Her Own Good Name: Two Centuries of Talk About Chastity

Lisa R. Pruitt

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Since the earliest days of U.S. legal history, women have sought legal redress for statements about their sexual behavior or otherwise about them as sexual beings. These female plaintiffs have typically employed defamation law to sue on the basis of communications that undermined their reputations for sexual propriety, which the law referred to as chastity. In this Article, Professor Pruitt tracks women’s use of defamation law from the earliest recorded cases to the turn of the twenty-first century, noting how changing society and evolving legal doctrines have altered judicial responses to these claims.

Defamation law was historically highly responsive to injuries resulting from such communications, but the ways in which the media portray and undermine women are constantly shifting. Professor Pruitt focuses in particular on late twentieth-century defamation cases related to chastity and sexual portrayals. She observes that courts still recognize injury to a woman’s reputation from a straight-
forward assertion of adultery, prostitution, or certain sexually "deviant" behaviors. Contemporary defamation fails, however, to acknowledge or provide redress for many other statements that ridicule and demean women in relation to their sexuality. Professor Pruitt's analysis illustrates how constitutional doctrines associated with defamation law, such as the fact-opinion dichotomy and the related protection of rhetorical hyperbole, defeat women's legal claims and obscure the dignitary injuries they suffer.

As a solution to this legal oversight, Professor Pruitt argues for recognition of a new tort for technically false statements that demean or ridicule. She explains how such a tort is consistent with first amendment jurisprudence, and she discusses how it is preferable to defamation law in terms of its candid characterization of injury as one to dignity, rather than to reputation. While she acknowledges that her proposed solution is not foolproof (and risks continuing legal regulation of women's sexuality), Professor Pruitt argues that it is nevertheless preferable to provide a remedy that women may invoke rather than to leave them entirely without the option of legal redress.
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Our society has long been preoccupied with women's sexual propriety, and that preoccupation has naturally led to talk. For several centuries, women in the United States have turned to defamation law when seeking legal redress for injuries caused by such talk, whether by neighborhood gossips or the mass media.

Historically, defamation law was highly responsive to lawsuits brought by women on the basis of statements that undermined their reputations for chastity. These cases frequently arose from straightforward assertions of adultery and other "improper" sexual behavior, and female plaintiffs frequently won their defamation actions. In recent decades, however, the type of statement giving rise to chastity-related defamation suits has changed, as has the law's response.

While contemporary women sometimes still sue on the basis of statements that allege or imply inappropriate sexual behavior, other defamation cases arise from statements that ridicule women in relation to their sexuality or otherwise portray them in sexually degrading ways. Such contemporary portrayals are the basis for what I call the "new chastity" cases. In contrast to those suing based on a straightforward assertion of sexual misconduct, a plaintiff bringing a new chastity claim seldom succeeds. The new chastity plaintiff is thus often left with no relief.

Using the label "new chastity" for these cases is admittedly a misnomer because the statements that give rise to them are hardly, if at

1. See Lisa R. Pruitt, "On the Chastity of Women All Property in the World Depends": Injury from Sexual Slander in the Nineteenth Century, 78 Ind. L.J. 965, 984 (2003) (noting that due to the permissive nature of the per se standard, women frequently won sexual slander cases based on allegations of unacceptable sexual conduct); see also, e.g., Walmsley v. Kopczynski, 195 N.Y.S. 699, 700 (App. Div. 1922) (holding that a statement that a woman was a whore was defamation per se justifying a verdict for the plaintiff); Emmerson v. Marvel, 55 Ind. 265, 267 (1876) (upholding a verdict for the female plaintiff where the defamation involved words intended to suggest the unmarried plaintiff had engaged in improper sexual conduct).

2. See Andrew J. King, Constructing Gender: Sexual Slander in Nineteenth-Century America, 13 Law & Hist. Rev. 63, 74 (1995) (examining representative cases from Indiana and New York and concluding that most slander cases brought by female plaintiffs were based on implications of sexual misconduct).

3. See Pruitt, supra note 1, at 1018 (discussing the increase in victories by female plaintiffs in sexual slander cases due to the per se standard).

4. See infra Part IV (noting a trend of media defendants in modern sexual defamation suits and plaintiffs' diminished success in court).

5. Such behavior includes adultery, prostitution, the contraction of a sexually transmitted disease, or the procurement of an abortion, among others. See infra Part IV.C.1 (describing contemporary cases based on traditional sexual slander claims).

6. See infra Part IV.C.2, 3 (discussing contemporary cases that explore non-traditional forms of sexual defamation). For specific examples of sexually degrading portrayals, see Deborah L. Rhode, Speaking of Sex: The Denial of Gender Inequality 79-76 (1997).
all, about chastity. They are about portrayals that demean and degrade, inflicting a dignitary injury. Nevertheless, I refer to them as “new chastity” cases because a plaintiff who brings one usually claims her reputation was damaged by an offending statement that implied sexual impropriety. I also use the phrase because the content of the offending speech is sexual, and its power to demean and degrade derives in part from that sexual content. Finally, I use the phrase “new chastity” because it reflects the theory of recovery I craft to respond to this injury.

I argue in this Article that the law should provide redress in some of these new chastity cases, and that contemporary constitutional law provides an opportunity to do so. In particular, I argue that when offensive statements are technically false, they are unprotected by the First Amendment, thereby permitting states to grant redress for the profound dignitary harm they inflict without implicating constitutional protections of free speech.

As a prelude to my discussion of the new chastity cases, I consider the evolution of the female plaintiff’s use of defamation law to redress communicative injuries caused by statements that imply inappropriate sexual behavior. The outcomes in both traditional chastity cases and the new chastity cases are problematic. Both types of decisions reinforce women’s collective association with the private sphere of life, in particular with sex. Traditional chastity cases do this by recognizing an injury when a woman is said to fall short of society’s expectations of a “good woman.” While the availability of this remedy may have been helpful to the individual women who have successfully sued, the law’s adjudication of these claims has negatively reinforced society’s expectations of what constitutes women’s “proper” sexual behavior. The new chastity cases reinforce—or attempt to re-create—women’s association with the private sphere by failing to recognize an injury when a woman has been involuntarily depicted in a sexually hateful and demeaning way. Thus, in both types of cases, tort law’s normative power perpetuates women’s historical alignment with the private sphere, and specifically with all things sexual.

Not only do new chastity cases symbolically relegate women to the private sphere, they fail to provide a remedy for, and frequently do not even acknowledge, the profound injury to the individual women who are depicted in these sexually demeaning portrayals. While that injury is not expressly recognized in contemporary defamatory law, theories of self-determination, identity, and privacy support the provision of a legal remedy to these women.

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Historically, the statements that spawned the vast majority of women's defamation suits were referred to as indicating a "want of chastity."\(^7\) The early prevalence of this type of defamation case no doubt stemmed from nineteenth-century social norms that relegated most women to the domestic sphere of life where they worked as wives and mothers or, as single women, awaited those roles.\(^8\) By the late nineteenth century, the vast majority of states had responded to the proliferation of sexual slander suits by designating statements that impugned a woman's chastity to be slander \textit{per se}.\(^9\) Doing so obviated the need for a plaintiff to prove special damages, thereby greatly increasing the likelihood of her success.\(^10\)

As women gradually moved into the public sphere of life in the late nineteenth and early twentieth centuries, they took on quasi-public roles as teachers, nurses, and "shop girls" in greater numbers.\(^11\) Yet

7. See, \textit{e.g.}, Sandifer v. Electrolux Corp., 172 F.2d 548, 550 (4th Cir. 1949) (stating that, generally, the plaintiff need not prove actual damage where the words spoken "plainly and falsely charge . . . adultery or a want of chastity"); Haynes v. Phillips, 99 So. 356, 357 (Ala. 1924) (statement that a woman was a "public whore" imputed a "want of chastity"); Roby v. Murphy, 27 Ill. App. 394, 1888 WL 1191, at *2 (1888) (finding that the word "slut," in its common meaning, does not charge a crime or indicate a want of chastity and therefore is not slanderous); Thormann v. Gormby, 1 Ky. Op. 461, 1867 WL 7024, at *1 (1867) (stating that the defamatory language did not impute a "want of chastity" or other offense for which an "action would lie"); Shilling v. Carson, 27 Md. 175, 185-86 (1867) (explaining that a plaintiff's reputation for "want of chastity" would mitigate her damages); Nealon v. Frisbie, 31 N.Y.S. 856, 856-57 (Sup. Ct. 1895) (holding that, on their face, the words spoken did not necessarily allege a "want of chastity" and therefore were not necessarily actionable \textit{per se}); Jones v. Brinkley, 93 S.E. 372, 373 (N.C. 1917) (making the following statement about the test for slander: "to charge a woman falsely of a want of chastity is slanderous and libelous, though such matter is not a felony."); Copeland v. State, 300 S.W. 86, 90 (Tex. Crim. App. 1926) (citing Texas criminal libel statute criminalizing language that "falsely and maliciously, or falsely and wantonly, imputes to any female a want of chastity"); State v. Clifford, 52 S.E. 864, 865 (W. Va. 1906) (noting that "[w]ords imputing want of chastity to a woman are slanderous . . . per se"); \textit{RESTATEMENT (FIRST) TORTS} § 574 (1937).

The cause of action has also sometimes been referred to as sexual slander. \textit{See, \textit{e.g.}}, King, \textit{supra} note 2, at 67-71; Pruitt, \textit{supra} note 1, at 965.

8. \textit{See} Pruitt, \textit{supra} note 1, at 971 (observing that the only expectation of women was that they would marry, thereby completing their expected role in society).

9. \textit{See} King, \textit{supra} note 2, at 71-81 (discussing sexual defamation cases under New York and Indiana law, and noting the trend toward a per se standard reflected in numerous other states); Pruitt, \textit{supra} note 1, at 98 (noting the movement in sexual defamation cases to the per se standard).

10. For a discussion of various state statutes adopting a per se standard, see Diane L. Borden, \textit{Reputational Assault: A Critical and Historical Analysis of Gender and the Law of Defamation}, 75 \textit{JOURNALISM \& MASS COMM. Q.} 98, 102-03 (1998); \textit{see also} King, \textit{supra} note 2, at 71-81 (discussing statutory and judicial adoption of the slander \textit{per se} rule for statements about women's chastity).

11. \textit{See} Dixon v. Allen, 11 P. 179, 179 (Cal. 1886) (teaching); Wertz v. Lawrence, 179 P. 813, 813 (Colo. 1919) (teaching); Wright v. Hilo Tribune-Herald, Ltd., 31 Haw. 128, 129
statements about a woman's sexual conduct, more than any other subject, continued to be the basis for the great majority of defamation actions by female plaintiffs. In cases brought before the mid-twentieth century, female plaintiffs were generally successful in their use of defamation claims to gain redress for their communicative injuries. Judges proved highly responsive and sympathetic to the injury, often indulging in paternalistic expressions of outrage on behalf of all wives and daughters.

Women have moved into public life in far greater numbers in the latter part of the twentieth century. As women have taken roles in the commercial, political, and other public realms, they have continued to suffer communicative injuries related to that which is quintessentially private, their sexual personhood. Women today represent only a small fraction of all defamation plaintiffs. However, many female plaintiffs who bring defamation actions continue to base their lawsuits upon statements about them as sexual beings. Thus, women have been left straddling the public-private divide; increasingly players

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12. See Diane L. Borden, Patterns of Harm: An Analysis of Gender and Defamation, 2 COMM. L. & Pol'y 105, 126-27 (1997) (stating that defamation cases brought by women between 1897 and 1906 predominantly concerned their private sexual lives).
13. See id. at 133-34 (calculating that women plaintiffs won 27 out of 42 (64.3%) sexual slander actions during the period 1897-1906).
14. Pruitt, supra note 1, at 967 n.2 (citing King, supra note 2, at 67 (characterizing judicial action as paternalistic and giving examples of such paternalistic judicial language from Beggarly v. Craft, 51 Ga. 309, 315 (1860))).
15. Borden, supra note 10, at 100 (recognizing the trend of women leaving the home to assume positions in the public sphere in increasing numbers as the twentieth century progressed); see also Susan Moller Okin, Justice, Gender, and the Family 142 n.t (1989) (citing statistics demonstrating the increasing numbers of women participating in the workforce and therefore not remaining solely in the private domain).
16. See infra Part IV.C (describing contemporary sexual defamation cases); see also Borden, supra note 12, at 134 (noting nine cases brought by women centered around their private, sexual, non-public lives during the period 1967-1976).
17. Borden, supra note 12, at 120. In his 1987 book, Professor Bezanson reported that only eleven percent of defamation plaintiffs were women. Randall P. Bezanson et al., Libel Law and the Press: Myth and Reality 7 (1987). While more recent statistics are unavailable, it seems unlikely that this percentage has more than doubled in the past fifteen years.
18. According to one study, between 1967 and 1976, half of the defamation actions brought by women were based on statements related to morality, while half were related to them as professionals or employees. See Borden, supra note 12, at 134 (noting nine cases that were based on allegations of immortality and nine that were based on business or professional concerns during this time period); see also infra Part IV.C (citing cases from the last forty years).
in the public sphere, they are nevertheless symbolically pulled back into the private realm by talk about their sexuality.\(^\text{19}\)

Increasingly, contemporary "talk" about chastity has really been talk about sex. It has taken the form of degrading and sometimes pornographic depictions of women. Although individual women targeted by such communications have sought redress in defamation, they have rarely won.\(^\text{20}\) These failures are attributable in part to particular legal doctrines of the constitutional era of defamation law that protect communications that do not assert verifiably false facts, or that are not likely to be interpreted literally.\(^\text{21}\)

My discussion proceeds in five parts. Part I includes some rudimentary information about the tort of defamation, including its theoretical foundations. In this part, I also discuss some of the gendered\(^\text{22}\) characteristics of both the tort's doctrines and its foundational premises. In Parts II and III, I describe the chastity-related actions women brought in the United States during two consecutive periods, roughly 1800-1890 and 1890-1960. While these eras are somewhat arbitrarily delineated, the parameters of the latter correspond at one end with women's entry in increasing numbers into the public sphere, as well as the rise of press sensationalism known as yellow journalism.\(^\text{23}\) The end of that period corresponds roughly with the beginning of the constitutional era of defamation law and what has been called the second stage of the women's movement.\(^\text{24}\) These events represent appropriate bookends for defining periods that might signal women's changing use of defamation law. In Part IV, I discuss the sex-related uses women have made of defamation law since about 1960, the period I call the contemporary era. Here I focus on three types of statements,

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20. See infra Part IV.A.

21. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (holding that statements cannot lead to a finding of defamation unless they are false); Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 440 (10th Cir. 1982) (taking into consideration the likelihood that the allegedly defamatory statements would be taken literally by a reader).

22. By gendered, I refer to what Susan Moller Okin has called "the deeply entrenched institutionalization of sexual difference." MOLLER OKIN, supra note 15, at 6.


24. See Borden, supra note 10, at 99, 104 (discussing two periods of women's rights movements—one in the end of the nineteenth century and the other in the middle of the twentieth century—and noting that a monumental change in defamation law took place between these two periods). This period has been titled the "constitutional era" of defamation. See Pruitt, supra note 1, at 979.
each related to a woman's sexual propriety, or in which she is derided in relation to sex: a straightforward assertion of improper sexual behavior, a sexually hateful epithet or invective, and a portrayal of an individual woman that demeans or ridicules in relation to sex. Analyses of these statements implicate several constitutional doctrines, which I discuss and critique in greater detail in this Part.

Having established in Part IV defamation law's failure to redress injuries arising from statements in the new chastity cases, I discuss in Part V alternate theories of relief. I conclude with a proposal for recognition of a new tort that would respond to the injury identified, and I explain how that tort is consistent with existing constitutional protections for speech.

I. A GENDERED PERSPECTIVE ON THE LAW OF DEFAMATION

Defamation is a cause of action aimed at protecting an individual's reputation. Including the twin torts of libel and slander, it was historically recognized in both civil and criminal law, though the latter has barely survived in the twentieth century. The cause of action provides redress for unprivileged false statements that are communicated to a third party, whether by the media or an individual, which hold a person up to obloquy, ridicule, or contempt. Judicial opinions and commentary historically expressed the key concept of defamatory meaning in terms of causing a person to be shunned by her community, regardless of whether the community was "right-thinking." Traditionally, the inquiry was not so much whether the state-

25. Restatement (Second) of Torts § 559 (1976); Bezanson et al., supra note 17, at 1.


27. The Restatement (Second) of Torts § 559 provides: "A communication 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." One of the most comprehensive definitions offered in case law is from a 1933 New York decision, which declared that reputation is injured by words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society. Kimmerle v. New York Evening Journal, Inc., 186 N.E. 217, 218 (N.Y. 1933).

28. See Peck v. Tribune Co., 214 U.S. 185, 190 (1909) (finding that a statement is defamatory if perceived as such by a significant segment of the community, regardless of whether they are right-thinking); Grant v. Reader's Digest Ass'n, 151 F.2d 733, 735 (2d Cir.
ment should have caused the plaintiff to be shunned and avoided because she had done something contrary to prevailing social norms,29 rather, it was whether or not the statement would in fact likely cause the plaintiff to be shunned and avoided.30 The law has evolved in such a way, however, that a finding of defamatory meaning now implies that the person has done something blameworthy or immoral and thus deserves to be shunned or avoided. A statement that one has a contagious disease, for example, is no longer defamatory.91 Once a standard example of a defamatory statement, it no longer is because it does not impute blameworthy behavior.32 A false statement

1945) (holding by Judge Learned Hand that the “right-thinking” segment of the community is irrelevant to a finding of defamation); cf. Connelly v. McKay, 28 N.Y.S.2d 327, 329 (Gen. Term 1941) (noting that some groups are so wrong-thinking that courts will not utilize their viewpoints in defamation cases); RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977) (articulating the standard that a statement is defamatory if it will prejudice the plaintiff in the eyes of a “substantial and respectable minority” of the community).

29. False communications that previously might have caused a person to be shunned even though the person had done nothing blameworthy are now rarely redressed in defamation law because they do not necessarily assert that the woman has done anything blameworthy or immoral. Instead, such false statements are, in the last several decades, more often redressed by the tort false light invasion of privacy. See Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1128 (7th Cir. 1985), discussed infra notes 520-533 and accompanying text (arising from unauthorized publication of plaintiff’s photographs); Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1084 (5th Cir. 1984), discussed infra notes 535-540 and accompanying text (involving unauthorized use of plaintiffs’ photos in Hustler). See also infra notes 496-519 (providing further discussion of the distinction between defamation and false light).

30. 1 intentionally use the word “would” rather than “did” because until the constitutional era of defamation law, courts did not require proof that a statement in fact caused a plaintiff to be shunned. Indeed, historically, many types of statements were accompanied by a legal presumption that the plaintiff had been injured. RODNEY A. SMOLLA, LAW OF DEFAMATION § 7.9 (2d ed. 2003). This has changed to some extent in the constitutional era of defamation law because damages are now rarely presumed. Thus, in order to prove damages, plaintiffs sometimes present evidence of what hearers of the offending statement believed it to mean.

The failure to consider the reader or hearer’s perception of an allegedly defamatory communication is the subject of an article written from the perspective of both a lawyer and a linguist. Randall P. Bezanson & Kathryn L. Ingle, Plato’s Cave Revisited: The Epistemology of Perception in Contemporary Defamation Law, 90 DICK. L. REV. 585, 586-87 (1986).

31. See Cox Enters. v. Thrasher, 442 S.E.2d 740, 742 (Ga. 1994) (indicating that a disease-related communication is by itself insufficient to support a defamation action).

32. The exception to the rule is for statements that indicate the plaintiff has contracted a sexually transmitted disease, if the circumstances lead the reader to conclude that the plaintiff acted in a sexually, immoral manner and therefore was blameworthy. See Cox Enters., 442 S.E.2d at 742 (holding that the newspaper article stating that a married woman had contracted chlamydia did not imply that the plaintiff had engaged in sexually immoral behavior).

Another example of a statement that does not impute blameworthiness and therefore is not defamatory was adjudicated in Cox v. Hatch, 761 P.2d 556 (Utah 1988). The Cox court held the publication of a photo that plaintiffs had consented to take with Orrin
that someone committed a criminal act, on the other hand, remains a prototype of defamatory meaning because it does imply blameworthiness or immorality. My analysis of women's chastity-related cases implicates the finer points of a defamatory meaning analysis, and I therefore revisit the issue below.

Perhaps more than any other tort, common law defamation features an enormously complex set of rules involving various aspects of the tort, including privileges and damages. Constitutional doctrines have further complicated the common law rules, beginning with \textit{New York Times Co. v. Sullivan} in 1964. Collectively, these rules have made it far more difficult for any defamation plaintiff to prevail.

Several common law and constitutional defamation law doctrines are gendered in that they have a disparate impact in the types of defamation actions that are often brought by women. Others are gendered in the sense that they were crafted to respond to the sorts of communicative injuries typically suffered by men. Few of these gendered aspects are explicit, but one is: the gender double-standard regarding sexual slander. Most U.S. jurisdictions have considered statements that impugn a woman's chastity to be slander per se for as long as they have been litigating the issue. The majority of states explicitly made such statements slander per se only with respect to women, although none of the other traditional per se categories is gen-

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Hatch did not defame them when later used in his campaign. \textit{Id.} at 562. The court noted that it might embarrass and offend them, but it was not defamatory. \textit{Id.} The court observed that both the Democratic and Republican parties were mainstream. \textit{Id.} Cox, 761 P.2d at 562 n.5; \textit{Restatement (First) of Torts} § 569 cmt. d (1938).

33. Cox, 761 P.2d at 562 n.5; \textit{Restatement (First) of Torts} § 569 cmt. d (1938).

34. See \textit{Restatement (Second) of Torts} § 559 (1976) (defining defamation); \textit{Restatement (First) of Torts} § 569 (1938) (providing a cause of action for defamation per se).


37. See Borden, \textit{supra} note 10, at 103 (suggesting that the inclusion of the want of chastity defamation claim in state laws causes a discrepancy between defamation suits available to men and those available to women).

38. Borden, \textit{supra} note 12, at 125 (noting that the results of a study showed that defamation suits brought by men tended to arise from profession-related statements, and not from statements involving sexuality or their homes).


40. Borden, \textit{supra} note 10, at 103.
der-specific.⁴¹ One nineteenth-century court explained the need for the gender-specific rules on sexual slander by noting its different impact on women than on men:

The nature of the charge is calculated to destroy her character, cut her off from virtuous society, prevent her from forming that connection in life in which are centered all her hopes and affections, and consign her to dependence, unhappiness and misery, or competency from infamous prostitution. Such a charge, in its extent and influence upon character, and in its consequences, is vastly more injurious to a female than to our sex.⁴²

Interestingly, the court identified itself as male, referring to “our sex,” while expressly labeling women the “other.”⁴³

⁴¹ Historically, only four categories of defamatory statements were actionable per se. These categories were (a) a criminal offense; (b) loathsome disease; (c) improper conduct of a lawful business; and (d) a woman’s chastity. William L. Prosser, Handbook of Law of Torts 798-803 (1941). Some states have moved away from the per se designations in recent years. For example, in Hayes v. Smith, 832 P.2d 1022 (Colo. Ct. App. 1991), the court noted the trend toward limiting the per se category of slander. Id. at 1024 (citing Restatement (Second) of Torts §§ 571-74 (1977)). Instead, the court noted, the per se designation should be used to refer to publications where the defamatory character is “apparent from the publication itself without reference to extrinsic facts.” Id. Many states, however, still abide by these four categories, seemingly unthinkingly. See Padilla v. Carrier Air Conditioning, 67 F. Supp. 2d 650, 663-64 (E.D. Tex. 1999) (retaining per se categories to analyze statement calling the plaintiff a “she-dog” who “slept around with a lot of men”); French v. Jadon, Inc., 911 P.2d 20, 32 (Alaska 1996) (considering a sex-related statement defamatory per se); Nazeri v. Mo. Valley Coll., 860 S.W.2d 303, 311 (Mo. 1993) (holding statements “actionable [per se] insofar as they impute adultery and unchastity” and citing a Missouri statute); Borden, supra note 10, at 103 (noting that Georgia’s use of the per se standard specifically for defamation cases arising from statements of criminal conduct and dishonesty in addition to chastity-related cases brought by women).

⁴² Sexton v. Todd, Ohio (Wright) 316, 320-21 (1833) (providing part of jury instructions in a case where the defamatory language stated in many forms that plaintiff had a “bastard child”). The court continued: “When believed, it places a female beyond the pale of society. Seldom seen, they can neither fly from, nor outlive the disgrace, but must pine and wither, and live under it, a loathed and filthy weed, whose touch is contamination.” Id.; see also McKeen v. Folden, 2 Ohio Dec. Reprint 248, 1859 WL 5285 (Ohio Ct. Com. Pl. 1859). In this case, the defamatory statement charged a man with bestiality. Id. at *1. The court observed: “To charge a man with adultery, may exclude him from the society of some, and not from that of others. The rule, thus modified, is no rule certain and fixed, since each court must settle, in each case, what will, or will not, tend to exclude one from society.” Id. at *2, discussed in King, supra note 2, at 103.

⁴³ Sexton, Ohio (Wright) at 320-21. In the case of Wilson v. Robbins, Ohio (Wright) 40 (1832), it was held not actionable to charge a man with adultery, though it was to charge a woman with adultery, because of the tendency of such a charge to exclude her from society. Id. at 40. This case asserts that there is a difference in the odium attached to the slander where the charge of want of chastity is made of a woman, and when made of a man, and that consequently there is a difference in the legal consequences that attach to one making such a charge. Id. at 40. Later courts have not always concurred. See Le
Defamation law is also gendered in more subtle ways. One of these relates to the public-private dichotomy that feminist scholars have employed to help explain law's disparate treatment of, and impact upon, the lives of women. More pervasive and long-standing than the feminist critique of this dichotomy has been the perception that public and private spheres of society are distinct, an idea that "is imbued in legal philosophy and informs legal policy." In discussing the divide between public and private, I focus on the different spheres—sometimes called the public and the private, sometimes the market and the domestic—that men and women, respectively, have historically inhabited. This dichotomy is also, to a lesser degree,

Moine v. Spicer, 1 So. 2d 730, 732 (Fla. 1941) (acknowledging that "the charge must be treated the same as if the plaintiff were a man instead of a woman; that there can in law be no differentiation because of sex"); Morris v. Barkley, 11 Ky. (1 Litt.) 64, 1882 WL 943, *2 (1882) (holding that a charge of fornication is defamatory per se for both men and women).

44. Philosopher Carole Pateman has said that "the dichotomy between the private and the public...is, ultimately, what the feminist movement is all about." Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in *PUBLIC AND PRIVATE IN SOCIAL LIFE* 281 (S.I. Benn & G.F. Gaus eds., 1983). This is related, of course, to the feminist mantra, "'[t]he personal is political[,] [which] is the central message of feminist critiques of the public/domestic dichotomy." MOLLER OKO, *supra* note 15, at 124; see also Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *STAN. L. REV.* 1 (1992) (arguing that the public-private dichotomy perpetuates gender inequalities).


Any area in or upon which the law operates is or becomes "public" to some degree. In this sense the public defines the private as that remnant of society with which it declines to deal. Olsen, *supra* note 45, at 1509 (noting society's avoidance of regulation of family-private life). The line is one between the regulated and the unregulated, and often also one between grievances for which the law provides redress and those for which it does not. Many scholars have acknowledged the definitional ambiguities associated with the public-private dichotomy. See *id.* (discussing problems of the public-private sphere distinction); O'DONOVAN, *supra* note 45, at 8 (noting that the dichotomy's existence relies on a societal choice); Nicola Lacey, *Theory into Practice? Pornography and the Public/Private Dichotomy*, 20 *J.L. & SOC'Y* 93, 103 (1993) ("[T]he private should be defined...as that aspect of his or her life and activity that any person has a right to exclude others from. The private in this sense is...what the individual chooses to withdraw from public view.") (quoting IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 119-20 (1990)).
about the division between what the law considers within its purview—regulated—and what it does not—unregulated.

Like many other feminists, I challenge this dichotomy, even while embracing a concept of privacy and recognizing each individual's need for personal privacy. In short, "privacy" has many connotations. I argue that women's alignment with the private sphere undermines and limits them, and I criticize the ways in which the law reinforces that association. At the same time, I argue that recognition of a "right to privacy," particularly as that right is conceptualized and manifested in tort law, is critical to solving a problem I identify in the chastity-based defamation litigation: the law's normative relegation of women to the private sphere.

Because defamation law seeks to restore to the defamed individual something immensely personal and intangible, the person's reputation, one might initially assume that defamation is a rare instance where the law redresses a wrong within the private sphere or makes private actions public. More careful consideration reveals that this is not the case. Rather, the dominant conception of reputation views it as a form of property and links it to a person's standing in the public realm of society, the marketplace. Men have historically been present in the marketplace in far greater numbers than women.

The public-private dualism arises in many legal contexts, and its connotations vary. One of these contexts relates to the free speech doctrine that distinguishes between public discourse and private discourse. See David Kairys, Freedom of Speech, in The Politics of Law: A Progressive Critique, supra note 45, at 265 (noting the relationship between free speech and the public-private dichotomy). Another related context is the tort of privacy, with its overarching concern to protect from public disclosure or exploitation that which invades the individual's personality or psychic space. Richard F. Hixson, Privacy in a Public Society: Human Rights in Conflict 26-51 (1987). Interestingly, the two public-private contexts noted here were considered compatible by the initial proponents of privacy law. Samuel Warren and Louis Brandeis wrote in their germinal 1890 article that the right of privacy did not prohibit publication of matters of "public interest," as the latter concept was central to First Amendment philosophy. Id. at 34 (discussing Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890)). This compatibility is similarly reflected in the contemporary law of invasion of privacy. With respect to the publication of private facts, the publication of so-called "newsworthy" items is exempt from liability. See Diaz v. Oakland Tribune, 139 Cal. App. 3d 118, 188 Cal. Rptr. 762 (1983).

47. See Moller Orin, supra note 15, at 127-28 (noting also the work of Carole Pateman, Linda Nicholson, Mary O'Brien, and Anita Allen).

48. In a similar vein, Bowman has observed that society has an expectation of women's association with the private or domestic. Accordingly, men are less likely to challenge or harass women when they are in places associated with women and their domestic responsibilities. Bowman, supra note 19, at 526, 530.


sphere is not only a commercial marketplace, but also the realm of public discourse, where democratic self-governance and shared political destiny is debated and where decisions tend to be made based upon commonly available facts and news.\(^5\)

This prevailing conception of reputation, which Professor Robert Post has written about as the property theory of reputation,\(^5\) is thus not about the "private" at all.\(^5\) By protecting a person’s reputation, defamation law protects a form of intangible property, his stature in the marketplace and the broader public sphere.\(^5\) Defamation law treats an individual’s reputation like the goodwill associated with a business, seeking to protect it as property that the individual has worked to develop or earn.\(^5\)

51. Clark, supra note 49, at 316.
52. Post, supra note 49, at 693-99. Post also discusses the dignity and honor theories of reputation, which are less prevalent in contemporary defamation jurisprudence. \textit{Id.} at 699-719.

The property-based concept of reputation is almost surely the most "masculine" concept of the three that Post discusses. Some feminists have commented on the association of property with men and masculine values, as well as the law’s neglect of emotional injuries that are associated with women. Martha Chamallas, \textit{The Architecture of Bias: Deep Structures in Tort Law}, 146 U. PA. L. REV. 463, 469 (1998). That association is manifest also in defamation law.

53. Defamation has not, for example, been commonly regarded as a remedy for the thin-skinned, to protect them from a vague or uncertain psychic injury. SMOLLA, supra note 30, § 1:4. Emotional distress damages, however, have long been available when attendant to damages for reputational harm. \textit{After Time, Inc. v. Firestone}, emotional distress damages are available in defamation suits, even absent proof of reputational harm. 424 U.S. 448, 460-61 (1976).

54. Post, supra note 49, at 716-17. As I have discussed elsewhere, the reputation-as-property concept is also evident in nineteenth-century sexual slander rhetoric. Indeed, courts seemed to see women as competing in a market to marry, viewing their reputations for chastity as critical capital in that market. \textit{See} Pruitt, supra note 1, at 971.

Professor Diane Borden has advanced a somewhat related thesis. She has argued that, as between the twin torts of libel and slander, slander has always been more associated with women:

\[\text{(H)istorically, reputational harm for women has been manifested most frequently in oral communications—slander—rather than written communications—libel.}\]

\[\text{In addition, because slanderous statements are presumed heard by relatively few persons and are transitory in nature, the penalties for slander have traditionally been less rigorous than those for libel, an offense viewed as more serious because the message gets disseminated into the public realm of business and government.}\]

\[\text{In other words, the law of libel exists to address reputational harm in the public sphere and thus exists mainly for men. The law of slander exists to address reputational harm in a more limited private setting and thus, research suggests, has existed mainly for women.}\]

Borden, supra note 10, at 101 (footnotes omitted).

55. Like the law of trespass, for example, which also represents public regulation of interaction between individuals, it provides a remedy when another causes damage to the "chattel" that is the plaintiff’s community (marketplace) standing. Without restoration of good reputation, a person’s valued ability to get the benefit of what he has worked for
Although this property theory of reputation indicates that defamation law evolved to respond to public sphere injuries and therefore primarily to men’s needs, defamation law has not been irrelevant for women. Because a woman historically functioned almost exclusively in society’s private or domestic realm, her reputational concerns were different. A woman’s association with the private or domestic sphere also meant that she was associated with that which was natural, sexual, relational, and emotional. Society historically sentimentalized women and valorized their roles as wives and mothers, valuing them primarily, if not exclusively, on the basis of those roles. Society defined a woman with her sexual virtue arguably being her most important attribute. When a woman’s reputation for chastity was impugned, judicial rhetoric often reflected the property metaphor. Nineteenth-century judges spoke of the injury with regard to her “marriageability,” envisioning a different market—that is, a private one for marriage—in which a woman’s reputation for sexual propriety was her “stock in trade.” As discussed further below, even at the turn of the twenty-first century, defamation jurisprudence continues to endorse the notion that a woman’s sexual virtue, if no longer her sole important attribute, still comprises a significant component of her worth.

would be damaged. Post uses the image of the craftsman who labors to achieve a good reputation for quality workmanship. Post, supra note 49, at 693.

56. See Borden, supra note 10, at 101 (suggesting that, historically, women’s reputational issues rested primarily in the private sphere).

57. See id. at 100 (discussing women’s accepted role in the domestic sphere as accompanied by views of women as embodying virtues associated with the home, and considering the societal myth that women are best suited to family life). Men, on the other hand, were and are associated with that which is rational, intellectual, economic, and physical. MOLLER OKIN, supra note 15, at 110-11; see also JUDITH A. BAER, OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE 52-55 (1999) (critiquing the sameness-difference debate that reinforces the public-private dichotomy); Chamallas, supra note 52 (discussing gendered dichotomies in tort law, including economic and non-economic injuries, physical and emotional injuries, and property and relational injuries).

58. See King, supra note 2, at 66-68; Pruitt, supra note 1, at 971.

59. See King, supra note 2, at 66 (noting that a woman’s chastity was essential for marriage in nineteenth-century America).

60. Pruitt, supra note 1, at 971-72. Professor Post has also observed that while the commercial marketplace is the model or prototype for reputation as property, the concept finds application outside business relationships. That is, defamation law redresses harm to character in other contexts that are not strictly related to business relationships because the reputation as property concept views character “as the fruit of personal exertion” and it seeks to protect the investment, if you will, that one makes in his or her character. Post, supra note 49, at 694.

61. See infra notes 293, 302-319 and accompanying text.
Also echoing the divide between public and private spheres is the defamation law dichotomy between public figures and private figures. A product of the constitutional era of defamation law, this dichotomy developed in the wake of the 1964 Supreme Court decision in *New York Times Co. v. Sullivan*, which dictated a new fault requirement for public officials. The new fault standard, called "actual malice," required proof that the defendant had published the statement either with knowledge of falsity or reckless disregard for it. The Supreme Court extended the requirement to public figure plaintiffs a few years later. The Supreme Court reasoned that in order to give adequate "breathing space" for the widespread circulation of ideas and truthful speech the freedom of speech must protect some falsehoods. Without some protection of falsehoods, would-be critics of official conduct might self-censor true statements to avoid lawsuits.

A private plaintiff remains free of the heavy burden of proving actual malice. She still is obliged to prove some degree of fault by the defendant, however, typically negligence with respect to the truth or falsity of the statement. The Court's justification for distinguishing between public persons and private persons rests in the belief that a public figure has better access to the media to achieve "self-help," that is, to get a false statement corrected and to get exposure for his or her version of events, and because such a person arguably has assumed the risk of greater media scrutiny.

Deciding whether a defamation plaintiff is a public figure or private figure is a complex inquiry with an unpredictable outcome. Most courts require, as a threshold matter, that a public controversy exist and that the plaintiff be involved in that controversy for the plaintiff to be deemed a public figure. Other factors considered include the extent to which the controversy existed prior to the defamatory

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63. *Id.* at 264.
64. *Id.* at 288.
67. *Id.*
70. *Smolla, supra* note 30, § 2.22.
speech and the degree to which the plaintiff was voluntarily involved in the controversy and his or her prominence in it.71

Although no perfect alignment exists between those functioning in the private sphere and private plaintiffs who bear a lower burden in proving their defamation cases, there is some correlation. To the extent that it does exist, courts have viewed many women plaintiffs in the last forty years as private figures and, on that basis, have had to prove only the defendant's negligence with respect to truth or falsity of the offending statement.72 A few women have been deemed public figures based primarily on their relationships with well-known men.73 Others have been more legitimately deemed public figures based on their significant and voluntary involvement in a matter of legitimate public concern.74 These female public figures have, of course, faced

71. *Id.* §§ 2.26, 2.30, 2.43.

72. Geary v. Goldstein, 831 F. Supp. 269 (S.D.N.Y. 1993) (ignoring actress' possible stature as a public figure); Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982) (neglecting to discuss public status of a Miss America pageant participant); Time, Inc. v. Firestone, 424 U.S. 448, 448 (1976) (stating that wife of the heir to the Firestone fortune was not a public figure for purposes of seeking divorce).

