stems from a tendency of two questions to become commingled. One is whether or to what extent there is a threshold element that some harm be proven without which the plaintiff cannot pursue his or her claim at all.\textsuperscript{194} This is a question regarding the nature of the keys to the multi-lock treasure room that houses the damages sought by the plaintiff. The other question relates to the amount of damages to which the plaintiff may be entitled once all of the elements have been established.\textsuperscript{195} In other words, the question here is how much treasure the plaintiff will be entitled to cart off after he or she has unlocked the door by satisfying all the elements.

In some states proof of special damages is a required element especially for some types of slander.\textsuperscript{196} Apart from a special damages requirement, when applicable, matters become more abstruse. Unlike negligence law generally, nominal damages were recoverable in defamation cases.\textsuperscript{197} Moreover, at common law, the plaintiff in a defamation case was entitled to recover presumed damages.\textsuperscript{198} The Supreme Court has, to some extent, restricted presumed and punitive (and perhaps nominal) damages by precluding the states from awarding them in cases involving matters of public concern, at least in the absence of proof that defendant acted with knowledge or reckless disregard of the truth or falsity.\textsuperscript{199} The Court held that the Constitution also requires that in matters of public concern\textsuperscript{200} the states limit recovery to "actual" injury, at least in the absence of proof that the defendant acted with

\begin{itemize}
  \item \textsuperscript{190} See generally infra Part III.B.2.a.
  \item \textsuperscript{191} See generally RESTATEMENT (SECOND) OF TORTS § 558 (1977).
  \item \textsuperscript{192} See generally id. §§ 620-623.
  \item \textsuperscript{193} See 1 SACK, supra note 9, § 10.3.2, at 10-8.
  \item \textsuperscript{194} See LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION § 95, at 539 (1978); Hemphill, supra note 27, at 405; Katz, supra note 27, at 1259.
  \item \textsuperscript{195} See RESTATEMENT (SECOND) OF TORTS § 621 cmt. a (stating that "[a]t common law, general damages have traditionally been awarded not only for harm to reputation that is proved to have occurred, but also, in the absence of this proof, for harm to reputation that would normally be assumed to flow from a defamatory publication of the nature involved"); 2 DOBBS, supra note 20, § 7.2(3), at 270; ELDREDGE, supra note 194, § 95, at 537; Anderson, supra note 128, at 748. Presumed damages were recoverable at common law, however, only if the statements were actionable per se (without the need to prove) or special damages were proven, and, of course, the applicable elements were established. See RESTATEMENT (SECOND) OF TORTS § 569 cmt. b (defining the phrase ""actionable per se""); 1 SLADE R. METCALF & LEONARD M. NIEHOFF, RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTERS AND REPORTERS § 1.74, at 1-170 (1999); Anderson, supra note 128, at 748.
  \item \textsuperscript{197} See Dun & Bradstreet, Inc., 472 U.S. at 761; DOBBS, supra note 25, § 422, at 1190.
\end{itemize}
knowledge of the falsity or reckless disregard with respect to whether the statement was true or false.\textsuperscript{198} This actual-injury limitation seems to fall short of effectively circumscribing damages in defamation cases in several respects. The actual injury limitation on the states does not apply when the defendant acted with knowledge or reckless disregard whether the statement was true or false.\textsuperscript{199} Furthermore, the limitation does not apply to statements involving matters of private (as opposed to public) concern.\textsuperscript{200} And finally, the force of the actual injury limitation is diluted and complicated not only by the fact that actual injury may include "personal humiliation, and mental anguish and suffering,"\textsuperscript{201} but also from the fact that the Court has said that the states may, if they choose, award such mental distress damages even in the absence of proof of some objectively discernible evidence of diminished reputation.\textsuperscript{202}

The courts should clarify whether, apart from a special damages element (where applicable), there is any other threshold element requiring proof of some actual reputational harm as a prerequisite to pursuing the claim, and if so, by what test of causation it must be established.

A second question relates to the amount of damages, and how they must be proven. Clearly, to the extent that the plaintiff claims that some specific economic loss—such as loss of customers or clients—is attributable to the defamation, the plaintiff must establish that the statement caused that loss.\textsuperscript{203} The plaintiff seeking to recover for mental distress must also prove that such distress was caused by the defamatory statement,\textsuperscript{204} except perhaps to the extent that such damages were encompassed within presumed damages when available.\textsuperscript{205} The availability of presumed and nominal damages also needs to be clarified.

The libel-proof plaintiff and incremental harm doctrines bear some kinship to both the causation element\textsuperscript{206} and damages rules.\textsuperscript{207} Indeed,
some of the cases discussing the libel-proof plaintiff and incremental harm doctrines describe them in causation terms.\(^{207}\) Thus, in one recent case the court explained that the reason a libel-proof plaintiff cannot recover is that he or she "cannot be harmed because the plaintiff’s reputation has already been so damaged that further falsehoods do not cause any additional damage."\(^{208}\) And with respect to the incremental harm doctrine, the same court identified the doctrine’s roots as follows: “otherwise actionable statements are dismissed because there is no benefit, and indeed only detriment, in proceeding with them when the harm which flows therefrom is virtually ... the same as the harm that flows from non-actionable statements.”\(^{210}\) Some courts have also invoked the causation requirement as an alternative holding in addition to one of the doctrines.\(^{211}\) A few courts have addressed the doctrines in the context

\[^{207}\] See Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512, 517 (Tex. App. 1987) (stating that “[t]he libel-proof plaintiff doctrine is the logical conclusion to be drawn from the principle underlying that rule” and “that the plaintiff’s tarnished reputation may be shown in mitigation of damages”).

\[^{208}\] See Procter & Gamble Co. v. Amway Corp., 80 F. Supp. 2d 639, 662 (S.D. Tex. 1999) (applying Texas law in approving the doctrine in principle, stating that “where there is no reputation it cannot be damaged[d] and without damage to reputation there is no actionable defamation,” but finding that the defendant did not prove that the plaintiff was libel-proof here) (quoting Finklea, 742 S.W.2d at 517) (alteration in original); Jewell v. NYP Holdings, Inc., 23 F. Supp. 2d 348, 394 (S.D.N.Y. 1998) (applying New York law in explaining that the reason a libel-proof plaintiff cannot recover is that he “cannot be harmed because the plaintiff’s reputation has already been so damaged that further falsehoods do not cause any additional damage,” but finding that the doctrine was inapplicable in the instant case); Jones v. Globe Int’l, Inc., No. 3:94:CV01463, 1995 WL 819177, at *11 (D. Conn. Sept. 26, 1995) (applying Connecticut law in stating that since “[t]he true facts surrounding the plaintiff’s criminal conviction along with the unchallenged statements in the articles at issue, had a devastating impact upon the plaintiff’s reputation” and therefore “[t]he plaintiff has failed to prove that the remaining statements caused him to suffer any further injury”); Tonnessen v. Denver Publ’g Co., 5 P.3d 959, 965 (Colo. Ct. App. 2000) (explaining that an otherwise actionable statement is not actionable where “it causes no harm beyond” that produced by unchallenged or nonactionable parts of the publication); Ganzett Co. v. Re, 496 A.2d 553, 558 (Del. 1985) (recognizing incremental harm doctrine in principle, but finding it inapplicable because at least a jury question was presented as to whether the allegedly actionable statement “caused the real damage to [plaintiff’s] reputation”); Brite Metal Treating, Inc. v. Schuler, No. 62360, 1993 WL 158256, at *6 (Ohio Ct. App. May 13, 1993) (stating that “if the quoted statement of [the defendant] was excised from the ... article, the opprobrium and humiliation caused the plaintiff ... would have been no less”).


\[^{210}\] Id. at 388 n.27 (applying New York law).

of causation and a special damages requirement, suggesting the doctrines might operate to preclude a finding of special damages, a threshold element for some types of defamation in some states.\textsuperscript{212}

Part of the attraction of the libel-proof plaintiff and incremental harm doctrines, and one of the reasons why some courts do not rely on a straightforward causation analysis instead of these expedients, may be due to uncertainty over exactly what it is that defamation plaintiffs must prove was caused by the defendant’s statement.\textsuperscript{213} Specifically, there has perhaps been an unspoken concern that relying on causation requirements might not end lawsuits by otherwise libel-proof or incrementally harmed plaintiffs.\textsuperscript{214} This concern may be based on possible awards of presumed,\textsuperscript{215} nominal,\textsuperscript{216} punitive,\textsuperscript{217} and mental

\textit{Id.} Then, \textit{alternatively} the court also held on the basis of the libel-proof plaintiff doctrine that the plaintiff “will be found ‘libel-proof’ as a matter of law.” \textit{Id.} The libel-proof plaintiff language in \textit{Logan} seemed to be invoked almost as an afterthought. In any event, the court’s reliance on causation grounds seems prescient since the libel-proof plaintiff doctrine was later repudiated by \textit{Liberty Lobby, Inc.} See \textit{Liberty Lobby, Inc. v. Anderson}, 746 F.2d 1563, 1568 (D.C. Cir. 1984) (applying District of Columbia law), \textit{vacated on other grounds}, 477 U.S. 242 (1986); \textit{supra} notes 159-62 and accompanying text. The causation analysis, however, would presumably still be available after \textit{Liberty Lobby, Inc.}, and would produce a more thoughtful analysis in any event.

\begin{itemize}
\item \textbf{212.} \textit{See Jones}, 1995 WL 819177, at *9, *9 n.20 (applying Connecticut law in employing the incremental harm doctrine and stating that the remaining portions of the publication were not actionable “because the true portions of [these publications] ha[d] such damaging effects” that the plaintiff had failed to prove the requisite special damages necessary in order to recover for libel); \textit{Partington v. Bugliosi}, 825 F. Supp. 906, 915 n.7 (D. Haw. 1993) (applying Hawaii law in impliedly approving the libel-proof plaintiff doctrine in principle and seemingly tying it to a special damages requirement), aff’d, 56 F.3d 1147 (9th Cir. 1995).
\item \textbf{213.} \textit{See generally Anderson, supra note 128, at 748-65.}
\item \textbf{214.} \textit{See generally id. at 764-65.}
\item \textbf{215.} Courts have invented “convoluted theories to avoid the doctrine of presumed harm.” \textit{Id.} at 750. The libel-proof plaintiff and incremental harm doctrines may be examples of this. \textit{Cf. Kurth v. Great Falls Tribune Co.}, 1998 MT 178N, ¶ 12, 977 P.2d 342 (unpublished table decision) (addressing the issue of whether a defamatory statement that plaintiff-attorney had nine criminal charges pending caused harm to his professional reputation). In \textit{Kurth}, the trial court found that by the time of the publication of the article, the plaintiff “was already ‘financially beleaguered’” due to the way he conducted his practice. \textit{Id.} ¶ 27. Thus, the article was not a cause of the decline in the plaintiff’s income and professional reputation. But, interestingly, while affirming the trial court’s finding of an absence of proof of causation, the supreme court nevertheless affirmed the trial court’s award of presumed damages to the plaintiff. \textit{See id. ¶¶ 12, 31.}
\item \textbf{216.} There remains a question whether, as a matter of substantive tort law, nominal damages should be recoverable at all in the absence of proof of actual injury, and also whether such nominal damages would be constitutionally permissible in such a case if otherwise subject to the constitutional actual injury limitation. \textit{See RESTATEMENT (SECOND) OF TORTS § 569 cmt. c (1977) (stating that “[t]he constitutionality of” allowing nominal damages under some circumstances “even in the absence of proof of [actual] harm to reputation, is now somewhat uncertain”); id. § 620 cmt. c (stating that to the extent that special damages are not required by state law, the defendant may, under common law principles, be liable for at least nominal damages, although the constitutionality of “nominal damages when there is no proof of some actual injury . . . remains in some doubt”); 1
distress damages, for which it was (and perhaps remains) unclear to the extent that proof that the defamatory falsehood actually caused provable adverse effects on the plaintiff's reputation was required. Whereas, the application of the libel-proof plaintiff and incremental harm doctrines may offer closure, at least according to some courts. 216

The problem is that using the libel-proof plaintiff and incremental harm doctrines to end-run the causation element short-circuits thoughtful analysis of how the plaintiff's preexisting reputation and nonactionable statements should figure into the defamation equation. What is needed

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SACK, supra note 9, § 10.3.1, at 10-5 (saying common law provides "that even if a plaintiff is not injured by a defamatory publication, he or she is nonetheless entitled to nominal damages").

217. If nominals are recoverable even in the absence of proof of some actual injury, this raises the concern that they might be used, depending on state law, to anchor claims for punitive damages (at least if the requisite state of mind required by state and constitutional law for matters of public concern is established). Of course, the right to punitives would also depend on whether state law permitted the award of punitive damages in a case when the plaintiff is otherwise entitled to only nominal damages, a question about which there is some confusion and uncertainty. See 2 DOBBS, supra note 20, § 3.11(10), at 513; Marder, supra note 27, at 1007 (referring to the general rule which allows punitive damages even when only nominal damages have been suffered). There is some uncertainty on whether punitive damages can constitutionally be awarded in such circumstances. See Schiavone Constr. Co. v. Time, Inc., 646 F. Supp. 1511, 1519 (D.N.J. 1986) (applying New Jersey law), rev'd on other grounds, 847 F.2d 1069 (3d Cir. 1988). In Schiavone, the district court and court of appeals both suggested a division of authority on whether nominal and punitive damages could constitutionally be awarded without a finding of "compensable" damage. Schiavone, 646 F. Supp. at 1519; Schiavone, 847 F.2d at 1032, 1032 n.19 (referring to the question as a "constitutional minefield"). The district court addressed that question, holding "as a matter of federal constitutional law, that" the plaintiff could not maintain an action for purely nominal and punitive damages "absent a showing of compensable injury." See Schiavone, 646 F. Supp. at 1520.

And, the plaintiff in the instant case could not, according to the district court, prove such injury to reputation because that court held that the plaintiff was libel-proof. See id. at 1515. The court of appeals, however, held that the libel-proof plaintiff doctrine did not apply under the facts presented and therefore it did not have to reach the question of the availability of nominal and punitive damages absent a showing of compensable injury to reputation. See Schiavone, 847 F.2d at 1032.

Most courts have held that application of the libel-proof plaintiff doctrine ends the claim and thus obviates the need to decide the questions of the availability of punitive damages. See Schiavone, 646 F. Supp. at 1520 (citing cases). But the court of appeals interestingly chose not to "confront the secondary issue posed by the libel-proof plaintiff doctrine of whether plaintiffs, if they were found to be libel proof as a matter of law, could nevertheless seek punitive damages." Schiavone, 847 F.2d at 1031 n.17.