73. See Brewer v. Memphis Publ'g Co., 626 F.2d 1238, 1240 (5th Cir. 1980) (plaintiff was Elvis Presley's former "No. 1 girl"); Carson v. Allied News Co., 529 F.2d 206, 209-10 (7th Cir. 1976) (finding that Johnny Carson's wife, like him, was a public figure simply because she was married to him); cf. Krauss v. Globe Int'l, Inc., 674 N.Y.S.2d 662, 662 (App. Div. 1998) (finding that the ex-husband of Joan Lunden was not a limited public figure for purposes of a story about their marriage and divorce).

In other cases, courts have quite correctly held the following female plaintiffs not to be public figures: the employee at an amusement park who fed a swimming piglet from a bottle, *Braun v. Flynt*, 726 F.2d 245, 249-59 (5th Cir. 1984); a nurse being investigated by the state licensing authority, *Russell v. Thomson Newspapers, Inc.*., 842 F.2d 896, 987-98 (Utah 1992); a public school teacher who was accused of being "disorganized, erratic, forgetful and unfair," *Richmond Newspapers, Inc. v. Lipscomb*, 362 S.E.2d 32, 34 (Va. 1987); the former wife of a university professor, even though she had written a guest editorial about men who "unilaterally divorce their wives" and initiated a public confrontation with her former husband as he was preparing to speak to a pro-choice group, *Maguire v. Journal Sentinel, Inc.*., 605 N.W.2d 881, 887 (Wis. App. 1999). *See also* Diane L. Borden, *Invisible Plaintiffs: A Feminist Critique on the Rights of Private Individuals in the Wake of Hustler Magazine v. Falwell*, 35 GONZ. L. REV. 291, 294 (1999) (critiquing the way in which the public figure/private figure dichotomy reinforces women's alignment with the domestic sphere); Ruth Colker, *Published Consentless Sexual Portrayals: A Proposed Framework for Analysis*, 35 BUFF. L. REV. 39, 69-74 (1986) (arguing that women are often incorrectly held to be public figures).

74. *See Street v. Nat'l Broad. Co.*, 645 F.2d 1227, 1236 (6th Cir. 1981) (white prosecutrix in Scottsboro rape case, a racially charged prosecution from the civil rights era, was public figure for purposes of a documentary made about the case several decades later; court had no difficulty concluding that the case was a public controversy, calling her the "pivotal character in the most famous rape case of the twentieth century"); Oaks v. City of Fairhope, 515 F. Supp. 1004, 1008 (S.D. Ala. 1981) (librarian sued city library board, received widespread press coverage both regionally and nationally, granted interviews on request, and spoke at conferences about the conflict); Moffatt v. Brown, 751 F.2d 939, 939 (Alaska 1988) (finding that physician who sought appointment to state medical board was
the greater burden of the actual malice standard.\textsuperscript{75}

Other gendered observations regard the defamation law doctrines of truth and the fact-opinion dichotomy. I discuss these below, in closer proximity to the cases that illustrate how they play out in the context of women’s chastity-oriented defamation suits.

II. THE NINETEENTH CENTURY: ALL ABOUT CHASTITY

Until about the turn of the twentieth century, the vast majority of women who turned to defamation law did so to get redress for statements that impugned their chastity.\textsuperscript{76} A few female plaintiffs sued based on statements that accused them of criminal behavior,\textsuperscript{77} but women—more often single than married\textsuperscript{78}—most frequently sought to

\begin{itemize}
    \item a public figure. \textit{But see Walko v. Kean Coll.}, 561 A.2d 680, 680-81 (N.J. Super. 1988) (finding that a college administrator was a public figure for purpose of advertisement that suggested she could be reached at a “whoreline”); Montandon v. Triangle Publ’ns, Inc., 120 Cal. Rptr. 186, 191 (Cal. Ct. App. 1975) (finding that a minor television personality who had written a book on “How to Be a Party Girl” was public figure for purposes of a statement that she was a call girl); James v. Gannett Co., 353 N.E.2d 834, 840 (N.Y. 1976) (finding that a belly dancer was a public figure because she had welcomed the public to her performances); Luper v. Black Dispatch Publ’g Co., 675 P.2d 1028, 1028 (Okla. Ct. App. 1983) (public school teacher considered a public figure).
    \item See \textsuperscript{supra} notes 62-67 (discussing the actual malice standard required by \textit{New York Times Co. v. Sullivan} and its progeny where a public figure sues for defamation).
    \item 76. This was also true as long ago as the early days of colonial America. Mary Beth Norton, \textit{Gender and Defamation in Seventeenth-Century Maryland}, 44 WM. & MARY Q. 3, 9 (1987). Among the sexually hateful epithets targeted at women during that time were “burnt Arse whore” and “ould Bawd,” whereas those directed at men included “cheating old knave” and “perjured rogue.” \textit{Id.} Norton argues that men were most concerned with statements that impugned their integrity and trustworthiness in business, while women brought actions based on allegations of sexual promiscuity. \textit{Id.}
    \item Shakespeare refers to sexual slander—in particular an allegation of adultery—as that “whose sting is sharper than the sword’s.” \textit{WILLIAM SHAKESPEARE, THE WINTER’S TALE} act 2, sc. 3, \textit{quoted in Flowers v. Carville}, 310 F.3d 1118, 1133 (9th Cir. 2002).
    \item 78. \textit{See King}, \textit{supra} note 2, at 73-74 (discussing New York and Indiana cases where a majority of female plaintiffs were unmarried at the time of the slander). When married women sued, it was often because the statement at issue charged them with having an extra-marital affair. \textit{See Paschal v. Georgian Co.}, 158 S.E. 372, 372-73 (Ga. Ct. App. 1931)
rehabilitate their reputations for sexual virtue. Many judges believed that maintaining the ideal that all "good" women—as opposed to those who had "fallen"—were chaste was so important that chastity was generally presumed. When a defendant attempted to prove the plaintiff's "unchastity," courts considered this issue irrelevant to the truth or falsity of the statement and therefore to liability. Rather, such arguments typically served to mitigate damages. A "less chaste" 

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(newspaper reported extra-marital affair as reason why plaintiff's husband stabbed man); Barker v. Green, 130 S.E. 599, 599 (Ga. Ct. App. 1925) (plaintiff was said to be the wife of two men); Good v. Johnson, 83 N.E.2d 367, 367 (Ill. App. Ct. 1949) (statement that plaintiff had been sleeping with another man while her husband was in the army); Colby v. McGee, 48 Ill. App. 294, 1892 WL 2480, at *1 (Ill. App. Ct. 1892) (statements that a married couple's first child was that of another man charged with adultery); Young v. Fox, 49 N.Y.S. 634, 639 (App. Div. 1898) (publication "tended to show meretricious relations between a married woman and some other person than her husband"); Sheridan v. Sheridan, 5 A. 494, 495 (Vt. 1886) (defendant, plaintiff's husband, alleged adultery by stating: "[a]sk your mother when she had the double shotted children [meaning twins], what strange bull came along").

One libelous statement about the wife of a wealthy and well-known Toronto merchant, to the effect that she had eloped with another man, apparently gave rise to suits against multiple defendants, with the litigation extending over a number of years. See Smith v. Sun Publ'g Co., 50 F. 399, 401 (C.C.S.D.N.Y. 1892) (statement reported "in a sensational and somewhat jeering manner" that married woman had eloped with a man with whom she had previously been openly intimate); Smith v. Sun Printing & Publ'g Ass'n, 55 F. 240, 240 (2d Cir. 1893) (wife of a well-known Toronto merchant was said to have eloped with another man); Smith v. Matthews, 46 N.E. 164, 165 (N.Y. 1897) (reinstating $4000 jury verdict, in part because of determination that defendant was grossly negligent in not investigating truth of statement before publishing it); Smith v. Matthews, 47 N.Y.S. 96, 97 (Spec. Term 1897) (permitting the defendants, publishers of the Buffalo Express, to present evidence of any past relations between the plaintiff and Rutherford, with whom she was said to have eloped); Smith v. Matthews, 27 N.Y.S. 120, 121, 124 (Spec. Term 1893) (denying defendant's motion for a new trial based on the defendant's claim of a good faith belief in the truth of the article). Just as contemporary defamation scholars have observed that affluent persons are more likely to pursue defamation actions, the same was surely true in the nineteenth century.

79. See Shilling v. Carson, 27 Md. 175, 188 (1867) (stating that "[e]very woman is presumed to be chaste and every man honest, until the contrary is shown"); Krulic v. Petcoff, 142 N.W. 897, 898 (Minn. 1913) (stating that in chastity actions, "[p]laintiff's character was presumed to be good, and she did not need to allege that such was the fact"); Buckley v. Knapp, 48 Mo. 152, 1871 WL 7709, at *5 (1871) (upholding jury instructions that stated plaintiff was presumed innocent of the charges made against her). See also Bowman, supra note 19, at 566 (discussing nineteenth-century notions of women as "chaste and delicate"); Borden, supra note 10, at 104-05 (discussing Gates v. New York Recorder Co., 49 N.E. 769, 770 (N.Y. 1898) (recounting Judge Bartlett's description of the defamatory language suggesting that the plaintiff was a dancer on Coney Island as placing her in the "lowest classes ... of fallen women").

80. See King, supra note 2, at 79 (describing courts' policies of allowing evidence of the plaintiff's general character, but not allowing any specific evidence about the plaintiff's chastity).

81. In Shilling, for example, the court noted that if the plaintiff's "general character" had been undermined by the offending statement, the "defendant is not entitled, for the
A woman was viewed as deserving less compensation for the damage to the property represented by her pre-slander reputation, but she almost always won something.

Not only did a nineteenth-century woman benefit from the presumption of chastity, most judicial opinions placed her in a proverbial gilded cage. The judicial language of the time tended to romanticize a woman's traditional role as wife and mother. For example, in up-

purpose of diminishing the damages, to offer evidence of particular instances of misconduct, because the plaintiff is required to be prepared only to maintain his general reputation. Shilling, 27 Md. at 176. However, because the "the subject matter of the suit be the reputation of a woman for chastity she must be expected to be ready to vindicate her character in that particular in which it is impugned. General reputation for a want of chastity would certainly be admissible in mitigation of damages." Id. at 185-86; see also Lanpher v. Clark, 44 N.E. 182, 183 (N.Y. 1896) (granting new trial so defendant could present evidence of "specific acts of lewdness ... or ... of immorality" by the plaintiff); Lanphere v. Clark, 29 N.Y.S. 107, 110 (Gen. Term 1894) (upholding jury verdict and damages award, following remand, so that the defendant could offer evidence that impeached the plaintiff's character for "truth and veracity, for sobriety and chastity" as relevant to the question of damages).

In Smith v. Matthews, 47 N.Y.S. 96 (Spec. Term 1897), the court permitted the defendant newspaper publishers to present evidence of any past relations between the plaintiff, a married woman, and Rutherford, the man with whom she was said to have eloped. Id. at 99. The court noted that, by suing, the plaintiff had not opened "the door for an examination of all her past intercourse with every one, but she does invite an inspection of her relations with Rutherford." Id. at 98. The court also noted if the plaintiff is "pure and honorable" the defendants will suffer from offering this testimony, but "[i]f discreditable and wanton, she ought not to be conspicuously exalted as a chaste woman and faithful wife by a large verdict." Id. at 99-100; see also Regnier v. Cabot, 7 Ill. (2 Gilm.) 34, 41 (1845) (stating that the court below allowed the defendant to prove the plaintiff's general bad character for chastity in mitigation of damages); Hanners v. McClelland, 37 N.W. 389, 391 (Iowa 1888) (stating that "evidence of the real character of plaintiff for chastity was material only as it affected the amount of her recovery"); Dinslor v. Fresh, 2 Ky. Op. 566, 1866 WL 5992, at *1 (1866) (stating that newly discovered evidence that plaintiff was pregnant prior to marriage was relevant only to mitigation of damages in a case based on a statement she was a "whore"); Krulic, 142 N.W. at 898 (stating that "[t]he bad character of a plaintiff in a libel action may be shown in mitigation of damages") (quoting Lydiard v. Daily News Co., 124 N.W. 985, 987 (Minn. 1910)).

82. See supra notes 52-61 and accompanying text (discussing the concept of reputation as property).


84. Indeed, courts were sometimes downright prudish in discussing the details of such cases. The Georgia Court of Appeals wrote in Redfearn that it was "purposefully omit[ting] any reference to the loathsome details of the very voluminous testimony in the case" and stated only that the alleged defamation reported that plaintiff had committed both adultery and murder. Id.
holding a defamation verdict against a newspaper that falsely charged a married woman with eloping, the New York Court of Appeals characterized it as "attack[ing], without the shadow of justification, the good name of an innocent wife and mother, charging her, in effect, with unfaithfulness to her marriage vows, and the abandonment of her children." Other judges were still more emphatic, and sometimes even poetic, in their proclamations of the imperative to protect feminine virtue. One characterized the injury thus:

A female against whom the want of chastity is established is at once driven beyond the reach of every courtesy and charity of life, and almost beyond the portals of humanity. By common consent, such an imputation is everywhere treated as the deepest insult and vilest charge that could be given or inflicted upon the victim or her friends, and the bowie knife or the cord must wipe out the stain, and punish the offender.

Until the turn of the century, a female defamation plaintiff rarely worked outside the home. She was generally a wife and mother whose reputation within her family, church, and community had been called into question by the offending statement. The social circle at stake for such a plaintiff was generally rather small, as she truly was a private

not itself a crime, a pregnant woman could not pursue a defamation action against the person charging her of engaging in such conduct); Abrams v. Foshee, 3 Iowa (3 Clarke) 274, 1856 WL 201, at *1-2 (1856) (noting that allegations that a woman "takes medicine and kills her children" were not per se actionable because "producing an abortion, before the child is quick, is not now a crime in Iowa"); Widrig v. Oyer, 13 Johns. 124, 124 (N.Y. Sup. Ct. 1816) (holding that statement that a woman had procured an abortion was actionable).

86. Dailey v. Reynolds, 4 Greene 354, 355 (Iowa 1854) (emphasis omitted).
87. See Hardin v. Harshfield, 12 S.W. 779, 779 (Ky. 1890) (female plaintiff's marital engagement was broken as a consequence of defamation); Olmsted v. Miller, 1 Wend. 506, 506 (N.Y. Sup. Ct. 1828) (young woman was charged with lewdness, which allegedly caused her to be shunned by family and friends); Moody v. Baker, 5 Cow. 351, 351 (N.Y. Sup. Ct. 1826) (marital contract broken as result of slander against plaintiff); Bradt v. Towsley, 13 Wend. 253, 253 (N.Y. Sup. Ct. 1835) (slander against the plaintiff—calling her a prostitute—resulted in a public scandal); Malone v. Stewart, 15 Ohio 320, 320 (1846) (court stated that calling a female a hermaphrodite causes her to be shunned by society). But see Fuller v. Fenner, 16 Barb. 333, 334 (N.Y. Gen. Term 1853) (slander against female plaintiff affected her ability to earn a living as a "tailoress"); Wendt v. Craig, 17 N.Y.S. 748, 748 (Sup. Gen. Term 1892) (plaintiff alleged that her business, running a hotel and restaurant, suffered when she was accused of unchastity); Ross v. Fitch, 58 Tex. 148, 148 (1882) (husband and wife alleged that statement impugning wife's chastity caused loss of customers from their boarding house, as well as loss of students at school the wife was planning to start); Kidder v. Bacon, 52 A. 322, 325-26 (Vt. 1902) (teacher alleged to have committed adultery lost her employment and her home as a result).
person. She typically functioned entirely within the domestic sphere of life, apart from the commercial marketplace, and it was the impact of the offending statement on these "private relationships" that constituted her injury. Furthermore, such a woman usually sued on the basis of a spoken rather than a written defamatory statement. The offending statement was often attributed to what might be called a neighborhood gossip or to a former lover, estranged husband, or someone associated with him. It was, however, rarely attributed to any media source.

88. Certainly they were not public figures in the sense of that term's meaning in the constitutional era of defamation law. See supra notes 62-71 and accompanying text (discussing the defamation law dichotomy between public and private figures).

89. See Pruitt, supra note 1, at 991-96 (discussing cases in which courts identified pecuniary injury on the basis of a woman's rejection by her family and social circle in the wake of a defamatory statement).

90. Borden, supra note 10, at 101. Borden also notes that penalties for slander tended to be lower than those for libel because the range of potential publication was smaller for spoken words. Id.

91. See, e.g., Jackson v. Williams, 123 S.W. 751, 752 (Ark. 1909) (woman told neighbors that female plaintiff was guilty of fornication); Wallace v. Dixon, 82 Ill. 202, 202 (1876) (female plaintiff accused of having an illegitimate child); Iles v. Swank, 105 Ill. App. 9, 1902 WL 2259, at *1 (1902) (male defendant was said to have gossiped about the plaintiff being "a lewd and unchaste woman" in the presence of a man who worked for the plaintiff's husband); Lovejoy v. Cooksey, 39 S.W. 514, 514 (Ky. 1897) (defendant said to "divers and sundry persons" that he saw plaintiff and another "in the very act" and that he saw her "putting down her clothes"); Williams v. Noel, 8 Ky. Op. 834, 1875 WL 11666, at *1 (Ky. 1875) (defendant "peeped through the keyhole" of plaintiff's house and saw her having "illicit" sexual intercourse together with another person and then told many people in the same town); Moberly v. Preston, 8 Mo. 462, 1844 WL 4000, at *1 (Mo. 1844) (defendant claimed that he heard slanderous words from another); Miller v. Gust, 127 P. 845, 846 (Wash. 1912) (defendant, the former wife of man who purportedly committed adultery with the plaintiff, made statements concerning the plaintiff in a previous divorce proceeding).

92. See Veazy v. Blair, 72 S.E.2d 481, 482 (Ga. Ct. App. 1952) (plaintiff's friend's husband stated that plaintiff was "running around with married men, waving at them, and dating them on every occasion possible, and that she was a public whore"); Ivester v. Coe, 127 S.E. 790, 792 (Ga. Ct. App. 1925) (prior to making his slanderous statement defendant tried to kiss the plaintiff); Randall v. Randall, 225 Ill. App. 560, 1922 WL 2514, at *1 (1922) (slanderous words calling plaintiff a "dirty whore" were spoken by former wife of plaintiff's husband); Krulic v. Petcoff, 142 N.W. 897, 897 (Minn. 1913) (after plaintiff refused to marry defendant, he threatened to ruin her reputation and told others that she was a "whore" and "had been used by men many times"); Pier v. Speer, 64 A. 161, 163 (N.J. 1906) (after plaintiff refused defendant's "improper proposals," he threatened to "get even with her").

Sometimes the offending statements were uttered to the plaintiff's husband, rather than by him. See Schultz v. Sohrt, 201 Ill. App. 74, 1915 WL 2749, at *2 (1915) (defendant stated to husband that plaintiff and husband were "whor[ing] around" before husband's first wife was dead); Hammond v. Stewart, 72 Ill. App. 512, 1897 WL 2764, at *1 (1897) (defendant told woman's husband that her last child was not his, but was the child of another man); Dinslor v. Fresh, 2 Ky. Op. 566, 1866 WL 5992, at *1 (1866) (defendant called plaintiff a "whore" and then proceeded to tell her husband that she "had to get a
As already noted, early nineteenth-century courts spoke with a virtually unanimous voice in expressing their outrage on behalf of sexually slandered women.93 Often a judge expressed his indignation even more emphatically when he found himself unable to justify a verdict or award for the plaintiff due to her failure to meet some legal requirement, such as satisfaction of the special damages element.94

In spite of their frequent expressions of disappointment and outrage when a woman plaintiff lost her defamation suit, other judges' assessments of defamatory meaning were sometimes the prime instrument of the failed cause of action. In short, judges were sometimes puzzlingly obtuse and excessively literal when it came to interpreting allegedly defamatory statements. In Hemmens v. Nelson,95 for example, the New York Court of Appeals found that, as a matter of law, it did not "charge unchastity" in a woman to say "she 'entertained gentlemen company at all hours of the night; that young men had been seen leaving plaintiff's sleeping room at different hours of the night.'"96 The court opined that "a call upon a lady, at a later hour than that prescribed by conventional rules, by gentlemen relatives or friends, may be entirely innocent."97 The New York Supreme Court was similarly quite narrow in its interpretation of a late nineteenth-century statute that made statements imputing unchastity slander per se.98 The court once maintained that it did not follow, from a statement that a woman was "not a lady" and worked as a cook in a "low" hotel,
that she was unchaste. Ignoring the innuendo of unchastity that other judges might have enthusiastically embraced in such a context, the court said that "[w]ords in these actions are things, and, where they are actionable per se, they must make a clear statement of the actionable charge, and the court and jury will not guess and surmise what might have been intended by the words that is not borne out by the words themselves." 

Most courts were less dense when examining for defamatory meaning statements that arguably impugned a woman's chastity. For example, in *Kedrolivansky v. Niebaum*, the plaintiff was called a "bad woman" because she had not lived with her husband for two years prior to his death and was said to have caused his death by virtue of having "driven him to drinking." The woman to whom these words were spoken, who knew that the plaintiff had an infant, testified that she took these statements to mean that the plaintiff must have "been untrue to her husband, or this little nursing child would not have been around." The plaintiff argued, supported by such testimony, that the defendant's statements signified and had been understood by the hearer to mean "that the plaintiff had deserted her husband, and had, prior to his death, led a dissolute and unchaste life." The plaintiff also argued that the defendant's statements indicated she "had become enceinte [sic] while living apart" from her husband and that "such bad conduct on the part of plaintiff drove her husband to drinking and caused his death." The court, recognizing the difficulty inherent in the issue of defamatory meaning in chastity cases, wrote, "The words are somewhat ambiguous, but charges of unchaste conduct are seldom made in plain and direct words. They are usually made by indirection or insinuation, and, however made, are slanderous when they convey to the minds of the hearers the meaning that the woman was unchaste."

100. *Id*.
101. 11 P. 641 (Cal. 1886).
102. *Id.* at 641. In addition, the defendant reported that the plaintiff's husband had fallen while drunk and was killed. *Id*.
103. *Id.* at 642.
104. *Id.* at 641.
105. *Id.* “ENCEINTE” is French for pregnant. COLLINS ROBERT FRENCH DICTIONARY 362 (6th ed. 2002). It is not clear from the case report whether the plaintiff or the court invoked this French term.
106. *Kedrolivansky*, 11 P. at 642. This case illustrates *innuendo*, a doctrine associated with defamatory meaning. SMOLLA, supra note 30, § 4:18. Innuendo refers to the use of information beyond the statement itself (called colloquium) that makes the statement defamatory. *Id.* Statements defamatory on their face, without reference to additional
Statements that gave rise to nineteenth-century sexual slander suits were sometimes based upon assertions that the plaintiff was a "bitch" or a "whore." The accusation that a woman was a "bitch" wrought differing assessments of meaning from courts, with some viewing the word as implicating unchastity and others not. One court said that while a statement that the plaintiff was a "damned bloody bitch" was "reproachful and offensive," it did not "import[ ] a charge of the want of chastity or an accusation of any offense." An allegation that a woman was a whore, on the other hand, was almost

information, were called libel per se; those defamatory only by reference to other information were libel per quod. Id. §§ 7:22-23. The former enjoyed a presumption of damages, while the latter had to be accompanied by proof of special damages. Id.

A number of years later but in the same vein, the Alabama Supreme Court in 1914 observed that when speaking about matters of sexual impropriety, people were rarely direct. Allen v. Fincher, 65 So. 946, 947 ( Ala. 1914). Arguably reflecting the refined sensibilities associated with the American South, the court wrote: "The average man . . . in speaking of an act of adultery, clothes the act in language which, while not so direct [as in describing larceny or murder] is nevertheless rarely misunderstood." Id. at 948. Accordingly, the court read a statement that a person saw a man and an unmarried woman "engaged in a very dirty act or in a very black act," to mean that the person saw them in "an act of sexual intercourse." Id.

In sharp contrast, a Florida court seemed especially dense about defamatory meaning in a case that had arisen a few years earlier. In Hulley v. Hunt, 57 So. 607 (Fla. 1912), the defendant and president of John B. Stetson University, expelled the plaintiff, a university student, and told others that the reasons for her expulsion were "serious," and that if she and her parents wanted the matter "kept quiet" they would not sue him. Id. at 608. Furthermore, the defendant stated that the plaintiff's parents knew that she "was not all right, because she had trouble in a St. Augustine school, right under their eyes." Id. The defendant also said that the plaintiff would be "ruined for life" if he told what he knew about her. Id. The plaintiff claimed that these statements, through innuendo, implied that she was guilty of immoral and improper conduct. Id. The court offered the following analysis:

A most careful and thoughtful reading of these alleged statements convinces us that, whether taken singly or all together, they are not susceptible to the innuendo of fornication imputed to them by the pleader. There is nothing in them, either with or without the colloquium, that bears upon the sex relation, except the being out late at night with the boys; and this is so immediately qualified by the showing of the early hour at which she returned, and by the further showing that the speaker, as president of the institution, expected to reinstate her in the school, that the remark clearly applies to an infraction of the rules or the proprieties of this coeducational boarding school, and may not be contorted into an imputation of unchastity.

Id.

107. See Craig v. Pyles, 39 S.W. 33, 35 (Ky. 1897) (holding that the words "[s]he is a dirty bitch; she has no character, and is no account," were not actionable and did not necessarily imply that plaintiff was "a common prostitute, or [was] guilty of fornication or adultery"); Nealon v. Frisbie, 31 N.Y.S. 856, 856 (Super. Ct. 1895) (calling the plaintiff a "God damned Irish bitch," while opprobrious, did not on its face impute unchastity and therefore was not actionable).

Two Centuries of Talk About Chastity

universally considered to impugn her chastity. Sometimes a court's job of interpreting words like "bitch" and "whore" was made easier because these terms were not the only derogatory communications made by the defendant. Rather, a speaker frequently had offered additional comments about a plaintiff that served to explain the use of these expletives.

Often the slanderous statement was crude; in some instances it was opaque. Among those interpreted as undermining a woman's reputation for chastity were: "she is a red light district woman"; [she] was getting fat; some one had slipped up on the blind side of her"; that she "was seen at the chicken coop... with her clothes up, with a man"; that she and a man had gone "into the woods together... under suspicious circumstances"; that the speaker prevented the plaintiff from marrying by notifying her fiancé that "her child was Nathaniel Griggs"; and that the plaintiff was said to be "like an old

109. See Pledger v. Hathcock, 1 Ga. (1 Kelly) 550, 1846 WL 1210, at *1 (1846) (holding statement by defendant that plaintiff and a particular man were "whoring of it" was actionable); Cox v. Bunker, 1844 WL 3964, at *2 (Iowa 1844) (holding that calling a woman a "whore" was actionable per se); Williams v. Greenwade, 33 Ky. (3 Dana) 432, 1835 WL 1920, at *1 (1835) (calling a woman a "drunken whore... necessarily import[s] slander, because it is impossible to be a whore without being guilty of fornication or adultery"); Steiber v. Wensel, 19 Mo. 513, 1854 WL 4618, *1-*2 (1854) (holding that a statement that plaintiff and another woman were "whores," "carry on roguery and are rogues," and that they "go to church and whore with the priests" were held to involve a charge of adultery and therefore were actionable without alleging special damages); Noyes v. Hall, 62 N.H. 594, 1883 WL 4065, at *1 (1883) (holding that a statement calling a woman a "whore" was actionable of itself and plaintiff did not need to allege or prove special damages); Courtney v. Mannheim, 14 N.Y.S. 929, 929-30 (Brooklyn City Ct. 1891) (holding that the words "[y]ou are an Irish whore" were slanderous per se given their "ordinary meaning").

110. In Walmsley v. Kopczynski, for example, the plaintiff said "I won't rent my house to whores like you... [y]ou have two or three men running after you. The man that knocked on the kitchen window was some one after you." 195 N.Y.S. 699, 700 (App. Div. 1922). In Lanphere v. Clark, the defendant, pointing to the plaintiff as she stood in the door of her hotel, stated "I will rout that bitch out of her den before Saturday night. They are a nest of bitches." 29 N.Y.S. 107, 108 (Gen. Term 1894). The court did not seem to doubt that this was defamatory given that it was spoken in addition to other language indicating that the hotel she kept was a "resort of thieves and murderers." Id. The court did not expressly find that "bitch" imputed a lack of chastity; indeed, it did not opine on its meaning, but rather only affirmed the lower court's ruling that the statements were defamatory. Id.

111. Tingle v. Worthington, 110 So. 143, 144 (Ala. 1926).

112. Emmerson v. Marvel, 55 Ind. 265, 267 (1876).

113. Lewis v. Hudson, 44 Ga. 568, 1872 WL 2450, at *1 (1872). The Lewis court found the words actionable even under Revised Code Section 2696, which made it "actionable to charge one with being guilty of any debasing act which may exclude him from society." Id. at *3 (emphasis omitted).

114. Ivester v. Coe, 127 S.E. 790, 792 (Ga. Ct. App. 1925). The court specifically noted the undisputed testimony from two physicians indicating that plaintiff was a virgin. Id. at 793.

boaring sow, and a bulling cow" who had John Tilton "on top of [her] once."  

As one court explained, "words having a provincial meaning will be used and understood in the province, the locality, with such meaning, and if that meaning be an actionable one, the words, in the province, will be, per se, actionable."  

In struggling to construe accurately the language that gave rise to these suits, courts sometimes recognized that it was appropriate to read into a statement the apparent intent of the speaker. In one such case, the Pennsylvania Supreme Court, considering whether the sentence "she is a loose character, a bad character" was defamatory, observed:

> It is said that these words do not expressly charge fornication, and here lurks the whole error of the Court below. This is, in fact, a return to the old doctrine of *mitior sensus*. They do charge it expressly, or not at all, unless we falsify their meaning by treating them too kindly. Such words are always understood as an assault upon the bright central virtue of a woman's character, and it is almost always made in a covert way—such is the *norma loquendi*. There is some natural and instinctive decency still left, even in the most degraded characters, that prevents them from speaking of this offense in the most direct terms.

Several courts recognized that a liberal interpretation of opaque statements was appropriate because even those who defame may be decent enough to have avoided speaking directly of such delicate matters. Most courts did not shy from recognizing obvious innuendo.

The case of *Matts v. Borba* is of special interest because it involved the interpretation and construction of a word in a language other than English. Probably because of that feature, the court took inor-
ordinate care with the issue of defamatory meaning. The plaintiff and defendant were Portuguese, and the offending statement was spoken in Portuguese in the presence of persons who understood that language. The statement included the word, "valhaca" which the plaintiff claimed translated into "whore." The plaintiff offered testimony that the word meant, "private whore; that is, a married woman who is doing it on the sly" and that "the word is in common use among the Portuguese to express a woman who has fallen so low as to be common with every one, even without pay." Others, referred to by the court as "intelligent Portuguese" (apparently because some of them had received tertiary education in Portugal), testified on behalf of the defendant that the word means "knave, rogue, rascal, scamp, scapegrace, crafty, cunning" and that it "never means unchastity." They indicated the Portuguese equivalent of the English word "whore" is "puta" and that the words "meretriz" and "prostituta" also have that meaning. The court accepted the defendant's argument that the primary meaning of the word valhaca, "[s]tanding alone, as a single word, [ ] does not imply want of chastity." The court went on to note, however, that like many English words whose dictionary definitions do not refer to chastity or the lack of it, the words may nevertheless be used to connote a want of chastity.

There are other words, however, corresponding very closely to the word "valhaca," which, in their ordinary use, do not refer to the subject of chastity, but yet imply qualities which embrace chastity. The word "dishonest," for example, corresponds very nearly, in its primary meaning, to the word "valhaca." The first definition given by Webster is: "Wanting in honesty; void of integrity; faithless; fraudulent; disposed to deceive or cheat," while the third meaning given is "dishonorable; disgraceful; shameful; wanton; unchaste." So Shakespeare used the word "honest" to denote chastity: "Wives may be merry, and yet honest too." Even the word "occupy" was formerly used to express sexual intercourse, though now never so used.

123. See id. at 159-60 (analyzing the meaning of the Portuguese words spoken by employing expert testimony and comparing the words with their English equivalents).
124. Id. at 159.
125. Id.
126. Id.
127. Id. (internal quotation marks omitted).
128. Id.
129. Id. at 160.
130. Id.
131. Id. (emphasis added).
The court concluded that evidence sufficiently supported the jury verdict in favor of the plaintiff because it is "reasonably clear" that the "word 'valhaca' is capable, without greatly distorting some of the definitions given to it, of expressing" a lack of chastity. 132

Late in the nineteenth century, as women began to move into the public sphere in greater numbers, the demographics associated with female defamation plaintiffs shifted. Women who worked outside the home in the sorts of jobs then available to them—as nurses 133 and teachers, 134 for example—began to sue for defamation. Like the unmarried women, housewives, and mothers who had long availed themselves of defamation law, the vast majority of defamation claims by these working women were based upon statements impugning their chastity. 135 While the gossip that labeled women "whores" and "bitches" 136 and made allegations about their private lives continued, the demographic among defendants began to change. Suggestive and

132. Id.
133. See, e.g., Wright v. Hilo Tribune-Herald, Ltd., 31 Haw. 128, 129 (1929) (newspaper reported that nurse had left her post to go on vacation); Brady v. Chaffee, 163 Ill. App. 242, 243 (1911) (doctor called nurse many varieties of "whore" while standing on public street); Copeland v. State, 300 S.W. 86, 87 (Tex. Crim. App. 1926) (nurse was said to have committed adultery with one of her supervisors).
134. See Dixon v. Allen, 11 P. 179, 179-80 (Cal. 1886) (school teacher in training sued newspaper publisher who reported that the teacher "by her conduct in class, by her behavior in and around the building, and by her spirit . . . has shown herself tricky and unreliable, and almost destitute of those womanly and honorable characteristics that should be the first requisites in a teacher"); Wertz v. Lawrence, 179 P. 813, 814 (Colo. 1919) (statement that female schoolteacher "acted like she was crazy" and might kill defendant's child); Hoover v. Jordan, 150 P. 333, 334 (Colo. Ct. App. 1915) (complaint to school board called teacher "immoral," and said that she did not have "control over the school").

Interestingly, among contemporary defamation suits brought by women, teachers have been well represented as plaintiffs. The statements on the basis of which they have sued have frequently portrayed them as disorganized, vengeful, and even mentally unfit. See Mendillo v. Bd. of Educ., 717 A.2d 1177, 1182 n.11 (Conn. 1998) (teacher called a "liar," "incompetent," and "learning disabled"); Hayes v. Smith, 832 P.2d 1022, 1023 (Colo. Ct. App. 1991) (teacher accused of being in a homosexual relationship with another female teacher); Nodar v. Galbreath, 429 So. 2d 715, 716 (Fla. Dist. Ct. App. 1983) (teacher accused of incompetence and of harassing students); Disend v. Meadowbrook Sch., 604 N.E.2d 54, 55 (Mass. App. Ct. 1992) (headmaster of school wrote letters claiming that teacher was "inappropriate in the way she dealt with the children"). For a discussion of defamation cases regarding teachers, see Peter S. Crane, Note, Defamation of Teachers: Behind the Times?, 56 Fordham L. Rev. 1191 (1988).
135. See Ketchum v. Gilmer, 115 Ill. App. 347, 1904 WL 1876, at *1 (1904) (female teacher referred to another teacher as a "whore" and not "a decent woman"); Brinsfield v. Howeth, 73 A. 289, 291 (Md. 1909) (plaintiff was said to be "a girl of loose character and not fit to teach school").
136. See Hollman v. Brady, 233 F.2d 877, 877 (9th Cir. 1956) (statement that plaintiff was an "ex-whore"); Haynes v. Phillips, 99 So. 356, 357 (Ala. 1924) (statement that plaintiff was a "straight public whore or a straight public woman, meaning a whore"); Kaplan v. Edmondson, 22 S.E.2d 343, 344 (Ga. 1942) (plaintiff called a "damned bitch").
sometimes outright salacious media statements about the social and sexual propriety of individual women increasingly gave rise to defamation actions in the age of yellow journalism.

III. TURN OF THE CENTURY: BRIDGING PRIVATE TO PUBLIC IN THE AGE OF YELLOW JOURNALISM

The turn of the twentieth century was a time of profound change for both women and the media. Women began to sever their "ties to obligatory domesticity." More affluent women began to create their own institutions, establishing "a separate space for themselves in public life." Middle-class wives visited shops and department stores. Young, working-class women undertook paid work in factories, offices, retail shops, and as domestic servants. Families supervised young women less, affording them opportunities to mingle with men in offices, stores, restaurants, street cars, sidewalks, and parks.

While the media took note of these changes, its response was not always respectful, in part because of the onset of the phenomenon that became known as yellow journalism. Responding to stiff competition at a time of media expansion, newspapers in the late nineteenth century "turned the high drama of life into cheap melodrama" to attract readers by offering them a "palliative of sin, sex, and violence." Indeed, Warren and Brandeis are believed to have written their germinal 1890 article, The Right of Privacy, in response to the

137. Borden, supra note 10, at 100.
138. Id. (emphasis omitted). Borden notes, by way of example, the establishment of women's universities, from Vassar in 1865 to Barnard in 1889. Id. Professors D'Emilio and Freedman have observed that by 1900 a "noticeable number of young middle-class women were enrolling in institutions of higher learning." JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 190 (2d ed. 1997). They emphasize that these educated women went on to create opportunities for other women, "as faculty at women's colleges . . . social workers, businesswomen, or journalists." Id.
139. Borden, supra note 10, at 100. D'Emilio and Freedman have discussed shifting patterns in women's employment. While domestic service accounted for sixty percent of female employment in 1870, it had dropped to one-third by 1900 and to eighteen percent in 1920. D'EMILIO & FREEDMAN, supra note 138, at 189. At the same time, women filled more factory, office, and retail jobs as "the number of working women expanded far faster than the growth of the female population." Id. Younger girls in particular held these latter jobs. Id.
140. D'EMILIO & FREEDMAN, supra note 138, at 194.
141. EDWIN EMERY & MICHAEL EMERY, THE PRESS AND AMERICA: AN INTERPRETATIVE HISTORY OF THE MASS MEDIA 244 (4th ed. 1978); see also Friedman, supra note 23, at 1114 (briefly discussing yellow journalism).
press excesses of the time. That article, considered the provenance of the privacy tort that evolved in subsequent years, argued that the gossip promulgated by the press was "potent for evil." Warren and Brandeis, echoing the paternalism of the time, articulated particular concern about the consequences for women and the preservation of "the sacred precincts of private and domestic life."