218. See Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 303 (2d Cir. 1986) (applying New York law in applying the libel-proof plaintiff doctrine and stating that the plaintiff was not even entitled to a nominal damages award); Schiavone, 646 F. Supp. at 1519; Jackson v. Longcoza, 476 N.E.2d 617, 619 (Mass. 1985) (holding that irrespective of whether someone is entitled to nominal damages in the absence of proof of actual harm, he or she is not entitled to nominal damages when the libel-proof plaintiff doctrine applies); 2 DOBBS, supra note 20, § 7.2(9), at 286 (stating that the libel-proof plaintiff "rule refuses to allow even nominal damages"). Interestingly, perhaps as a caveat, the court of appeals in Schiavone chose not to "confront the secondary issue posed by the libel proof plaintiff doctrine of whether plaintiffs, if they were found to be libel proof as a matter of law, could nevertheless seek punitive damages." Schiavone, 847 F.2d at 1031 n.17.
here is not the creation of two new doctrines, but rather delineation of
the causation and damages principles that should govern all defamation
claims. I will attempt to briefly identify some of the causation and
damages issues that seem in need of some analysis.

a. Identifying the Interest Protected

The courts should address the nature of the interest protected by
defamation. This step is an essential prelude to any sensible resolution of
situations commonly decided under the libel-proof plaintiff doctrine.
What is encompassed within the protected interest known as
“reputation?” The courts should decide how a plaintiff’s preexisting
standing should affect his or her defamation claim. Use of the libel-proof
plaintiff construct does not facilitate analysis. The preexisting reputation
of the plaintiff may be relevant to the damages question, depending on
precisely how the plaintiff is claiming he or she was harmed by the
statement. But the libel-proof plaintiff doctrine treats the plaintiff’s
preexisting reputation in all-or-nothing terms. This can be seen in the
way one proponent of the libel-proof plaintiff doctrine illustrates its
operation. He characterizes the plaintiff’s prior reputation as a wall with
a hole caused by prior damage to his or her reputation, then, the test
is, simply put, whether the subsequent alleged defamation passes
through the prior hole “thus causing no additional reputational harm . . .
or . . . was sufficiently different in kind or degree . . . to either create a
new hole or enlarge the bounds of the first.” If it were only that simple.
Reputations are not concrete walls, but intangible, dynamic, and
polycentric, making such illustrations metaphorical wishful thinking.
Plaintiff’s preexisting condition should not operate as a binary all-or-
nothing proposition. Reputation can only exist in the eyes of the
beholders, and therefore is constantly changing, as are the many facets
that comprise the plaintiff’s character. Aside from economic losses,
“reputational harm is intangible.” Reputations are not quantifiable into

New York law in explaining that the libel-proof plaintiff doctrine is based on the idea that the
plaintiff “cannot be harmed because the plaintiff’s reputation has already been so damaged that
further falsehoods do not cause any additional damage”).
220. See Hemphill, supra note 27, at 426.
221. Id.
222. 2 DOBBS, supra note 20, § 7.2(7), at 280.
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neat composite scores. They are not monolithic, but polycentric and multifaceted. They are not static, but dynamic.

The courts should also decisively confront the question of presumed damages. Specifically, they should consider adopting a universal threshold requirement of proof of some actual injury to reputation, one manifested by some discernible adverse effect on the plaintiff's relationships. Professor David Anderson has made a thoughtful case for abolishing the doctrine of presumed damages.

After identifying the evils of presumed damages in defamation, Anderson proposed a threshold requirement of proof of actual harm to at least one of three types of relational interests: harm to existing relations, harm to an existing favorable public image, or creation of a negative public image for a plaintiff who previously had no public image. Only then, if that threshold was satisfied, would the plaintiff be entitled to seek damages, if proven, for harm to future relations and for mental anguish. The process of reform could be facilitated if the Supreme Court would overrule Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., and extend the constitutional requirement for proof of actual injury to all cases, and would more narrowly define the actual injury requirement in a more limited way that is similar to Professor Anderson's thesis.

The courts should also clarify how a person's preexisting reputation should be considered in mitigation of damages. Most authorities agree

223. See Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1568 (D.C. Cir. 1984) (applying District of Columbia law in stating that "the theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety"), vacated on other grounds, 477 U.S. 242 (1986).

224. See Anderson, supra note 128, at 758, 767-71; Note, supra note 27, at 1915 n.39.

225. See Anderson, supra note 128, at 758, 767-71.

226. Anderson complains that presumed damages have no standards, are "inherently irrational," create a temptation to consider impermissible factors, prompt courts to invent convoluted theories to avoid them, result in abstract evaluation of claims based on whether the defamation was of a kind that would tend to harm, permit recovery unrelated to the interest of protecting the reputation of the particular individual, diminish the court's control over the size of jury verdicts, and generate mystifying evidentiary rules. See Anderson, supra note 128, at 749-53.

227. See id. at 765-67. The threshold requirement could be satisfied by any "type[] of demonstrable harm to existing relations" in the form of either pecuniary relational losses (such as "[l]oss of a specific job, contract, or client") or nonpecuniary relational losses ("such as desertion by a spouse, the estrangement of a child or parent, loss of friends, ... any other deterioration of an existing relationship," or denial of "membership in social or professional organizations"). Id. at 767, 769. The possibility of future relational harm would not alone satisfy the threshold requirement, but such harm would be compensable once the plaintiff had proven injury to the existing relationship (and the other elements). See id.

228. See id. at 769-71.

that the fact that the plaintiff had a preexisting poor reputation may be considered in mitigation of damages,230 or at least that those aspects of his or her prior reputation that are affected by the defamation may be considered.231 Thus, in one recent case, the plaintiff sued for allegedly being induced to portray herself as a teenage prostitute (and as such, libeled) on the Sally Jessy Raphael Show.232 The court held that “[i]f plaintiff’s reputation was disreputable before the purported defamatory statements were uttered, because she had been known for having casual sex with strangers, in exchange for money, drugs or otherwise, this information is clearly relevant to mitigation of damages.”233 As Professor Dan Dobbs has said, “[t]he plaintiff’s reputation, as it stood before the publication of defamatory material, is the benchmark from which reputational loss must be estimated.”234 The courts should clarify whether it is the plaintiff’s general reputation that is admissible, and also whether

230. See, e.g., Marcone v. Penthouse Int’l Magazine For Men, 754 F.2d 1072, 1079 (3d Cir. 1985) (applying Pennsylvania law in stating that “[e]vidence of a tarnished reputation is admissible and should be considered as a factor to mitigate the level of compensatory damages”); Weber v. Multimedia Entm’t, Inc., No. 97 Civ. 0682 PKL THK, 1997 WL 729039, at *2 (S.D.N.Y. Nov. 24, 1997); Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512, 517 (Tex. App. 1987) (referring to the rule “that the plaintiff’s tarnished reputation may be shown in mitigation of damages”); RESTATEMENT (SECOND) OF TORTS § 578 cmt. c (1977) (stating that the fact that the recipient of the communication “has already heard [a] similar statement[,] from other sources . . . is to be taken into account in determining the damages recoverable for the harm to the reputation of the person defamed”); 2 DOBBS, supra note 20, § 7.2(9), at 284 (stating that “[t]he plaintiff’s prior bad reputation” may be considered by the trier of fact on the issue of damages); 1 SACK, supra note 9, § 10.5.5.2, at 10-48 (stating that “[t]he fact that the plaintiff already had a bad reputation tends to show that his or her reputation has not been substantially affected by additional derogatory communication”); Hemphill, supra note 27, at 405 n.38 (observing that “[d]efendants in defamation actions have long been able to introduce evidence of the plaintiff’s previous bad reputation in an effort to mitigate damages”). Professor Anderson would also use this mitigation principle to mitigate mental distress damages. He comments: “On the theory that a person of good character is more likely to suffer genuine anguish from an accusation of misconduct than a person who is guilty, the court should permit the defendant to demonstrate prior acts of misconduct by a plaintiff who seeks recovery for mental anguish.” Anderson, supra note 128, at 772.

231. See Gosden v. Louis, 687 N.E.2d 481, 494 (Ohio Ct. App. 1996) (recognizing the rule on mitigating damages in principle but holding that it was error to admit such evidence in the instant case, and noting that in order to mitigate damages based on prior reputation, the mitigating evidence must “pertain[] to the same aspects of the plaintiff’s reputation as are alleged to have been damaged by the defamatory matter” and the subject character traits must have been “known by others in the community”); DOBBS, supra note 25, § 410, at 1150. Eldredge states “that the defendant may offer evidence of general bad reputation or bad character,” and general bad reputation of the plaintiff “for the particular thing charged.” ELDREDGE, supra note 194, § 97, at 564, 566. But he suggests, that “evidence of particular and separate departments of character” should not be allowed. Id. § 97, at 564-65 (quoting Steinman v. McWilliams, 6 Pa. 170, 175 (1847)).


233. Id. at *2.

234. 2 DOBBS, supra note 20, § 7.2(9), at 284.
evidence regarding specific aspects and characteristics of the plaintiff's preexisting reputation are admissible and the extent to which they must relate to those characteristics impugned by the alleged defamation.

The straightforward-appearing rule allowing evidence of prior reputation in mitigation of damages, like so much in defamation lore, has been complicated by other "rules." Thus, there is a rule occasionally mentioned to the effect that the mere fact of prior publication of the negative information should not be admissible. This obscure rule, on which it has been said, "the picture clouds," seems difficult to reconcile with the general rule allowing mitigation of damages based on prior reputation. Dobbs tries, referring to the rule against admission of prior publications, then saying "but if the plaintiff's prior reputation can be established independent of that publication, it would be admissible under the general rule."

Another related issue that deserves clarification involves the situation in which the plaintiff has committed prior acts of misconduct. The question is what effect, if any, those prior misdeeds should have on the plaintiff's defamation claim. In general, the prior acts of misconduct would ordinarily not serve to establish substantial truth where the alleged defamation consisted of imputation of other specific misdeeds to the plaintiff. Additionally, evidence of plaintiff's prior misdeeds would not seem to support mitigation of damages based on the plaintiff's prior reputation, unless those misdeeds had become sufficiently well known to be deemed a part of the plaintiff's reputation and were sufficiently related to the particular characteristic described in the defamatory statement. Nevertheless, some commentators allude to a rule to the

235. See id. § 7.2(9), at 286 (stating that most of the limited authority on point "holds that evidence of prior publication itself is inadmissible to mitigate damages"); 2 SMOLLA, supra note 19, § 9:62, at 9:44.1 (stating as an "established rule . . . that damages may not be mitigated by proof that the defamatory statement had already been published or in general circulation prior to the publication"); Anderson, supra note 128, at 754 (referring to the rule that "precludes a defendant from showing that the libel was already in circulation"); Kelley & Zansberg, supra note 45, at 9 (referring to the rule as an "anachronism [that] is routinely ignored by modern judges who require plaintiffs to prove and permit defendants to disprove that the wrong caused the damages claimed"). The rationale for this supposed rule is also obscure. Professor Anderson speculates that perhaps prior-publication evidence is excluded "on the theory that segregating the harm from different sources is too difficult." Anderson, supra note 128, at 754.

236. 2 DOBBS, supra note 20, § 7.2(9), at 285.

237. Id. § 7.2(9), at 290.

238. See supra notes 182-85 and accompanying text.

239. See DOBBS, supra note 25, § 410, at 1149-50 (noting that "evidence of the plaintiff's conduct on specific occasions would not be admissible, but evidence of the plaintiff's general reputation would be admissible, at least aspects of reputation affected by the defamation"); 1 MCCORMICK, supra note 183, § 187, at 651 n.1 (noting that "[reputation (not character) comes
effect that even apart from a substantial truth argument or mitigation based on prior reputation, damages should be reduced when, "had the truth been published instead of the false charge, the plaintiff’s reputation would also have been injured." This supposed rule does not make sense because the “truth” to which it refers is not the truth of the defamatory statement, but other truths about the plaintiff. Of the few authorities to address the question, most seem to reject such a rule, and would not allow evidence of prior misconduct for the purposes of mitigating damages, unless it was sufficiently related to and a relevant part of the plaintiff’s actual reputation to justify mitigating damages.

into issue when defendant seeks to mitigate damages by showing that plaintiff's reputation was bad," but that “[s]pecific acts may not be used to make this showing”); 2 SMOLLA, supra note 19, § 9:60, at 9-41 (stating that “[s]pecific prior acts of misconduct by the defendant concerning actions unrelated to the defamatory charges are traditionally not admissible in mitigation of damages”).

240. 1 SACK, supra note 9, § 10.5.5.1, at 10-48 & n.230 (citing several cases); see also Lawlor v. Gallagher Presidents' Report, Inc., 394 F. Supp. 721, 734 n.26 (S.D.N.Y. 1975) (applying New York law); cf. Fulani v. N.Y. Times Co., 686 N.Y.S.2d 703, 703 (App. Div. 1999) (holding that a statement was not actionable where it “could not have had a different or worse effect on the mind of a reasonable reader than the truth”). But see 1 SACK, supra note 9, § 10.5.5.2, at 10-49 n.236, 10-50.

241. See Gobin v. Globe Publ'g Co., 620 P.2d 1163, 1166 (Kan. 1980) (stating that "specific acts of misconduct, would not establish reputation"); Gosden v. Louis, 687 N.E.2d 481, 494-95 (Ohio Ct. App. 1996); Shirley v. Freunsch, 735 P.2d 600, 603 (Or. 1987) (stating that “[s]pecific instances of plaintiff’s prior business misconduct have no relevance to his reputation unless they were generally known in the business community”); Towle v. St. Albans Publ'g Co., 165 A.2d 363, 366 (Vt. 1960); DOBBS, supra note 25, § 410, at 1149 (rejecting the argument that the statement “generate[d] no more opprobrium or disturbance in readers’ minds than the truth," reasoning that a substantial truth finding would not be supportable unless the statement and the truth were substantially similar, and the truth about the plaintiff would not be admissible to reduce damages unless the true facts about the plaintiff were similar to the defendant's charges and, presumably, had become sufficiently known to be associated with the plaintiff as part of his reputation); cf. Maguire v. Journal Sentinel, Inc., 605 N.W.2d 881, 888 (Wis. Ct. App. 1999) (rejecting the defendant's argument that substantial truth could be established by proof that had it "printed the whole truth," the plaintiff would have been seen in a worse light than as portrayed), appeal denied, 2000 WI 36, 612 N.W.2d 732. But see Schafer v. Time, Inc., 142 F.3d 1361, 1372 (11th Cir. 1998) (applying Georgia law in permitting admission of evidence regarding specific instances of plaintiff's conduct on the issue of whether plaintiff's reputation was harmed). See generally 1 MCCORMICK, supra note 183, §§ 186-189, 195 (discussing in general the question of the admissibility of evidence of prior character, habit, acts, and conduct to prove specific conduct for various purposes). In Maguire, the plaintiff's claim was based on a newspaper story reporting that the plaintiff had assaulted her ex-husband. See Maguire, 605 N.W.2d at 889. The defendant argued that it “could have printed the facts pertaining to true instances where [the plaintiff] ‘verbally assaulted’ [her former husband], where she grabbed his coat, where she dumped baptismal water on him, and where she embraced him against his will,” in order to (presumably) either prove substantial truth or support the libel-proof plaintiff doctrine. Id. at 888. In rejecting the argument, the court seemed to vacillate among several doctrines in addressing this type of argument. They included substantial truth, the libel-proof plaintiff doctrine (which the court mislabeled as the incremental harm doctrine), and a truth-would-be-worse type rule. See id. The court rejected the defendant's argument, noting simply that the court was “unwilling to stretch the substantial truth doctrine this far.” Id.
Perhaps the most sensible approach to evidence of prior misconduct would be similar to the one I propose for dealing with the libel-proof plaintiff and incremental harm doctrines. Evidence of the plaintiff’s prior misconduct would be allowed only to the extent that it is relevant to an element of defamation, such as the state of mind requirement, or relates to the plaintiff’s actual established preexisting reputation. Otherwise, evidence of prior misdeeds should ordinarily be inadmissible.