As a component of the media expansion associated with yellow journalism, many publications began to include and target women in their coverage. As Professor Carolyn Kitch observed, magazines, the first truly mass medium in the U.S, achieved wide-scale distribution only in the 1890s. In her study of female images on magazine covers, Kitch noted that in the first two decades of the twentieth century, the idealized image of the new woman was often contrasted with her evil opposite, the modern woman, a "beautiful but dangerous wom[a]n who overpowered and used men." During World War I, magazines portrayed women as angelic, men as strong. After the war, a woman was usually depicted as one of two seemingly opposite but complementary images—on the one hand the sexually-free, asexually-shaped flapper and on the other as a symbol of motherhood and family happiness. During World War II the "new woman" was one who worked; later, however, the media emphasized that this "new woman" preferred housework to paid work. Kitch demonstrates that World War II changed little in the media's limited portrayals of female types: "Between the 1930s and 1960s, the old stereotypes—the 'true' domestic woman, the all-American girl-pal, the sexually dangerous schemer, the vapid party girl, and the modern Madonna—resurfaced fairly intact."

Professor Gaye Tuchman has argued that, from its earliest history, fiction in women's magazines lauded women's domestic roles,


144. Warren & Brandeis, supra note 46, at 196. In particular, they were concerned with lowering standards of morality, and worried that such gossip "both belittles and perverts" by "inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people." Id. at 195.

145. Id. at 195.


147. Id. at 14.

148. Id. at 15.

149. Id.

150. Id. at 184-87.

151. Id. at 185.
denigrating those who worked outside the home.\textsuperscript{152} She observes that newspapers also encouraged "rigid treatment of sex roles."\textsuperscript{153} During the newspaper wars of the 1880s, competitors attracted female readership by providing a "segregated" women's page, separate from hard news.\textsuperscript{154} On these pages, newspapers portrayed women as interested in marriage, upper-class parties, food, and clothing, while ignoring issues associated with less-privileged women.\textsuperscript{155} While content centered on domestic topics, items written about and for women were sometimes "scandalous revelations of the activities of 'Society.'"\textsuperscript{156} Newspapers added gossip columns in the early twentieth century.\textsuperscript{157} These portrayed women "as the consorts of famous men, not as the subjects of political and social concern in their own right."\textsuperscript{158}

Changes in a woman's social role and in her portrayal in the media around the turn of the century are reflected in the type of statement that typically gave rise to a female plaintiff's defamation action. Professor Diane Borden's empirical study of women's use of defamation law provides a useful backdrop for considering some of the individual cases. Borden analyzes the types of statements that gave rise to defamation suits during two periods: 1897-1906 and 1967-1976.\textsuperscript{159} In particular, she compares statements that were either about chastity or immorality with those about the plaintiff's business or profession.\textsuperscript{160}

\textsuperscript{153} Id. at 25. Among the magazines Tuchman studied were \textit{Ladies' Home Journal}, \textit{McCall's}, \textit{Good Housekeeping}, \textit{Redbook}, \textit{Cosmopolitan}, \textit{True Story}, \textit{Modern Romance}, \textit{Glamour}, and \textit{Mademoiselle}.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 28.
\textsuperscript{156} Id. at 26.
\textsuperscript{157} Id. at 26-27.
\textsuperscript{158} Id. at 28.
\textsuperscript{160} While Borden's findings are illuminating, her study contains many self-acknowledged problems. Borden, \textit{supra} note 12, at 123 n.50. The West reporting system contains mostly appellate level cases, many appellate and most trial level cases are not reported, other cases get settled out of court, and most appellate case reports rarely display the affirmation or reversal of damage awards. \textit{Id.} While Borden displays the information in percentages, she actually works with a small number of cases, a total of sixty-one for female plaintiffs. \textit{Id.} at 125. Nevertheless, these constitute presumably all the available cases for the time periods studied.
\textsuperscript{160} Borden, \textit{supra} note 12, at 121-22.
The former represents that which is traditionally feminine, and the latter represents that which is traditionally masculine.  

During the period between 1897 and 1906, only one female plaintiff brought—and lost—a defamation action based on a statement related to her business. In sharp contrast, some forty-two women sued in defamation based on statements in the immorality category. During the same period, sixty-four percent of these women prevailed in their actions based on statements impugning their morality or chastity. Borden thus concluded that women tended to

161. Id. at 122. Borden hypothesizes that men’s reputations are based on “honor” whereas women’s are based on “virtue.” Id.  

In both periods combined, she found that female plaintiffs brought approximately 61 of a total of 278 cases (21.9%). Id. at 125. Borden found that female plaintiffs brought more than twice as many defamation actions in the earlier period, with 43 from 1897-1906, and only 18 from 1967-1976. Id. at 124. Female plaintiffs in the earlier period predominantly sued individuals, with slightly less than a quarter suing newspapers. Id. at 131. During the later period, 50% of female plaintiffs sued individuals, 27.8% sued newspapers or periodicals, and the remaining 16.7% sued non-media organizations. Id. One case was brought against both a media defendant and an individual, which accounts for the remaining 5.5%. Id. Consistent with the type of defendants, during the earlier period 72.1% of defamation actions were for slander alone, as compared to the later period where only 16.7% of the cases were for slander alone, and 11.1% were for slander and libel. Id. at 132.  

162. Id. at 133-34. Outside the nine-year period Borden studied, more than one woman sued in defamation based on a statement about her business or profession. See Moore v. Gregory, 34 S.E.2d 624, 625 (Ga. Ct. App. 1945) (damage to plaintiff’s career as court reporter and public stenographer); Kirkland v. Constitution Publ’g Co., 144 S.E. 821, 821 (Ga. Ct. App. 1928) (damage to plaintiff’s career as public official and oil inspector); Brown v. McCann, 138 S.E. 247, 248 (Ga. Ct. App. 1927) (damage to plaintiff’s career as public school teacher).  

163. Borden, supra note 12, at 133. Of the 51 defamation actions women brought based on allegations of immorality in both periods, about two-thirds (32) involved “want of chastity and adultery.” Id. at 125. Six other cases involved “disorderly house,” five fornication, incest or rape; four prostitution; two immorality in general; and one each abortion and bigamy. Id. Analyzing the data from another perspective, Borden found that during the earlier period, women brought forty-two of fifty-four (nearly seventy-eight percent) of all actions based on statements about immorality. Id. at 126.  

164. Id. at 133. Borden calculated the success rate for female plaintiffs by adding together the number of plaintiff judgments affirmed, defendant judgments reversed, and judgments for the plaintiff. Id. at 132-33 n.54 In the later period, female plaintiffs lost seventy-eight percent of business actions while winning fifty-six percent of immorality actions. Id. at 134.  

Borden also observed a discrepancy in damages between male and female plaintiffs. Id. at 134-35. Between 1897 and 1906, female plaintiffs were awarded damages more often than male plaintiffs, but the damages tended to be for half the amount the males received. Id. at 134. The situation worsened in the period from 1967 to 1976, when male plaintiffs were awarded damages five times as often as female plaintiffs and received eight times the amount of damages as female plaintiffs. Id. at 135. Borden hypothesized that this difference stems not only from the higher earnings of men, but also from courts’ predilection that a woman’s sexual virtue—her “most prized, albeit culturally constructed possession . . . was worth far less than a man’s honor in the marketplace.” Id. at 140-41. Another factor likely influencing the significantly lower damage awards for women, especially in the ear-
issue in defamation “based on their private-sphere social roles, culturally coded in terms of their sexuality (wives, mothers, housekeepers).” Borden further concludes that the law reinforced these “uni-

dimensional cultural assumptions about women.”

Correlating with the media images of women that were typical of this time were publications that gave rise to a number of defamation cases brought around the turn of the twentieth century. Reflecting the same paternalism Warren and Brandeis exhibited in their article on privacy, judges of the time responded with particular concern for the chastity of young women, which they valorized in highly idealized terms. In *McFadden v. Morning Journal Ass'n*, for example, the court addressed the defamatory meaning of an article that portrayed the plaintiff and another young woman, in the words of the court, as engaging in “ridiculous, immodest, and forward behavior.” The story was titled *Row, Nell! Pull, Mame! Two Girls Row a Race for a Beau with a Handsome Face. Prospect Park Lake Turned into a Cupid's Course, with a Fringe of Femininity.* The story portrayed the plaintiff, Nell, competing with another woman in a rowing race for the affections of one Frederick Bohn. The newspaper facetiously labeled it the “Cupid cup” and referred to it as “an aquatic love chase” in which the two women demonstrated “their love for this perfectly proper Don Juan.” Nell was said to have “pulled till the handles of the oars burned her pretty pink palms.” Following publication of the article, “'evil-minded persons'” sent the plaintiff mail ridiculing her and “'subjecting her to indecent suggestions, proposals, and insults.'”

The court had no difficulty concluding that the article was defamatory because even a “casual reading” demonstrated that it “expose[d] the plaintiff to contempt, ridicule and obloquy and . . . cause[d], or

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166. *Id.*
168. *Id.* at 280.
169. *Id.* at 276.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 277. The plaintiff's attorney argued that the plaintiff had received “hundreds of indecent or immoral missives, sent to her by degraded men, who had formed an estimate of her character by reason of the article published by the defendant.” *Id.* In terms of other damages suffered, the plaintiff said the article had “caused her to cry, and had kept her from sleeping and eating and going into society, and made her feel as if she were of no account, and that that feeling had continued until the trial.” *Id.* at 279.
tend[ed] to cause, her to be shunned or avoided." 174 The court found that the article imputed to her behavior such as no respectable girl could be guilty of without meeting the condemnation of every right-minded man and woman, and gives rise to the suggestive suspicion that the woman guilty of such behavior was loose in conduct and ready for adventure, without regard to the becoming modesty of a woman. The delineation of two young women engaged in a muscular contest for the affection of a lover might have passed current in the Middle Ages, but it is not in accordance with the more refined ideas of the nineteenth century, no matter what may be the woman's station in life. There can be no question that the article is libelous per se. 175

The court's ready conclusion that a young woman, whatever her class, would be shunned and ridiculed as a result of a report that she had pursued a young man—not to mention that she had engaged in a muscular pursuit—is somewhat comical by contemporary standards. The ability of such a suggestion to defame may have seemed obvious in light of nineteenth-century sensibilities, but the court's outrage on behalf of the young woman seems excessively paternalistic and sentimental to twenty-first century eyes. 176 It also makes one puzzle at the change in societal attitudes that would so readily see this language as imputing unchastity, when language that a woman had "entertained gentlemen company at all hours of the night" had not done so less than two decades earlier. 177

The decision in Gates v. New York Recorder Co., 178 cited in McFadden and decided the same year, expressed similar sentiments about the exalted place of womanly virtue. The New York Recorder reported that the plaintiff, a "dashing blonde, twenty years old," who was "said to have been a concert-hall singer and dancer at Coney Island" 179 had

174. Id. at 280.
175. Id. (citing Gates v. New York Recorder Co., 49 N.E. 769, 770 (N.Y. 1898)).
176. For another example of similar judicial sentiment, see Stafford v. Morning Journal Ass'n, 22 N.Y.S. 1008, 1012 (N.Y. Gen. Term. 1893). There the defendant published an advertisement that read: "LeHuray Sisters; Blanche, Stella, and Allien. Just from Paris. Massage, French style. Love secrets. How to get a husband. Inclose stamp. Valuable information for ladies by aid of cards. LeHuray sisters, 444 2nd Ave., Mt. Vernon, N.Y." Id. at 1009. The court had no difficulty upholding the jury verdict that the statement was defamatory to the plaintiff, one of the listed women. Id. at 1012. The court may have been influenced by the fact that a number of men had written to the women and proposed lewd relationships in the wake of the story's publication. Id. at 1011.
178. 49 N.E. 769 (N.Y. 1898).
179. Id. at 769.
secretly married a 75-year-old man who was “fond of pretty women.”\textsuperscript{180} In fact, the plaintiff was a thirty-five-year-old school teacher, who not only had never been on any stage, but had never even been a spectator in a concert hall.\textsuperscript{181} Three days before the newspaper published the story she had married a “reputable citizen of Brooklyn” whose age the court did not reveal.\textsuperscript{182} The court did not hesitate to hold the newspaper report libelous per se and, indeed, considered the resulting injury so grave as to opine that it could not even be “measured by mere money.”\textsuperscript{183} The court explained the obloquy associated with places such as Coney Island as follows:

When the general public read of the plaintiff that she had been a concert-hall singer and dancer at Coney Island, they . . . [associated her] with that class of cheap and disreputable entertainments, which flourish at the western end of the island, known as ‘concert halls,’ the character of which has been fully disclosed in this record. To say that the words published of the plaintiff in the community where the character of the concert hall is well known were not calculated to hold her up to disgrace and disrepute, and to charge her with unchaste conduct, is to reach a conclusion both illogical and unjust.

* * *

To make this false and serious charge concerning a lady who . . . hoped . . . to deserve the friendship and respect of virtuous women and honorable men, was to advertise her as no better than a woman of the pave. Such a charge, if believed, holds a woman up to the public gaze, not only as unchaste, but as belonging to one of the lowest classes of the great army of fallen women.\textsuperscript{184}

The majority’s opinion expressed outrage that the plaintiff, whom it described as a woman of virtue, should be characterized as a “fallen woman.”\textsuperscript{185} In so doing, the court implicitly endorsed a sort of

\begin{itemize}
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Id. at 770. Based also upon findings that the publication was entirely false and that the defendant knew it was false, the court upheld the $3000 jury verdict and award. Id. at 769-70.
\item \textsuperscript{182} Id. at 769-70.
\item \textsuperscript{183} Id. at 770.
\item \textsuperscript{184} Id. at 769-70 (emphasis added). The court distinguished the Coney Island dance halls from other stages, which “good and noble women have graced” because the latter are “entirely without application” to this case where there is an explicit charge that the plaintiff is reported to have been a concert hall singer and dancer at Coney Island, “which can mean but one thing, as already pointed out.” Id. at 770.
\item \textsuperscript{185} Id.
\end{itemize}
Maryland-whore dichotomy with respect to women. That dichotomy was also evident in a number of late nineteenth-century sexual slander cases, and it was reflected in the media's portrayals of the new woman on the one hand, and her evil opposite on the other.

Justice O'Brien, dissenting, did not view Coney Island's dance halls quite as unfavorably as did his colleagues. Nor did he view women's roles in society as so universally exalted. He observed, perhaps too optimistically, that "[w]omen are now engaged in most of the professions and occupations of life," including the stage. Calling them an "indispensable part of all public amusements and entertainments," he insisted that it was no more injurious to a woman than to a man to say that she was an entertainer.

When we consider how society is made up in these days, and the numerous occupations in which women are engaged, it would be impossible to hold that loose morality is necessarily imputed to a female from the fact that she is or was a concert-hall singer or dancer. In all civilized countries it has become an art or profession in which women earn a living without necessarily being disgraced. It could be written and published to-day of many good and devoted women that they were once upon the stage, and yet I think that no

186. See D'Emilio & Freedman, supra note 138, at 133 (noting that "[t]he 'pure' woman and the 'fallen' woman represented two sides of the same sexual coin"). They explain that the "fallen woman" image emerged in the mid-nineteenth century as the antithesis to the pure woman, the new ideal of womanhood. Id. A "fallen woman" endured a terrible stigma. Id. at 70. One novelist of the period wrote that a virtuous woman became, "'when once fallen, the vilest of her sex.'" David Brion Davis, Homicide in American Fiction, 1798-1860: A Study in Social Values 219 (1957) (noting Ned Buntline, The 'Boys of New York: A Sequel to "The Mysteries and Miseries of New York" 51 (n.d.)); see also Andrea Dworkin, Pornography: Men Possessing Women 207 (1989) (discussing the division between mother and whore, with the virgin being the potential mother and the sexuality of a woman actualized in the image of the whore).

187. McFadden v. Morning Journal Ass'n, 51 N.Y.S. 275, 280 (App. Div. 1898); Stafford v. Morning Journal Ass'n, 22 N.Y.S. 1008, 1012 (Gen. Term 1893). Courts then, however, rarely categorized a woman as a "whore"; they simply contemplated the category of the "whore" for comparison sake, generally presuming the chastity of all female plaintiffs. See, e.g., McFadden, 51 N.Y.S. at 280 (implying a difference between respectable women and "loose" women). But see Beggary v. Craft, 31 Ga. 309, 315 (1860) (contrasting daughters who grow up without restraint to the "modest maiden" in the context of a sexual slander action).

188. See supra notes 146-151 (referring to Kitch's analysis).


190. See id. at 771 (emphasizing that under prior case law statements imputing unchastity to a woman were not actionable unless special damages were shown).

191. Id.

192. Id.
one would suppose that it imputed to them anything in the slightest degree disgraceful.\textsuperscript{193} Justice O'Brien thus spoke like an early "equality" or "sameness" feminist, espousing an ideology associated with that strand of feminism.\textsuperscript{194} He was also far less paternalistic toward women, describing them as less fragile, less idealized, less needful of protection, and more autonomous than had his colleagues.\textsuperscript{195} Still, his opinion implied a clear dichotomy between good and devoted women on the one hand, and those of questionable morality on the other. He thus engaged in the sorts of judgments about worthiness that were increasingly being made by most judges at the turn of the century, as a woman's chastity was less frequently presumed than it had been a few decades earlier.

\textit{Ervin v. Record Publishing Co.}\textsuperscript{196} is another turn-of-the-century defamation case that illustrates the media's scandalous portrayals of women at a time they were bridging the private and public spheres.\textsuperscript{197} Like \textit{McFadden} and \textit{Gates}, the story in \textit{Ervin} hinted at social impropriety.\textsuperscript{198} It also, however, suggested that the plaintiff engaged in illicit sexual activity.\textsuperscript{199} The plaintiff, Mabel Clare Ervin, was a journalist\textsuperscript{200} for the defendant newspaper, the \textit{Sporting Edition}.\textsuperscript{201} She sued when the daily paper published a story about her supposed relationship with

\begin{itemize}
  \item \textsuperscript{193} \textit{Id.}
  \item \textsuperscript{194} \textit{See} \textit{Baer}, supra note 57, at 28-30, 54-55 (describing sameness and difference theories in feminist jurisprudence); Deborah L. Rhode, \textit{Definitions of Difference, in theoretical Perspectives on Sexual Difference} 197-212 (Deborah L. Rhode ed., 1990) (analyzing the use and disadvantages of a sexual difference framework in law).
  \item \textsuperscript{195} \textit{Gates}, 49 N.E. at 771. Justice O'Brien's disavowal of the law's paternalism also applied to the New York legislature's decision almost thirty years earlier to deem slander per se statements that impugned a woman's chastity; he apparently disagreed with that decision. \textit{See id.} (citing and discussing the New York statute).
  \item \textsuperscript{196} \textit{97 P.} at 21 (Cal. 1908).
  \item \textsuperscript{197} \textit{Id.} at 21-22. Other cases also illustrate the early twentieth-century press's use of satire in salacious and hateful ways. In \textit{Beeson v. H.W. Gossard Co.}, a woman hired by a corset company was reported to have modeled corsets at the American Medical Association Meeting. 167 Ill. App. 561, 564 (1912). A newspaper characterized her as a "living Venus" and suggested she appeared indecently clad. \textit{Id.} In \textit{Cherry v. Des Moines Leader}, a newspaper described the Cherry Sisters, female entertainers, in a review as "strange creatures with painted faces and hideous mien." 86 N.W. 323, 323 (Iowa 1901). The article stated that the "mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom." \textit{Id.} The report described one sister as a "capering monstrosity," one as a "frisky filly," and the other as an "old jade." \textit{Id.} The court held the report privileged as concerning a public performance, and noted that the newspaper's use of ridicule, sarcasm, and exaggeration was justifiable in this case. \textit{Id.} at 325.
  \item \textsuperscript{198} \textit{Ervin}, \textit{97 P.} at 22 (noting that the article implied that the plaintiff was a member of the underworld and that she engaged in indecent activities).
  \item \textsuperscript{199} \textit{Id.}
  \item \textsuperscript{200} \textit{Id.} (describing Ervin as "engaged in the business of writing for newspapers").
  \item \textsuperscript{201} \textit{Id.} at 21-22.
\end{itemize}
a well-known "Chinese prize fighter."\textsuperscript{202} The story, which referred to the plaintiff as "Queen Mab,"\textsuperscript{203} read, in relevant part:

Before he left home, he wired "Queen Mab," asking her to meet him at the depot at 7 a.m., but the hour was too early for her majesty, and Ah Wing came into town with nobody to welcome him. He was dressed in his bulliest and brassiest Chinese costume, consisting of a pair of pale blue flowered trousers, a dark blue broadcloth jacket, and a black pot-shaped chapeau surmounting by a cute little rosette of red silk. The first time he was here he had on his second best suit. The queen interviewed him and made the biggest hit of her life. This time Ah Wing wore his best clothes because—well, because he wanted to look well in the eye of her majesty, and he never dreamed that she wouldn't be at the depot to meet him. He forgot that one of the prerogatives of royalty is to do as you please, and Ah Wing was sad as he came into the Record office to find Queen Mab. There are some things which are better left unsaid, so it is best to pass over the meeting between the queen and her humble subject. Some things are too sacred for mere words.\textsuperscript{204}

The plaintiff alleged that these words suggested, and were understood as meaning, that

\textit{[p]laintiff was a person of low character, a sweetheart and boon companion, and the consort of the said Chinaman prize fighter, that she associated with him, was in the habit of

\textsuperscript{202} Id. at 22.

\textsuperscript{203} Id. at 21. The newspaper's use of this title may imply a reference to Shelley's poem of the same name—that poem was once censored in Britain. See Robert C. Post, \textit{Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment}, 76 CAL. L. REV. 297, 306 (1988) (citing Regina v. Moxon, 4 St. Tr. N.S. 693 (Eng. 1841)).

\textsuperscript{204} Ervin, 97 P. at 22. Not only is sexism in relation to the plaintiff apparent in publications such as this one, so is racism in relation to the "Chinaman" fighter. See id. at 21-22. In Stevens v. Kobayshi, another case in which a publication demonstrated both sexism and racism, the \textit{Japanese-American News} reported that the plaintiff had formerly been "'a Chinese doctor's concubine'" and that she "'surely is no good or worthy of teaching; she is not decent.'" 128 P. 419, 420 (Cal. Ct. App. 1912). The court, analyzing the meaning of "concubine" relative to the word "mistress" found sufficient evidence to support the jury's verdict for the plaintiff that this statement had defamatory meaning. Id. The court also discussed the meanings of these words relative to the Japanese word "mekake" which it does not define. Id.

Racism is also evident in many early defamation cases from the American South. See, e.g., Castleberry v. Kelly, 26 Ga. 606, 609 (1858) (finding that statement, "'Negroes have been with your wife'" was defamatory as "it is disgraceful to be on terms of social intercourse" with slaves). Cases, primarily from the Northeast, in which a woman was called an "Irish whore" or an "Irish bitch" also evince the racism of that time and place. See, e.g., Courtney v. Mannheim, 14 N.Y.S. 929, 929 (Brooklyn City Ct. 1891); Nealon v. Frisbie, 31 N.Y.S. 856, 856 (Sup. Ct. 1895).
meeting him socially and intimately, and would have met him at the train, except that it was too early.\textsuperscript{205}

The plaintiff concluded by alleging that the charge was false and scandalous, and that it imputed to her a "low and base character, without shame or self-respect."\textsuperscript{206} The appellate court rather summarily upheld the jury's finding that the article was defamatory, saying that the plaintiff had properly pleaded the innuendo that rendered defamatory the otherwise ambiguous statement.\textsuperscript{207}

\textit{Ervin}, like many other cases of the era, well illustrates the phenomenon of yellow journalism. In particular, it demonstrates the ways in which women often bore the brunt of scandal generated by such journalistic practices, particularly when that scandal was sexual in nature.\textsuperscript{208}

The 1910 case of \textit{Barth v. Hanna}\textsuperscript{209} shows that female plaintiffs continued to sue individuals, not only media outlets, for defamation based on their sexual propriety.\textsuperscript{210} Amolia Barth, a school teacher in Carroll County, Illinois, brought suit against her employer, Stephen Hanna.\textsuperscript{211} Barth claimed that Hanna's defamatory statement caused her no longer to be able to teach in the local school district.\textsuperscript{212} Specifically, Barth alleged that Hanna had made the following statement:

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\textsuperscript{205} \textit{Ervin}, 97 P. at 22. Indeed, the court stated the publication "might readily be understood by any one reading it as implying that the plaintiff was a member of the underworld, familiar with the Chinese prize fighter, and upon such terms of intimacy with him that when they met things took place between them that were not proper for publication." \textit{Id.}

\textsuperscript{206} \textit{Id.}

\textsuperscript{207} \textit{Id.} at 22. Among the additional facts pleaded that provided the innuendo was information that the plaintiff was "an unmarried woman of marriageable age" who was known as "Mab Ervin" and that at the time of the publication she was employed by the \textit{Record} as a writer. \textit{Id.}

\textsuperscript{208} See \textit{id.} (describing the negative effects the defamatory statement had on the plaintiff). Stories of women who had fallen because of rough living—even when it wasn't sex-related—also sold newspapers and thus also made for tantalizing stories in the age of yellow journalism. In \textit{Butler v. News-Leader Co.}, Annie Butler sued the News-Leader Company based on a story that portrayed her as a drug addict who had committed theft in order to supply her addiction. 51 S.E. 213, 215 (Va. 1905). Butler, a "famous rifle shot," had appeared under her maiden name, Annie Oakley, with a Wild West show. \textit{Id.} at 214. The story was headlined "Annie Oakley at the Bottom of Toboggan. Once Famous Beauty and Crack Shot of the World Winds up in Police Court for Petty Theft." \textit{Id.}

\textsuperscript{209} 158 Ill. App. 20, 1910 WL 2308 (1910).

\textsuperscript{210} \textit{Id.} at *1. In addition to \textit{Barth}, there are other cases in which the chastity of a school teacher was impugned by a statement. See, e.g., Hewett v. Samuels, 272 P. 703, 704 (Idaho 1928) (statement that the plaintiff-teacher had engaged in immoral acts); Kidder v. Bacon, 52 A. 322, 326 (Vt. 1902) (statement that the plaintiff had been caught in the act of adultery).

\textsuperscript{211} \textit{Barth}, 158 Ill. App. 20, 1910 WL 2308, at *1.

\textsuperscript{212} \textit{Id.}
She followed the boy, a pupil in the public school, around like a boaring sow would follow a boar . . . . She is a catch-colt . . . . She is a bastard and has no rights in law . . . . She slept with the boy . . . . She slept with Virgil McCombs [a 13-year-old male student of plaintiff's] . . . . We could not use her on account of her immorality . . . . She was expelled from another school because she got to fooling around with some big boys . . . . I told her she would be a pretty thing to employ in a school room if there was a lot of big boys . . . she would just make a plaything for them.\textsuperscript{213}

Affirming the jury's verdict,\textsuperscript{214} the appellate court concluded that such slander was actionable per se without proof of special damage because the words might impair one's credit or reputation within one's profession.\textsuperscript{215}

\textit{Barth v. Hanna} is one of several cases of this era in which courts recognized this interrelation between private and public. These courts acknowledged that a statement which undermined a woman's reputation for chastity—something quintessentially private—could have an impact on her professional reputation—something quintessentially public. In another case, for example, a court held that a statement to the plaintiff's employer that she "did not act like a 'lady'" injured her in her "trade or profession," when it caused her to lose her job.\textsuperscript{216}

\begin{itemize}
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Id. at *4. The jury awarded the plaintiff $2000. Id.
\item \textsuperscript{215} Id. at *3. \textit{Kidder v. Bacon} is also interesting in this regard because there the plaintiff also linked her public role as a school teacher to this private matter with regard to which she had been defamed. 52 A. 322, 324 (Vt. 1902). The plaintiff in \textit{Kidder} alleged that the charge of adultery was spoken "in her character as a school teacher" and the court permitted her to offer evidence of her "reputation and standing as a teacher" prior to the defamatory statement. Id. (emphasis added). Thus, courts sometimes analyzed these public-private "cross over" slander actions more as ones in which a plaintiff was injured in her profession rather than as "chastity" cases. \textit{See id.; Barth}, 158 II. App. 20, 1910 WL 2308, at *1, 4.
\item \textsuperscript{216} Stanley v. Moore, 173 S.E. 190, 190 (Ga. Ct. App. 1934). To the contrary, in \textit{Porak v. Sweitzer's, Inc.}, the court held that the plaintiff, who made her living as a bookkeeper, did not have a claim for libel per se when her name appeared on a list of delinquent debtors. 287 P. 633, 634-35 (Mont. 1930).
\end{itemize}

As respects a charge of failure to pay debts, without any imputation of insolvency, it seems to be settled that a writing containing the mere statement that a person who is not a trader or merchant, or engaged in any vocation wherein credit is necessary for the purpose and effectual conduct of his business, owes a debt and refuses to pay or owes a debt which is long past due is not libelous per se, and does not render the author or publisher of such statement liable without proof of special damages. \textit{Id.} at 635 (quoting 17 R.C.L. 299). The plaintiff did not attempt to prove special damages. \textit{Id.}
Because it reveals judicial and societal views about female virtue in relation to rape, *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*[^217] is of particular interest among cases from this era. This 1934 English decision illustrates how the reputations of alleged rape victims were affected amongst those who learned of the rapes. The plaintiff, a Russian princess, sued on the basis of MGM’s film, *Rasputin, The Mad Monk*, which featured a portrayal of a “Princess Natasha” being seduced by Rasputin.[^218] After the jury awarded the plaintiff £25,000, MGM appealed.[^219] The film company argued that the plaintiff was not identified in the film and that the film portrayed the woman being raped, not seduced, such that it was not defamatory.[^220] Lord Justice Scrutton, in taking up the second point, fairly ridiculed the defendant, noting that it took “some courage” to make the argument.[^221] Defining defamation as “a false statement about a man to his discredit,”[^222] the court noted the great deference that it must give to the jury’s determination of whether the statement constituted libel.[^223] Lord Justice Scrutton interpreted the essence of the defendant’s argument as follows:

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[^217]: 50 T.L.R. at 581-82.
[^218]: *Youssoupoff,* 50 T.L.R. at 581.
[^219]: *Id.* at 581.
[^220]: *Id.* at 582.
[^221]: *Id.* at 584. He also wrote, “I desire to approach this argument seriously if I can, because I have great difficulty in approaching it seriously.” *Id.*
[^222]: *Id.* (citing Scott v. Sampson, 8 Q.B.D. 491 (1882)).
[^223]: *Id.*
To say of a woman that she is raped does not impute unchastity. From that we get to this, which was solemnly put forward, that to say of a woman of good character that she has been ravished by a man of the worst possible character is not defamatory. That argument was solemnly presented to the jury, and I only wish the jury could have expressed, and that we could know, what they thought of it, because it seems to me to be one of the most legal arguments that were ever addressed to... a sensible body.

Lord Justice Slesser similarly scoffed at the notion that the plaintiff might not have been defamed, focusing on the movie's certain consequences for her: "One may, I think, take judicial notice of the fact that a lady of whom it has been said that she has been ravished, albeit against her will, has suffered in some social reputation and in opportunities of receiving respectable consideration from the world."225

The Lord Justices rendering decisions in the case disagreed as to whether the allegedly defamatory film depicted the plaintiff being "ravished"—that is, raped—or merely seduced.227 Nevertheless, at least Lord Justice Slesser appeared to consider such a distinction irrelevant to the question of defamatory meaning, writing that it was not necessary to ask the jury to entertain such speculation [about rape versus seduction] at all. When this woman is defamed in her sexual purity I do not think that the precise manner in which she has been despoiled of her innocence and virginity is a matter which a jury can properly be asked to consider.

224. Id. at 584. The court continued, "I really have no language to express my opinion of that argument. I therefore come, on the second point, to the view that there is no ground for interfering with the verdict of the jury... [and] that the words and the pictures in the film are defamatory of the lady whom they have found to be Princess Irina." Id. 225. Id. at 587.

226. The plaintiff's identification was an additional issue addressed on appeal, but details of the court's handling of that matter are not relevant to the issue of defamatory meaning. Id. at 582-84.

227. Id. at 584-88. Lord Justice Slesser opined that the pictures and language of the film were consistent with either rape or seduction, and he was uncertain that the jury considered it rape rather than seduction. Id. at 587-88.

228. Id. at 588. Lord Justice Slesser clarified, "When I say 'properly' I do not mean it would be wrong to ask them to consider it, but the absence of any such consideration cannot, in my view, disturb the jury's ultimate finding." Id.; cf. Loecks ex rel. T.L. v. Reynolds, 34 Fed. Appx. 644, 650, 2002 WL 539111, *1 (10th Cir. 2002) (news report that minor plaintiff had engaged in consensual sex was substantially true when she had been victim of statutory rape); Street v. Nat'l Broad. Co., 645 F.2d 1227, 1233 (6th Cir. 1981) (whether rape prosecutrix truly had been raped determined whether the documentary's statements alleging she had lied in her testimony were true or false); Kennedy v. Cannon, 182 A.2d 54, 56 (Md. 1962) (attorney's statement that the plaintiff had "'submittd [sic] to [the defen-
Whereas most defamatory statements feature some element of the plaintiff's wrongdoing, moral or character failing, or ignorance, Lord Justice Slesser considered the question of the plaintiff's morality or fault "immaterial." [A]s has been frequently pointed out in libel, not only is the matter defamatory if it brings the plaintiff into hatred, ridicule, or contempt by reason of some moral discredit on her part, but also if it tends to make the plaintiff be shunned and avoided and that without any moral discredit on her part.

None of the judges considering the case on appeal specifically noted that if Princess Irina had in fact been raped, rather than seduced, by Rasputin, she would not have done anything blameworthy, although Lord Justice Slesser hinted at it. Rather, the judges focused on what they apparently saw as the logical conclusion that the plaintiff would be shunned and ridiculed as a consequence of this portrayal—regardless of the fact that, at least in theory, society does not hold rape victims at fault for the crime committed against them. This analysis of defamatory meaning, surely a reflection of the time, sadly implies that rape survivors bear some blame for their victimization, just as most other defamatory statements suggest a moral failing by their subjects.

dant's] advances willingly" was slanderous per se and not privileged); Gazette, Inc. v. Harris, 325 S.E.2d 713, 733 (Va. 1985) (article falsely indicating that victim was pregnant and unmarried at time of rape was defamatory).

229. See supra notes 29-33 and accompanying text.

230. Youssoupoff, 50 T.L.R. at 587. The Lord Justice used the language "more or . . . less moral" to describe the distinction between ravishment and seduction, implying that in the former situation, she had no moral fault but in the latter situation, she had some degree of moral fault. Id.

Lord Justice Greer, on the other hand, assumed that the jury believed that the film portrayed the plaintiff's seduction, thus falsely implying her moral weakness and explaining the substantial damages award. Id. at 586.

231. Id. at 587. Lord Justice Greer, in discussing the damages award rather than defamatory meaning, wrote:

I cannot help thinking myself that the jury took the view that this was a case in which the defendants had alleged that the lady had been seduced, not merely that she had been raped, and if they did I should not be inclined to interfere.

The reason I say that is because of the largeness of the damages which they awarded.

Id. at 586.

232. Id. at 587.

233. See id. (implying that she would not be at moral fault if she had been raped). But see Rhode, supra note 6, at 120 (noting that society often blames rape victims).

234. See Youssoupoff; 50 T.L.R. at 584 (implying that a rape victim is at fault to some extent). Though British law does not recognize false light invasion of privacy, the film in Youssoupoff would be a terrific candidate for redress under such a cause of action because
IV. THE CONTEMPORARY ERA: OF WHORES AND HYPERBOLE

The tide of women moving into paid employment has risen steadily since it began in earnest more than a century ago. "Women's participation in the public workforce has increased in each decade during the last century, from sixteen percent of the labor force in 1880 to forty-four percent in 1980."235 In 2003, women comprised forty-six percent of the labor force.236 Cases brought by female defamation plaintiffs in the past half century reflect this demographic shift and the greater diversity in women's roles in our society.

A. Contemporary Media Portrayals of Women

The publications and broadcasts that give rise to women's defamation suits in the contemporary era are linked to trends in how the media portrays women.237 Feminist critics of the contemporary media

the plaintiff is portrayed as pitiful, a portrayal that would likely be found highly offensive. See infra Part IV.A.1 and accompanying text.

Of interest among contemporary cases is Hovey v. Iowa State Daily Publication Board, Inc., 372 N.W.2d 253 (Iowa 1985). The plaintiff there sued when a newspaper reported that she had been raped. Id. at 254. In fact, she had been the victim of a sexual assault when her assailant forced her to perform oral sex. Id. Apparently assuming that a false statement that a woman had been raped would in fact carry defamatory meaning, the court found in favor of the defendant on the basis of the substantial truth doctrine. Id. at 256. The court held that the events that occurred gave rise to second degree sexual assault, which was tantamount to a charge of rape. Id. at 255-56. The plaintiff's point may have been that there is something more harmful to reputation about being a victim of rape than about being a victim of forced oral sex. See id. at 255 (noting that the plaintiff had stressed at trial that no genital sexual intercourse had occurred).

See also Loecks ex rel. T.L. v. Reynolds, 34 Fed. Appx. 644, 648, 2002 WL 539111 (10th Cir. 2002) (holding that although under state law a person cannot consent to sex if she is under the age of fifteen, an article stating that a thirteen-year-old victim of statutory rape had engaged in "consensual sex" was substantially true and therefore precluded defamation).