b. Test for Causation

The courts should also clearly delineate and explain the test for causation in defamation cases. This is especially important for providing a sensible framework for deciding cases arising from publications with similar actionable and nonactionable statements in the same publication, situations sometimes analyzed under the incremental harm expedient.  

Causation in personal injury cases generally has been based on a so-called “but for” (or “sine qua non”) test. Under this test, causation requires that the injury would not have occurred “but for” the defendant’s tortious conduct. There has been a notable exception to this test, however, in the situation best illustrated by the two-fires paradigm. In the classic example, there are two fires, one set by the defendant and one of other origin, that converge before destroying the plaintiff’s property. Although a literal “but for” test of causation will not work here—the property would have been destroyed even without the defendant’s fire—causation may still be found in this type of situation if under an alternative test either fire alone was deemed “a substantial factor” in producing the harm. This alternative construct

242. See infra note 282 and accompanying text.
243. See Herbert v. Lando, 781 F.2d 298, 310 (2d Cir. 1986).
246. See Restatement (Second) of Torts § 432 illus. 4 (1965).
247. See Dobbs, supra note 25, § 171, at 414.
248. See Restatement (Second) of Torts § 432(2). In general, the substantial factor test of causation was conceived to operate interstitially in situations in which a literal “but for” test does not work very well, “particularly when two independent causes concur to produce an injury that either of them alone could have produced.” Waste Mgmt., Inc. v. S. Cent. Bell Tel. Co., 15 S.W.3d 425, 431 (Tenn. Ct. App. 1997).
used in the “duplicative causation” situation is commonly referred to as the “substantial factor” test. According to the Restatement (Second) of Torts (“Restatement”), the defendant’s conduct may be a substantial factor (and thus a cause) if it would have alone been sufficient to produce the outcome and essentially is not found to have been too insignificant or diluted in effect when compared to the other contributing factors.

The law has been unclear not only on the scope of the causation requirement in defamation cases generally, but also on the controlling test for causation. Although the “but for” test seems to be the test that would apply in a typical defamation case, the possibility that a substantial factor test might be appropriate in the defamation equivalent of the two-fires situation has been approved or at least acknowledged in some defamation cases. And indeed, the Restatement has alluded to its potential application in defamation. A few slander of title or


250. See RESTATEMENT (SECOND) OF TORTS §§ 431-433; DOBBS, supra note 25, § 171, at 415.

251. See RESTATEMENT (SECOND) OF TORTS § 432(2).

252. See id. § 433 cmt. d.

253. See 2 DOBBS, supra note 20, § 7.2(7), at 279, § 7.2(9), at 284 (referring to the requirement of “show[ing] that defamation is a but-for cause of reputational harm,” in discussing the “but for” test as the general rule except for presumed damages).


255. See Kurth v. Great Falls Tribune Co., 1998 MT 178N, ¶¶ 27-30, 977 P.2d 342 (unpublished table decision). In Kurth, the issue was whether an allegedly defamatory statement (that plaintiff-attorney had nine criminal charges pending) caused harm to his professional reputation. See id. ¶ 7. The trial court found that by the time of the publication of the article, the plaintiff “was already ‘financially beleaguered,’” id. ¶ 27, due to the way he conducted his practice. See id. ¶ 12. Thus, the article was not a cause of the decline in the plaintiff’s income and professional reputation. See id. The supreme court affirmed. See id. ¶ 32. It seemed to straddle both a preexisting condition analysis—that the harm to the plaintiff’s reputation had already occurred—and a causation analysis—that the article did not cause the decline in the plaintiff’s income and harm to the plaintiff’s professional reputation. See id. ¶¶ 26-30. The “already” language suggests the former, while later the court expressly used causation language. See id. The court was noncommittal on whether a substantial factor test of causation (as compared to a “but for” test, presumably) should be adopted for defamation. See id. Instead, the court assumed arguendo that a substantial factor test would be applied, and said in any event there was sufficient evidence to support the trial court’s decision that the article “was [not] a substantial factor in bringing about [his] damage or injury.” Id. ¶ 29.

256. See RESTATEMENT (SECOND) OF TORTS § 622A cmt. b (1977) (noting use of the substantial factor test of causation for the proof of special harm when required).

product disparagement cases have approved the potential application of the substantial factor test, perhaps paving the way for its adoption in defamation cases.

The incremental harm doctrine may be, in its effect, a repudiation of the substantial factor test. The incremental harm doctrine seems essentially to mandate a “but for” test of causation when a publication contains similar actionable and nonactionable statements and the actionable statements do not appear to have added further injury to that harm attributable to the nonactionable statements. Thus, one commentator articulates the incremental harm doctrine in a way that is tantamount to a but for test, stating “that a libel plaintiff's reputation before and after the challenged statement should be compared ... [and if] the reputation after the statement is no worse than it was before the statement, no libel action should lie.” There may actually be several factual patterns in which the incremental harm doctrine might be considered. One is where the harm suffered is “incremental,” another is where it is “identical” to the harm attributable to the nonactionable statements, and a third is where the challenged statements merely lend

alleging that an invalid notice of termination of an easement caused a delay in the sale of his real property. See id. at 118-19. The defendant, on the other hand, contended that a challenge to the zoning variances was the cause of the delay. See id. at 119. The court applied a substantial factor test of causation. See id. at 120-21 (relying on Section 632 of the Restatement (Second) of Torts). The court described its substantial factor test, saying: "[W]here several factors combine to produce an injury, and where any one of them, operating alone, would have been sufficient to cause the harm, a plaintiff may establish factual causation by showing that the defendant's actions ... were a 'substantial factor' in producing a plaintiff's injuries." Id. at 121 (quoting Skinner v. Square D Co., 516 N.W.2d 475, 480 n.8 (Mich. 1994)). The court elaborated that "the factfinder must assess the relative weight of all the reasons for delay and determine whether the notice of termination was a substantial factor in the purchaser's decision to delay the closing." Id.