235. Borden, supra note 10, at 100.

236. See News Release, Bureau of Labor Statistics, Dep't of Labor, The Employment Situation: June 2003, available at http://www.bls.gov/news.release/archives/empsit_07032003. pdf (last visited Jan. 21, 2004). Deborah Rhode illuminates that although women have made dramatic progress by entering the workforce, including traditionally male-dominated professions, great discrepancies still exist between the positions and pay that women attain as compared to those attained by men. Rhode, supra note 6, at 141-76. For example, although female representation in the bar has increased from three to forty-five percent since the 1960s, female lawyers are half as likely as similarly qualified males to become partners. Id. at 141. The pay gap between men and women in comparable positions ranges from ten to thirty-five percent. Id. Rhode emphasizes, "Law is not atypical." Id.

237. See Borden, supra note 12, at 119-20 (noting the relationship between media coverage of women and defamation actions). Of the cases analyzed by Borden during the period 1967-1976, only 27.7% of female plaintiffs sued newspapers or periodicals, while half sued individuals and 16.7% sued non-media institutions. Id. at 129-32. Almost 17% of these actions were for slander, about 56% were for libel only, about 11% were for both
have discussed its "symbolic annihilation" of women by virtue of women's "condemnation, trivialization, or absence." In spite of the slight majority of the population that women now represent and the close to fifty percent of the labor force they comprise, the media rarely portrays women in any but highly traditional roles. The few women portrayed working outside the home are generally condemned. Other women are trivialized by their portrayals as "child-like adornments who need to be protected" or are "dismissed to the protective confines of the home." Professor Deborah Rhode has observed that while women appear to be everywhere in the media, they are in fact missing from positions of status and authority.

libel and slander, and approximately 11% were for both libel and invasion of privacy. Id. at 132.

238. Tuchman, supra note 152, at 8; see also Borden, supra note 10, at 99 (noting that the media symbolically annihilates women by representing them in their domestic roles).


240. Tuchman, supra note 152, at 8. Susan Faludi has noted that the media backlash to feminism in the 1980s paralleled a similar backlash in Victorian times. SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 78 (1991). Carolyn Kitch similarly argues that many of the media stereotypes associated with the period 1970-1990 emerged in the first three decades of the twentieth century. KITCH, supra note 146, at 3. She illustrates with the cover of Time announcing the death of the feminist movement:

The women's heads that floated ominously on Time's 1998 cover were types arranged in a pattern, from older, matronly activists to the dangerous but beautiful radical to the cute, skinny, sexually free girl. The same types appeared in the same order on magazine covers of the early twentieth century, during the peak and the aftermath of the suffrage movement.

Id.

241. Tuchman, supra note 152, at 8. As another example, Susan Alexander, examining Mademoiselle and Ladies' Home Journal from 1966-1994, found that though statistically fewer and fewer real women believed the most satisfying lifestyle was a traditional marriage with a husband who assumed responsibility, nonfiction content continued to emphasize that "a woman's ultimate happiness and true fulfillment depend on possessing a loving husband and children." Susan H. Alexander, Messages to Women on Love and Marriage from Women's Magazines, in MEDITATED WOMEN: REPRESENTATIONS IN POPULAR CULTURE 25, 36 (Marian Meyers ed., 1999) [hereinafter MEDITATED WOMEN].

242. RHODE, supra note 6, at 66-67. Rhode writes:

Female journalists have escaped the "women's page," with stories confined to food, fashion, and society "do's and doings." On billboards and soap operas, heroines have been promoted. No longer do three-quarters of the television commercials featuring women involve laundry and bathroom products . . . . Because women have escaped these constraints and now seem to be everywhere, we lose sight of where they are missing. Their absences are in predictable places, notably those positions of greatest status and authority.

Id. (footnote omitted).

Marian Meyers observes:

[Symbolic annihilation is no longer an appropriate blanket description for the media's portrayal of women. Certainly, women continue to be trivialized, marginalized, and silenced by the media. However, over the past 20 years, feminism and the women's movement have, in many cases, made inroads in both
Rhode emphasizes that a discomfort with female authority and a preoccupation with female appearance predominate contemporary media portrayals.\(^{243}\) The media presents accomplished women in "sexually freighted terms," such as portraying an Olympic gymnast as a "'calculating coquette,'" or a feminist activist as promoting "'her agenda by means she affects to despise.'"\(^{244}\) Rhode observes that the media often presents powerful women as sex objects, thus "undermin[ing] their credibility and marginaliz[ing] their contributions."\(^{245}\) Portrayals of working women are sometimes hostile in a way not directly related to sexuality. The media use images of women as strident, irrational, and extremist to discipline or censure those who have not remained in their rightful place—the domestic sphere.\(^{246}\) Hateful images of women are among the communications that now give rise to women's defamation actions.\(^{247}\)

The media's sexual trivializations and degradations of women are also the basis for much new chastity litigation.\(^{248}\) The culprits include society and the media . . . . The representations of women just prior to the next millennium could more accurately be described as fractured, the images and messages inconsistent and contradictory, torn between traditional, misogynistic notions about women and their roles on the one hand, and feminist ideals of equality for women on the other. Mediated women appear both hypersexualized and asexual, passive and ruthlessly aggressive, nurturing and sadistic, independent and dependent, domestic and career-oriented, silent and shrill, conforming and deviant . . . .


243. RHODE, supra note 6, at 69.

244. Id. at 73-74.

245. Id. at 74. For example, the media ridiculed Hillary Clinton for her attire, stating that "'Fashion stayed home!" in response to "one mid-1990s European venture." Id. at 73. They also criticized her for "trying to be fashionable," for wearing "absurdly" styled accessories, and for "acquiescing in press releases that sounded like fashion promotions." Id. at 73-74. The media also made numerous comments about O.J. Simpson prosecutor Marcia Clark, including that her legs were "great." Id. at 74. Feminist leaders "who defy cultural standards of femininity are subject to ridicule," but those who "take pains to look attractive . . . risk seeming vain, petty, or hypocritical." Id. On the other hand, the New York Times ridiculed activists for the opposite tendency, using the headline "Leading Feminist Puts Hairdo before Strike" for a story about a 1970 women's movement rally. Id.

246. Id. at 87. By way of example, Rhode notes *Time* magazine's coverage of women in the 1970s, characterizing them as strident, humorless, extremist, lesbian, and hairy-legged. Id. More than a decade later a cover story on women in the 1990s reported that "hairy legs haunt the feminist movement as do images of women being strident and lesbian." Id. There is no acknowledgement that *Time* created those very images.

247. See infra Part IV.C.3.

the mainstream media, as well as the ever-burgeoning pornography industry, which utilizes the images of unwitting women, as well as those of paid models.249

B. Doctrinal Stumbling Blocks in the "New Chastity" Cases

As noted above, certain defamation doctrines loom large in the chastity cases that women bring in the contemporary era. I provide an overview of those doctrines here as a prelude to the more detailed analysis of the cases.

1. The Fact-Opinion Dichotomy, Rhetorical Hyperbole, and Imaginative Expression.—Defamation law, at both common law and in the constitutional era, seeks to prohibit false communication of fact while permitting free expression of critical opinion.250 Justice Powell's oft-quoted line from Gertz epitomizes the rationale behind the fact-opinion dichotomy: "Under the First Amendment there is no such thing as a false idea."251 The challenge has thus been one of defining what constitutes protected idea or opinion. In practice, this task has proven extraordinarily complex.252

249. The size of the pornography industry in the United States has been the subject of some debate in recent years. The New York Times Magazine, in a May 2001 cover story, reported that the pornography business in the United States is worth between $10 billion and $14 billion a year, meaning its accrued revenue is far greater than either the NFL, the NBA, or Major League Baseball. Frank Rich, Naked Capitalists, N.Y. Times Mag., May 20, 2001, at 50. That article also asserted that "porn is no longer a sideshow to the mainstream... it is the mainstream." Id. Several journalists responded by challenging these figures and assertions. See Dan Ackman, How Big is Porn?, Forbes.com, available at http://www.forbes.com/2001/05/25/0524porn_print.html (last visited Apr. 17, 2004) (estimating the industry to be worth between $2.6 billion and $3.9 billion annually); Emmanuelle Richard, The Perils of Covering Porn, Online Journalism Rev., Apr. 3, 2002, at http://www.ojr.org/ojr/business/p101786651.php (last modified June 5, 2002) (quoting Ackman, supra, and other porn industry insiders about the limited economic potential of the porn industry).

Professor Smolla has written about the frequency with which pornographic outlets like Hustler and Penthouse, which might be considered mainstream pornography, have been engaged in defamation and other litigation implicating the First Amendment. SMOLLA, supra note 30, ch. 8. For a discussion of pornography's role as an "opiate of the masses" and "frontier literature" that presages future sexual relationships and practices, see JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 347 (1991).

250. See SMOLLA, supra note 30, § 6:1.

251. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974). Justice Powell instructs us that the best remedy for undesired ideas is the "competition of other ideas." Id. at 340. He goes on to say "there is no constitutional value in false statements of fact," thus setting up the long-standing dichotomy between ideas and opinions on the one hand, and facts on the other. Id.

252. A number of scholars have examined the ambiguity surrounding what constitutes defamatory meaning, particularly in terms of the dichotomy between fact and opinion. See John Bruce Lewis & Gregory V. Mersol, Opinion and Rhetorical Hyperbole in Workplace Defama-
Under the common law fair comment privilege, courts typically ruled against defendants whose opinions were sufficiently derogatory and therefore capable of injuring the plaintiff’s reputation.\textsuperscript{253} A statement of opinion was privileged only if reasonably justified by true facts.\textsuperscript{254} Comment was most often privileged “when it concerned a matter of public concern, was based upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm.”\textsuperscript{255} Later, the common law began to protect opinions regarding matters of public concern even when they were not so reasonably based.\textsuperscript{256} Only after \textit{New York Times} in 1964 did the protection of opinion take on a constitutional dimension.\textsuperscript{257} After \textit{New York Times} commentators assumed the fair comment privilege had been trumped by First Amendment considerations.\textsuperscript{258} Subsequently, a great deal of speech was given absolute protection as opinion.\textsuperscript{259}

Professor David Anderson has written that the method most often used to distinguish fact from opinion analyzed four factors to determine whether “the totality of circumstances in which the statements are made” indicated that the average reader would understand them as opinion rather than fact. The factors were (1) the common meaning of the language used, (2) the verifiability of the statement, (3) the journalistic context in which the statement was made (e.g., editorial column vs. news article), and (4) the setting in which the statement occurred (e.g., political controversy vs. private business dispute).


\textsuperscript{253} \textit{Restatement (Second) of Torts} § 566 cmt. a (1977).

\textsuperscript{254} Smolla, \textit{supra} note 30, § 6:2. For a brief history of the privilege, see Post, \textit{supra} note 252, at 650.


\textsuperscript{256} Smolla, \textit{supra} note 30, § 6:4. In a fair comment privilege analysis, the statement was typically divided into two portions—the first containing the factual assertions which were provable as either true or false; the second consisting of the opinion based upon such facts. Courts ultimately applied the fair comment privilege only against public plaintiffs, albeit a very broad range. \textit{Id.} § 6:5. But the fair comment privilege created another challenge of definition: the meaning of “fair.” Most courts left the question of the “fairness” of the comment to the jury, which instead tended erroneously to judge the comment’s value or worth, a practice potentially “inimical to free expression.” \textit{Id.} § 6:6.

\textsuperscript{257} \textit{Id.} § 6:3.

\textsuperscript{258} \textit{Id.} § 6:7.

\textsuperscript{259} The following statements were deemed opinion and therefore enjoyed absolute protection:

[A] broadcast characterizing plaintiff as a member of an “an international network of medical quackery whose patients were victims of ‘cancer con artists’”; a published assertion that plaintiff “is the Al Capone of the City”; and a review of a
In its 1990 decision in *Milkovich v. Lorain Journal Co.*, the Supreme Court sought to clarify the situation. *Milkovich* repudiated the *Gertz* assertion that "there is no such thing as a false idea," characterizing it as dictum. The Court refused to create either any sort of "wholesale defamation exemption for anything that might be labeled 'opinion'" or a "separate constitutional privilege for 'opinion.'" The Court wrote:

[W]e think the "breathing space" which "freedoms of expression require in order to survive," . . . is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact.

Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications.

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* Smolla, supra note 30, § 6:7.

* Milkovich, 497 U.S. at 18 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)). As Professor Anderson has summarized the case:

The much-quoted sentences from *Gertz* were not intended "to create a wholesale defamation exemption for anything that might be labeled opinion." The Court explained that statements of opinion often convey implications that can cause as much damage to reputation as explicit statements of fact. It concluded that the other constitutional protections adequately protect the free and uninhibited discussion of public issues, and that any benefits resulting from the proposed privilege for opinion did not outweigh society's "pervasive and strong interest in preventing and redressing attacks upon reputation."

Anderson, supra note 252, at 507 (footnotes omitted).

* Milkovich, 497 U.S. at 18, 21. Further, in spite of the fact that the defendant newspaper's column repeatedly indicated that the accusation of perjury was largely the author's opinion rather than an assertion of fact, the Court upheld the plaintiff's defamation claim. Thus, the Court concluded that "a reasonable fact finder could conclude that the statements in the . . . column imply an assertion that . . . Milkovich perjured himself in a judicial proceeding." *Id.*


* Id. at 18-19.
On its face, then, *Milkovich* refused either to mandate a constitutional inquiry into whether a statement is opinion or fact, or to make actionable only factual statements.\(^{266}\) Even while eschewing protection of opinion as such, the *Milkovich* Court relied on two key precedents that it said would provide sufficient protection to the press: *Philadelphia Newspapers, Inc. v. Hepps*\(^ {267}\) and *Hustler Magazine, Inc. v. Falwell*.\(^ {268}\) The Court wrote:

> Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations . . . where a media defendant is involved. Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion, Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.\(^ {269}\)

As additional protection for speech, the Court cited a line of cases, culminating in *Falwell*, for the proposition that statements "that cannot 'reasonably [be] interpreted as stating actual facts' about an individual" are protected.\(^ {270}\)

*Milkovich* essentially restated the dichotomy as one between fact and non-fact.\(^ {271}\) Albeit with a different name, "the rubric of the 'opinion' doctrine remains alive and well" after *Milkovich*.\(^ {272}\) "Imaginative

\(^{266}\) Id.

\(^{267}\) 475 U.S. 767 (1986).


\(^{269}\) Milkovich, 497 U.S. at 19-20.

\(^{270}\) Id. at 20 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1987)). In so doing, the Court said that "public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." Id. (citing Hustler Magazine, Inc., 485 U.S. at 53-55).

\(^{271}\) See Smolla, supra note 30, § 6.21.

\(^{272}\) Id. Lower courts interpreting *Milkovich* now examine two central questions regarding whether the defendant's statement is opinion: "whether [the statement] can reasonably be interpreted as stating or implying defamatory facts about the plaintiff and, if so, whether the defamatory assertions are capable of being proved false." Id. § 6.22.

New wrinkles can be added, of course. In a New York Court of Appeals decision remanded by the Supreme Court after its decision in *Milkovich*, the court crafted its own broader approach to the fact-opinion distinction based on state constitutional law. *Immuno AG. v Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991), discussed in Smolla, supra note 30, § 6:26. The *Immuno* decision permits New York courts to place the statements within the context in which they appear to determine whether they are constitutionally protected opinion. Smolla, supra note 30, § 6:26. In that case, because the statements were made by a citizen at a public hearing in a "rambling, table-slapping monologue," the court held they
expression," "rhetorical hyperbole," and "loose, figurative, or hyperbolic language" have remained protected in the wake of Milkovich as types of speech that are not "provable as false" or that "cannot reasonably be interpreted as stating actual facts" about an individual. Courts thus continue blindly to protect speech that takes these forms, overlooking the substantive message it conveys.

As will become evident from the detailed discussion of cases below, the doctrines of "opinion" and "rhetorical hyperbole" often loom large in women's chastity-oriented defamation actions. Indeed, analyses under these doctrines serve to disarm the offending statements from a legal standpoint, frequently leaving a court to conclude—even as it acknowledges the irony—that the more hateful, objectionable, and offensive the communication, the less likely it is to give rise to liability.

2. Truth and Falsity.—Because the goal of defamation law is to protect the reputation that an individual has earned, the law typically has permitted recovery only for false statements. While in earlier times truth only served as a limited defense, twentieth-century Supreme Court decisions indicated a strong conviction that the First Amendment protects truthful speech "in all but the most extreme situations."

The truth defense took on a constitutional dimension with New York Times in 1964, and the germinal Supreme Court decision on the issue of truth and falsity came in 1986. The Court in Philadelphia Newspapers, Inc. v. Hepps, which was discussed above in relation to Milkovich, held that when the allegedly defamatory statement is made

were not an actionable presentation of facts. Id. (citation omitted). Other state and federal appellate courts have also sought to place apparently factual assertions within the context of non-actionable opinion. Id. § 6:27.

273. Smolla, supra note 30, § 6:21 (citation omitted).

274. Id.

275. See Dworkin v. L.F.P., Inc., 839 P.2d 903, 915 (Wyo. 1992); Spence v. Flynt, 816 P.2d 771, 774 (Wyo. 1991) (noting that defamation law has evolved "along a strange path to a place where we now say that the more outrageous, vile, vulgar, humiliating and ridiculous the publication, the more it is protected" and that even statements that subject individuals to "enormous ridicule" are "all right").

276. See Zimmerman, supra note 66, at 306. The offense of defamation from its inception was harm to reputation through falsity. English common law has always granted an absolute truth defense in civil defamation cases. Smolla, supra note 30, § 5:2. Some American jurisdictions at the turn of the century modified truth to a more limited defense, such as requiring the defendant to prove he published the derogatory (but true) statement in good faith and without malice. Id. § 5:3.

277. Zimmerman, supra note 66, at 311.

278. 475 U.S. 767 (1986).
by a media defendant and involves issues of public concern, a private plaintiff must bear the burden of proving falsity in order to recover damages. The Court confirmed that it was prepared to dictate this price against the interests of legitimately defamed private plaintiffs who would be unable to prove the falsity of the defamer’s statement. Rationalizing the decision as a minor change to the law, the Court wrote:

We note that our decision adds only marginally to the burdens that the plaintiff must already bear as a result of our earlier decisions in the law of defamation. The plaintiff must show fault. A jury is obviously more likely to accept a plaintiff’s contention that the defendant was at fault in publishing the statements at issue if convinced that the relevant statements were false. As a practical matter, then, evidence offered by plaintiffs on the publisher’s fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted.

Perhaps to mollify critics, the Court then severely limited the reach of its holding. In a footnote, the Court declined to consider the quantity of proof that a private plaintiff must present to recover damages, or what standards would apply if the plaintiff were to sue a non-media defendant.

After Hepps, media defendants in cases involving matters of public concern may litigate the truth issue with greater confidence because the burden of proof lies with the plaintiff, even when the plaintiff is a private person. Courts employ a substantial truth test, meaning

279. The Court acknowledged that “requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so.” Id. at 778.
280. To do otherwise, the Court concluded, would risk deterring speech that the Constitution has declared free. Id. at 777.
281. Id. at 778.
282. Id. at 779 n.4. Justice O’Connor’s footnoted limitation in Hepps leaves a gaping hole in defamation law: what happens when the plaintiff sues a non-media defendant, or the case relates to a purely private matter? Arguably in such cases the First Amendment-inspired concerns would be greatly reduced.

As Smolla has speculated, some private plaintiffs suing a non-media defendant for defamation regarding a private matter will likely seek to thrust the burden of proving truth upon the defendant. Under current law, such a burden—imposed by some states exhibiting greater concern for its citizens’ respective reputations than their freedom to criticize each other—is constitutional. SMOLLA, supra note 30, § 3.24 n.5. Professor Smolla has opined, “The wisest choice in those cases left open by Hepps... is to place the burden of proof on the plaintiff, creating one uniform rule for all defamation cases.” Id. § 5:13.
284. SMOLLA, supra note 30, § 5:14.
that a statement with only minor inaccuracies will still be defensible as substantially true. These defendants are thus protected from liability even when the precise truth of the statement cannot be ascertained. In practice, this means many media defendants can successfully employ a defense that combines the substantial truth test with the Milkovich doctrine: all statements either are "substantially true" or not "provably false."  

Recent commentators have pointed out that defamation law, particularly in the constitutional era, does a poor job of rehabilitating a plaintiff’s reputation precisely because cases do not often squarely adjudicate the issue of the truth or falsity. As stated in the Annenberg Report on Libel Reform:

Libel suits only occasionally resolve the most critical issue from the plaintiff’s perspective—whether the defamatory statement was true or false. The litigation often focuses on the defendant’s alleged malice or recklessness rather than on the question of truth . . . . After years of litigation, the court either fails to set the record straight or does so too late for the decision to be meaningful or useful.

A failure to establish truth or falsity is a feature of many new chastity cases, as the court’s conclusion that a statement is not actionable preempts an ultimate inquiry about whether the statement that gave rise to the litigation is true or false.

For a woman suing in any chastity case, the issue of truth or falsity presents a particular conundrum. If the woman is to prevail on her

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285. *Id.* The key is to determine whether the inaccuracy in any way alters the substance of the statement and thus the damage to the plaintiff’s reputation. *Id.*

286. *Id.*

287. *Id.* The issue of defamatory meaning is also closely connected with the substantial truth test. *Id.* § 5:28. For example, in *New York Times Co. v. Sullivan*, the black protesters were not singing "My Country, 'Tis of Thee," as alleged, but rather the "Star Spangled Banner." 376 U.S. 254, 258-59 (1964). The defendants in this case had two defenses: (1) the allegation was substantially true, because the inaccuracy in no way altered its substance, and (2) there was nothing defamatory in this small factual misstatement. *Smolla, supra* note 30, § 5:28.

288. See *Bezanson et al.*, *supra* note 17, at 184-200.

289. *Proposal for the Reform of Libel Law, Report of the Libel Reform Project of the Annenberg Washington Program* 10 (1988). This proposal for libel reform would mandate that plaintiff request a reply or retraction before suing. *Id.* The proposal also would permit transformation of a damages action into an action for declaratory judgment. See also *Bezanson et al.*, *supra* note 17, at 188, 193 (providing statistics on the adjudication of truth or falsity in defamation cases and indicating that falsity is fully adjudicated in only fourteen percent of cases).

290. A few other cases illustrate different ways in which the issue of truth or falsity may play out in chastity cases. In *Street v. National Broadcasting Co.*, a woman who accused several
claim, she must prove she is chaste or that she did not engage in whatever act of sexual impropriety the statement alleged. In short, she must put her sexual propriety and sexual history at issue before the court, surely a consequence of litigation that no woman would undertake lightly. The dilemma is illustrated by a couple of cases, Street v. National Broadcasting Co. and Pring v. Penthouse International, Ltd.

The plaintiff in Street was a white woman who accused nine black men of raping her in what became known as the Scottsboro rape case, men of rape was depicted by NBC as having lied about the rape. 645 F.2d 1227, 1231-32 (6th Cir. 1981). A determination of whether the statement was false necessitated a determination of whether she had been a truthful witness and, indeed, had been raped. Id. at 1233.

In Cox Enterprises v. Thrasher, a newspaper article implied that a married woman was promiscuous because she had contracted chlamydia, a sexually transmitted disease. 442 S.E. 2d 740, 741 (Ga. 1994). The plaintiff apparently was unable to prove the falsity of the statement and therefore lost her case. Id. Noting that the plaintiff was a private citizen but the publication a matter of public concern, the court characterized as uncontroverted the evidence that "Thrasher was infected with a bacteria that was treated with the drug used to cure Chlamydia." Id. at 741-42. Agreeing with the trial court that because the bacteria was not identified before treatment, the appellate court found that whether or not the plaintiff had the sexually transmitted disease would never be known. Id. (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)). The court did not explain what the matter of public concern was, but, in a footnote, rejected the plaintiff's argument that "discussing the dangers of a transmittable disease with few manifest symptoms that affects millions of people, did not involve speech of inherent public concern." Id. at 741 n.1.

In Crellin v. Thomas, a woman sued when she was called a whore and said to have "worked in a house of prostitution." 247 P.2d 264, 264 (Utah 1952). In fact, the plaintiff admitted that she had, for a short time and some 50 years earlier, worked as a "dance hall girl," also called a "percentage girl," in two different establishments, both in the "red light district" of Ely, Nevada. Id. at 265. The character of these establishments was disputed. One witness called one of the places "a whorehouse—a good one," while others said that prostitutes (or "crib girls" as they were also called) worked out of the establishments, but were not employed by the dance halls. Id. at 265-66. The dance halls did, however, employ "percentage girls" to "dance with the patrons and encourage them to buy drinks." Id. at 266. Apparently the name "percentage girl" was derived from the fact that the "girl" got to keep 50¢ for each $1 drink she sold. Id. Because the appellate court concluded that a distinction existed between "percentage girls" and prostitutes, the court found erroneous the jury instruction that if the plaintiff had worked "in a house of prostitution in any capacity" the defendant must win. Id. at 265-66. The court explained that, in spite of the doctrine of substantial truth, the "language of the utterance" was of "such a fixed and certain meaning" that a dance hall girl was not necessarily a prostitute. Id. at 266. The court explained that this is so, "even though the dance hall may have been a house of prostitution or that prostitution may have been practiced in connection with it." Id.

291. See generally Street, 645 F.2d at 1227; see also Pring v. Penthouse, Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982).

292. 645 F.2d 1227 (6th Cir. 1981).

293. 695 F.2d 438 (10th Cir. 1982); see infra notes 389-405 and accompanying text (discussing details of case).
arising from events in Alabama in 1931. She sued several decades later when NBC made a television docudrama depicting her as having lied about her criminal allegations regarding the men. While courts never reached the issue of these representations' truth or falsity, doing so would have put a jury in the position of adjudicating the very truth or falsity of her claim that she had been raped.

The Pring plaintiff sued on the basis of a magazine article that portrayed her performing acts of fellatio on several men. In order to avoid answering various interrogatories during pre-trial discovery for her defamation suit, she made a strategic litigation decision. She amended her complaint to focus on the defamatory meaning of the three acts of fellatio she was said to have performed. The effect was to narrow her cause of action to defamation based upon these three sexual acts and to exclude general implications that might be drawn from them. As the court acknowledged, one consequence of this was to disallow the defendants from questioning the plaintiff about her sexual history. In order to avoid having her sexual propriety made an issue at trial, Pring thus chose to forego her best opportunity for a defamation victory: a general imputation that she had been behaved in a sexually improper way.

This aspect of the Pring case makes one curious about the influence such considerations must have on a female plaintiff seeking redress in chastity cases. Like rape victims before the advent of rape shield laws, many female defamation plaintiffs are naturally reluctant to have their sexual histories put at issue in a public trial. One can
see that this rule "outs" personal and private information about a female plaintiff seeking redress for her communicative injury. Yet, as I discuss in more detail below, such disclosures may be a natural consequence of my proposed solution to make legally cognizable the injuries for which women seek redress in the new chastity cases.

C. Women as Defamation Plaintiffs in the Contemporary Era

Following a century of higher visibility and increasingly significant roles in politics, commerce, and other public-sphere arenas, we might expect contemporary women to be the subject of defamatory communications in the mass media as frequently as men.301 Further, we might expect them to sue as often as men. Contrary to these expectations, male defamation plaintiffs still well outnumber females.302 When contemporary women do bring defamation lawsuits, like their male counterparts, they do so based on a wide range of communicative injuries. These increasingly include statements associated with their jobs and professions or statements otherwise made in the workplace.303 Perusal of cases litigated in the 1980s and 1990s indicates focus from the defendant to the witness and her character by admitting evidence of her sex life); Frank Tuerkheimer, A Reassessment and Redefinition of Rape Shield Laws, 50 OHIO ST. L.J. 1245, 1246-47 (1989) (explaining that the rape shield laws were created to curtail inquiry into a woman's sexual past in order to resolve the case on more rational grounds and to prevent the victim from having to undergo a "second rape" at trial).

301. Borden, supra note 10, at 99.

302. Id. (citing BEZANSON ET AL., supra note 17, at 7). One study calculated that women represented only eleven percent of all defamation plaintiffs in the 1980s. BEZANSON ET AL., supra note 17, at 8. Professor Borden's empirical study of the gender of defamation plaintiffs during the period 1967-1976 reveals that women were plaintiffs in only 18 of the 148 defamation cases reported by West. Borden, supra note 12, at 125. Borden's study also shows that between 1967 and 1976, male plaintiffs were awarded damages five times as often as female plaintiffs, and received eight times the amount of damages as female plaintiffs. Id. at 135.

Borden has observed that the "overwhelming majority of libel plaintiffs are men engaged in corporate or public life who boast relatively elite standing in their communities." Borden, supra note 10, at 99. She also notes that suits are most often brought by wealthy and powerful persons—those "most likely to be the targets of defamatory comments because of their prominence in the public sphere and who can afford the time and expense of defending their reputations from harm." Id.

303. See Cent. Bering Sea Fishermen's Ass'n v. Anderson, 54 P.3d 271, 275 (Alaska 2002) (economic development project coordinator awarded compensatory and punitive damages after accusations of stalking and physical violence by former employers); Moffatt v. Brown, 751 P.2d 939, 939 (Alaska 1988) (physician libeled by right-to-life organization); Rybachek v. Sutton, 761 P.2d 1013, 1013 (Alaska 1988) (newspaper columnist defamed in editorial to the paper); Fairbanks Publ'g Co., v. Pitka, 445 P.2d 685, 686 (Alaska 1968) (school teacher subject of newspaper article that said she was fired); Gannett Co. v. Kanaga, 750 A.2d 1174, 1178 (Del. 2000) (female obstetrician and gynecologist awarded $2.6 million in compensatory damages and $250,000 in punitive damages based on news story that she was performing unnecessary hysterectomies); Kanaga v. Gannett Co., 2002 WL 143819, at *1 (Del.
that women frequently now sue in defamation based on statements related to their roles as employees and professionals. At the same time, since the 1960s, the number of cases stemming from straightforward assertions of "unchastity" has tapered off. Nonetheless, there are some indications that courts remain more sympathetic to a woman's traditional chastity claim than to a claim related to her role in the workplace.

Increasingly, statements that give rise to defamation suits of all sorts also give rise to other tort claims, and this is certainly true with the new chastity claims. For example, potentially defamatory statements have been spoken under circumstances that also make them viable candidates for redress under a theory of intentional infliction of emotional distress. Yet others overlap with different varieties of the


304. Particularly prevalent are cases arising from statements by employers that evaluate women as employees or accuse them of malfeasance. These statements are virtually always protected as privileged. See Lieberman v. Gant, 474 F. Supp. 848, 852 (D. Conn. 1979) (female professor denied tenure sued on the basis of statement that her teaching was average and her writing marginal); Jensen v. Times Mirror Co., 634 F. Supp. 304, 307-08 (D. Conn. 1986) (female reporter fired because she allegedly allowed her employer to publish inaccurate information about her roommate, who was a participant in an armed robbery); Luckey v. Gioia, 496 S.E.2d 539, 540 (Ga. Ct. App. 1998) (female nurse sued doctor for libel based on doctor's statements blaming nurse for an improper patient transfer); Kramer v. Kroger Co., 534 S.E.2d 446, 449 (Ga. Ct. App. 2000) (plaintiff sued for defamation and intentional infliction of emotional distress, claiming that she was forced to resign after her employer wrongfully accused her of theft); Nye v. Dep't of Livestock, 639 P.2d 498, 499 (Mont. 1982) (bringing a wrongful discharge and a slander complaint against the Montana Department of Livestock for terminating plaintiff's employment with the Department for deficiencies in her work); Niles v. Big Sky Eyewear, 771 P.2d 114, 116 (Mont. 1989) (defendant accused plaintiff of stealing from store's cash register); Luckey v. Gioia, 496 S.E.2d 539, 540 (Ga. Ct. App. 1998) (female nurse sued doctor for libel based on doctor's statements blaming nurse for an improper patient transfer); Kramer v. Kroger Co., 534 S.E.2d 446, 449 (Ga. Ct. App. 2000) (plaintiff sued for defamation and intentional infliction of emotional distress, claiming that she was forced to resign after her employer wrongfully accused her of theft); Nye v. Dep't of Livestock, 639 P.2d 498, 499 (Mont. 1982) (bringing a wrongful discharge and a slander complaint against the Montana Department of Livestock for terminating plaintiff's employment with the Department for deficiencies in her work); Niles v. Big Sky Eyewear, 771 P.2d 114, 116 (Mont. 1989) (defendant accused plaintiff of stealing from store's cash register); Minyard Food Stores, Inc. v. Goodman, 80 S.W.3d 573, 574 (Tex. 2002) (court held as privileged one employee's defamation of another in the context of a workplace misconduct investigation); Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 897-98 (Utah 1992) (plaintiff nurse said to have been addicted to controlled substances).

305. It is telling that women have been far more successful in their pursuit of chastity cases, even in the latter part of the twentieth century, than they have been in the pursuit of cases about their public sphere roles. Borden's study shows, for example, that between 1967 and 1976, women won only two (twenty-two percent) of the nine suits based on statements about their business or profession, while they won five (fifty-six percent) of the nine suits based upon allegations of unchastity or immorality. Borden, supra note 12, at 134.

invasion of privacy tort. Finally, related to the fact that more women are in the workplace and many of the statements that give rise to defamation lawsuits are spoken or otherwise published there, significant overlap now exists between defamation and sexual harassment law. In this setting in particular, defamation law has taken a back seat to a more robust remedy that was previously unavailable.

Many of the statements that have given rise to the new chastity claims could also be considered hate speech. Indeed, the statements are often self-evidently misogynist in their message. The Supreme Court has made it so difficult to regulate hate speech, however, that creating a remedy based on this theory is not feasible.

A few things are particularly surprising about women's use of defamation law in the past several decades. First is the persistence of chastity-type cases. One might expect that in this age of sexual liberation, a woman's chastity would matter less and she would not bother to seek redress for such an injury. Well into the 1970s, how-
ever, many women sued on the basis of straightforward assertions of their sexual impropriety. It was as if the more things had changed, the more they had stayed the same.

Also noteworthy is the rise of what I have already labeled the new chastity cases: those based on statements that demean and degrade women in relation to their sexual personhood, generally without asserting anything literal or specific about their sexual behavior. The statements that are the basis for these cases have become, for all practical purposes, liability-proof. This is because the statements are either so hateful that they are seen as carrying no ascertainable content or they are so exaggerated and imaginative that they are deemed to be beyond reasonable belief. Often in the form of parody, they tend to be protected as rhetorical hyperbole or some other variety of speech that is said not to be capable of being proven true or false. Such statements ridicule and demean the targeted woman in relation to her sexuality, rendering her the contemporary version of the prototypical “fallen woman.” Yet she is bereft of any legal redress for a communicative injury that often seriously undermines her personhood, wounding her dignity, identity, and self-esteem.

Here, I discuss three broad categories of contemporary chastity cases: those based on straight forward assertions of a woman’s sexual misbehavior, those based primarily on sexually hateful epithets, and the so-called new chastity cases.

1. Old Chastity Cases in a New Era.—While many contemporary cases involve parody or other forms of protected speech, others involve more prosaic statements in which a woman’s sexual behavior becomes the subject of media attention or other comment. Like their predecessors from earlier decades, “traditional” chastity cases litigated in the contemporary era arise from straight forward statements that undermine a girl or woman’s reputation for sexual propriety.

311. Borden, supra note 12, at 134.
312. SMOLLA, supra note 30, §§ 5:14-5:17.
313. Id. § 6:21.
314. Id. § 5:13.
315. See infra note 316.
316. See McGuire v. Adkins, 226 So. 2d 659, 660 (Ala. 1969) ("she was wild, stayed out late with boys and had a bad reputation"); French v. Jadon, Inc., 911 P.2d 20, 32-33 (Alaska 1996) (stating that plaintiff had traded sex for drugs alleges sexual misconduct and criminal activity and, thus, is defamatory per se); Anson v. Paxson Communications Corp., 736 So. 2d 1209, 1211 (Fla. 1999) (holding that statement that plaintiff was "a drug-using homosexual prostitute" was not necessarily protected opinion); Cox Enters., Inc. v. Thrasher, 442 S.E.2d 740, 741 (Ga. 1994) (newspaper article implied that married woman was promiscuous because she had contracted chlamydia, a sexually transmitted disease); Thomas
In one case, the physician of a thirteen-year-old school girl incorrectly reported to her school that she was pregnant.\textsuperscript{317} The defamatory character of the statement appears to have been presumed, as the matter was not addressed in the opinion.\textsuperscript{318} In another, TV Guide's implication that the plaintiff was a call girl was the basis for a successful libel suit.\textsuperscript{319} A statement alleging that a woman was "like a she-dog that slept around with a lot of men" was said to "impute[ ] unchas-

v. Hillson, 361 S.E.2d 278, 280 (Ga. Ct. App. 1987) (misdiagnosis of gonorrhea and communication to plaintiff's husband was defamatory, though privileged); Tench v. Ivie, 173 S.E.2d 237, 238 (Ga. Ct. App. 1970) (holding that it was a jury question whether saying woman "ran around with men" was defamatory); Balderree v. Beeman, 837 S.W.2d 309, 324-25 (Mo. Ct. App. 1992) (statement that woman "propositioned" business associates held slander per se); Trevino v. Espinosa, 718 S.W.2d 848, 850 (Tex. 1986) (newspaper described pictures of plaintiff as "XXX" and "top secret"; court upheld jury's determination that statement was defamatory).