260. Hemphill, supra note 27, at 430.


262. See id.; see also Church of Scientology Int'l v. Time Warner, Inc., 932 F. Supp. 589, 594 (S.D.N.Y. 1996) (applying New York law in stating that where the otherwise actionable statement merely “implies the same ultimate conclusion as that of the remainder of the publication,” it is not actionable, and referring to this rule as “[t]he subsidiary meaning doctrine”).
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weight to the sting from the nonactionable portions. The incremental harm doctrine appears similar to a "but for" test of causation where the nonactionable and actionable statements were coterminous. The doctrine might even be more onerous to plaintiffs than a "but for" test when the effects of the otherwise actionable statement were incremental rather than identical, since the plaintiff might be able to satisfy a "but for" test and still lose.

Rather than sidestep the question with the incremental harm device, the courts should analyze the causation element in a straightforward way. They should decide whether a substantial factor test of causation is available in the defamation equivalent of the "two fires" paradigm. A causation analysis employing a substantial factor test seems preferable to the incremental harm doctrine. However, one article has argued for an exclusively "but for" test. That preference may, however, reflect an incomplete view of the substantial factor alternative. Although the substantial factor test requires that either of the "two fires" would have alone been sufficient to produce the harm, such a finding does not automatically satisfy the substantial factor test. Rather, the substantial factor test, according to the Restatement, also requires an inquiry and determination of whether the defamatory statements "had[d] a substantial as distinguished from a merely negligible effect in bringing about the plaintiff's harm." Thus, a substantial factor test would not

263. See Herbert v. Lando, 781 F.2d 298, 310 (2d Cir. 1986) (applying New York law); Framson, supra note 45, at 1484, 1500. In Herbert, a broadcast had allegedly implied that the plaintiff had lied that he had reported war crimes in Vietnam, and therefore that the plaintiff had been relieved of command for reasons other than the fact that he had reported war crimes. See Herbert, 781 F.2d at 302-03, 307. The trial court refused to grant defendants summary judgment on two statements that were not facially defamatory, but which tended to bolster the weight of the defamatory implication that the plaintiff had not reported war crimes (and therefore had not been relieved of command for that reason). See id. at 307. On appeal, the court of appeals reversed and held that summary judgment should have been granted on those two statements, which were merely subsidiary to the basic implication that the plaintiff had lied about reporting war crimes, about which the defendants had other ample grounds to support their conclusion. See id. at 312. Essentially, the two statements bore on the broader conclusion ("subsidiary to these larger views") that the plaintiff had lied, which was nonactionable because other grounds for making it foreclosed a finding of the element of actual malice. See id. at 311. But Judge Kaufman refused to characterize his rule as a variation of the incremental harm doctrine. See id. at 311 n.10.

264. See Kelley & Zansberg, supra note 45, at 13.

265. Thus, the authors seem to view the substantial factor test in narrow terms, as depending solely on whether each of the actively operating forces would alone have been sufficient to bring about the harm. See id. (referring to the substantial factor test as "the 'itself sufficient' exception").

266. RESTATEMENT (SECOND) OF TORTS § 431 cmt. b (1965). The Restatement identifies a number of important considerations to be weighed in deciding whether a defendant's otherwise actionable conduct constituted a substantial factor for the purposes of causation. They include the number of other contributing factors and their predominance. See id. § 433(a) & cmt. d; see also

http://scholarlycommons.law.hofstra.edu/hlr/vol29/iss2/1
automatically preclude a claim when the publication contained overlapping actionable and nonactionable statements, but neither would it find causation, unless the effect of the otherwise actionable statement was deemed substantial enough.

Of course, one might say that a substantial factor test is really not all that different from the incremental harm doctrine, especially an incremental harm rule based on multiple criteria like those identified in the Jewell v. NYP Holdings, Inc.257 case.258 But that misses the point. By eschewing the incremental harm doctrine in favor of a causation-based analysis, we return to the more stable footing of the elements. In addition, we also avoid indulging the objectionable premises underlying the doctrine.269

3. Other Potentially Applicable Elements and Defenses

Although the proof-of-falsity and causation elements and damages rules are the primary tools that should be considered instead of the libel-proof plaintiff and incremental harm doctrines, several other elements or privileges may also occasionally overlap to varying degrees with those doctrines. The degree of overlap is, however, difficult to gauge given the illusive conceptual underpinnings of the libel-proof plaintiff and incremental harm doctrines. One element that occasionally overlaps with the two doctrines is the requirement that the defendant's statement be one of fact rather than opinion.270 The Supreme Court has held, in a related construct, that at least in matters of public concern, the Constitution requires that the defendant's statement be provable as false.271 The idea behind this element is basically that pure opinions

GKC Mich. Theaters, Inc. v. Grand Mall, 564 N.W.2d 117, 121 (Mich. Ct. App. 1997) (stating in a slander of title case applying a substantial factor test that "[t]he factfinder must assess the relative weight of all the reasons for delay and determine whether the notice of termination was a substantial factor in the purchaser's decision to delay the closing"), appeal denied, 586 N.W.2d 924 (Mich. 1998). Professor Dobbs adds that the substantial factor test should depend to some extent on the jury's intuition. See DOBBS, supra note 25, § 171, at 416.

268. See supra notes 49-83 and accompanying text. Some of the commentary purporting to be discussing the incremental harm doctrine also seems similar to a substantial factor causation analysis without explicitly framing the matter in such terms. See Kite, supra note 27, at 558 (explaining that the incremental harm doctrine bars the claim 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 required ... judicially futile").

269. See discussion infra Part III.C.
represent only the defendant’s reflective processing of known facts rather than an assertion of "new" damaging facts about the plaintiff.272

The potential overlap of the fact element and the libel-proof plaintiff doctrine is illustrated in *Kevorkian v. American Medical Ass’n.*273 Dr. Kevorkian brought a defamation claim based on a variety of statements published by various people connected with the American Medical Association, including statements to the effect that the plaintiff "'perverts the idea of the caring and committed physician,' ‘serves merely as a reckless instrument of death,’ ‘poses a great threat to the public,’ and engages in ['continued killings' and] ‘criminal practices.’”274 The court held “that, with respect to the issue of assisted suicide, plaintiff is virtually ‘libel proof.’”275 As an alternative holding, the court added that

with respect to this highly public plaintiff and the facts of this case, which are nothing if not matters of public concern, because the statements also are necessarily subjective and could also be reasonably understood as not stating actual facts, they are either nonactionable rhetorical hyperbole or must be accorded the special solicitude reserved for protected opinion.276

The requirement that the statement be one of fact rather than pure opinion is sometimes also deemed to overlap with the incremental harm doctrine. In one case, the defendant’s book review had stated that the plaintiff’s book was "'sloppy journalism.'"277 The court said that there were a number of observations about the plaintiff’s book that could support the sloppy-journalism appraisal, and at least five of those could

272. *See Restatement (Second) of Torts §§ 565-566.*
274. *Id.* at 235 (quoting a letter).
275. *Id.* at 239.
276. *Id.* The court added:

Having exercised his leadership on behalf of one side of this debate, ... it is now more than a little disingenuous for plaintiff to accuse those on the opposite side of this debate of defamation. Such alleged defamation is grounded here in nothing more than the fact that defendants are in disagreement with plaintiff’s position: they would characterize plaintiff’s conduct differently than plaintiff would characterize it. *Id.* at 240. The dissent viewed the issue exclusively in terms of whether the alleged defamatory statements were "expressions of opinion" and thus protected. *See id.* (Jansen, J., dissenting). In another case, although the court of appeals relied on the libel-proof plaintiff doctrine in affirming the Claims Commission decision, the Commission had based its decision on the fact that the statement in question was not a factual statement. *See Coker v. Sundquist, No. 01A01-9806-BC-00318, 1998 WL 736655, at *4 (Tenn. Ct. App. Oct. 23, 1998).* Thus, the Commission noted it "was an exaggeration, just a piece of mockery" and anyone reading the newspaper would see that it was "not statistically precise[" and would not “take[ it with nit-picking precision.” *Id.* at *2.
not be proven false, were reasonable interpretations, or were not challenged. 278 Although the court acknowledged that the incremental harm doctrine had already been rejected in the jurisdiction, 279 it nevertheless held that the sloppy-journalism statement was not actionable on other grounds based on the fact-opinion rule. 273 The court reasoned that a book review commentary was actionable only when its interpretations were unsupportable by reference to the written work, but if the book review's statement is a supportable interpretation of the author's work, then it is not actionable (because it would be opinion rather than factual). 281

The factual context in which the libel-proof plaintiff doctrine is sometimes considered may also involve the state of mind element. For example, one case held that "[e]vidence of plaintiff's alleged past misconduct will generally be admissible . . . on the issue of defendant's malice, if the requisite foundation for such evidence is laid." 282 The constitutional substantive tort law complexities of the state of mind requirement in defamation are beyond the scope of this Article. The point here is that the state of mind element represents another doctrinal tool for potentially limiting the scope of defamation claims, and like the other elements, is more rationally grounded in comprehensible defamation law than the libel-proof plaintiff doctrine.

Defendants sometimes also invoke a privilege to report official proceedings 283 (or a related privilege) in addition to the libel-proof plaintiff doctrine. 284 In one case, for example, although the defendant's statement incorrectly reported that the plaintiff had been convicted of one crime, he did have a long record of arrests and convictions

278. See id. at 320.
279. See id. at 319.
280. See id. at 320.
281. See id. at 313, 315.
284. See Rogers v. Jackson Sun Newspaper, No. CIV.A.C-94-301, 1995 WL 383080, at *2 (Tenn. Cir. Ct. Jan. 30, 1995) (stating that defendant's statement was privileged because the article was a "substantially accurate account of [the plaintiff's] criminal record"); Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512, 515 (Tex. App. 1987). Interestingly, one of the two cases relied on by the seminal libel-proof plaintiff Cardillo case was Urbano v. Sondern, 41 F.R.D. 355, 357 (D. Conn.), aff'd, 370 F.2d 13 (2d Cir. 1965). See Cardillo v. Doubleday & Co., Inc., 518 F.2d 638, 639 (2d Cir. 1975). Although the trial court in Urbano relied on a ground similar to the libel-proof plaintiff doctrine in finding that the plaintiff did not qualify under the in forma pauperis statute, the court of appeals also relied on two alternative grounds to support its affirmance. It held that the action would also be precluded under the falsity element (because the statement was substantially true) and under the privilege to report on official proceedings. See Urbano, 370 F.2d at 14.
extending over the last twenty-five years. In addition to the libel-proof plaintiff doctrine and a substantial truth ground, the court of appeals affirmed a summary judgment for the defendant on the alternative ground that the defendant’s statement was privileged. The privilege in question, a statutorily created one, was to report on judicial proceedings. In applying the privilege, the court used a test based on whether “any greater opprobrium would attach to appellant’s crimes as reported than to those crimes for which he has been convicted.”

In another case, the court’s invocation of the incremental harm doctrine seemed influenced in part by a desire to protect the privilege to report official proceedings. In Tonnessen v. Denver Publishing Co., a newspaper was sued for reporting the in-court statements by the plaintiff’s former wife accusing him of marital rape, and reporting out-of-court statements by the wife’s sister to the effect that the wife had told the sister essentially that the plaintiff had forced his wife to have sex with him. Reporting the wife’s accusations were privileged under the privilege to report official proceedings. The court held that the report of the sister’s remarks, even if not privileged, were subject to the incremental harm doctrine and therefore not actionable. The court reasoned that “[t]o hold otherwise would allow [the plaintiff] to do indirectly what he could not do directly; that is, to make [the defendant-newspaper] liable for accurately reporting the wife’s in-court statement.”

The preceding cases illustrate how various established elements and defenses may overlap with both the libel-proof plaintiff and incremental harm doctrines. Those established elements and defenses represent other potential elemental tools with which the courts may address concerns, similar to those that may have animated the libel-proof plaintiff and incremental harm doctrines.

285. See Finklea, 742 S.W.2d at 514.
286. See id. at 515.
287. See id.
288. Id.
290. See id. at 962.
291. See id. at 964.
292. See id. at 966.
293. Id.
C. "Unworthy Wretches"

The libel-proof plaintiff and incremental harm doctrines are also objectionable for what they represent. Viewed as discrete freestanding constructs, separate from the elements of defamation law, it becomes easier to see the tenuous premises on which these doctrines depend. They are premised on a conception of an individual's nature and reputation that is static rather than dynamic. They are also based on a view of reputation that is monolithic rather than multifaceted. These premises are then applied in a methodology that operates in a binary and classificatory manner. The effects of this static and monolithic perspective and the doctrines' operative methodology are compounded when combined with a moral explanation for a person's classification.

The static and one-dimensional point of view inherent in the libel-proof plaintiff doctrine hauntingly parallels what has been described as the "static paradigm"\textsuperscript{294} embodying American systems of poor relief.\textsuperscript{295} This static paradigm connotes a fundamental acceptance of socio-economic stasis.\textsuperscript{296} Some of the implications of the acceptance of the immutability of the status quo identified by Professor Larry Catá Backer, include "an acceptance of the existence, value, and immutability of income inequality and its derivative notions."\textsuperscript{297} With a static paradigm, we can become comfortable with the assumption that "[t]he poor ... make up an inevitable element of the stable social and economic order."\textsuperscript{298} Attitudes toward the poor also reflect a view of wealth as "necessarily a function of the ability of people, by their own efforts, to accumulate it, [so that] those who cannot or do not accumulate it in quantity sufficient to meet their needs are labelled ... life's losers."\textsuperscript{299} Therefore, "the desperately poor are [viewed] not like the rest of the laboring population; they are akin to a different subspecies of humanity."\textsuperscript{300} Poverty is seen as "a pathological condition of each individual pauper rather than a symptom of a malfunctioning society or economic system."\textsuperscript{301}


\textsuperscript{295} See id.

\textsuperscript{296} See id. at 889.

\textsuperscript{297} Id.

\textsuperscript{298} Id. at 893.

\textsuperscript{299} Id. at 891.

\textsuperscript{300} Id.

\textsuperscript{301} Id. at 893.
Similar attitudes inhere in the libel-proof plaintiff doctrine. Human beings are neatly classified, labeled, and consigned away. They are characterized as static entities, beyond redemption, at least with respect to the facet of their reputation under consideration. Libel-proof plaintiffs commonly are persons with criminal records. They frequently are or were imprisoned. Recent reports peg the current United States adult prison population at 1,860,520, "the highest in the world." Yet, as Professor Joan Vogel reminds us, "[c]rime ... is quintessentially a cultural—not a biological—construct." It is convenient to classify poor and imprisoned persons as permanently impaired goods, just like it has been to distinguish between worthy and unworthy poor persons. As Professor Backer notes, "[t]he very labels society uses to 'describe' the poor separate them from the rest of society." The static paradigm makes it easier "to focus on directly manipulating the target population rather than attempting the manipulation of the system." That way the targeted population is contained. With the libel-proof plaintiff doctrine, the legal options of the unworthy members of the society are similarly contained.