A great many chastity cases were brought by women in New York in the 1960s, with varying outcomes. See Conner v. Niemiec, 269 N.Y.S.2d 788, 789 (App. Div. 1966) (statement by landlord that he knew "what's going on up there and I'm not running a whorehouse" was actionable per se as imputing a crime to tenant); Wildstein v. New York Post Corp., 243 N.Y.S.2d 386, 389 (Spec. Term 1963) (statement about police delving into business affairs decedent had with plaintiff might reasonably be held to convey meaning of some "meretricious association"); Segal v. Barnett, 263 N.Y.S.2d 789 (App. Div. 1965) (statement referring to the plaintiff as a prostitute and implying that she had frequent sexual relations with numerous men); Segel v. Barnett, 226 N.Y.S.2d 141, 143 (Spec. Term 1962) (words unspecified, but they were held to impute unchastity or adultery and therefore to be slander per se); Hewitt v. Wasek, 231 N.Y.S.2d 884, 884 (Sup. Ct. 1962) ("keeping company" indicates associations between courting persons, but does not necessarily imply sexual intimacy); Morris v. Stellakis, 212 N.Y.S.2d 488, 490 (Spec. Term 1961) ("you had men or a man paying the rent" on your apartment held not necessarily to impute unchastity). The cases dropped off sharply in the 1970s and 1980s, but a few cases were decided. See Matherson v. Marchello, 473 N.Y.S.2d 998, 1004 (App. Div. 1984) (words "fooling around with his wife" could mean that plaintiff was having an affair with one of the defendants and therefore was libelous per se); Morrow v. Wiley, 423 N.Y.S.2d 658, 659 (App. Div. 1980) (statement that plaintiff "often had men visitors to her apartment when her parents weren't home" was not an actionable imputation of unchastity).


318. In their pleadings, the plaintiffs (the young woman was joined by her parents) asserted not only that the plaintiff was not pregnant, but that she was "chaste." Id. at 720.

319. Montandon v. Triangle Publ'ns, Inc., 120 Cal. Rptr. 186, 188 (Cal. Ct. App. 1975). The offending statement read: "'From Party Girl to Call Girl.' Scheduled guest: TV Personality Pat Montandon and author of 'How to Be a Party Girl.'" Id. at 188 (quoting TV Guide listing). The court wrote, "It cannot be gainsaid, and the evidence strongly shows, that this published writing exposed the subject to hatred, contempt, ridicule and obloquy." Id. at 190. The court cited the testimony of Arthur Huston, Professor Emeritus of English from U.C. Berkeley, that the "average reader would conclude from the article that Miss Montandon had progressed from being a party girl to being a call girl, with party girl meaning a girl who likes to give and go to parties and a call girl being a prostitute." Id. at 189-90. The trial court also noted lay evidence that supported this interpretation, including the testimony of a newspaper society editor, a bank vice president, two TV producers, and one of the plaintiff's fans. Id. at 189-90.
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tity."\textsuperscript{320} Another article falsely indicating that a woman was unmarried and pregnant was held defamatory.\textsuperscript{321} A statement implying that a married woman has committed adultery is still standard fare, and a number of defamation lawsuits in the past several decades have been based on such communications.\textsuperscript{322}

\textsuperscript{320} Padilla v. Carrier Air Conditioning, 67 F. Supp. 2d 650, 664 (E.D. Tex. 1999). The court wrote that the remark "could constitute defamation \textit{per se}" but that the employer-defendant could not be held liable "for the racist views" of the employee who had made the statement. \textit{Id}. The finding regarding defamatory meaning was, therefore, dicta. Nonetheless, the court's characterization of the statement as racist, rather than sexually degrading, is interesting.

\textsuperscript{321} Gazette, Inc. v. Harris, 325 S.E.2d 713, 733 (Va. 1985) (article about rape trial that falsely indicated that victim was pregnant and unmarried at time of rape was defamatory).

\textsuperscript{322} See Brewer v. Memphis Publ'g Co., 626 F.2d 1238, 1245 (5th Cir. 1980) (implication that woman was divorced and having an affair with a married man, who happened to be Elvis Presley, assumed to carry defamatory meaning); Sauerhoff v. Hearst Corp., 538 F.2d 588, 591 (4th Cir. 1976) (newspaper report that married man, who had won the lottery, had a "girlfriend," was "intrinsically defamatory" because it "can be read by innuendo as meaning that [the two] were having an extra-marital affair"); Lyons v. Gilliland, 305 F.2d 452, 453 (9th Cir. 1962) (libelous statements accused plaintiff of adultery with defendant's husband); Kneivel v. ESPN, Inc., 223 F. Supp. 2d 1173, 1176 (D. Mont. 2002) (statement that Evel Knievel was a pimp and his wife was a prostitute); Ellis v. Price, 990 S.W.2d 543, 545 (Ark. 1999) (defendants told plaintiff's husband that his wife was carrying another man's child); Grimes v. Carter, 50 Cal. Rptr. 808, 809 (Cal. Ct. App. 1966) (defendant told others that plaintiff had slept with two or more married men); Moreau v. Brenan, 466 So. 2d 572, 573 (La. Ct. App. 1985) (allegation that married woman engaged in "extra-marital sexual relations" was defamatory, to both the woman and her husband); Devlin v. Greiner, 371 A.2d 380, 388 (N.J. Super. Ct. Law Div. 1977) (false statement by private detective to husband stating that his wife had committed adultery not absolutely privileged); Matherson v. Marchello, 473 N.Y.S.2d 998, 1004 (App. Div. 1984) (words "fooling around with his wife" could mean that plaintiff was having an affair with one of the defendants and therefore be libelous per se).

Women do sometimes lose chastity cases, of course. See Campbell v. Scabury Press, 486 F. Supp. 298, 300 (N.D. Ala. 1979) (statement that plaintiff and her husband had previously "practiced" marriage was ambiguous and did not "necessarily refer to premarital sexual intimacy or unchastity"); Hayes v. Smith, 832 P.2d 1022, 1026 (Colo. Ct. App. 1991) (allegation of adultery and homosexuality held not slander per se, causing plaintiff to lose her case due to her failure to prove special damages); Schupmann v. Empire Fire & Marine Ins. Co., 689 S.W.2d 101, 102 (Mo. Ct. App. 1985) (statement questioning whether minor plaintiff was pregnant, but not implying belief that she was, did not impugn her chastity); Hooch v. Tiedebohl, 391 P.2d 651, 652 (N.M. 1964) (holding that a statement that woman was "expect[ing] an addition to an already half-grown family" not libelous per se); Gaeta v. N.Y. News, Inc., 465 N.E.2d 802, 803 (N.Y. 1984) (article stating that woman was involved in "messy divorce" and that she "dated other men" was not defamatory).

As in earlier eras, some courts have been very sensitive to the possibility that a statement alleged sexual impropriety. For example, the Missouri Court of Appeals in a 1992 decision held that an allegation that the plaintiff had "propositioned" business acquaintances was slander per se.\textsuperscript{323} The court explained that, considering its vernacular meaning, the statement "branded" the woman as one willing to "barter sexual favors for business gains."\textsuperscript{324}

A few contemporary cases might be considered "accidental" chastity cases. In one case, for example, a television reporter stated that the plaintiff was "an alleged prostitute," but in doing so had accidentally transposed the plaintiff's name with that of the woman who was in fact the alleged prostitute.\textsuperscript{325} In another, a television news feature on prostitution showed a film clip of the African-American plaintiff at a time when the reporter was noting that "street prostitutes [are] often black."\textsuperscript{326} The court held that this posed a jury question with regard to defamatory meaning.\textsuperscript{327}

Regardless of the fact that accident, rather than malice, caused these unfavorable portrayals, the plaintiffs' successes in these cases demonstrate contemporary courts' sensitivity to false portrayals of women that show them to be unchaste or engaged in behavior that is generally viewed as sexually immoral. Like their more numerous fore-runners, contemporary chastity cases of this "traditional" variety have the unfortunate effect of reinforcing the social significance of a woman's sexual propriety.

2. Epithet-Based Cases.—As illustrated by numerous cases over the years, a statement calling a woman a whore was long seen as conveying defamatory meaning.\textsuperscript{328} Cases based on such assertions were at that time winners for women, as courts were quick to conclude that such statements meant that the woman had engaged in inappropriate—or

\textsuperscript{323} Balderree v. Beeman, 837 S.W.2d 309, 324-25 (Mo. Ct. App. 1992). Interestingly, the court's decision was based on the fact that the statement imputed to her "misconduct and lack of integrity in her occupation, bespeaking unfitness to perform it." \textit{Id.} In deciding the case on that basis, the court did not have to consider whether the statements also imputed "serious sexual misconduct." \textit{Id.} at 325.

\textsuperscript{324} \textit{Id.} at 324.


\textsuperscript{326} Clark v. Am. Broad. Co., 684 F.2d 1208, 1211 (6th Cir. 1982).

\textsuperscript{327} \textit{Id.} at 1219.

\textsuperscript{328} See supra notes 109-110 (discussing nineteenth-century and early twentieth-century cases in which women were defamed by being so labeled).
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Epithets such as “bitch” and “slut” were less reliably held defamatory, but frequently also provided the basis for winning suits. In the contemporary era, however, sexually hateful epithets, when they constitute most or the entirety of the offending statement, have rarely been the foundation of successful defamation actions. Courts now tend to see the statement as personal invective or opinion without any “ascertainable content.” Further, courts considering such cases are concerned about running afoul of First Amendment protection of hate speech.

Courts adjudicating claims based on sexually hateful epithets often do not contemplate that the words have anything to do with sex, gender, or chastity at all. Instead, they view these statements essentially as expressions of personal contempt. Any meaning related to sexual impropriety has been largely neutralized over the years as our use of language has changed. The gender angle attendant in the words is nevertheless still present in relation to the targeted person’s own gender because it reinforces gender as a basis for the disdain or hatred expressed. Jane Caputi has written, “[b]itch functions as a universal term of contempt for women,” and in any event the power and meaning of sexually hateful epithets may be perceived quite differently by women than by men.

Typical of contemporary cases are Ward v. Zelikovsky and Lee v. Metropolitan Airport Commission, which represent two courts’ deter-

329. See, e.g., Williams v. Greenwade, 33 Ky. (3 Dana) 432, 1835 WL 1920, at *1 (1835) (calling a woman a “drunken whore . . . necessarily import[s] slander, because it is impossible to be a whore without being guilty of fornication or adultery”).
330. See, e.g., Craver v. Norton, 86 N.W. 54, 54 (Iowa 1901) (concluding that the word “bitch” has a defamatory meaning).
331. See Ward v. Zelikovsky, 643 A.2d 972, 983 (N.J. 1994) (concluding that the word “bitch” did not have a verifiable factual meaning); Lee v. Metro. Airport Comm’n, 428 N.W.2d 815, 821 (Minn. Ct. App. 1988) (holding that statements calling the plaintiff “fluffy,” a “bitch,” or “flirtatious” were too imprecise to be actionable).
332. Ward, 643 A.2d at 983.
334. See Caputi, supra note 248, at 65-69 (describing past and contemporary use of the word “bitch”).
337. See Love, supra note 306, at 147-49, discussed in Bowman, supra note 19, at 565 (noting that sexist speech may be common in our society because the average person regards it as unavoidable, or even acceptable, because we apply a majoritarian test to discriminatory speech targeting a member of a non-dominant group).
minations that calling a woman a “bitch” was not actionable. In Ward, the statement was made at a condominium association meeting at which the plaintiff was apparently also accused of being an anti-Semite. In Lee, the statement was made in the workplace. In both cases, the courts concluded that the offending comment was an opinion and was, therefore, not actionable in defamation. In Ward, for example, the court wrote that “[a]lthough extremely offensive to Mrs. Ward and perhaps understood by those who heard it to express a negative opinion of her, defendant’s description of Mrs. Ward as a ‘bitch’ was ‘simply personal invective.’” Acknowledging that “bitch” is “undeniably disparaging,” the court nevertheless said that to consider it actionable would be to “imbue the term with a meaning it does not have.” The court wrote:

Such a holding would, in effect, say that some objective facts exist to justify characterizing someone as a bitch. If calling someone a bitch is actionable, defendants must be able to raise the defense of truth. “Bitch” in its common everyday use is vulgar but non-actionable name calling that is incapable of objective truth or falsity. A reasonable listener hearing the world “bitch” would interpret the term to indicate merely that the speaker disliked Mrs. Ward and is otherwise inarticulate. Although Zelikovsky’s manner of expression was very offensive, our slander laws do not redress offensive ideas. Because the term “bitch” has no ascertainable content, is not verifiable and the context does not imbue the term with a fact intensive meaning, the trial court should have ruled the “bitch” statement non-actionable.

340. Ward, 643 A.2d at 975-76 (stating that defendant allegedly “jumped up” at a meeting and said of plaintiff, “[s]he’s a bitch,” and either “[t]hey don’t like Jews” or “they hate Jews”).

341. In addition, the plaintiff in Lee was apparently called “fluffy” and flirtatious. Lee, 428 N.W.2d at 821. The plaintiff also alleged that she was “defamed when fellow employees made comments at a meeting and in personal conversations which occurred in the office, regarding alleged sexual affairs, the manner in which she got her job, and other comments regarding her character.” Id. at 819.

342. Ward, 643 A.2d at 979-80; Lee, 428 N.W.2d at 820, 821 (citing Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir. 1986), Buckley v. Littell, 559 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977)). The Lee court wrote that “the social context of these statements, office gossip and banter, would not lead a listener to believe them as statements of fact.” Id. at 821.


344. Id.

345. Id. at 982-83.
The Lee court wrote that the terms were "too imprecise in nature to be actionable defamatory statements" and that summary judgment for the defendant was appropriate because the statements were "mere opinions." These courts' reliance on a statement's character as opinion is akin to that of courts in the new chastity cases, as I discuss further below.

Some contemporary courts, in contrast, have regarded epithet-based statements as capable of defamatory meaning. These cases generally involve the presence of what might be called explanatory words, in addition to the epithets. This additional language tends to clarify that the speaker is asserting something in relation to the woman's sexual behavior. In Walia v. Vivek Purmasir & Associates, Inc., for example, the court summarily concluded that the words "whore" and "slut" constituted slander per se. There the plaintiff's male employer had so characterized the plaintiff to members of her family and also to others in their shared Indian community. Given that these statements were uttered after the plaintiff filed a sexual harassment suit based on the defendant's egregious behavior in the workplace—for example, squeezing the plaintiff's breasts, asking her to sit in his lap, ordering her a cocktail dress, and telling her she would marry him if he were not already married—it is not surprising that the court viewed the words "whore" and "slut" as related to the plaintiff's sexual behavior or propriety. Nevertheless, the court might as easily have dismissed them as epithets, verbal assaults that merely expressed the defendant's anger that the plaintiff had sued him and carried no meaning regarding her character or behavior.

In Branda v. Sanford, a fifteen-year-old hotel busgirl sued comedian Redd Foxx for allegedly calling her a "fucking bitch," "fucking cunt," and "no lady." The plaintiff had the encounter with Foxx as she performed her duties as a busgirl at a Las Vegas hotel, when Foxx

346. Lee, 428 N.W.2d at 821.
347. 160 F. Supp. 2d 380, 394-95 (E.D.N.Y. 2000). In so holding, the court cited the New York Civil Rights statute, N.Y. Civ. Rights Law § 77 (McKinney 1992) and Courtney v. Mannheim, 14 N.Y.S. 929 (Brooklyn City Ct. Gen. Term 1891), in which the City Court of Brooklyn held that the word "whore" is slanderous per se under New York Law. Walia, 160 F. Supp. 2d at 394-95.
349. Id. at 383-84, 394-95.
350. Interestingly, the court seemed quite attuned to the cultural context in which this occurred, specifically the parties' situation in the "Indian community" in which "people blame the woman." Id. at 384. The court valued the damage to the plaintiff's reputation and standing in the community at $20,000. Id. at 395.
352. Id. at 1224.
also asked her if her name, Cheryl, was "like in cherry." She sued him for both defamation and intentional infliction of emotional distress. The trial court determined that the words "cherry" and "bitch" did not imply unchastity and were therefore not slander per se. On appeal the Nevada Supreme Court agreed that the words were not, as a matter of law, slanderous per se, but held that a jury should have been allowed to determine whether, in light of the context in which spoken, the words were defamatory. The court noted the "ample testimony" that Foxx spoke additional words that could be construed to be defamatory. In particular, the court said, "‘you’re no lady,’ ‘[profanity] shouldn’t bother you,’ and ‘f—k—g bitch’ could be seen to “impute unchastity." On the other hand, the court acknowledged that these statements were also capable of a non-defamatory construction, "as insults and epithets, rhetoric which is not generally actionable." The court cited other cases where "bitch," modified by "low-lived" or "whoring," had been held susceptible of a defamatory construction, but did not acknowledge that those cases dated back nearly a century.

Smith v. Atkins is another case in which the statement’s character as opinion or epithet was not raised in defense. There, a female law student sued for defamation and intentional infliction of emotional distress after her law professor allegedly called her a "slut" in a classroom setting. While some details were disputed, it was appar-
ently agreed that the professor had recounted to the class a story about seeing the plaintiff at a local bar, where she fell to the floor as she started to sit. After the defendant told the story, the plaintiff apparently challenged him, in front of the class, about why he had not helped her up. He "responded with either 'I aint' pickin' no Slut up off the floo" or an elaborate mock stage-whisper 'Slut.'

The trial court found that the defendant had defamed the plaintiff. The appellate court upheld the verdict, summarily concluding that "calling a woman a 'slut' is defamatory per se." The court did not specify whether its conclusion was based on the common-law rule that a statement impugning a woman's chastity was slanderous per se.

Judge Plotkin's concurrence with the holding was more thorough and analytical. He disagreed that calling a woman a "'slut' is always actionable as defamatory per se," but noted that Louisiana law does hold that "using words imputing 'immorality or other traits or acts calculated to arouse hatred, ridicule, etc.'" generally is defamatory per se. He made determinative of the statement's meaning the context and circumstances surrounding its utterance. On that basis, he concluded that the defendant had defamed the plaintiff "by saying what he said in the way that he said it, without making sweeping

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363. Id. at 796-97.
364. Id. at 797.
366. Atkins, 622 So. 2d. at 799. The trial court also found that she had not proved "damage to reputation or loss of esteem of her fellow student [sic]." Id. The court set damages at $1500 plus legal costs and interest. Id.
367. Id. at 800 (discussing Manale v. City of New Orleans Dep't of Police, 673 F.2d 122, 125 (5th Cir. 1982), in which calling a male police officer "a little fruit," "fruit," and "gay" was held defamatory per se). Further, finding the award of $1500 inadequate and an abuse of the court's discretion, the appeals court increased it to $5000, calling that "the lowest amount that could be awarded." Id.
368. See supra notes 39-41 and accompanying text (discussing this common law rule of slander per se). However, in its discussion of Manale, the court noted that "Louisiana law distinguishes between statements only susceptible of a defamatory meaning and those that are defamatory per se." It defines the latter type as those having a tendency to deprive a person of the benefit of public confidence or to injure him in his occupation or reputation. Atkins, 622 So. 2d at 799 (quoting Manale, 673 F.2d at 125 (citations omitted)).
369. Atkins, 622 So. 2d at 802 (Plotkin, J., concurring).
370. Id. (citing Moreau v. Brenan, 466 So. 2d 572, 574 (La. Ct. App. 1985)).
371. Id.
statements about whether the same word might be actionable under other circumstances.372

Judge Plotkin undoubtedly came closer than his colleague writing for the majority to doing justice to the question of whether the word "slut" carries defamatory meaning.373 Still, none of the judges took up the question of the actual meaning of the word "slut." The judges did not inquire, for example, whether it connotes a lack of chastity or some sexual impropriety, or whether it might be defamatory based on some other connotation. Even Judge Plotkin focuses more on the context in which the word was uttered than on its content.374 None of the opinions in Smith, however, mentioned rhetorical hyperbole or epithet—concepts that have defeated so many similar claims and which might have defeated this one.375

These epithet-based cases demonstrate how little has changed over the years in terms of women being targeted by sexually hateful epithets, both standing alone and in the context of other disparaging remarks. What has changed is the greater difficulty that contemporary women experience in winning such lawsuits. Losing cases usually fail on the basis that they are protected opinion.376 These cases demonstrate that the statements deemed actionable are typically those in which the epithets are accompanied by other remarks, or, in the event of Walia, events that make it reasonable to interpret them as attacking the plaintiff's reputation for sexual propriety.377 For it is on that basis, and not because they may also be misogynistic hate speech, that courts grant redress.378 The epithet cases therefore fall between traditional

372. Id. He went on to note his agreement with the increase in damages award based on what he called the "egregious circumstances" of the case, noting the "personal attack on [a] student[ ] in [a] crowded classroom setting" and the "insular, closed environment, where the plaintiff was very vulnerable, both personally and professionally." Id. at 803. Another concurring judge, without stating reasons, said that he would have raised the damages awarded to $10,000. Id. at 802 (Barry, J., concurring). Chief Judge Schott in his dissent seemed to suggest that his colleagues were unduly sympathetic to the plaintiff and that they based their findings on their own evaluations of witnesses' credibility, which differed from those of the trial court. Id. at 801 (Schott, C.J., dissenting).

373. See id. at 802 (Plotkin, J., concurring).

374. Id. at 802-03. Cases like Geary v. Goldstein, 831 F. Supp. 269 (S.D.N.Y. 1993) and Pring v. Penthouse International, Ltd., 695 F.2d 438 (10th Cir. 1982) also illustrate the significance of context. See infra notes 384-400 and accompanying text.


376. See, e.g., Ward, 643 A.2d at 974-80; Lee, 428 N.W.2d at 820-21.


378. Id.
chastity cases and new chastity cases on a continuum that also runs the
gamut between statements that undermine one's reputation for chas-
tity and those that ridicule and demean on the basis of sexuality.

3. The "New Chastity" Cases.—What I have labeled the new chas-
tity cases arise from portrayals that parody or otherwise ridicule a
plaintiff in relation to her sexual personhood. The female plaintiffs
who bring these lawsuits are often private persons, known only to their
respective circles of family and friends.379 They are sometimes rela-
tively high-profile women, such as models or actresses of limited
fame.380 They are rarely politicians or others involved in matters of
public controversy.381 Whatever their status as public or private, it
rarely determines the outcome of a woman's chastity-related suit. In-
stead, the defamation lawsuits these women bring are rarely success-
ful382 because of other constitutional doctrines: those that protect

a private woman's experiences after being portrayed as a prostitute on a television
broadcast).

380. Professor Ruth Colker, who has written about cases including the type I call new
chastity cases, sorted plaintiffs into five categories:
(1) well-known nonpolitical individuals, often models or actresses who are por-
trayed sexually without their consent; (2) private individuals who have informa-
tion about their sexual behavior or sexual victimization published in news-related
stories without their knowledge or consent; (3) public or private figures who are
portrayed in dramatic fictionalizations of their sexual behavior without their con-
sent; (4) individuals who seek to enter the arena of political dialogue and face
sexual invectives about their gender; and (5) private individuals who appear in
advertisements in a sexually suggestive context without their knowledge or
consent.

Ruth Colker, Published Consentless Sexual Portrayals: A Proposed Framework for Analysis, 35
BUFF. L. REV. 39, 42-43 (1986) (citations omitted) [hereinafter Colker, Published Consentless
Portrayals]. The plaintiffs in the cases that are my focus fall primarily into categories 1 and
5, but with respect to the latter category, the publications are rarely advertisements and
more often editorial content in the respective publications.

Professor Colker's project took an approach different to mine. In particular, she dis-
cussed these matters in relation to the law on pornography and invasion of privacy. She
proposed a framework for analysis of cases which she characterized as "consentless sexual
portrayals." Id. at 62-68. Her work preceded development of many of the constitutional
doctrines that have so complicated the litigation of these claims in the past twenty years.
See also Ruth Colker, Legislative Remedies for Unauthorized Sexual Portrayals: A Proposal, 20
NEW. ENG. L. REV. 687 (1984-85); Ruth Colker, Pornography and Privacy: Towards the Develop-
ment of a Group Based Theory for Sex Based Intrusion of Privacy, 1 LAW & INEQ. 191 (1983)
[hereinafter Colker, Pornography and Privacy].

381. However, for example, one case, Montandon v. Triangle Publications, Inc., did involve
a well-known author who had falsely been described as a "call girl" in a national publica-
tion. 120 Cal. Rptr. 186, 188 (Ct. App. 1975).

382. As already noted, facts that give rise to defamation suits may also give rise to suits
for invasion of privacy, intentional infliction of emotional distress, and, increasingly, sexual
harassment. Nevertheless, the only one of these causes of action that provides much prom-
opinion, rhetorical hyperbole, and other types of statements that are unlikely to be "taken literally" by those who perceive them.\textsuperscript{383}

*Pring v. Penthouse*\textsuperscript{384} is representative of the parody cases in which women have turned to defamation law seeking redress. The plaintiff was Kimerli Jayne Pring, a former Miss Wyoming who sued on the basis of a story in *Penthouse* magazine.\textsuperscript{385} The story, set at a Miss America contest, was about a Miss Wyoming contestant named Charlene, whose talent was baton twirling.\textsuperscript{386} In the story, as she was about to perform her talent, Charlene was described as thinking about an incident back in Wyoming when she caused a football player to levitate by performing an act of fellatio on him.\textsuperscript{387} When the story returns to the contest stage, Miss Wyoming is said to be performing her talent, which is a fellatio-like act on her baton.\textsuperscript{388} Later, she is described as fantasizing about "sav[ing] the world" with her "real talent"\textsuperscript{389} before performing an act of fellatio with her coach at the edge of the stage.\textsuperscript{390} This causes her coach to levitate while the audience applauds the new Miss America—a contestant other than Miss Wyoming—at center stage.\textsuperscript{391} The story ends with a description of the television cameras remaining on Miss Wyoming and her coach, rather than on the new Miss America.\textsuperscript{392}

In legal arguments, *Penthouse* characterized the story as a "spoof of the contest, ridicule, an attempt to be humorous, 'black humor,' a complete fantasy which could not be taken literally."\textsuperscript{393} In her complaint, Pring asserted that the article "create[d] the impression" that
she had performed fellatio on her coach in the presence of a national television audience at the pageant and that she had committed fellatio-like acts upon her baton at the pageant. 394 While lay witnesses for the plaintiff testified that the article "could not be about the plaintiff," her expert witness argued that "some individuals might attach a broader subliminal meaning of sexual permissiveness." 395 At trial, the plaintiff won one of the largest damages awards ever granted in a defamation case: $1.5 million in actual damages and $25 million in punitive damages. 396

The U.S. Court of Appeals for the Tenth Circuit, however, reversed the jury and dismissed Pring's complaint based on its conclusion that the offending publication could not be perceived as describing actual facts or events. 397 While describing the article as "a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants" with "no redeeming features whatsoever," the court explained that the article nevertheless deserved First Amendment protection. 398 Because the story described something that was "physically impossible in an impossible setting," the court said that readers would have understood the offending portions as "pure fantasy and nothing else." 399 Indeed, in its analysis, the court failed altogether to acknowledge any impact on Kimerli Pring as the contestant identified, and mentioned the faceless institution of

394. Id. at 441.
395. Id. at 442-43.
396. Spence, supra note 384, at 397. In addition, Pring was awarded $10,000 in actual damages and $25,000 in punitive damages against the author of the article, Philip Cioffari. Id. Ruling on post-trial motions, the district judge reduced the $25 million in punitive damages awarded against Penthouse to $12.5 million. Id. at 421.
399. Id. (citing Greenbelt, 398 U.S. at 6). Elsewhere the court wrote: "It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else. The incidents charged were impossible. The setting was impossible." Id. The court also wrote that the statements "were obviously a complete fantasy." Id.
the Miss America pageant and its multiple contestants as the only targets.\footnote{400} In a dissenting opinion, Judge Breitenstein asserted that the offending publication contained both fact and fiction.\footnote{401} While the details of the levitation, dreams, and public performance were fiction, he wrote, "[f]ellatio is not. It is a physical act, a fact, not a mental idea. Fellatio has long been recognized as an act of sexual deviation or perversion."\footnote{402} Emphasizing that the word "fellatio' was not used as a hyperbole or epithet," and that Penthouse did not claim that the "fact statement" about fellatio was truthful, Judge Breitenstein concluded that the article defamed Pring's character and was not protected by the first amendment.\footnote{403} Thus Breitenstein acknowledged Pring's injury, in typical chastity-case defamation terms, as one to Pring's repu-

\footnote{400. \textit{Id.} In a separate suit, the Miss America pageant sued \textit{Penthouse} for defamation. Miss America Pageant, Inc. v. Penthouse Int'l, Ltd., 524 F. Supp. 1280 (D.N.J. 1981). The plaintiff lost based on its inability to establish actual malice, but the court expressly refused to hold that the story was protected by the first amendment by virtue of its satirical form. \textit{Id.} at 1287-88.}

\footnote{401. \textit{Pring}, 695 F.2d at 444 (Breitenstein, J., dissenting).}

\footnote{402. \textit{Id.} at 443-44. He went on to say that [r]esponsibility for an irresponsible and reckless statement of fact, fellatio, may not be avoided by the gratuitous addition of fantasy. Penthouse does not claim that the fact statement was truthful. Moral standards may have changed since the First Amendment was adopted but that change has not gone so far as to protect a publisher which defames [a person] by relating commission of an act of sexual deviation and perversion. \textit{Id.} at 444. Breitenstein's expression of his outrage at this statement is reminiscent of nineteenth-century judges who expressed similar outrage when women were accused of lack of chastity, let alone perversion. \textit{See supra} note 14 and accompanying text.}

\footnote{403. \textit{Pring}, 695 F.2d at 444 (Breitenstein, J., dissenting). Judge Breitenstein went to some length to distinguish the present case from \textit{National Ass'n of Letter Carriers}, in which the plaintiffs had been referred to as "scabs" in a union publication, and \textit{Greenbelt}, in which a newspaper report of a city council meeting characterized the "plaintiff's negotiating position as 'blackmail.'" \textit{Pring}, 695 F.2d at 444. Breitenstein specifically pointed out that in both cases the defamatory statement was true. \textit{Id.} He argued that nothing in either case applied a "reasonably understood" test to defamation actions generally. \textit{Id.} In concluding that the statement was true, Breitenstein presumably referred to both the non-literal interpretation regarding an unreasonable bargaining position, as well as to the facts indicating it was true. This is discussed further \textit{infra} at notes 627-634.}

\footnote{474 The legal implications of an allegedly defamatory communication being opinion or rhetorical hyperbole, particularly in the workplace setting, are discussed in a recent article. Lewis & Mersol, \textit{supra} note 252.}

\footnote{403. \textit{Pring}, 695 F.2d at 444 (Breitenstein, J., dissenting). Judge Breitenstein distinguished the offending statement in \textit{Pring} from two Supreme Court cases relied upon by the majority and long associated with constitutional protection of opinion. He observed that the protected opinion at stake in each of those cases was, in fact, true. \textit{Id.} \textit{See generally} Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974) (stating that the epithet at issue was based on truth); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 14 (1970) (noting that the offensive behavior at issue was described truthfully).}

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tation based on false allegations that she had engaged in sexually deviant behavior.\textsuperscript{404}

\textit{Geary v. Goldstein}\textsuperscript{405} is another such “new” chastity case, again one in which a relatively high profile woman sued on the basis of a sexually degrading portrayal of her.\textsuperscript{406} There, a producer of pornographic television programming converted a television commercial for Wasa Crispbread, in which model Angie Geary appeared, into an unauthorized video that juxtaposed scenes from the commercial with graphic sexual images.\textsuperscript{407} Geary sued for defamation and invasion of privacy.\textsuperscript{408} In conflicting opinions, Judge Kimba Wood initially characterized the offending video as capable of defamatory meaning,\textsuperscript{409} but three years later she granted the defendant’s motion for summary judgment on the basis that the video was a parody and that no reasonable viewer would fail to perceive it as such.\textsuperscript{410}

Geary was hired by Wasa to appear in a television commercial for its product.\textsuperscript{411} The commercial juxtaposed two types of scenes: some of the plaintiff in a towel emerging from a morning shower and meeting her male companion in the kitchen in his bathrobe and some showing various types of bread, including the Wasa Crispbread prod-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{404} Pring, 695 F.2d at 444. Breitenstein’s assessment of truth in the \textit{Greensbelt} and \textit{Letter Carriers} cases reveals that he looks beyond hyperbole to determine the non-literal message conveyed.
\item \textsuperscript{405} 831 F. Supp. 269 (S.D.N.Y. 1993) [hereinafter \textit{Geary I}].
\item \textsuperscript{406} Id. at 270.
\item \textsuperscript{407} Id.
\item \textsuperscript{408} Id. at 271.
\item \textsuperscript{409} Id. at 277-78. Judge Wood held that Geary’s cause of action for defamation was viable. \textit{Id.} at 278.
\item \textsuperscript{410} Geary v. Goldstein, 1996 WL 447776, at *4 (S.D.N.Y. 1996) [hereinafter \textit{Geary II}]. In a somewhat similar case, a professional model who had posed for a cigarette advertising campaign sued when \textit{Hustler} magazine reproduced the ad, in a slightly altered form, as a parody. Byrd v. Hustler Magazine, Inc., 433 So. 2d 593, 594 (Fla. Dist. Ct. App. 1983). In the original ad for Viceroy cigarettes, the plaintiff was “making the famous ‘V’ for victory sign.” \textit{Id.} \textit{Hustler} airbrushed the photograph to eliminate one of the plaintiff’s fingers, giving “the impression that [he] was making an obscene gesture.” \textit{Id.} The caption beneath the photo read:
\begin{quote}
\textit{Up Your Ad} When you saw this ad in magazines or on billboards, you might remember having seen this gentleman with two fingers—rather than one—raised in front of his face. But the reader who sent us this couldn’t resist the temptation to change the picture. We can’t blame him—this is probably what the cigarette companies are saying to Americans.
\end{quote}
\textit{Id.} Although a jury awarded the plaintiff $10,000 in his defamation and invasion of privacy claim, the appellate court reversed. \textit{Id.} at 595. The court said that the caption sufficiently clarified that the photo, as it appeared, had not been consented to by the plaintiff. \textit{Id.} Thus, his argument that it created false impression of him necessarily failed. \textit{Id.}
\item \textsuperscript{411} \textit{Geary I}, 831 F. Supp. at 270.
\end{itemize}
\end{footnotesize}
The beginning of the voiceover recited statistics indicating how many million people eat “this as bread,” accompanied by a picture of a bagel, then how many million people “eat this” while showing a picture of a croissant. It ended by cutting to a picture of Wasa Crispbread. The remaining voiceover stated: “[O]nly eight million eat this as bread. These people produce more safe cars and blond beauties. They invented the Nobel prize and the zipper. They also play better tennis, and they watch less television. That’s the Swedish way. Wasa Crispbread. You can have it in America.” Accompanying the latter part of the final voiceover was video of Geary leaning back on the kitchen counter and embracing her companion as she accidentally knocks a box of Wasa Crispbread from the counter. The underlying message seemed to be that the couple portrayed eat Wasa and consequently are happier, feel healthier, and perhaps have a better sex life.

The defendant was inspired by this commercial to adapt it for Midnight Blue, a “sexually explicit late-night cable television program.” The adaptation’s first half maintained the voiceover’s initial sentences, as well as the parts of the commercial in which Geary appeared. Those parts were juxtaposed, however, not with pictures of different bread products, but rather with images of “scantily clad couples, apparently engaging in oral sex and vaginal and anal intercourse.” Rather than implying that people eat bread, the adaptation implied that the “this” which people ate were sex organs or that they engaged in the sexual activities portrayed. At one point, for example, “in a pornographic part of the adaptation a man ejaculates into the mouth of a woman whose face is obscured. The adaptation immediately cuts to Ms. Geary wiping her mouth,” a clip from the original commercial. As the voiceover’s second paragraph continued, the adaptation “consisted almost entirely of pornographic videotape with little cutting to the original commercial, except that it broadcast the visual of Wasa Crispbread with the commercial’s tag

412. Id.
413. Id.
414. Id.
415. Id.
416. Id.
417. Id.
418. Id.
419. Id.
420. Id.
421. Id. at 275 n.6.
Two Centuries of Talk About Chastity

line: "Wasa Crispbread. You can have it in America." The defendant received the permission of neither Geary nor Wasa to use any part of the commercial, and Wasa stopped running its commercial after the adaptation was broadcast, thereby ending the plaintiff's royalty income.

In her initial consideration of Geary's defamation claim, Judge Wood had no difficulty concluding that the Midnight Blue adaptation was a "statement." She also found that Geary had stated a cause of action for defamation because it was possible that some reasonable viewers could believe that the plaintiff "willingly participated in a pornographic video segment—and that such an interpretation could be one that 'brings her into hatred, contempt or ridicule by asserting some moral discredit upon [her] part.'" Three years later, however, on the defendant's motion for summary judgment, Judge Wood reached a contrary conclusion. Finding in this second opinion that what she had previously characterized as pornography was clearly a "parody"—and using the term "parody" throughout her opinion to

422. Id. at 270.
423. Id.
424. Id. at 277 (citing Regan v. Sullivan, 557 F.2d 300, 308-09 (2d Cir. 1977); Burton v. Crowell Publ'g Co., 82 F.2d 154, 155 (2d Cir. 1936)).
425. Id. at 277 (citing Schermerhorn v. Rosenberg, 426 N.Y.S.2d 274, 281 (App. Div. 1980)). In a footnote, Judge Wood went on to disagree with Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1135 (7th Cir. 1985), in which Judge Posner had written that the implication that someone appeared in pornography could not be defamatory "in today's moral climate." Id. She wrote:

I disagree that such a conclusion is so clear that it can be reached as a matter of law. One need only consider that a mere nine years ago, a woman was prevented from serving as Miss America because she had posed for nude photos several years before. See "Miss American Asked to Quit Over Photos Showing Her Nude," New York Times, July 21, 1984, A1 Col. 6 (quoting executive director of Miss America Pageant as saying that for Vanessa Williams to 'remain as Miss America would seriously jeopardize and irrevocably damage the entire Miss America Pageant program'). I cannot conclude, as a matter of law, that an actress trying to succeed in mainstream productions would not face serious obstacles to her career and a damaged reputation in her community, if people believed that she had appeared in pornography.

Id. at 277 n.10. There is, of course, a certain irony in Wood's statements, given that Judge Wood's own career was affected by the revelation that she had been involved with the Playboy organization. See, e.g., Ruth Marcus & Mary Jordan, Clinton Resume Hunt for Attorney General, BUFFALO NEWS, Feb. 7, 1993, at A10 (stating that Judge Wood trained briefly as a Playboy Bunny in the 1960s); Clinton Resumes Search for AG; Critics Say Wood Abandoned, DALLAS MORNING NEWS, Feb. 7, 1993, at 8A (stating that many were concerned that Wood trained at a Playboy Club while a student).

427. Id. at *1 n.2. Interestingly, Judge Wood cites the then-recent Supreme Court decision in Campbell v. Acuff Rose Music, Inc., 510 U.S. 569, 580 (1994). In that case, the Court discussed the meaning and obviousness of parody in the context of the fair use defense to
refer to the offending video—Judge Wood concluded that “most reasonable viewers would correctly infer” that each set of juxtaposed images came from a different source.  

Citing the defendant’s own filings in the case, the court wrote, in a footnote, that Midnight Blue “substituted for [the advertisement’s] bland images of bread shocking images of sex in order to expose and ridicule the [advertisement’s allegedly] exploitative sexuality. . . . The work is a classic parody in that it retained characteristic aspects of the original work, and also had the effect of ridiculing the original work.” Judge Wood noted that its presentation within the “Midnight Blue” program would lead viewers to interpret it as a parody. The judge observed that a “theme of Midnight Blue” is “‘the hypocrisy of denying sexuality and the mainstream media’s censoring of explicit sex . . . while exploiting sex for purely commercial gain.’” As for “‘channel-surfing’ viewer[s]” who would not see enough of the show to know that it was irreverent and featured other parodies, Judge Wood declined to include them in the “category of reasonable viewers” because a statement must be interpreted considering “the full copyright infringement, stating that parody in that context is “‘a literary or artistic work that imitates the characteristic style of . . . a work for comic effect or ridicule’: or a “‘composition in prose or verse in which the characteristic turns of thought and phrase in an author . . . are imitated in such a way as to make them appear ridiculous.’” Id. (citing 11 OXFORD ENGLISH DICTIONARY 247 (2d ed. 1989)). It seems odd that Judge Wood chose to state this part of her rationale in a footnote rather than in the text of the opinion.  

428. Id. at *1.  
429. Id.  
430. Id. (quoting Defendant’s Memorandum at 28).  
431. Id. Wood quoted from Goldstein’s deposition, in which he asserted that he was “commenting on the fact that ‘Madison Avenue, Wasa Bread, is using T and A to get me to pay attention and to sell some hard piece of matzo-like bread.’” Id. She also emphasized the disparity in production quality between the Wasa video clips and those added in the Midnight Blue production as evidence that no reasonable viewer would conclude that it was anything other than a parody. Id. The court wrote:  

Here, for example, where the Parody effectively criticized Wasa for its use of sexual innuendo in its advertising and ridiculed Geary’s performance in the Wasa advertisement, it is not reasonable for a viewer to infer that either Wasa or Geary consented to Goldstein’s use of the segments from the Advertisement, for payment or otherwise. The contrast between the crude, pornographic character of the Parody and the high production quality of the Advertisement makes an inference of consent or association even less likely than in the case of a non-pornographic parody.  

Id. The court then cited Campbell, quipping that “[p]eople ask for criticism, but they only want praise.” Id. at *2 (citing Campbell, 510 U.S. at 592 (quoting SOMERSET MAUGHAM, OF HUMAN BONDAGE 241 (Penguin ed. 1992))). On this basis, the court observed that there was no reason that the plaintiff would be presumed to have consented to being the object of criticism. Id.
context" in which it was promulgated. Rejecting contrary interpretation rules that she said would be "too dangerous to the rights of media speakers" and relying expressly on "First Amendment values," the judge concluded that no reasonable viewer would have made the defamatory inference alleged—that the plaintiff had participated in or consented to the video. The implication of Geary's voluntary association not being credible, Judge Wood concluded that she could not have been defamed. Aside from the conclusion that the video had not damaged Geary's reputation, at no point did the court acknowledge how Midnight Blue's admitted ridicule of Geary might otherwise have injured her.

The decision of the California Appellate Division in Seelig v. Infinity Broadcasting Corp. provides yet another example, this one involving radio and therefore no visual component. The plaintiff, who had been a losing contestant on the reality television show Who Wants to Marry a Multimillionaire?, declined a request to be interviewed by the defendant radio station. On the day when the segment of the television show in which the plaintiff appeared was to air, two talk show hosts on the defendant radio station were chatting about the television show when one of the hosts said that "we have uh, a local loser" on the television program. He and his on-air producer, in the course of banter about the television program and its local contestant, referred to the plaintiff as "Chicken butt" and said, "I found out more dirt about this girl, since we're not saying her name. She actually is

432. Id.; see also James v. Gannett Co., 353 N.E.2d 834, 838 (N.Y. 1976); Frank v. Nat'l Broad. Co., 506 N.Y.S.2d 869, 874 (App. Div. 1986); Matherson v. Marchello, 473 N.Y.S.2d 998, 1004 (App. Div. 1984); Orr v. Lynch, 401 N.Y.S.2d 897, 899 (App. Div. 1978). Judge Wood opined that "it would be clear to any viewer who watched for more than a few minutes that both the Parody and Midnight Blue were produced by Goldstein; that they arose from his particular set of beliefs; and hence that the Parody was part of the larger work of the Midnight Blue Program." Geary II, 1996 WL 447776, at *3.

433. Geary II, 1996 WL 447776, at *3. In distancing herself from her earlier contrary conclusion, Wood wrote that she had given "insufficient weight to New York precedent," thus emphasizing that a court must interpret a statement in context. Id. at *2.

434. Id. at *3.

435. See id. Judge Wood tailored her analysis narrowly to the defamation context.


437. Id. at 111.

438. Because she was not selected to be one of five finalists, the plaintiff appeared on the television show for less than a minute, stating only her name and that she worked in sales at a radio station in San Francisco. Id. The plaintiff received the cost of a trip to Las Vegas and some gifts, but she was not paid for her participation in the show. Id. The reason the plaintiff gave for declining the interview was that she had participated in the contest only as a "personal experience" and that she did not want to "bring attention to herself or to chance being ridiculed or subjected to public humiliation." Id. at 112.

439. Id.
the ex-wife of someone who works at our sister station down the hall. And uh, yeh, he just says what a big skank she is." 440

In determining that it was unlikely that the plaintiff would prevail on her claim, 441 the court noted that a defamation claim must include "a statement of fact that is provably false." 442 The court continued:

"Statements do not imply a provably false factual assertion and thus cannot form the basis of a defamation action if they cannot "reasonably [be] interpreted as stating actual facts" about an individual. Thus, "rhetorical hyperbole," "vigorous epithet[s]," "lusty and imaginative expression[s] of . . . contempt," and language used "in a loose, figurative sense" have all been accorded constitutional protection . . . ." The dispositive question after the *Milkovich* case is whether a reasonable trier of fact could conclude that the published statements *imply a provably false factual assertion*. 443

Thus, the question became whether "chicken butt," "big skank," and "local loser" could, considering the context in which they were stated, reasonably be understood to state actual facts capable of being proven false. 444 Considering the literal meaning of "chicken butt," the court noted this must express the subjective interpretation of the defendant because a "literal interpretation is nonsensical when applied to a human being." 445 Characterizing the statements varyingly as "sophomoric," "in bad taste," "a school yard taunt," and "plainly a derogatory figure of speech," the court nevertheless said that chicken butt and local loser were "unquestionably statements of the speaker's subjective judgment." 446 They fall into the realm of "classic rhetorical

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440. *Id.* The plaintiff was very upset and angry with her ex-husband for reportedly having made these statements, but he denied having made them. The radio producer who had made the comment on air later apologized for attributing the comment to him. *Id.* at 114.

441. *Id.* The analysis was offered pursuant to California's Anti-SLAPP Statute, aimed to curtail lawsuits that "chill the valid exercise of . . . freedom of speech and petition for redress of grievances." *CA. CIV. PROC. CODE* § 425.16 (West 2003). Pursuant to the statute, the trial court is to grant a motion to strike "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." § 425.16(b)(1).

442. *Seeilig*, 119 Cal. Rptr. 2d at 116 (citing *Milkovich* v. Lorain Journal Co., 497 U.S. 1, 19 (1990)), which explained that an idea must be proven false to be actionable under defamation law.


444. *Id.* at 117.

445. *Id.*

446. *Id.* at 117-18.
 hyperbole which cannot 'reasonably [be] interpreted as stating actual facts.'

Although the plaintiff offered testimony that "big skank" meant "a woman of loose morals," the court found it not actionable. The court called "skank" a "derogatory slang term of recent vintage with no generally recognized meaning," "devoid of any factual content," and "too vague to be capable of being proven true or false." Focusing on what it called the "non-serious" nature of the broadcast, the court called the exchange "light banter," noted that it was "frequently punctuated by laughter," and concluded that "no reasonable listener would take them as factual pronouncements."

447. Id. at 117 (citing Ferlauto, 74 Cal. App. 4th at 1404; quoting Milkovich, 497 U.S. at 20). The court considered them comparable to—indeed, indistinguishable from—"'creepazoid attorney'" and "'loser wannabe lawyer,'" which had been found to be rhetorical hyperbole in another case. Id. (quoting Ferlauto, 74 Cal. App. 4th at 1404).

448. Seelig, 119 Cal. Rptr. 2d at 118.

449. Id.

450. Id.

451. Id. Indeed, the court consistently dismissed the plaintiff's arguments, refusing to take any of the comments about her seriously. As another example, at one point in the proceedings plaintiff noted that the on-air producer had attributed the "skank remark" to the plaintiff's "jilted ex-husband," arguing that jilted indicates that plaintiff "dumped her husband as part of an infidelity or extramarital affair." Id. at 118; see also id. n.7. The court quoted MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 629 (10th ed. 2000) to refute the argument, noting that "jilt" is defined as "to drop (a lover) capriciously or unfeelingly." Id. at n.7.

An analogous case involving male plaintiffs and the epithet "bastard" is Curtis Publ'g Co. v. Birdsong, 360 F.2d 344, 345 (5th Cir. 1966). There the defendant referred to the Mississippi Highway Patrol as "bastards" who "walked off and left us" according to a quote by a Justice Department official who was discussing joint efforts by the two law enforcement bodies in relation to the registration of James Meredith as a student at the University of Mississippi in 1962. Id. In analyzing whether "bastards" carried defamatory meaning, the court took a very literal approach, writing:

[I]t is perfectly clear that no reasonable person of ordinary intelligence could believe that the person whom the author of the article was quoting was accusing every member of the Mississippi Highway Patrol who was on duty at Oxford of having been born out of wedlock. On the contrary it is perfectly apparent that these words were used as mere epithets, as terms of abuse and opprobrium. As such they had no real meaning except to indicate that the individual who used them was under a strong emotional feeling of dislike toward those about whom he used them. Not being intended or understood as statements of fact they are impossible of proof or disproof. Indeed such words of vituperation and abuse reflect more on the character of the user than they do on that of the individual to whom they are intended to refer. It has long been settled that such words are not of themselves actionable as libelous. [Citations omitted] . . . [A court in 1838 stated] "[t]hat mere general abuse and scurrility, however ill-natured and vexatious, is no more actionable when written than spoken, if it do not convey a degrading charge or imputation. Against all such attacks, a man needs no other protection than a good character; and the law will not suppose that damage can
By seeking and considering only the literal meaning of "chicken butt," the court ignored the essence of the communication: an expression of disgust and disdain for the plaintiff. Its handling of "skank" was similarly one-dimensional. In concluding that the word had no "generally recognized meaning," the court overlooked its dictionary definition: "a prostitute or a dirty, repulsive, or immoral person." The court also ignored the dictionary's note that the word's use dates to between 1980 and 1985—as much as a full twenty years before its use by these defendants. Thus, the court's finding that the offending statements were devoid of factual content is wrong.

With respect to "local loser," on the other hand, the court took a different approach, reading the term literally and finding it true. "Loser is a description applied to persons in many contexts," the court wrote, "that bears no potential defamatory inference, particularly if, like plaintiff in this case, the person was unsuccessful in some contest."

The defendant's message in Seelig was conveyed in a mocking and contemptuous tone. The court observed that it was punctuated by laughter, but that laughter was evoked at the plaintiff's expense. She was the butt of their joke, which carried underlying factual assertions about both her character and her actions. In short, the Seelig court concluded that the term could not be taken literally and therefore must be protected rhetorical hyperbole, invective, or humor that no one would take seriously. What the court failed to do was determine the meaning conveyed by the hyperbolic statement. Here, arguably, that message was two fold: that the plaintiff was an absurd figure who was to be ridiculed for having participated in Multimillionaire, but also that she was sexually promiscuous.

happen to such a character from the pointless arrows of mere vulgarity.' This is still the law.

Id. at 348 (quoting Rice v. Simmons, 1838, 2 Del. (2 Harr.) 417, 429). The Birdsong court did not appear to consider that the use of the word, in this context, might undermine the plaintiffs in their profession, implying as it did, that they had failed their partners in crime-fighting.

452. Id. at 118.
454. Id.
455. Seelig, 119 Cal. Rptr. 2d at 117.
456. Id.
457. See id. at 112-16. While the plaintiff avoided the show in anticipation of disrespectful behavior, the name-calling and personal jabs exceeded cordial behavior.
458. Id. at 118.
459. Id.
460. Id.
Walko v. Kean College was decided a few years after Pring and cited both that decision and Falwell in finding that the offending publication was protected as a parody. The defendant, a student newspaper, published a "spoof" edition in which an ad indicated that the plaintiff, a college administrator, could be reached on a "whoreline" for "good phone sex." The trial court granted the defendant's summary judgment motion on the basis that, appearing in a seven-page spoof insert on a page that contained not a single serious article, no reasonable person would have understood it as factual information about the plaintiff. Like other courts in these new chastity cases, the court viewed the publication with disdain, observing that while everyone would know the "whoreline" ad was a joke, it was "not a very good joke, perhaps; downright vulgar and tasteless, most readers probably would conclude; but definitely not an assertion of fact that anyone would take seriously."

While Dworkin v. L.F.P, Inc. concerned a woman portrayed as hateful rather than sexually degraded, the case echoes several of the doctrinal themes that loom large in the new chastity cases. In-
deed, Dworkin is like the new chastity cases in that the defendant there similarly used mean-spirited language with sexual content to ridicule and degrade a woman.468

The offending statements appeared in a July 1995 issue of Hustler magazine in which Gerry Spence, a well-known defense attorney, was the featured “Asshole of the Month.”469 After noting that Spence was known for representing the proverbial “little guy” and that he had won huge judgments against large corporations, the article also discussed Andrea Dworkin, whom the court characterized as “an outspoken opponent of pornography.”470 The story read:

His client is “little guy” militant lesbian feminist Andrea Dworkin, a shit-squeezing sphincter in her own right. In her latest publicity-grab Dworkin has decided to sue Hustler for invasion of privacy among other things.

Dworkin seems to be an odd bedfellow for “just folks,” “family values” Spence. After all, Dworkin is one of the most foul-mouthed, abrasive manhaters on Earth. In fact, when Indianapolis contemplated an antiporn ordinance co-authored by Dworkin, she was asked by its supporters to stay away for fear her repulsive presence would kill the statute ***. Considering that Dworkin advocates bestiality, incest and sex with children, it appears Gerry “this Tongue for Hire” Spence is more interested in promoting his bank account than the traditional values he’d like us to believe he cherishes.

This case is a nuisance suit initiated by Dworkin, a crybaby who can dish out criticism but clearly can’t take it. The real issue is freedom of speech, something we believe even Dworkin is entitled to, but which she would deny to anyone who doesn’t share her views. Any attack on First Amendment freedoms is harmful to all[,] Spence’s foaming-at-the-mouth client especially. You’d think someone of Spence’s stature would know better than to team with a censor like Dworkin.471

470. Id. Dworkin is the author of, among other works, INTERCOURSE (1987) and PORNOGRAPHY: MEN POSSESSING WOMEN. See ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981). She was the co-author, with Catherine MacKinnon, of a model anti-pornography ordinance that was adopted by the City of Indianapolis before being struck down as unconstitutional. See infra note 584.
471. Id. at 907-08. As a result of this article, Dworkin, along with two Wyoming-based National Organization for Women officials, brought a variety of claims. Id. at 908. In the
The Wyoming Supreme Court in *Dworkin* upheld the trial court's grant of the defendant's summary judgment motion on the basis that the offending language constituted non-actionable "[a]busive epithets, vulgarities, and profanities." After concluding that the plaintiff was a public figure and noting that she would have to prove actual malice with convincing clarity in order to win her defamation claim, the court considered whether the *Hustler* statements were actionable as a matter of law. The court observed that the Supreme Court in *Milkovich* had provided protection for "statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual." The *Dworkin* court also quoted with approval the *Milkovich* language that valued imaginative expression and rhetorical hyperbole as adding greatly to the discourse of our nation. In order to determine whether a statement is factual, the *Dworkin* court wrote, it must "scrutinize the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made."

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fourth claim, at stake here, Dworkin alone sued for libel. *Id.* Under each claim, the plaintiffs sought $50 million in actual damages and $100 million in punitive damages. *Id.*

472. *Id.* at 915.

473. *Id.* at 913. The court noted that the Wyoming Constitution is even more “elaborate and clearly worded” than the U.S. Constitution in its protection of free speech. The state document reads: “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right ***.” *Id.* The court then concluded that it was not necessary to discuss possible additional state protections because the public-figure/media defendant “federal floor ... adequately protects the media defendants here from liability to Dworkin.” *Id.*

474. *Id.* at 914.

475. *Id.* (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 2 (1990)).

476. *Id.* The court expresses concern that free speech will be stifled. *Id.*

477. *Id.* The *Dworkin* court noted that “[t]he kind of language used may signal readers that a writer is not purporting to state or imply actual, known facts.” *Id.* at 915.

The court analogized the present matter to two Supreme Court decisions, one in which “blackmail” had been held to be “no more than rhetorical hyperbole, a vigorous epithet” and one in which “scab” was determined to be a “literary definition” of traitor, and in which the word was used “in a loose, figurative sense,” “a lusty and imaginative expression of the contempt felt by union members.” *Id.* (citing Nat’l Ass’n of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974) (“scab” case)); *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 8 (1970) (using the word “blackmail” to characterize a land developer’s negotiating position).

Another recent case held that similar language was not actionable. *Flowers v. Carville*, 310 F.3d 1118, 1133 (9th Cir. 2002). In a suit by Gennifer Flowers against James Carville, George Stephanopoulos, and Hillary Rodham Clinton, the court held that comments by the defendants that Flowers’ allegations against President Clinton were “trash,” “crap,” and “garbage” to be no more than “generic invective” and not actionable in defamation. *Id.* at 1127. Other recent cases demonstrate that offensive language is often in actionable. *See* Pospicil v. Buying Office, Inc., 71 F. Supp. 2d 1346, 1362-63 (N.D. Ga. 1999) (stating that the comment that plaintiff was “psycho” was not slander per se where term amounted to an
Finally, the court compared the *Hustler* statement about Dworkin to the ad parody in *Falwell*.\(^{478}\) The *Dworkin* court wrote that the "*ad hominem* nature of such language easily identifies it as rhetorical hyperbole which, as a matter of law, cannot reasonably be understood as statement of fact."\(^ {479}\) Clearly falling into this category, the court wrote, were *Hustler*’s statements characterizing Dworkin, the litany of which it proceeded to repeat—from "‘little guy’ militant lesbian feminist," to "shit-squeezing sphincter" to "a cry-baby who can dish out criticism but clearly can’t take it."\(^ {480}\) The court later characterized these as "hopelessly vague, imprecise, indefinite and amorphous."\(^ {481}\) The court went on to explain that certain "formats—editorials, reviews, political cartoons, monthly features—signal the average reader to expect a departure from what is actually known by the writer as fact."\(^ {482}\) Because the "Asshole of the Month" regular feature appears under the heading "Bits and Pieces" and because its tone is "pointed, exaggerated and heavily laden with emotional rhetoric" the court was convinced that the "average reader is fully aware that the statements found there are not ‘hard news.'"\(^ {483}\)

"expression of opinion" about her personality and reasonable persons could differ on this issue); Thompson v. Campbell, 845 F. Supp. 665, 680 (D. Minn. 1994) (noting that statements that plaintiff was "complainer" and "troublemaker" were too imprecise to be actionable because they related to personal traits; to be actionable, statements must be specific and verifiable by fact).


\(^{479}\) *Dworkin*, 839 P.2d at 915.

\(^{480}\) Id.

\(^{481}\) Id. at 916. The court went on to write, "[t]hese terms are loosely definable and subjectively interpreted in such a variety of contexts that they cannot support an action for defamation. ‘Lacking a clear method of verification with which to evaluate a statement * * * the trier of fact may improperly tend to render a decision based upon the approval or disapproval of the contents of the statement, its author, or its subject.’" *Id.* (quoting *Ollman v. Evans*, 750 F.2d 970, 981 (D.C. Cir. 1984)).

\(^{482}\) Id. at 915.

\(^{483}\) Id. The court acknowledged that four statements in the article were more likely to be objectively capable of proof: "that Dworkin is a lesbian; supporters of the anti-pornography ordinance asked her to stay away; she advocates bestiality, incest and sex with children, and she initiated a nuisance suit." *Id.* The court analyzed each of these separately and found that each statement was true, or if the inference drawn by *Hustler* from Dworkin’s own writings was false, Dworkin had not established that it was "drawn with actual malice." *Id.* at 916-19.

Oddly, in a case Gerry Spence brought based on the same publication, the court denied the defendant’s motion for summary judgment, holding that Spence should have his day in court, just as *Falwell* had. *Spence v. Flynt*, 816 P.2d 771, 779 (Wyo. 1991); see *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988). The *Spence* court also cited the proposition that certain publications, including the "lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived
Like Geary and Pring, then, the Dworkin court essentially considered the facial message of the offending statement and concluded that no one would take it literally. The court did not, however, go on to consider what meaning or message the average reader would perceive.

Finally, the court discussed the "broader social circumstances in which the statement was made" and concluded that Hustler's communication related to a matter of public controversy. The court reiterated that Dworkin was an anti-pornography activist who had taken on publications and publishers such as Hustler and Flynt. The court, therefore, viewed Hustler's article as an "ad hominem attack against an advocate of a social, moral and political viewpoint contrary to Hus-

from them is clearly outweighed by the social interest in order and morality," Spence, 816 P.2d at 775 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)). Spence relied on Chaplinsky's language to support the proposition that an individual may sue for "the kind of grossly defamatory statement as those at issue here." Id. The Spence court then made a somewhat awkward segue to Milkovich, saying that it develops Chaplinsky in a "concise, easily read and understood fashion." Id. In sum, the Spence court said Milkovich 

[L]aid to rest the absurd notion that anything published that is couched in opinion language cannot be defamation for which damages are recoverable when it said: "[W]e think the 'breathing space' which 'freedoms of expression require in order to survive,' . . . is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact." Id. at 775 (quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990), which in turn quotes Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 772 (1986)) (internal quotation marks omitted). The Spence court then explained how this principle was similar to the common-law privilege of fair comment, which provided immunity for "the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." Id. The court also acknowledged that some of the other aspects of the Hustler feature might be proved false by Spence, in particular the statement that he'd "sold out his personal values for a chance to 'fatten his wallet.'" Id. at 776. Applying this principle, the court concluded that it was for a jury to determine whether Hustler was exercising the privilege to state "an honest expression of opinion, on a matter of public concern," when it called Spence a "'vermin-infested turd dispenser,' a 'parasitic scumsucker,' a 'shameless shithole,' a 'reeking rectum,' a 'hemorrhoidal type,' and 'Asshole of the Month for July.'" Id. at 775. Because the statements are clearly defamatory, the court said, they were actionable unless protected criticism of a public figure under the common-law privilege. Id. at 776.

Overall, the Wyoming court's handling of Spence's claim displayed more sensitivity to him as a human being than the Dworkin court did to her. The court also found significant Spence's role as an attorney. Id. at 777. At one point, the court wrote: "Free speech cannot equate with the freedom to intimidate, destroy and defame and advocate seeking to represent a client." Id.

484. Dworkin, 839 P.2d at 914.

485. Id. The court analogized this to "labor's historical confrontation with management" that presented a "widely recognized arena in which bruising and brawling, rough and tumble debate is daily fare." Id. at 916; see also Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974) (referring to social and situational circumstances that are relevant to a court's decision).
The statements in question were uttered in the context of an ongoing debate in which Dworkin seeks to destroy the industry of which *Hustler* is part. The court concluded: "Ludicrous statements are much less insidious and debilitating than falsities that bear the ring of truth. We have little doubt that the outrageous and the outlandish will be recognized for what they are." "Vulgar speech," the court wrote, "reflects more on the character of the user of such language than on the object of such language."

486. *Dworkin*, 839 P.2d at 916. The court went on to quote another case in which *Hustler* Magazine was involved: "The offending phrases in this article are, unfortunately, representative of the type of language generated in a dispute over such a subject." *Id.* (quoting *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 881 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989)).

487. *Id.* (quoting *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1194 (9th Cir. 1989)). Elsewhere, Dworkin made the argument that "the truth, when published with good intent and [for] justifiable ends, shall be sufficient defense." *Id.* at 920. Dworkin argued that, pursuant to this provision, *Hustler* bore the burden of proving that the statements, even if true or constitutionally protected, were published with "good motives and for justifiable ends." *Id.* The court concluded that, "[w]here the challenged statements criticize public officials or public figures in matters of public concern, 'the interest in private reputation is overborne by the large public interested, secured by the Constitution, in the dissemination of the truth.'" *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)). The Wyoming court did not, of course, acknowledge that the statements about which Dworkin complained contained few "truth[s]." *Id.* The Wyoming court simply noted that the U.S. Constitution trumped this Wyoming provision, which it said was "repugnant to the First Amendment of the United States Constitution." *Id.*

488. *Id.* at 916. In a concurring opinion in which he explained that the outcome was dictated by established law, Justice Cardine nevertheless expressed his repugnance with the protection of the offending material. He wrote: "I am less than enthusiastic over a state of law which allows a publisher to create a money-making business out of cruel, obscene, random attacks upon public figures." *Id.* at 922 (Cardine, J., concurring). He ridiculed the proposition that these publications might be equated with those of Shakespeare or Chaucer, writing "[t]hey are hardly in that class." *Id.* Opining that Canadian law struck a "better balance" between the rights to reputation and free speech and press, the Justice concluded, "I firmly believe that freedom of speech and of the press can survive nicely without the protection now afforded the likes of *Hustler* magazine." *Id.* He also re-characterized *Milkovich* as providing somewhat less protection for statements of opinion than the majority had indicated, while nevertheless concluding that U.S. Supreme Court precedent dictated the conclusion reached by the majority. *Id.*

Justice Urbigkit, dissenting, took a completely different tack, finding that summary judgment was not appropriate "within this profusely demonstrated, factually conflicting appellate record." *Id.* at 927 (Urbigkit, J., dissenting). He continued:

Where the words of the libel are ambiguous, allegorical, or in any way equivocal, and the jury have found that they were meant and used in a defamatory sense, the court will not set aside their verdict, unless it can be clearly shown that, on reading the whole passage, there is no possible ground for the construction put upon it by the jury. But where the words are not reasonably capable of any defamatory meaning, there the judge will be right in directing a nonsuit.

*Id.* at 932.
These cases illustrate that adjudication of "new chastity" cases is
dominated in the constitutional era of defamation law by what was
formerly called the fact opinion-dichotomy. More particularly,
analysis of these cases is dominated by the question whether the
offending statement can reasonably be interpreted to assert actual facts
about the individual. Courts talk of literal interpretations, hard
news, and the capability of verification and contrast those variations of
actionable statements with language that is vague, amorphous, hyper-
bolic, imaginative, and which no reasonable person would believe. What
courts fail to do, however, is consider what lies between these
dichotomous categories—that is, the message that is conveyed in hy-
perbolic or imaginative form. What courts are really asking is not
whether any reasonable person would believe the statement, but
rather whether any reasonable person would take it literally. The an-
swer in most cases is, of course, no. Courts should be asking instead
what is the non-literal meaning, the subtext or innuendo, of the hyper-
bolic, imaginative, and vague communication. That message should
then be analyzed in light of Milkovich's fact and non-fact dichotomy,
asking whether a statement carries a provably false connotation.

V. RECONCEPTUALIZING THE INJURY AND CRAFTING A REMEDY

By summarily concluding that these sexually hateful statements
are protected as rhetorical hyperbole or imaginative expression,
courts are able to avoid acknowledging the harms they inflict. In fact,
a serious dignitary injury is inflicted on one who is targeted by such
speech. Such dignitary injuries are widely recognized in modern
tort law, and the following discussion draws heavily on that recogni-

(noting that a majority of circuits have held that opinions are constitutionally protected
because one cannot express a false opinion); see also id. at 1415 (drawing a distinction
between a "reasonably understood" requirement and the fact-opinion dichotomy in defa-
mation actions). The Supreme Court has since held that the First Amendment does not
protect opinions because a statement of opinion may suggest a false assertion. Milkovich v.

490. See Milkovich, 497 U.S. at 21 (posing the dispositive question in the case as whether
a reasonable factfinder could conclude that the statements made by the defendant imply
an assertion that the plaintiff acted in a particular way).

(determining that a parody advertisement was not defamatory because it was surrounded
by "fake ads," no reasonable person would believe it, it was clearly delineated as intended
humor, and it was therefore not fact); see also Milkovich, 497 U.S. at 20 (advocating the
protection of "imaginative expression" and "rhetorical hyperbole" in public debate).

492. See, e.g., Braun v. Flynt, 726 F.2d 245, 251 (5th Cir. 1984) (compensating plaintiff
for the embarrassment and humiliation suffered when the defendant published her pic-
ture in a sexually explicit magazine).
tion in support of a new tort that would provide redress for sexually hateful speech. It also considers the constitutional limitations that would apply.

A. False Light Invasion of Privacy as an Alternate Remedy

One cause of action that seeks to protect individual dignity is false light invasion of privacy. In contrast to the new chastity cases discussed above, female plaintiffs relying on a false light theory have won some lawsuits arising from portrayals that are highly offensive and demeaning. A closer consideration of the tort, then, may lead to a solution for the otherwise uncompensated injuries that occur in the new chastity cases.

1. The Law.—One of the four types of invasion of privacy described by Prosser in his landmark 1960 article, the false light tort provides redress for widely publicized statements that portray a person in a way that is both inaccurate, and highly offensive to a reasonable person. Although it features similarities to defamation law, the injury redressed is to mental and emotional well-being rather than to

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496. Restatement (Second) of Torts, § 652E (1977); see also Robert C. Post, The Social Foundations of Privacy: Community and Self in the Common Law Tort, 77 Cal. L. Rev. 957, 958-59 (1989) (identifying publicized statements placing a person in false light as one of four branches of the modern invasion of privacy tort); Nathan E. Ray, Note, Let There Be False Light: Resisting the Growing Trend Against an Important Tort, 84 Minn. L. Rev. 713 (2000) (providing an overview of false light invasion of privacy and defending the tort against criticisms). But see Ken Gormley, One Hundred Years of Privacy, 1992 Wis. L. Rev. 1335, 1387-90 (describing the Supreme Court’s mechanical application of its press-friendly standard for defamation cases to false light cases and the resulting failure of false light privacy claims when they conflict with the First Amendment); J. Clark Kelso, False Light Privacy: A Requiem, 92 Santa Clara L. Rev. 783 (1992) (arguing that, despite the more than 600 false light cases litigated, not one displays an important contribution that the tort makes to the body of law); Matthew Stohl, False Light Invasion of Privacy in Docudramas: The Oxymoron Which Must be Solved, 35 Akron L. Rev. 251 (2002) (classifying courts’ application of false light invasion of privacy as “narrow” and asserting the near-impossibility of prevailing on a false light claim); Diane Leenheer Zimmerman, False Light Invasion of Privacy: The Light that Failed, 64 N.Y.U. L. Rev. 364 (1989) (exposing weaknesses in the false light privacy tort and arguing for its elimination). See generally Prosser, Privacy, supra note 495, at 398-401 (discussing the emergence of the false light privacy tort, its various applications, and possible concerns associated with it); John W. Wade, Defamation and the Right of Privacy, 15 Vand. L. Rev. 1093, 1096-1108 (1962) (discussing the precedent for false light cases).
reputation. Because of its orientation to psychic well-being, one court has called it an "odd hybrid of defamation and intentional infliction of emotional distress." Like defamation, liability for the false light tort is contingent on an inaccurate communication. Most courts interpret this to require a false statement of fact, which is defined in a way akin to how Milkovich defines the same requirement in defamation. Nevertheless, a few courts have permitted rhetorical hyperbole or imaginative expression to provide the basis for a false light claim. The Restatement (Second) of Torts also requires that each

497. Wood, 736 F.2d at 1088 (citing Braun, 726 F.2d at 250); see also Flowers v. Carville, 310 F.3d 1118, 1132-33 (9th Cir. 2002) (noting that in some jurisdictions false light does not require injury to reputation where defamation does).

498. Flowers, 310 F.3d at 1132. The Flowers court went on to say that this "jurisprudential offspring [ ] recalls George Bernard Shaw's witty rebuff of Isadora Duncan." Id.

499. Id. at 1132.

500. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990) (suggesting that, in a defamation case, the dispositive question is whether as assertion could be reasonably interpreted by a juror as stating facts). Similarly, the Flowers court stated that rhetorical hyperbole may not be the basis for a false light claim, and overturned the trial court's decision on this point. Flowers, 310 F.3d at 1133 & n.14. Indeed, if a communication can be characterized as a spoof or a parody, that has also defeated claims for false light invasion of privacy. In Stein v. Marriott Ownership Resorts, Inc., the plaintiff sued based on video titled "What's sex like with your partner?" 944 P.2d 374, 376 (Utah Ct. App. 1997). In it, video clips of the plaintiff's husband and his colleagues each describing in detail a household chore they hate, were juxtaposed and presented as answers to the question "What's sex like with your partner?" Id. at 376. The plaintiff's husband's "answer" was

The smell. The smell, the smell. And then you go with the goggles. You have to put on the goggles. And then you get the smell through the nose. And as you get into it things start flying all over the place. And the smell. And you get covered in these things.

Id. The court noted that defamation law does not view as actionable a "parody or spoof that no reasonable person would read as a factual statement, or as anything other than a joke." Id. at 380 (quoting Walko v. Kean Coll., 561 A.2d 680, 683 (N.J. Super. Ct. Law Div. 1988)). The court concluded that those seeing the video "had to know it was a spoof, devoid of any real or purported factual material" and therefore that summary judgment for the defendant was appropriate. Id. at 381; see also Pospicil v. Buying Office, Inc., 71 F. Supp. 2d 1346, 1361-62 (N.D. Ga. 1999) (stating that in order to recover on a false light claim, the plaintiff must show that the publicity was false and not a statement of personal opinion); Ault v. Hustler Magazine, Inc., 860 F.2d 877, 881 (9th Cir. 1988) (holding that defendant was not liable for defamation or false light after printing an inflammatory article about the plaintiff because the article stated an opinion rather than fact. In making that distinction, the court applied a three-prong test: 1) whether the words are defamatory in light of the surrounding publication; 2) whether the context in which the statements were made lead to anticipation of inflammatory speech; and 3) whether the language that was generated is the kind generally expected to be used in a legal dispute). Id.

501. See People's Bank & Trust Co. v. Globe Int'l Publ'g, Inc., 978 F.2d 1065, 1069 (8th Cir. 1993) (finding story that reported 101-year-old woman was pregnant was an assertion of fact that could be proven true or false and that, in the context of the case, it was reasonably believable and therefore actionable in false light); Spence v. Flm, 816 P.2d 771, 775 (Wyo. 1991) (permitting jury to decide whether "vermin-infested turd dispenser," "para-
and every plaintiff prove the defendant's knowledge or reckless disregard as to the statement's falsity.\textsuperscript{502} While this requirement is not necessarily constitutionally mandated for private plaintiffs, as opposed to public figures, most jurisdictions impose the requirement on all plaintiffs.\textsuperscript{503} Only four states have expressly rejected the tort of false light invasion of privacy.\textsuperscript{504} One court rationalized doing so on the basis of an optimistic assessment that "journalists simply are more responsible and professional today" than during the age of yellow journalism that spawned Warren and Brandeis' plea for recognition of a right to privacy.\textsuperscript{505}

For purposes of the new chastity cases, the most significant distinctions between false light and defamation are (1) that statements which form the basis for successful false light cases need not imply something blameworthy on the part of the plaintiff\textsuperscript{506} and (2) that the injury associated with false light more closely reflects the nature of the injury suffered by these female plaintiffs. Words that portray the plaintiff in a false light typically cause her to be ridiculed, humiliated, and shunned, even though they do not necessarily indicate that she has done anything immoral and blameworthy.\textsuperscript{507} Words that defame, on the other hand, may also cause a plaintiff to be ridiculed, humiliated, and shunned, if only briefly.\textsuperscript{508} What makes defamatory words

\textsuperscript{502} \textit{Restatement (Second) of Torts} § 652E(b) (1977).

\textsuperscript{503} \textit{See id.} at cmt. d (pointing out that limits to First Amendment protections afforded to the media in defamation cases since \textit{Gertz} may not apply to privacy cases); \textit{see also} \textit{Wood v. Hustler Magazine, Inc.}, 786 F.2d 1084, 1090 (5th Cir. 1984) (explaining that, after \textit{Gertz}, most states adopted negligence as the minimum standard of care in defamation cases where the plaintiff sought actual damages, but that the actual malice standard was required where the plaintiff sought punitive damages); \textit{People's Bank & Trust Co. v. Globe Int'l, Inc.}, 786 F. Supp. 791, 798 (W.D. Ark. 1992) (upholding a jury instruction requiring actual malice for a false light claim brought by a private plaintiff and framing the issue as whether the defendant "intended, or recklessly failed to anticipate, that readers would construe the publicized matter as conveying actual facts or events concerning" the plaintiff).


\textsuperscript{505} \textit{Renwick}, 312 S.E.2d at 413.

\textsuperscript{506} Statements forming the basis for defamation suits are historically ones that hold the plaintiff up to obloquy and ridicule. \textit{See discussion supra} notes 27-30 and accompanying text.

\textsuperscript{507} \textit{See Ray, supra} note 496, at 726 (listing possible interests protected by false light, including freedom from scorn, ridicule, embarrassment, and humiliation).