By perceiving the distress of poor and imprisoned persons as a moral matter, we not only confine them "to a purgatory of personal failure and [make] them mere outcasts of society," but decision makers thereby can more comfortably avoid acknowledging any societal

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302. See Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 303 (2d Cir. 1986) (applying New York law). The court held that with respect to the statement that the plaintiff "‘is married and also has a live-in girlfriend, Kathy Keeton,’” id. at 299 (quoting a 1983 issue of Penthouse), the plaintiff’s “reputation regarding adultery rendered him libel-proof on this subject.” Id. at 303-04. The court added, “[n]or is it tenable to maintain that [the plaintiff], though libel-proof as to adultery from 1966 to 1979, somehow succeeded in restoring his reputation during the four years prior to the Hustler statement.” Id. at 304.


304. Id.

305. See id.

306. Vogel, supra note 14, at 426.

307. See JOEL F. HANDLER & YEHEZKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 37 (1991) (stating that “the evolution of welfare policy is, in large part, the process of creating and revising the moral classifications of the poor”).

308. Backer, supra note 294, at 891.

309. Id. at 983-84.

310. WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 77 (2d ed. 1979).

311. See Wes Daniels, “Derelects,” Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates, 45 BUFF. L.
responsibility. They need not address other explanations for the current plight of such individuals, such as centuries of pervasive racism, modern urban apartheid, and gender, class, and race-based exploitation. Throughout American "social history, racial discrimination and nativism have served to affirm dominant values, status, and power by defining people of color and immigrants as deviant and degraded." 312

Social Darwinism313 provided the most obvious philosophical prop for classificatory doctrines like the libel-proof plaintiff doctrine, although no court has expressly acknowledged the connection. Herbert Spencer, the quintessential Social Darwinist who coined the "survival of the fittest"314 phrase, provided much of the intellectual fodder paving the way for rules like the libel-proof plaintiff doctrine. One and a half centuries ago Spencer tells us:

A civilized society is made unlike a barbarous one by the establishment of regulative classes—governmental, administrative, military, ecclesiastical, legal, ... which ... are also held together as a general class by a certain community of privileges, of blood, of education, of intercourse. In some societies, fully developed after their particular types, this consolidation into castes, and this union among the upper castes by separation from the lower, eventually grow very decided: to be afterwards rendered less decided, only in cases of social metamorphosis caused by the industrial regime. 315

Just as Social Darwinism rationalizes preservation of the economic status quo,316 so does it rationalize recognition of a libel-proof classification. It has never made sense to me, however, how an evolutionary theory, premised as it is, on change and development, could

REV. 687, 688 (1997) (stating that "as scholars have noted in a variety of areas, legal doctrine is structured in such a way as to effectively erase struggle").
313. See generally RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (rev. ed. 1955) (describing the impact of Charles Darwin's theories of biological evolution on intellectual life and social thought).
315. HERBERT SPENCER, FIRST PRINCIPLES § 111, at 317 (4th ed. 1896, largely based on 2d ed. 1867). He adds that "gradually, as the tribe progresses, the contrast between the governing and the governed grows more decided." Id. § 122, at 343. On Spencer's influence, Hofstadter notes: "If Spencer's abiding impact on American thought seems impalpable to later generations, it is perhaps only because it has been so thoroughly absorbed." HOFSTADTER, supra note 313, at 50.
316. See HOFSTADTER, supra note 313, at 7 (referring to Social Darwinism as defending the status quo and strengthening "almost all efforts at the conscious and directed change of society"); Vogel, supra note 14, at 427 (noting that "[n]o sort of political and social reform that tried to improve the conditions for the lower classes would only interfere with the workings of natural selection").
be so unabashedly urged as justification for preserving the status quo. Biological evolutionary notions founded on dynamic change and development do not seem well-suited premises on which to hang a rule of law that depends on individuals in a permanently suspended stage of character development. In truth, then, the "survival of the fittest" epigram provided more of an emotional than a logical foundation to support the preservation of the status quo and social stasis. The unworthy poor person, the incorrigible criminal, and the libel-proof classifications become effortless guilt-free next steps once fixed socio-economic strata were viewed simply as nature's way.317

In his oral history of homeless Americans, Steven VanderStaay relates the story of a twenty-eight-year-old homeless person.318 He quotes her: "I'm Hell; that's my name. My mother called me that."319 She explained: "My mom had emotional problems, some type of mental disability, and drug addiction and alcoholism on top of it. And everything that went wrong in her love life, or home life, or anything else, was my fault."320

Would a homeless street person who has been to prison, who panhandles, who has had two children, and who has been known for twenty-eight years as "Hell," be deemed libel-proof? Is that where we are headed with this?

The static libel-proof plaintiff classification conflicts with bedrock spiritual values of redemption and dynamic human resilience. As J. R. Lucas has noted:

If God created man in His own image, He must have created him capable of new initiatives and new insights which cannot be precisely or infallibly foreknown, but which give to the future a perpetual freshness as the inexhaustible variety of possible thoughts and actions, on the part of His children as well as Himself, crystallizes into actuality.321

317. The poor, according to Spencer, were unfit for aid and should be winnowed out. See HOFSTADTER, supra note 313, at 41.


319. Id. at 73.

320. Id. at 72.

It is hard to imagine that judges, who have learned to distrust human classifications, could ever feel comfortable deciding who is or is not so characteristically unworthy as to be deemed libel-proof.\footnote{See Daly, supra note 42, at 392 (saying that the libel-proof plaintiff doctrine would require the judge to make a determination he "would be extremely uncomfortable with, akin to making plaintiffs wear a scarlet 'L-P' on their chest").}

IV. CONCLUSION

I believe that the libel-proof plaintiff and incremental harm doctrines should be rejected by the courts. I base this conclusion on two objections to the doctrines. First, on an instrumental level, I oppose the doctrines because they bypass the elements, privileges, and damages rules of defamation law, or at least operate independently of those established elemental principles. Far from rationalizing and streamlining the litigation process, the doctrines add uncertainty and complexity to defamation law. Many cases ostensibly relying on the libel-proof plaintiff or incremental harm doctrines can be (and often, through alternative holdings, have been) better analyzed within the framework of the elements, privileges, and damages rules, without the need to invoke the libel-proof or incremental harm doctrines. Defamation claims should be determined exclusively within the framework of the elements, privileges-defenses, and damages rules of defamation law. If those foundational components are in need of change, then that process should occur directly and thoughtfully, rather than obliquely through doctrinal expedients.

Secondly, the libel-proof plaintiff doctrine and to some extent the incremental harm doctrine are based on faulty premises. The doctrines depend on a view of an individual’s nature and reputation that is static rather than dynamic. They are also premised on a view of reputation that is monolithic rather than multifaceted. The doctrines are binary and classificatory in their methodology and operation. This classificatory approach is emblematic of a broader tendency to use "unworthiness" classifications as easy solvents for complex social problems, masking and thereby avoiding the felt need to grapple with the underlying causes. Classifying persons as libel-proof, or criminals, or unworthy poor, neatly dismisses their claims and their predicaments. And we are no closer to real solutions for untangling the gnarled coils that have ensnared so many for so long. The doctrines also place our judges in a position they have usually assiduously avoided—that of deciding who is and who is not
characteristically worthy of legal respect and protection from defamatory attack.