\textsuperscript{508} \textit{See Restatement (Second) of Torts} § 559 (defining defamatory communications as those tending 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").
harmful by contemporary standards, however, is that they assert—implicitly or explicitly—that the plaintiff has done something to deserve that treatment.\footnote{509} Statements that give rise to successful defamation suits indicate that the plaintiff has earned this ill-treatment by society because he or she has, for example, committed a criminal act or engaged in dishonest behavior.\footnote{510} Thus, communications such as those in Youssoupoff (falsely reporting that the plaintiff had been raped), or statements falsely imputing homosexuality or the contraction of a disease, formerly gave rise to successful defamation actions.\footnote{511} These statements would now more likely find redress instead in false light invasion of privacy.\footnote{512} As one court has expressed this requirement of

\footnote{509. See, e.g., \textit{Flowers v. Carville}, 310 F.3d 1118, 1122 (discussing action in which plaintiff alleged that defendants painted her in a false light by "claiming that she had lied in her story to the \textit{Star} and 'doctored' . . . tape-recorded phone calls").}

\footnote{510. See, e.g., id. at 1127-28 (distinguishing between comments that may be classified as rhetorical hyperbole, which are not defamatory, and statements that insinuate deception, which could be defamatory). Of course, a number of contemporary cases also indicate that society sees adultery as blameworthy or immoral because these statements also still give rise to successful defamation actions. \textit{See}, e.g., \textit{Ellis v. Price}, 990 S.W.2d 543, 549 (Ark. 1999) (upholding a jury verdict holding defendant liable for telling plaintiff's husband that she had been unfaithful).}

\footnote{511. \textit{See Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.}, 50 L.T.R. 581, 584 (Eng. C.A. 1934) (expressing extreme distaste for the argument that false allegations that a woman had been raped are not defamatory); \textit{Douglass v. Hustler Magazine, Inc.}, 769 F.2d 1128, 1132 (7th Cir. 1985) (indicating that a claim that the plaintiff is a lesbian could be the basis for a defamation claim); \textit{RESTATEMENT (SECOND) OF TORTS} § 559 cmt. c (explaining that the implication that a person suffers from a disease may be defamatory because it will deter others from dealing with her); \textit{see also Manale v. New Orleans Dept. of Police}, 673 F.2d 129, 125-26 (5th Cir. 1982) (finding that calling a police officer "little fruit" and "gay" was defamatory); \textit{Schomer v. Smidt}, 170 Cal. Rptr. 662, 664-66 (Ct. App. 1980) (holding that calling a woman a lesbian implied "unchastity and abnormal behavior" and therefore, if a statement imputed lesbianism, it was to be considered slander per se); \textit{Moricoli v. Schwartz}, 361 N.E.2d 74, 76 (Ill. App. Ct. 1977) (holding that complaint filed by a nightclub singer sufficiently alleged a cause of action for defamation where defendants had called plaintiff a "fag"); \textit{Nazeri v. Mo. Valley Coll.}, 860 S.W.2d 303, 312 (Mo. 1993) (noting that "homosexuality is still viewed with disfavor, if not outright contempt, by a sizeable proportion of our population" and false statements alleging it constitute slander per se); \textit{Gray v. Press Communications, L.L.C.}, 775 A.2d 678, 685-86 (N.J. Super. Ct. App. Div. 2001) (concluding that a false accusation of homosexuality could be defamatory); \textit{Mazar v. State}, 441 N.Y.S.2d 600, 604 (1981) (finding that, because homosexual activity was a crime in New York at the time the words were published, printing a letter indicating that the plaintiff was gay was slander per se). \textit{But see Boehm v. American Bankers Ins. Group, Inc.}, 557 So. 2d 91, 94 (Fla. Dist. Ct. App. 1990) (stating that "[t]he modern view . . . has not found statements regarding sexual preference to constitute slander per se") (citing \textit{Moricoli v. Schwartz}, 361 N.E.2d 74 (Ill. App. Ct. 1977); \textit{Morrisette v. Beattie}, 17 A.2d 464 (R.I. 1941); \textit{Boy Scouts of America v. Teal}, 374 F. Supp. 1276 (E.D. Pa. 1974)).}

\footnote{512. \textit{See, e.g., \textit{Douglass}}, 769 F.2d at 1135, 1138 (declining to say that a reasonable jury could not infer that plaintiff was a lesbian and concluding that she had a cause of action for false light invasion of privacy). The court suggests that "people who are made to seem pathetic or ridiculous may be shunned, and not just people who are thought to be dishonest-}
blameworthiness, in particular with respect to statements regarding homosexuality:

if a person is falsely accused of belonging in a category of persons considered deserving of social approbation, *i.e.*, thief, murderer, prostitute, etc., it is generally the court’s determination as to whether such accusation is considered slander *per se* so that damages are presumed. A court should not classify homosexuals with those miscreants who have engaged in actions that deserve the reprobation and scorn which is implicitly a part of the slander/libel *per se* classifications. For a characterization of a person to warrant a *per se* classification, it should, without equivocation, expose the plaintiff to public hatred and contempt.\(^5\)

In a similar vein, Judge Posner has written that, to the extent that false light is distinct from defamation, the distinction “rests on an awareness that people who are made to seem pathetic or ridiculous may be shunned, and not just people who are thought to be dishonest or incompetent or immoral.”\(^6\) Posner’s reference to pathetic and ridiculous is to the portrayal that gave rise to the germinal Supreme Court decision on false light, *Time, Inc. v. Hill.*\(^7\) The *Hill* plaintiffs, who had been held hostage by escaped convicts, sued on the basis of a *Life* magazine article that portrayed them being “subjected to various indignities that had not actually occurred. The article did not defame the family members in the sense of accusing them of immoral, improper, or other bad conduct, and yet many people would be upset to think that the whole world thought them victims of such mistreatment.”\(^8\) The false light injury is thus conceptualized as one to human dignity, and it expressly recognizes and compensates for emotional injury.\(^9\) Unlike in defamation law, a finding of false light does not suggest that the offending statement imputed blameworthy or im-

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513. Hayes v. Smith, 832 P.2d 1022, 1025 (Colo. Ct. App. 1991) (citations omitted). The court noted the lack of empirical evidence to demonstrate that “homosexuals are held by society in such poor esteem” and observed that “the community view toward homosexuals is mixed.” \(\text{Id.}\) see also Boehm, 557 So. 2d at 94-95 n.1 (citing cases that have held imputations of homosexuality not to be slander *per se* due to the “changing temper of the times”).

514. Douglass, 769 F.2d at 1134.

515. 385 U.S. 374 (1967).

516. Douglass, 769 F.2d at 1134; see also *Time*, 385 U.S. at 377-79 (detailing the facts of the case).

517. See Braun v. Flynt, 726 F.2d 245, 250 (5th Cir. 1984) (recognizing that the principle element in an invasion of privacy false light action is mental anguish).
It only indicates that the statement is inaccurate and highly offensive.\footnote{518} Several cases illustrate the distinction between false light and defamation as it plays out in cases regarding statements about women’s sexual behavior and propriety. \textit{Douglass v. Hustler Magazine, Inc.}\footnote{520} represents perhaps the most complex of the reported cases. The plaintiff, a television actress and model of minor fame, had consented to be photographed for \textit{Playboy} magazine but sued when the photos later appeared, without her permission, in \textit{Hustler}.\footnote{521} With respect to her defamation claim, Posner wrote:

> It would have been difficult for Douglass to state this claim as one for libel. For what exactly is the imputation of saying (or here, implying) of a person that she agreed to have pictures of herself appear in a vulgar and offensive magazine? That she is immoral? This would be too strong a characterization in today’s moral climate. That she lacks good taste? This would not be defamatory.\footnote{522}

Rather, Posner saw her false light claim as stronger, analogizing the facts to \textit{Time, Inc. v. Hill}\footnote{523} and focusing on the nature of the injury. He wrote that being shown nude “in such a setting before millions of people—the readers of the magazine—is degrading in much the same way that to be shown beaten up by criminals is degrading.”\footnote{524}

Evaluation of her false light claim necessitated close scrutiny of and comparison of the respective characters of the magazines \textit{Playboy} and \textit{Hustler} because of the “truth” that Douglass had consented to have her photos published in the former.\footnote{525} One question, therefore, was whether sufficient distinction existed between the two so that her appearance in \textit{Hustler} in fact cast her in a “false light” or otherwise constituted a false statement about her for purposes of a defamatory meaning analysis.\footnote{526} As Judge Posner wrote, in order to complete the...
task, "we shall have to enter imaginatively into a world that is not the natural habitat of judges—the world of nude modeling and (as they call themselves in the trade) 'provocative' magazines." After dis-

"Ripped Off! A Torrid Nine-Page Pictorial," which by its position on the cover appears to be a reference to the cover girl. The inside cover is a conventional advertisement for Scotch whisky. Besides advertisements (none sexual), the issue contains fiction, a column of sexual advice (more refined than its Hustler counterpart), book reviews (only one of a book on sex), and articles. None of the stories or articles is obscene, though one story is erotic (a "Ribald Classic") and there are many bawdy cartoons and jokes (but not vicious ones, like many of those in Hustler) and four nude pictorials. In one of the pictorials a woman is doing exercises and being massaged; some of the frames contain an erotic suggestion of a mild sort. Two of the other pictorials show nude women in various poses but there is no suggestion that they are engaged in erotic activity. The last nude pictorial is "Ripped-Off," which turns out to consist of photographs of nude women (some in erotic poses) by different photographers. Two of the photographs are by Gregory, and one of them is of Robyn Douglass, though she is not identified by name. Although she is shown removing the slip of the other woman, as in the Hustler pictures, the text beneath the picture weakens any inference of lesbianism: "How long since you've seen a girl—let alone two—in lingerie like this? 'I pick very feminine, almost outdated slips for the girls to wear in this scene,' says photographer Gregory. ‘To me, that made it more of a fantasy, more of a turn-on.'" Among other pictures in "Ripped-Off," one could be taken to be an (obviously simulated) photograph of sexual intercourse.

Id. at 1137.

527. Id. at 1134. Other courts' characterizations of the "adult" magazine defendants in these cases are of some interest. A great deal of ink frequently is spilled on descriptions of these publications—or, in cases like Geary, the pornographic television program that gave rise to the suit. Judges ostensibly offer these descriptions not because they are simply fascinated with the genre, but because, in determining whether the false light element is satisfied, courts must assess the communicative milieu in which the offending statement was delivered.

In Braun v. Flynt, for example, Judge E. Grady Jolly of the Fifth Circuit began the opinion with a two-paragraph description of Chic magazine, stating, among other things, that the "dominant theme of Chic magazine is 'female nudity.'" 726 F.2d 245, 247 (5th Cir. 1984). The court also quoted the magazine's editor as saying that it "depicts 'unchastity in women.'" Id. "Suffice it to say," Judge Jolly concluded, "that Chic is a glossy, oversized, hard-core men's magazine." Id. Judge Jolly also wrote, regarding the magazine feature in which the plaintiff appeared:

One of the opening sections of the magazine entitled "Chic Thrills," contains brief stories about current "events." In the issue of the magazine in question, twenty-one vignettes were included in "Chic Thrills." Most of these either concerned sex overtly or were accompanied by a photograph or cartoon of an overtly sexual nature.

Id. Elsewhere, in explaining how the publication portrayed Braun in a false light and may have defamed her, the court demonstrated the relevance of the magazine's nature to the harm done:

The pertinent facts and circumstances alleged here are that Mrs. Braun's picture was placed without her consent in a magazine devoted exclusively to sexual exploitation and to disparagement of women. Mrs. Braun contends, and the jury implicitly found, that the ordinary reader automatically will form an unfavorable opinion about the character of a woman whose picture appears in Chic magazine.
cussing in detail the *Hustler* feature in which photographs of the plaintiffs were included, Judge Posner went on to discuss other aspects of the magazines. He noted, for example, that *Hustler*'s cover portrayed a "naked woman straddling and embracing a giant peppermint stick" and that one of the titles on the cover was "New Discovery: How to Give Women Vaginal Orgasms." He distinguished *Hustler* from

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*Id.* at 254. *Chic* had argued that "no ordinary reader would assume Mrs. Braun to be unchaste or promiscuous on the basis of its publication of her picture." *Id.* at 254 n.11. The court responded that, assuming that were true, the jury might nevertheless have found that

the publication implied Mrs. Braun's approval of the opinions expressed in *Chic* or that it implied Mrs. Braun had consented to having her picture in *Chic*. Either of these findings would support the jury verdict that the publication placed Mrs. Braun in a false light highly offensive to a reasonable person. *Id.*

The court fairly ridiculed *Chic*'s argument that "context has no bearing" on whether the plaintiff had been defamed. *Id.* at 254. The court characterized the magazine's argument as being that "we should cut out Mrs. Braun's picture and look solely at it to determine whether she had been defamed or cast in false light." *Id.* In rejecting that argument, the court explained, "Common sense dictates that the context and manner in which a statement or picture appears determines to a large extent the effect which it will have on the person reading or seeing it." *Id.*

528. *Douglass*, 769 F.2d at 1135-36, 1137.
529. *Id.* at 1135. In addition, he provided the following lengthy description of *Hustler*:

The inside cover is a full page of advertisements for pornographic video cassettes. On page 5 there is the 'publisher's [Larry Flynt's] statement'—a call to tax the churches. This sounds another theme of Hustler: 'irreverence,' which has the practical meaning in Hustler of hostility to or contempt for racial, ethnic, and religious minorities. Then there is a 'World News Roundup'—the news is all concerned with sex—and a page of coarse advice to readers who have sexual problems. Between these two features is a full-page advertisement entitled 'Get Any Girl Within 5 Minutes or YOU PAY NOTHING!' with subtitles such as 'Turn Women Into Putty.' The issue contains many similar sexual advertisements, some with obscene pictures and text. The reader arrives next at a regular monthly feature, 'Asshole of the Month,' in which a man's head—in this issue the head of a professor at the Harvard Law School who, in January 1981 was in charge of the criminal division of the Justice Department—is shown protruding from the rear of a donkey. The next few pages consist of vulgar photographs, some from pornographic movies, plus jokes and cartoons many of which are racially offensive; all are offensive in one way or another. In one cartoon, a doctor in an abortion clinic is feeding a foetus to a rat in an alley. Then there is an illustrated feature on pornographic movies, followed by four book reviews (two of erotic works) and 'How to Achieve Vaginal Orgasms.' The magazine sobered up a little with a symposium on gun control, punctuated however by tasteless cartoons such as one in which a black child says to Santa Claus, 'I'd like a new little brother for Christmas. We could use the extra welfare check!' The symposium is followed by a nude pictorial, by more tasteless cartoons, and by a mock advertisement for a 'Starving Cambodian Baby Doll.'

We shall leave off here, on page 51 of a 136-page issue, having sufficiently indicated the character of the magazine. To be depicted as voluntarily associated with such a sheet (the Harvard law professor's association is not represented as voluntary) is unquestionably degrading to a normal person, especially if the de-
Playboy, noting that the latter publication had a “more refined” sexual advice column than Hustler, that Playboy included book reviews and articles but no sexual advertisements, that Playboy does not “ridicule racial or religious groups and avoids repulsive photographs” and that none of its stories was “obscene, though one story is erotic . . . and there are many bawdy cartoons and jokes (but not vicious ones like many of those in Hustler).” Posner summarized:

We cannot say that it would be irrational for a jury to find that in the highly permissive moral and cultural climate prevailing in late twentieth-century America, posing nude for Playboy is consistent with respectability for a model and actress but that posing nude in Hustler is not (not yet anyway), so that to portray Robyn Douglass as voluntarily posing nude for Hustler could be thought to place her in a false light even though she had voluntarily posed nude for Playboy.

Posner thus concluded that “the setting is indeed a degrading one” and, at another point, referred to its “debasement” of Douglass. Douglass, therefore, had a claim for false light invasion of privacy because the truth of her consent to appear in Playboy was not tantamount to consenting to appear in Hustler, a qualitatively different publication.

Wood v. Hustler Magazine, Inc., a Fifth Circuit decision, similarly illustrates how the false light remedy may provide redress in the so-called new chastity cases, even when defamation law does not. The court explained that the unauthorized appearance of the plaintiff’s nude photograph in the magazine falsely represented that she had “consented to the submission and publication in a coarse and sex-cen-

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Id. at 1135-36.

530. Id. at 1137. The court’s summary of the distinctions between the two publications also said:

Although many people find Playboy, with its emphasis on sex and nudity, offensive, the differences between it and Hustler are palpable. Playboy, like Hustler, contains nude pictorials, but the erotic theme is generally muted, though there are occasional photographs that an earlier generation would have considered definitely obscene.

Id.

531. Id.

532. Id. at 1135.

533. Id. at 1138.

534. 736 F.2d 1084 (5th Cir. 1984).

535. The plaintiff in Wood sued for defamation and invasion of privacy, but the statute of limitations had run on the defamation claim. Id. at 1086.
tered magazine of a photograph depicting her in the nude." A neighbor of the plaintiff, LaJuan Wood, had broken into Wood's home, stolen a nude photograph of Wood, and submitted it to *Hustler* for publication in the regular "Beaver Hunt" feature. This section included photographs, typically submitted by *Hustler* readers, of themselves, as "non-professional female 'models.'" The photo was published with copy reading, "LaJuan Wood is a 22-year-old housewife and mother from Bryan, Texas, whose hobby is collecting arrowheads. Her fantasy is 'to be screwed by two bikers.'" In the context of analyzing the standard of fault that should apply, the court reasoned that the nature of the material published in the Beaver Hunt section would obviously warn a reasonably prudent editor or publisher of the potential for defamation or privacy invasion if a consent form was forged. The wanton and debauched sexual fantasies and the intimate photos of nude models were of such a nature that great care was required in verifying a model's consent.

The court thus had no difficulty confirming that the non-consensual inclusion of nude photographs had portrayed the plaintiff in a highly offensive false light, and that the magazine had acted negligently in doing so.

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536. *Id.* at 1089.
537. *Id.* at 1085.
538. *Id.* at 1086.
539. *Id.* The staff of *Hustler*, upon receiving this submission from the neighbor of the plaintiff who stole it, said that they thought LaJuan Wood's name was a play on words. "In the photograph LaJuan was sitting on a horizontal portion of a tree trunk, creating the impression that 'LaJuan Wood' was an alteration of 'Lay You on Wood.'" *Id.*
540. *Id.* at 1092. The consent form sent with the photo did not provide a telephone number. *Id.* at 1086. However, it provided that the $50 check, earned if the photo was published, was to be sent in the name of the photo thief's wife, to an address that purported to be LaJuan's. *Id.* Once the photo was selected for publication, *Hustler* sent the thief's wife a mailgram addressed to LaJuan. *Id.* The woman phoned *Hustler* and a staffer asked her a "series of leading questions, answerable by 'yes' or 'no,' in a conversation that lasted only one or two minutes." *Id.*
541. *Id.* at 1092. *Braun v. Flynt* is similarly illustrative. 726 F.2d 245 (5th Cir. 1984). The plaintiff in *Braun* worked as an amusement park performer who treaded water as a trained pig dove into the pool and drank from the bottle she held. *Id.* at 247. *Chic* magazine published a publicity photo, provided by the amusement park under false pretenses, showing the plaintiff with Ralph, the trained pig, "in good form, legs fully extended, tail curled, diving toward Mrs. Braun, who is shown in profile holding the bottle." *Id.* The caption accompanying the reproduced photo said: "SWINE DIVE—A pig that swims? Why not? This plucky porker performs every day at Aquarena Springs Amusement Park in bustling San Marcos, Texas. Aquarena staff members say the pig was incredibly easy to train. They told him to learn quick, or grow up to be a juicy ham sandwich." *Id.* at 248 n.2. The photo appeared on the same page with a number of tasteless stories, such as one about the use of
One successful false light case is different to these in that it involved a less straightforward assertion about the plaintiff. Like the new chastity cases involving plaintiffs who lost on a defamation theory, People's Bank and Trust Co. v. Globe International Publishing, Inc. featured a statement that arguably would not be taken literally. Nellie sexual organs of animals being used as a Chinese elixir and another about men having their breasts enlarged through the use of a synthetic hormone. Id. at 248. Other stories included one titled "10 Things that P— Off Women," accompanied by a cartoon of a woman with her breasts partially exposed. Id. The story about male breast enlargement was entitled "Mammaries Are Made Of This." Id.

On the facing page is a picture showing a nude female model demonstrating navel jewelry and an article on ‘Lust Rock Rules' about a ‘throbbing paean' to sex written by ‘the Roman Polanski of rock.’ The cover of the issue shows a young woman sitting in a chair with her shirt open so as partially to reveal her breasts, one hand to her mouth and the other hand in her tightly-fitting, unzipped pants.

Id.

The plaintiff prevailed on her false light invasion of privacy and defamation claims at trial and was awarded a total of $95,000 in actual and punitive damages. Id. The jury awarded $5000 for defamation. Id. The remaining damages were allocated $25,000 for punitive damages arising from the defamation, $15,000 in actual damages associated with the invasion of privacy, and $50,000 in punitive damages associated with the invasion of privacy. Id. The appellate court upheld the verdicts, but determined that the plaintiff should receive only one recovery for these overlapping torts and remanded for a new trial on damages. Id. at 250-51. The court explained that while the principal element of injury in defamation is impairment of reputation, and invasion of privacy is founded on mental anguish, the plaintiff could recover for mental anguish under either theory. Id. at 250. The court observed that there was "[v]ery little evidence" to show that the plaintiff's "reputation in her community actually was harmed by the publication" nor that she had suffered "tangible economic damage." Id. at 251. Thus, the court concluded that the jury's award to her was "primarily compensating her for the embarrassment and humiliation she suffered." Id. The court upheld the verdict, seeing no difficulty with the jury's conclusion that the publication had created "false impression as to Mrs. Braun's reputation, integrity or virtue." Id. at 248-49, 252. The plaintiff had an opportunity to avoid remand by accepting the damages award based on a false light theory. Id. at 251. Certainly her claim fits more comfortably into the latter theory because Chic's publication of her photo arguably implied nothing blameworthy, but nevertheless portrayed her in a way that was inaccurate, highly offensive, and caused her great emotional distress.

Ten years after Braun, the Texas Supreme Court clarified that Texas law does not recognize the false light variety of invasion of privacy. Cain v. Hearst Corp., 878 S.W.2d 577, 579 (Tex. 1994).

The case of Messenger v. Gruner + Jahr Printing and Publishing illustrates a different approach to analyzing cases like this. 208 F.3d 122 (2d Cir. 2000). The plaintiff, a 14-year-old model, sued the publishers of Young and Modern magazine based on its use of three photos of her to illustrate a column with the headline or "pull quote": "I got trashed and had sex with three guys." Id. at 124. The plaintiff argued that the publication created the false impression that she had written the letter describing the sexual encounter. Id. Applying New York law, the court stated that "where a photograph illustrates an article on a matter of public interest, the newsworthiness exception bars recovery unless there is no real relationship between the photograph and the article." Id. at 125. The court noted that this is so even where the "photograph, when juxtaposed with an article, could reasonably have been viewed as falsifying or fictionalizing plaintiff's relation to the article." Id. at 127.
Mitchell, a ninety-five-year-old newspaper carrier, sued when the Sun, a newspaper tabloid, published her photo to accompany an article with the headline, "Pregnancy forces granny to quit work at age 101." The story was about an Australian woman who had quit her paper route at the age of 101 after she became pregnant as a consequence of an extramarital affair with a millionaire client on her route. Mitchell, who was known as the "paper lady" in the small Arkansas town where she resided, operated a newsstand, and delivered papers, sued for defamation, false light invasion of privacy, and intentional infliction of emotional distress. She lost the first claim but prevailed on the latter two in federal district court.

The defendant did not dispute that the story was highly offensive to a reasonable person, but defended on the basis that it was "pure fiction." Specifically, the defendant argued on appeal that readers could not reasonably believe the story conveyed actual facts about Mitchell because the biological impossibility for a woman of her age to become pregnant clearly rendered "the whole story an obvious, non-actionable 'fiction.'"

Nevertheless, the court upheld the jury verdict for Mitchell, noting that every aspect of the story could be proven true or false. Showing sensitivity to the story's innuendo, the court noted that some components of the story—specifically the suggestion of Mitchell's sexual impropriety—could reasonably be believed. Calling pregnancy "a physical condition, not an opinion, metaphor, fantasy, or surrealism," the court refused to say as a matter of law that readers could not reasonably have believed the story as portraying actual facts.

The format and style of the Sun suggest it is a factual newspaper. Globe advertises the Sun as publishing "the weird, the strange, and the outlandish news from around the globe," and nowhere in the publication does it suggest its stories are

543. Id. at 1067. The photo had been purchased from the Baxter County Bulletin, a local newspaper in Mitchell's community. Id. The Sun editor who chose the photo for the story testified that he assumed the person shown in the photo was dead. Id. at 1070.
544. Id. at 1067.
545. Id.
546. Id. The tort of intentional infliction of emotional distress is known as outrage in Arkansas. Id. The jury awarded Mitchell $650,000 in compensatory damages and $850,000 in punitive damages. Id.
547. Id. at 1068.
548. Id. at 1069.
549. Id. at 1069.
550. Id.
551. Id. Note the similarity to Judge Breitenstein's dissent in Pring. See supra notes 389-394 and accompanying text.
false or exaggerated. The Sun also mingles factual, fictional, and hybrid stories without overtly identifying one from the other. At trial, even its own writers could not tell which stories were true and which were completely fabricated.552

Noting that the Sun publishes disclaimers above some personal ads to indicate that these have not been investigated, the court viewed such disclaimers as implying that other ads and stories had been investigated.553 The court thus concluded that Globe Publishing did not intend the Sun to be an obvious work of fiction, but rather held it out as factual and true.554 Finally, the court observed that this was the "kind of calculated falsehood against which the First Amendment can tolerate sanctions without significant impairment of its function."555

Douglass and Wood are, of course, distinguishable from similar cases relying on defamation law to seek redress for sexually demeaning portrayals. Specifically, these false light decisions analyze what is more clearly a factual assertion. That factual assertion is an implicit one: that the plaintiff consented to have her photo published in what the judges characterize varyingly as off-color, vile, vulgar, hard core, and degrading publications "devoted exclusively to sexual exploitation and to disparagement of women."556 Globe Publishing is helpful in a different way. It demonstrates a more technical approach to the determination of what an offending publication "says." The court used a combination of interpretive approaches. On the one hand, it

552. Peoples Bank & Trust Co., 978 F.2d at 1070. The court also observed that the newspaper alerted its readers to items that were advertisements with small-print caveats above the text of those ads. Id. The district court had similarly concluded that if the defendant wanted its readers to know that the material was fiction, it very easily could have indicated this. Peoples Bank & Trust Co. v. Globe Int'l, Inc., 786 F. Supp. 791, 799 (W.D. Ark. 1992). The district court cited a survey, which it acknowledged was not scientific, that was conducted in Arkansas at about the time of the Mitchell trial. Id. at 799 n.4. Survey respondents were asked whether they believed the stories in supermarket tabloids are real. Id. Fifty-three percent responded "yes." Id.

553. Peoples Bank & Trust Co., 978 F.2d at 1070.

554. Id.

555. Id. The district court had similarly focused on the part of the article that went to Mitchell's sexual propriety. The court noted that even if some facts contained in an article could not reasonably be believed, "the implication of sexual promiscuity" could. Peoples Bank & Trust Co., 786 F. Supp. at 798. In making that determination, the court considered the "surrounding circumstances in which the statements were made, the medium by which they were published, and the audience for which they were intended." Id.

556. Braun v. Flynt, 726 F.2d 245, 254 (5th Cir. 1984) This was, of course, similar to the plaintiff's argument in Geaty v. Goldstein. Supra notes 405-435 and accompanying text. There the plaintiff argued that she was defamed because of the implication that she had consented to the use of her image in the Midnight Blue parody. Geary v. Goldstein, 831 F. Supp. 269, 270 (S.D.N.Y. 1993); Geary v. Goldstein, 1996 WL 447776, at *1 (S.D.N.Y. Aug. 8, 1996).
was very literal, focusing on the aspects of the communication that could be proven true or false—whether Nellie Mitchell was pregnant and whether she planned to cease delivering newspapers.\footnote{Peoples Bank & Trust Co., 978 F.2d at 1069.} \footnote{Id.} Nevermind, the court said, that pregnancy was a biological impossibility; the Sun wanted readers to believe the plaintiff was, in fact, pregnant.\footnote{Id.} In addition to its willingness to take literally some of the story's assertions, though, the court also discerned the story's subtext: Nellie Mitchell's sexual impropriety.\footnote{Id.}

False light cases like these may provide an avenue of escape from the defamation law conundrum in which a female plaintiff in a new chastity case may find herself. First, the concept of injury being redressed in these cases permits a woman to achieve legal recourse for statements that portray her in a highly offensive and inauthentic way—regardless of whether that portrayal implies blameworthiness on her part. It thus takes law out of the business of saying what is and is not sexually proper and leaves it simply adjudicating what is inaccurate and highly offensive. After all, if a woman's sexual practices and propriety must be the subject of litigation—and it appears they must if she is to receive redress—it is preferable to do so in a manner that does not expressly assess blameworthiness or immorality. Finally, all of these false light cases are helpful in their acknowledgement of the harms caused by a woman's sexually degrading or ridiculous portrayal.\footnote{See, e.g., Braun, 726 F.2d at 250 (recognizing that the plaintiff was entitled to recover damages for mental anguish suffered as a result of her picture being published in a sexually explicit magazine).} These cases help shift the focus away from reputational harm to emotional distress and other threats to psychological well-being that are caused by such sexually hateful communications.

2. \textit{The Theory}.—An understanding of the injury being redressed by false light invasion of privacy is enhanced by knowledge of its theoretical underpinnings. Rather than discuss the tort in relation to the voluminous literature on the concept of privacy generally, I limit my discussion to conceptions of this particular variety of the invasion of privacy tort.\footnote{In addition to the torts context, issues of privacy arise in many other legal contexts, including the constitutional right to family privacy, to have an abortion, and to have sexual relations. Privacy issues also arise in the context of data privacy and many other digital age scenarios. See David D. Meyer, \textit{The Paradox of Family Privacy}, 53 \textit{VAND. L. REV.} 527, 532-48} While some commentators have argued that false light...
invasion of privacy is redundant to defamation law because the injury being redressed is one to reputation, most have viewed the interest protected by false light as fundamentally different.\(^{562}\) Professor Bloustein, for example, writing about the tort at mid-century, called false light portrayals an "assault on individual personality and dignity" and argued that the tort protects individual integrity from violation.\(^{563}\) He analogized the privacy tort to assault, battery, and false imprisonment, noting that it provides vindication instead of compensation.\(^{564}\) Bloustein concluded that "[t]he damage is to an individual's self-respect in being made a public spectacle."\(^{565}\)

In a related vein, Professor Gary Schwartz has argued that portraying an individual in a false light confounds or impugns his identity in society because of the offensive or disorienting mismatch between his actual identity and his identity in the minds of others.\(^{566}\) While such portrayals affect reputation, they may also implicate privacy by disclosing information related to a private aspect of the person's life.\(^{567}\)

A related and highly compelling argument in support of the false light tort, the argument based on self-determination is similarly per-

\(^{562}\) See Flowers v. Carville, 310 F.3d 1118, 1132 (9th Cir. 2002) (declaring that false light differs from defamation in that the former does not require injury to reputation). \(^{563}\) But see Holt v. Camus, 128 F. Supp. 2d 812, 816 (D. Md. 1999) (noting that, under Maryland law, the same legal standards apply to libel and false light claims).


\(^{565}\) Id. at 1002-03.

\(^{566}\) Gary T. Schwartz, Explaining and Justifying a Limited Tort of False Light Invasion of Privacy, 41 CASE W. RES. L. Rev. 885, 897-98 (1991), discussed in Ray, supra note 496, at 741. 

\(^{567}\) Schwartz, supra note 566, at 897-98.
suasive with regard to the cases examined in this Article. Nathan Ray has asserted that self-determination is a component of human dignity. He argues that self-determination is undermined by misleading portrayals because the person is inappropriately redefined in a way that leaves her with "different and inferior options" for interacting with others. The harm is not about reputation, but rather is the "self-imposed withdrawal or defensiveness" that is a natural consequence of "feelings of humiliation, indignity, helplessness, resentment, nakedness and the like." False light thus provides redress not only for hurt feelings, but also guards against the "consequences of these inner reactions in the specific setting of the public arena." Law should provide a remedy, Ray argues, because false light publicity "impairs an individual's involvement with public life and freedom of decision-making."

Plaintiffs in the new chastity cases apparently suffer this same humiliation, as well as the consequent withdrawal and defensiveness. While not often discussed in case reports because it is not at issue on appeal or summary adjudication, the nature of the false light injury has been addressed in a few opinions. The evidence offered in these cases is consistent with the type of injury described by Bloustein, Ray, and others. For example, one plaintiff testified that, upon learning of the unauthorized publication of her photo in Chic magazine, she "was very upset and felt like crawling in a hole and never coming out."

568. Ray, supra note 496, at 746.
569. Id. at 745-46. Philosopher Stanley Benn has made a related argument. He conceptualizes privacy as related to individuals making choices. He explains that being an "object of scrutiny, as the focus of another's attention, brings one to a new consciousness of oneself, as something seen through another's eyes." Stanley I. Benn, Privacy, Freedom, and Respect for Persons, in PRIVACY: NOMOS XIII, at 1, 7 (J. Ronald Pennock & John W. Chapman eds., 1971) (discussed in Solove, supra note 561, at 1116-17). He becomes "aware of himself as an object, knowable, having a determinate character." Benn, supra, at 7. Thus, the person who is observed is "fixed as something—with limited probabilities rather than infinite, indeterminate possibilities." Id.
570. Ray, supra note 496, at 746. Professor Lu-in Wang has also written about the impact that hateful speech has on self-worth. She speaks specifically about the diminution of self-worth that is suffered by those who are victims of violent crime. See Wang, supra note 309, at 101-04.
571. Ray, supra note 496, at 746.
572. Id. Ray also argues that self-determination is not a new concept in the law, noting its implicit recognition in First and Fourteenth Amendment jurisprudence. Id. at 747-48 (citing Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Georgia, 394 U.S. 557 (1969); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965)).
573. Braun v. Flynn, 726 F.2d 245, 248 (5th Cir. 1984). She described how she learned that her picture was in the magazine when a stranger in a convenience store recognized her from the photo and pointed it out to her. She said,
The court characterized her injury as "primarily, personal humiliation, embarrassment, pain and suffering."574

In *Globe Publishing*, the ninety-five-year-old plaintiff testified that she was mad, upset, embarrassed and humiliated by the article, and that she had been teased about being pregnant.575 The court observed that the outward manifestations of her depression and humiliation included "avoiding other people for a few days and a temporary loss of a certain blithe cheerfulness, apparently typical of her personality."576 The district court was considerably more outraged about the plaintiff's injury, which it described in graphic terms. It equated her "heretofore unsullied photograph" with "her very 'being"' and noted they were "literally buried in . . . muck, mire and slime spewed forth by defendant."577 The court analogized her injury to being dragged slowly through untreated sewage, writing

After that person had showered and a few weeks had passed, there would be little remaining visible evidence of the ordeal which the person had endured and the resulting damage incurred, but few would doubt that substantial damage had been inflicted by the one doing the dragging.

To use the words of the very judges who are frequently denying them a remedy—women who bring these claims are portrayed as

I stood there because I was really really terrified. I thought something is going to happen, my picture is not in this magazine. My legs were like jelly, I couldn't untrack. I was petrified. And he was thumbing through these pictures. I was raised in a private Catholic school and I had never seen anything like this. And I was terrified, I didn't know what he had in mind. I thought something horrible was going to happen to me. He flipped through that book and my picture was in that book. I didn't believe it. I stood there like a dummy.

*Id.* at 248.

574. *Id.* at 252. The description of Braun's injury is strikingly similar to the description of injury in a turn-of-the century case, *McFadden v. Morning Journal Ass'n*, although the publication there was seemingly much less offensive. 51 N.Y.S. 275 (App. Div. 1898), discussed *supra* at notes 167-175. In terms of other damages suffered, the *McFadden* plaintiff said the article had "caused her to cry, and had kept her from sleeping and eating and going into society, and made her feel as if she were of no account, and that that feeling had continued until trial." *Id.* at 279.


576. *Id.*


578. *Peoples Bank & Trust Co.*, 786 F. Supp. at 796. The court refused to reduce the plaintiff's award, finding that reasonable jurors could conclude that it is "'worth' a great deal to suddenly find your likeness buried in the slime of which this publication was made, directly in front of an article describing the relative tastiness of adult human flesh compared to that of children." *Id.*
Two CENTURIES OF TALK ABOUT CHASTITY

"wanton or debauched," debased, degraded, vulgar, and ridiculous. The publications in which they are featured are similarly described as "coarse and sex-centered," "devoted exclusively to sexual exploitation and to disparagement of women," and having "no redeeming features whatever." It is not surprising that such portrayals undermine the targeted woman's sense of self, causing her to withdraw from the public in response to a profound assault on her dignity, indeed often on her very humanity.


One case cited by Judge Wood in Geary v. Goldstein is the 1936 decision in Burton v. Crowell Publishing Co. I return to that decision here because the Burton court's handling of the issue of defamatory meaning in relation to ridiculous or imaginative speech, as well as in relation to truth, may enhance our understanding of the constitutional doctrines that evolved a number of years after Burton. The

580. See Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 443 (10th Cir. 1982) (noting that the story about the plaintiff "is a gross, unpleasant, crude, distorted attempt to ridicule the [plaintiff]").
581. Wood, 736 F.2d at 1089.
582. Braun v. Flynt, 726 F.2d 245, 254 (5th Cir. 1984).
583. Pring, 695 F.2d at 443.
584. Like the injury that I argue should be recognized in relation to the new chastity cases, the anti-pornography ordinance proposed by Catharine MacKinnon and Andrea Dworkin in the 1980s was built on conceptions of human dignity to argue for recognition of causes of action for those who had been injured by the production and distribution of pornographic materials. ANDREA DWORKIN & CATHARINE A. MACKINNON, Pornography and Civil Rights: A New Day for Women's Equality 41-52 (1988). One component of that ordinance would have provided a cause of action for defamation. The proposal provided, in relevant part, "It shall be sex discrimination to defame any person through the unauthorized use in pornography of their proper name, image or recognizable persona likeness." Id. at 51. The authors justified the need for this cause of action by explaining that some pornography "turns individual women into pornography against their will, sexualizes them." Specifically, they argued that pornographers "reduce specific women," especially those "in the public eye, to 'cunt.'" Id. None of the cities that passed the ordinance included this provision, but the ordinance, as passed by the City of Indianapolis, was struck down as unconstitutional. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986); see also Catharine A. MacKinnon, Pornography as Defamation and Discrimination, 71 B.U. L. Rev. 793, 796 (1991); CATHARINE A. MACKINNON, ONLY WORDS (1993) (arguing that pornography defames the women used in its making, and proposing a theory of group defamation).

Other feminists also have linked pornography to dignitary injuries. Professor Ruth Colker has linked pornography with privacy in her argument for tort liability based on sex-based invasion of privacy, including unauthorized sexual portrayals. See Colker, Pornography and Privacy, supra note 380.
586. 82 F.2d 154 (2d Cir. 1936).
court's approach to these issues also inspires workarounds to those doctrines, which have proven stumbling blocks for many plaintiffs in the new chastity cases.

The plaintiff in *Burton* was a well-known "gentleman steeple-chaser" who had contracted with Camel to endorse its cigarettes. He sued for defamation based on what might have been an ad parody, but was in fact a straight ad that embarrassed him by including a misleading photo. The offending Camel advertisement featured photographs of the plaintiff and text that quoted him as declaring that Camel cigarettes "restored" him after "a crowded business day." Additional copy read "Get a lift with a Camel." The basis of the complaint was a photograph that showed Burton carrying his saddle in a way that gave the illusion that part of the saddle he carried was his penis hanging down. "So regarded," the court wrote, "the photograph becomes grotesque, monstrous, and obscene; and the legends, which without undue violence can be made to match, reinforce the ribald interpretation. That is the libel.

Judge Learned Hand's opinion in *Burton* is an exercise in the finer points of a defamatory meaning analysis. At various junctures in his characteristically lyrical opinion, Judge Hand seems to contradict himself. He rejects out of hand the argument that the ad might be perceived literally to say

that the plaintiff was deformed, or that he had indecently exposed himself, or was making obscene jokes by means of the legends. Nobody could be fatuous enough to believe any of these things; everybody would at once see that it was the camera, and the camera alone, that had made the unfortunate mistake.

Hand goes on to emphasize that the picture clearly doesn't depict the plaintiff "as he is," and that the photo is "patently an optical illusion" that "carries its correction on its face as much as though it were a

587. *Id.* at 154.
588. *Id.*
589. *Id.*
590. *Id.*
591. *Id.* The court described the scene as the plaintiff "carrying his saddle in front of him with his right hand under the pommel and his left under the cantle; the line of the seat is about twelve inches below his waist. Over the pommel hangs a stirrup; over the seat at his middle a white girth falls loosely in such a way that it seems to be attached to the plaintiff and not to the saddle." *Id.*
592. *Id.*
593. *Id.* at 155.
verbal utterance which expressly declared that it was false. Hand observes that the "obvious mistake only added to the amusement.

Acknowledging the paradox, Hand continues, "notwithstanding all we have just said, it exposed the plaintiff to overwhelming ridicule" and was defamatory on that basis. "Literally, therefore the injury falls within the accepted rubric; it exposes the sufferer to 'ridicule' and 'contempt.'

Hand’s focus on the aggravation created by the obviousness of the error—its undisputedly evident literal falsity—presents a sharp

594. Id. While Hand speaks of something "patently" an optical illusion, contemporary cases speak of offending statements being patently or obviously parodies.

595. Id.

596. Id. By way of explanation of this proposition, the court noted "[t]he contrast between the drawn and serious face and the accompanying fantastic and lewd deformity," which made the plaintiff "a preposterously ridiculous spectacle." Id.

597. Id. (emphasis added). Judge Hand specifically rejected the defendant’s argument that a libel must go to the plaintiff’s "character" if "by 'character' is meant those moral qualities which the word ordinarily includes, the statement is certainly untrue," stating that many libels "do not affect the reputation of the victim in any such way." Id. Hand then cited a number of cases in which people have been found to be defamed, even though the offending statement did not go to their character. These include Totten v. Sun Printing & Publ’g Ass’n, 109 F. 289 (C.C.S.D.N.Y. 1901) (holding that calling a man insane was libelous); Southwick v. Stevens, 10 Johns. 443 (N.Y. 1813) (same); Stultz v. Cousins, 242 F. 794 (6th Cir. 1917) (noting that plaintiff has "negro blood when he professes to be white); Snyder v. New York Press Co., 121 N.Y.S. 944 (App. Div. 1910) (that a woman had been served process in a bathtub); Martin v. Press Publ’g Co., 87 N.Y.S. 859 (App. Div. 1904) (noting that the plaintiff was “too educated to earn his living”); Simpson v. Press Publ’g Co., 67 N.Y.S. 402 (1900) (noting that the plaintiff has an infectious, albeit not venereal, disease); Moffatt v. Cauldwell, 3 Hun. 26 (N.Y. 1874) (noting that the plaintiff is desperately poor); Villers v. Monfley, 2 Wils. 403 (1769) ("Old Villers, so strong of brimstone you smell, as if not long since you has got out of hell, But this damnable smell I no longer can bear, therefore I desire you would come no more here, You old stinking, old nasty, old itchy, old toad . . . .").

Still, Judge Hand cautioned, “A man must not be too thin-skinned or a self-important prig; but this advertisement was more than what only a morbid person would not laugh off; the mortification, however ill-deserved, was a very substantial grievance.” Burton, 82 F.2d at 155 (emphasis added).

One commentator has criticized Judge Hand for “concentrat[ing] on the effect on the victim” while not considering the nature of the defendant’s act or state of mind. Tiersma, supra note 292, at 308. Tiersma argues that ridicule often has little to do with the reputational interest of the victim. A victim’s feelings may be hurt if others laugh at him, but damage to reputation is frequently absent. Furthermore, any effect on reputation is generally transitory. A false imputation of criminal activity may be almost impossible to overcome, but a mocking poem or derisive picture will usually have no lasting impact on the esteem in which the community holds the reputable person. Id. at 308-09.

Interestingly, Hand noted that if the image had been “deliberately produced,” everyone would agree that the defendant was liable. Burton, 82 F.2d at 155. He argued that the outcome could be no different when it was inadvertent. Id. Clearly this would not be so under contemporary constitutional precedents. See supra Section IV.B.
contrast with the new chastity cases. In those contemporary cases, courts have found a reverse correlation between the degree of obviousness of the parody—the magnitude of the joke if you will—and the injury caused by it.598 The Dworkin court wrote, for example: "Ludicrous statements are much less insidious and debilitating than falsities that bear the ring of truth. We have little doubt that the outrageous and the outlandish will be recognized for what they are."599 Because these contemporary courts found that no reasonable viewer would fail to perceive the parody or joke, they have concluded that viewers would not take the statements literally.600 From this they have surmised that nothing factual has been asserted and, therefore, no reputational harm could result.601 Hand drew the contrary conclusion: a literal interpretation of the offending statement—the fact it was an optical illusion—would hold the plaintiff up to ridicule so great that it was "a very substantial grievance."602 He gave no credence to the argument that the obviousness of the optical illusion rendered it harmless to the plaintiff and saw that making a person the butt of a joke is, in fact, a statement about that person.603 While Hand realized everyone would know the photograph was not an accurate portrayal of Burton, he nevertheless understood that it disparaged the plaintiff, playing him for a fool.604

As in contemporary cases, Hand's analysis of whether the communication was actionable was linked to the statement's truth or falsity. Truth was no defense to the plaintiff's depiction in the photograph, not because the depiction was false (although it was, of course, false in the sense of being inaccurate), but because no one would perceive it

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598. For example, in Spence v. Flynt the court offered these contrasting examples based on the facts in Hustler Magazine v. Falwell. The court began by noting that the law of defamation is more likely to protect a publication the "more outrageous, vile, vulgar, humiliating and ridiculous" it is. Spence v. Flynt, 816 P.2d 771, 774 (Wyo. 1991). Therefore if Jerry Falwell had reportedly had sexual relations with a member of his congregation, that would be defamatory as reasonably believable. Id. However, an assertion that he had engaged in sex in an outhouse with his mother was not defamatory because it was not believable and "no matter what the ridicule, hurt and damage," it was merely "'imaginative expression'—'rhetorical hyperbole.'" Id.


600. Id.

601. Id.

602. Burton v. Crowell Publ'g Co., 82 F.2d 154, 155 (2d Cir. 1936).

603. Id. (noting that the caricature of the plaintiff "affects a man's reputation, if by that is meant his position in the minds of others; the association so established may be beyond repair; he may become known indefinitely as the absurd victim of this unhappy mishap").

604. Id.
as asserting literal truth.\textsuperscript{605} This was not the end of the analysis, however. Hand realized that the photograph nevertheless made a statement about the plaintiff.\textsuperscript{606} In a form that a contemporary court would label rhetorical hyperbole or imaginative expression, Hand looked for the message that the picture communicated.\textsuperscript{607} He found that the photograph effectively “said” that Burton was an absurd and ridiculous figure.\textsuperscript{608} This, Hand said, was not true.\textsuperscript{609} It was false and therefore the photograph as a statement was technically false.\textsuperscript{610} Because the statement was false and because it held the plaintiff up to a degree of ridicule that no one could be expected to endure, it was defamatory.\textsuperscript{611} Hand greatly privileged truth, but not as highly as he privileged reputation. He wrote,

\begin{quote}
[T]he common law has so much regard for truth that it excuses the utterance of anything that is true. But it is a non sequitur to argue that whenever truth is not a defense, there can be no libel; that would invert the proper approach to the whole subject. . . . The only reason why the law makes truth a defense is not because a libel must be false, but because the utterance of truth is in all circumstances an interest paramount to reputation. . . . When there is no such countervailing interest, there is no excuse; and that is the situation here.\textsuperscript{612}
\end{quote}

Not stating any verifiably true facts about the plaintiff, the photograph—as a statement—was not privileged.\textsuperscript{613} Hand’s approach to defamatory meaning provides a brilliant insight into what the portrayals in the new chastity cases “say.” He saw that interpreting a statement—even though it was patently fanciful or literally implausible—necessitated consideration of subtext.\textsuperscript{614} Further, the subtext or suggestion he discerned from the “optical illu-

\begin{itemize}
\item 605. Id. (stating that “[n]obody could be fatuous enough to believe” that the plaintiff was “deformed,” had “indecently exposed himself,” or was “making obscene jokes”).
\item 606. Id. The picture “exposed the plaintiff to overwhelming ridicule.” Id.
\item 607. Id. (noting that “the effect [of the picture] is the same whether it is deliberate or not”).
\item 608. Id.
\item 609. Id.
\item 610. Id.
\item 611. Id. at 156.
\item 612. Id. (emphasis added).
\item 613. Id.
\item 614. Id. (stating that “the picture taken with the legends . . . was . . . actionable . . .; the fact that it did not assume to state a fact or an opinion is irrelevant . . .”).
\end{itemize}
sion" photo was that Burton was a ridiculous figure, an idiot, a fool. 615 This, he said, was defamatory. 616

Many of the female plaintiffs in the new chastity cases are similarly played for the fool. They are portrayed as ridiculous, and sometimes pitiful, in relation to their sexuality. 617 Alternatively, the portrayals suggest that they are vulgar or sexually inappropriate in some way. 618 If courts were willing to seek the subtext of such communications and to interpret a sexually hateful portrayal as communicating one of those messages, they would then have to consider whether the statement was true or false. In Section V.C.4 below, I take up these issues of interpretation and falsity in relation to contemporary constitutional limits on defamation law.

C. A New Dignitary Tort for Technically False Speech that Ridicules or Demeans

Like the ridicule the photo communicated about the Burton plaintiff, the harm caused by highly offensive and sexually degrading portrayals of women in new chastity cases should receive legal redress. The most obvious vehicles for accomplishing this are false light invasion of privacy and defamation, even though the latter has consistently failed women in the constitutional era. 619 While the law of defamation is more universally recognized and has a much longer and more established pedigree, 620 several features of the false light tort make it a much tidier fit for responding to the injuries suffered by women in the new chastity cases. It also has the benefit of not suggesting blame-worthiness or immorality, which is implicit from an adjudication of defamatory meaning. 621 Rather, the focus of false light is on inaccuracy and the offensiveness of the statement. 622 In my conceptualization and definition of a new communicative tort, I draw on elements of both torts.

615. Id. at 155.
616. Id. at 156.
617. See supra Part III.C.3 (describing how female plaintiffs were portrayed in the new chastity cases).
618. See supra Part III.C.3.
621. Ray, supra note 496, at 735. "Because false light requires no damage to reputation, a plaintiff can be cast in a false light that reflects positively or even improves reputation." Id.
622. Id. at 734. False light "requires intentional or reckless disclosure to the public at large of statements or facts that are false and highly offensive." Id.
I propose a tort that would provide redress for statements that are (a) widely published, (b) highly offensive, (c) technically false, and (d) which cause either emotional distress or reputational harm. In addition, the law would require a public figure or public official to show that the defendant acted with knowledge or reckless disregard for the technical falsity of the statement, while requiring a private figure to show only that the defendant was negligent with respect to the statement's technical falsity. While sexually hateful portrayals of women have led to this proposal, the tort would be available to redress any communication that fulfills the elements, whatever the gender, race or other characteristics of the plaintiff.

Only the third element, "technical falsity," requires further explanation and definition. That discussion follows below in Section D. While each of the other elements is familiar based on its inclusion as an element in an existing tort, I will explain why each should also be included in the proposed new tort.

1. Widespread Publication.—False light invasion of privacy requires widespread publication, in contrast to defamation law's re-

623. A few men have brought cases based on sexually misleading portrayals. See Solano v. Playgirl, Inc., 292 F.3d 1078, 1082-84 (9th Cir. 2002) (noting that the actor’s photo on the cover of Playgirl, surrounded by lurid captions, created false impression that he appeared nude inside the magazine); Jackson v. Playboy Enters., 574 F. Supp. 10, 11, 14 (S.D. Ohio 1983). Three minor males sued on the basis of a photograph that showed a policewoman assisting them to repair a bicycle; the policewoman was featured in nude photos in same issue; the court granted defendant's motion to dismiss. Id. Hustler Magazine v. Falwell is, of course, the ultimate male-plaintiff case of the new chastity variety. The parody certainly ridiculed Falwell in a manner related to sex. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48 (1988). "The ad[ ] clearly played on the sexual double entendre of the general subject of 'first times'" and "suggests that respondent is a hypocrite who preaches only when he is drunk." Id.

624. This is consistent with R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), which requires regulation of hateful speech (which my proposal is in some form) to be content neutral. See supra note 309 and accompanying text. As I have already noted, the proposed tort is intended to regulate speech on the basis of its falsity rather than on the basis that it targets one group or another.

625. Restatement (Second) of Torts § 652E (1977). The cause of action requires "publicity" of information that places another before the public in a false light. The Restatement does not explain why this is required, only what it means:

that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

quirement that the offending statement be communicated to only one other person. Because the concern I have identified is with a dignitary injury associated with widespread embarrassment and humiliation, which may have an impact on one’s willingness to be in the public sphere, this “widely publicized” element is an appropriate requirement. The injury to be remedied, after all, is one arising from being made a public spectacle or held up to public ridicule in a sexually hateful manner. The injury is less about embarrassment among family and friends, although such embarrassment may necessarily be attendant to being held up to public ridicule. In addition, including this element will limit liability, preventing application when the offending statement has been perceived only by the plaintiff and a limited number of other persons.

Globe Newspaper Co., 217 N.E.2d 736, 740 (Mass. 1966) (noting that false light requires “acts which are sufficient in themselves to familiarize the public with either the name, likeness, or other means of identifying the plaintiff”); Weinstein v. Bullick, 827 F. Supp. 1193, 1202 (E.D. Pa. 1993) (requiring publicity element to also include showing that the statement be reasonably understood as referring to the plaintiff).

The tort of publication of private facts similarly requires widespread publication of the private information. RESTATEMENT (SECOND) OF TORTS § 652D (1977). The information must be “widely publicized” because an element of the tort requires that the general public be informed of a private fact; this involves publication at least to a group. SANFORD, supra note 26, § 11.3.8.

Few cases or commentators discuss the reason for including this requirement in the false light tort, but those that do generally link it to the goal of guarding that which is private. A statement that is communicated to only a few persons arguably remains private and is not truly made public. See Stewart v. Pantry, Inc., 715 F. Supp. 1361, 1369-70 (W.D. Ky. 1988) (stating that publicity in false light context requires “more than the mere act of firing plaintiffs under circumstances which may result in gossip” and requires a communication of the plaintiffs’ termination “to members of the public”), quoted in Hart v. Seven Resorts, Inc., 947 P.2d 846, 854 (Ariz. App. Div. 1997); Butler v. Town of Argo, 2003 WL 21489719 (Ala. June 30, 2003) (stating that it is not an invasion of privacy “to communicate a fact concerning the plaintiff’s private life to a single person or even to a small group of persons” because the distinction is one between private and public communication) (citing Rosen v. Montgomery Surgical Ctr., 825 So. 2d 735, 739 (Ala. 2001); Johnston v. Fuller, 706 So. 2d 700, 703 (Ala. 1997); Ex parte Birmingham News, Inc., 778 So. 2d 814, 818 (Ala. 2000)).

Professor Bloustein wrote of the widespread publicity requirement forty years ago that “the gravamen of the complaint here is [that] . . . in effect, the publicity constitutes a form of intrusion, it is as if 100,000 people were suddenly peering in, as through a window, on one’s private life . . . . The wrong is in replacing personal anonymity by notoriety, in turning a private life into a public spectacle . . . . [P]ublicity concerning those facets of private life represents an imposition upon and affront to the plaintiff’s human dignity.” Bloustein, Answer to Prosser, supra note 563, at 979.
2. Highly Offensive.—The "highly offensive" element is also borrowed from the false light tort. This requirement narrows the tort in order not to deter or punish too much speech. Speech that may be merely misleading and even moderately unflattering to the plaintiff, for example, would not give rise to liability. Rather, the goal is to compensate only for speech that clearly inflicts a dignitary injury by ridiculing and degrading which, with respect to a woman plaintiff, is usually on the basis of sex. The portrayals in Pring (performing fellatio on her coach on the Miss America stage), Dworkin ("militant lesbian feminist" and "shit-squeezing sphincter"), and Geary (parody of commercial suggesting that plaintiff consented to be portrayed in pornographic fashion), for example, would easily meet this requirement. The statements in Seelig (referring to the plaintiff as "skank," "chicken butt," and "local loser" in the context of a radio show that ridiculed her) and Walko (saying plaintiff could be reached on a "whoreline") would, at a minimum, create jury questions with respect to this element.

3. Causing Emotional Distress or Reputational Harm.—I have already described the dignitary harms caused by sexually degrading portrayals. Although my description focused on the emotional and dignitary harms that seem to be dominant in these cases, plaintiffs may also suffer reputational harm. More precisely, it is possible that the offending statement will have economic consequences for the plaintiff, whether or not on the basis of a traditional reputational injury. For example, the plaintiffs in Geary and Douglass focused less on the psychic injury they may have suffered and more on how the unauthorized and degrading publications undermined their acting ca-

628. Restatement (Second) of Torts §§ 652D, 652E (1977) (requiring the matter publicized to be "highly offensive to a reasonable person").


631. See supra Part V.A.2.

632. See supra note 164 (describing plaintiffs who suffered reputational harm).

633. See Geary, 831 F. Supp. at 270 (discussing how a sexually explicit spoof of the commercial starring the plaintiff caused the original commercial to be pulled from national television, ending the plaintiff's royalties); Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1132 (7th Cir. 1985) (describing how the plaintiff's commercial acting career was destroyed by the publication of her nude photographs in Hustler Magazine because "advertisers thought she had voluntarily appeared in . . . an extremely vulgar magazine").
Thus, the new tort must acknowledge the longer-recognized injury to reputation as an alternative to the emotional distress injury that new chastity plaintiffs typically suffer.

4. Actual Malice or Negligence with Respect to Technical Falsity.—The new tort would retain the constitutionally mandated requirement that a statement giving rise to liability is false. The concept of falsity would be enhanced, however, to include what I call "technical falsity," as further explained in Section D. That more sophisticated understanding of falsity would necessarily be incorporated into the actual malice requirement associated with public figures and public officials in the constitutional era of defamation law: knowledge of or reckless disregard of technical falsity. Courts would similarly incorporate it into the mental state requirement associated with private figures: the defendant's negligence with regard to the statement's technical falsity.

Defamation law draws this distinction between public and private persons, making it slightly easier for the latter to recover. Most states require false light plaintiffs to prove actual malice, although the Constitution only mandates it with respect to public persons. I opt for the dichotomy associated with defamation law, in part because it is likely to make redress more attainable for many of the plaintiffs in

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634. Id.; see also Ann-Margret v. High Soc'y Magazine, Inc., 498 F. Supp. 401 (S.D.N.Y. 1980) (noting that the plaintiff was embarrassed by reproduction of shot from one of her movies in which she appeared topless); Russell v. Marboro Books, 183 N.Y.S.2d 8 (Sup. Ct. Spec. Term 1959). In the latter case, Mary Jane Russell described the damage to her professional modeling career from being portrayed, without her consent, in a highly sexually suggestive ad.


636. See BEZANSON ET AL., supra note 17, at 200.

637. See id. at 200-01.

638. See id. at 201 (stating that the results of a study showed that private plaintiffs had a success rate of 17.5%, while public-figure plaintiffs' success rate was 10.2%).

639. See Stohl, supra note 496, at 270-71 (discussing the relationship between false light and the First Amendment).
these cases. I also choose it because the traditional justifications for a higher burden of proof do not seem appropriate for these plaintiffs.

The standard justification for imposing the actual malice standard with respect to public figures is that they have the power to have publicized their own message, which will correct the defamatory falsehood. Few women, particularly the plaintiffs in the cases I have discussed, have the power to command such media attention. For example, presumably the only public figure in any of these cases is Andrea Dworkin, based on her long-standing involvement in a campaign to regulate pornography. Further, because it is difficult to imagine any speech that will effectively counter the sort of demeaning message to which these plaintiffs have been subjected, this rationale for a higher burden of proof seems especially misplaced with respect to the new chastity cases. As a related matter, I would argue that no person should be seen as assuming the risk that she will be portrayed so contemptuously. If one has assumed such a risk, it should be only on the basis that she holds meaningful political power.

D. Keeping it Constitutional: Non-Literal Meaning and Technical Falsity

One critical key to the acceptance and success of this new hybrid tort is keeping it within the existing constitutional parameters for either or both defamation and invasion of privacy. The constitutionality of both of these torts hinges on the falsity of the speech, as reflected in Justice Powell's statement in Gertz that "there is no constitutional value in false statements of fact." The tort that I propose would therefore similarly require the offending statement to be false. I reconsider falsity and its relation to defamatory meaning, however, in a more sophisticated way than contemporary courts have. I coin the term "technical falsity" to refer to this concept.

640. Tribe, supra note 620, at 641.
641. In many of the cases I have discussed, courts never reached the question whether the plaintiff was a public or private figure. In both Dworkin and Walko, the courts specifically found that the plaintiffs were public figures. See Dworkin v. Hustler Magazine, Inc., 668 F. Supp. 1408, 1418 (C.D. Cal. 1987); Walko v. Kean Coll., 561 A.2d 680, 686 (N.J. Super. Ct. Law Div. 1988). The Sixth Circuit in Street v. National Broadcasting Co. held the plaintiff to be a public figure, but I do not consider Street a new chastity case because the defendant's assertion of the plaintiff's sexual misbehavior was straightforward. See Street v. Nat'l Broad Co., 645 F.2d 1227, 1232, 1236 (6th Cir. 1981).
I chose the term "technical falsity" for three reasons. First, my analysis shows that the message being communicated is technically or actually capable of being proven true or false. Second, technical falsity is a candid label because my tort relies on a technicality—falsity—for its situation within the constitutional jurisprudence on defamation and false light invasion of privacy. Because speech that is merely hateful receives greater First Amendment protection than does false speech, this technicality is the key to the constitutionality of the proposed tort. This, in turn, is related to the final reason for the term. In my analysis, falsity is a technicality because the injury for which redress is sought does not stem from the statement’s falsity. It stems instead from the dignitary injury inflicted by the communication’s misogynistic message, which ridicules and demeans. The communication’s falsity is merely the hook that justifies a lower level of First Amendment protection.

As demonstrated by the cases discussed above, courts very often do not reach the issue of falsity in contemporary chastity cases based on sexually degrading portrayals. This is because of the indelible link between the fact-opinion and truth-falsity inquiries. In particular, whether a statement is protected “opinion” or unprotected false “fact” was long determined according to whether a party could prove that the fact was true or false. Before Milkovich, courts in these cases frequently determined that a statement was vague, opinion, or for some other reason not capable of being proven true or false. After Milkovich, the questions have become whether the court can reasonably interpret the statement as stating actual facts (per Falwell) or whether it contains a provably false factual assertion (per Hepps). This first test is the one that generally looms largest in analysis of the new chastity cases. It essentially asks whether the statement will be perceived literally. Whichever question is asked, courts protect the hyperbolic and imaginative speech, thereby preempting consideration of whether the statement is true or false.

644. See supra Part III.B.2; see also supra note 302 and accompanying text.
645. See Anderson, supra note 252, at 507 (discussing the fact-opinion dichotomy).
646. See, e.g., Baker v. L.A. Herald Exam’r, 721 P.2d 87, 89 (Cal. 1986) (holding that a statement was opinion and therefore not libelous).
The problem is not so much that courts are asking the wrong questions but that they are answering them superficially. In asking each of these questions—(1) whether the statement can “reasonably be interpreted as stating actual facts about the individual,”649 (2) whether the statement contains a provably false factual assertion, and (3) if so, whether that assertion is true or false—courts should engage in a more sophisticated interpretive analysis. Specifically, they must consider the meaning conveyed by the hyperbolic and imaginative speech and, in turn, determine the truth or falsity of that message. Here, I discuss these Falwell-based and Hepps-based aspects of Milkovich’s protection of the sort of speech that is often at issue in the new chastity cases.

1. Milkovich, Falwell, and the Misunderstanding about Rhetorical Hyperbole.—While courts have not inquired into the subtext of the statements that give rise to the new chastity cases—a prerequisite to the technical falsity inquiry—they could do so without violence to the First Amendment and while remaining consistent with the holdings of both Milkovich and Falwell. Again, Falwell dictated the protection of speech that cannot reasonably be interpreted as stating facts about the plaintiff.650 Milkovich embraced this test and established a dichotomy between statements that will be perceived literally and those that will not.651 Those statements that will not be taken literally are protected by the First Amendment because they are viewed as not asserting facts.652 Courts, both before and after Milkovich, have presumed that statements employing rhetoric hyperbole or imaginative expression are protected because they are seen as the quintessential statements “that cannot ‘reasonably be interpreted as stating actual facts’ about the individual.”653 Such unthinking protection of speech that takes this form, however, has obscured the message that is conveyed by the hyperbolic or imaginative language.

Professor Robert Post has challenged the taxonomy that always designates rhetorical hyperbole as a form of protected speech.654 While Post advanced this argument prior to the decision in Milkovich, the Milkovich Court did nothing to undermine his argument, as it essentially re-named what had been protected as “opinion” and affirmed

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650. Falwell, 485 U.S. at 56.
652. Id.
653. Id.
654. Post, supra note 252, at 650-52.
the value of rhetorical hyperbole and imaginative expression.\textsuperscript{655} "Strictly speaking," Post argues, rhetorical hyperbole "has nothing to do with the distinction between fact and opinion."\textsuperscript{656}

Post explains how the Supreme Court has been perceived to have made rhetorical hyperbole synonymous with constitutionally privileged opinion.\textsuperscript{657} Specifically, Post asserts that the Supreme Court, in a case decided the same day as \textit{Gertz}, \textit{Old Dominion Branch No. 496, National Letter Carriers v. Austin},\textsuperscript{658} left a legacy of misunderstanding by implying that rhetorical hyperbole was synonymous with protected opinion.\textsuperscript{659} The case, which arose from a labor dispute in which the union had identified three plaintiffs as "scabs," misled by contrasting "representations of fact" with that which was "merely rhetorical hyperbole."\textsuperscript{660} Post characterizes the Court as going "out of its way" to cite \textit{Gertz} and \textit{Bresler} in a decision that actually turned on federal labor law rather than on First Amendment principles, thereby implying that rhetorical hyperbole was tantamount to opinion.\textsuperscript{661}

Having explained the misunderstanding created by \textit{Letter Carriers}, Post argues that the inquiry should be whether the "actual meaning made visible by the concept of rhetorical hyperbole is fact or opinion."\textsuperscript{662} In other words, instead of concluding that rhetorical hyperbole is protected because it is opinion, the meaning conveyed by the rhetorical hyperbole should be discerned and a determination made regarding whether that meaning constitutes fact or opinion. Post, then, would presumably forego \textit{Milkovich}'s test of whether a statement can "reasonably [be] interpreted as stating actual facts"\textsuperscript{663} because it implies that only literal interpretations matter and therefore, if a statement will not be read literally, it cannot give rise to liability for defamation. For Post, it does not follow that if a literal reading reveals a statement to be imaginative expression or hyperbole, the statement is necessarily protected on that basis.\textsuperscript{664} His analysis would include addi-

\textsuperscript{655} See \textit{Milkovich}, 497 U.S. at 20.
\textsuperscript{656} Post, \textit{supra} note 252, at 650.
\textsuperscript{658} 418 U.S. 264 (1974).
\textsuperscript{659} \textit{Post}, \textit{supra} note 252, at 651-52.
\textsuperscript{660} \textit{Id.} (discussing \textit{Nat'l Ass'n of Letter Carriers}, 418 U.S. at 268).
\textsuperscript{661} \textit{Id.} at 652.
\textsuperscript{662} \textit{Id.}
\textsuperscript{664} See \textit{id.}. 
tional steps, specifically determining what message is conveyed and whether that message gives rise to liability for defamation. 665

Post illustrates his point by reference to the ad parody that gave rise to the litigation in *Hustler Magazine, Inc. v. Falwell.* 666 The item purported to quote Falwell as describing his first sexual encounter, with his mother in an outhouse. 667 Post observes that the *Falwell* Court’s analysis of the matter only created confusion by simply labeling the offending publication rhetorical hyperbole and, on that basis, protected. 668 Post notes that Larry Flynt, *Hustler*’s publisher, explicitly stated what he intended the parody to mean: “that Falwell’s message is ‘b.s.’ . . . that this formidable public figure’s teachings are nonsense.” 669 Assuming that was a reasonable interpretation, Post asserts that the next question should have been whether that message was opinion or fact. 670

Although Post’s argument relies primarily on *Letter Carriers,* his conclusion that rhetorical hyperbole is not synonymous with protected fact is also supported by a close reading of *Greenbelt Cooperative Publishing Ass'n v. Bresler,* 671 which *Letter Carriers* cited. 672 More even than *Letter Carriers,* courts have long relied on *Greenbelt Publishing* for the proposition that rhetorical hyperbole is not actionable in defamation. 673 The offending statement in *Greenbelt Publishing* characterized the plaintiff businessman’s negotiating position regarding a city zoning matter as “blackmail,” 674 and the plaintiff argued that it thereby communicated that he had been accused of the crime of blackmail. 675 The Court rejected that argument, explaining that the statement was not actionable because:

> It is simply impossible to believe that a reader who reached the word ‘blackmail’ . . . would not have understood exactly

665. For application and explanation of Post’s extended analysis, see infra notes 666-670 and accompanying text.


669. *Id.* (citing Reply Brief of Petitioner at 20, *Falwell* (No. 86-1278)). Laurence Tribe had described the magazine as “a mix of eroticism, violence, and misogyny.” *Tribe,* *supra* note 620, at 668.

670. Post, *supra* note 252, at 652. Post concludes that it was protected opinion because it was making a judgment about Falwell’s teachings. *Id.* at 652-53.


674. *Greenbelt Cooper. Publ’g Ass’n,* 398 U.S. at 13-14.

675. *Id.* at 13.
what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense.\footnote{Id. at 14.}

Significantly, the Supreme Court in \textit{Milkovich} read \textit{Greenbelt} similarly, looking beyond the literal meaning of "blackmail."\footnote{\textit{Milkovich}, 497 U.S. at 16-17.} Given its subtext, which suggested an unreasonable bargaining position, the Court held that it did not carry defamatory meaning.\footnote{Id. at 17.} The \textit{Milkovich} Court wrote of \textit{Greenbelt}:

Noting that the published reports "were accurate and full," the \textit{[Greenbelt]} Court reasoned that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable."\footnote{Id. (quoting \textit{Greenbelt Coop. Publ'g Ass'n}, 398 U.S. at 13-14).} As this passage illustrates, reading \textit{Greenbelt} for the broad proposition that hyperbolic and imaginative speech cannot be actionable in defamation fundamentally misunderstands the case. Rather, \textit{Greenbelt} provided protection for the word "blackmail" because the meaning it conveyed—its subtext if you will—regarding a tough negotiating stance, did not necessarily carry defamatory meaning and, indeed, appeared to be true.\footnote{\textit{Greenbelt Coop. Publ'g Ass'n}, 398 U.S. at 14.}

Contrary to \textit{Greenbelt}'s implication and Post's argument, most courts give hyperbolic statements a literal reading and conclude on that basis that no reasonable person would believe that the statement is intended to be read literally.\footnote{See, e.g., \textit{Hustler Magazine, Inc. v. Falwell}, 485 U.S. 46, 57 (1988) (finding that the ad parody "could not reasonably be understood as describing actual facts" about Falwell).} In so holding, courts fail to consider what meaning \textit{is} being perceived by those reasonable persons. Thus, while courts appear to speak in terms of literal readings or interpretations by considering only the literal, they are in fact engaging in superficial interpretations. As Post argues, they should be considering the substance conveyed—the subtext—of the hyperbolic and imaginative speech.\footnote{Post, \textit{supra} note 252, at 652-57.}
In *Pring*, for example, Kimerli Pring argued for a literal reading that she could prove false: that she had not, in fact, performed the acts of fellatio suggested. The court was dismissive of her argument, however, concluding that the story could not be perceived as describing actual facts or events. In essence, the court concluded that no one would take it literally. On that basis, it was not actionable, and her ability to prove its literal falsity was irrelevant. Having concluded that the offending publication would not be read literally, however, the court failed to consider how it might be read, including the meaning a reasonable reader might perceive. Thus, the court never reached the argument made by Pring's expert, that the Penthouse story's "subliminal meaning" was that she was a woman with questionable sexual morals. The court also never considered the possibility that it conveyed a different message—that Pring was a fool, a person to be ridiculed.

Courts make the same error in the post-*Milkovich* world. The court in *Seelig*, for example, like that in *Pring*, insisted on a literal reading of the offending communication. That literal reading was superficial, however, and led to a superficial analysis of defamatory meaning. Read literally the statement included only one statement of fact that was "provably false"—that the plaintiff was a "local loser"—and that allegation was not necessarily defamatory. As for the other problematic elements of the broadcast, the court held them not actionable because the plaintiff could not literally be the butt of a chicken and because "skank" was vague and had no ascertain-
There were several problems with this analysis. First the court was wrong to consider only the literal meaning of “chicken butt.” In combination with the other statements, it carried meaning, if only meaning as simple and base as that conveyed by the photograph in Burton: that the plaintiff was a fool, an idiot worthy of ridicule. Second, the court was wrong about “skank” having no ascertainable meaning. Recall that the dictionary defines skank as “a prostitute or a dirty, repulsive, or immoral person.” If spoken in isolation it might be considered a verbal slap or epithet. Collectively with the other remarks, however, skank was no more vague than the Milkovich Court’s example of a provably false statement—calling someone a liar. Skank clearly suggested sexual scandal, and it arguably “impl[ied] a provably false factual assertion.” In its conclusion, the court failed to look beyond the literal assertions to the readily perceived nuance of the entire broadcast segment.

In their literal readings of statements—readings characterized by a sort of tunnel vision that parody, hyperbole, and imaginative expression carry no subtextual meaning—contemporary courts deviate from the practice of their predecessors, who were quick to consider a statement’s innuendo. These late twentieth-century judges’ interpretive practices stand in particularly sharp contrast with those of judges at the turn of the century. Recall, for example, judges considering the offerings of the period of yellow journalism. These judges took as clear inputations of unchastity suggestions of “unladylike” behavior such as rowing a boat until one’s palms were pink, or appearance on a Coney Island stage. Even further back, early and mid-nineteenth-century judges rarely hesitated to interpret less-than-straightforward imputations of unchastity for what they were. Recall the earlier cases that found defamatory meaning in statements calling a woman

692. *Id.* at 117-18.
693. *Id.* at 119.
694. The entry indicates that the term originated between 1980-85 in America. RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 1229 (2001).
696. See supra notes 107-125 and accompanying text (exploring turn-of-the-century courts’ willingness to consider a statement’s perceived innuendo).
697. For specific examples of judicial language and discussion of cases, see *supra* notes 174-189 and accompanying text.
698. See *supra* notes 117-125 and accompanying text (providing examples of cases from this period).
"low" or "bad" or saying she had gone into the woods under suspicious circumstances.699

These judges interpreted the statements consistent with the social expectations of their respective times. At the turn of the twentieth century, courts were also responding to the realities of salacious media coverage. I am admittedly uncomfortable with many of these courts' motives in seeking defamatory meaning because I believe they sought to keep women on their proverbial pedestals. I am also uncomfortable with the long-term consequences of the law's assessment of what constitutes sexual propriety and with its reinforcement of the significance of women's sexual virtue. I nevertheless acknowledge that these earlier courts were at least realistic about the power of a statement that impugned chastity to undermine a woman's standing in her community.

Contemporary courts, in sharp contrast, often appear oblivious to current realities regarding sex and meaning.700 Rare is the woman at the turn of the twenty-first century who suffers serious reputational injury by virtue of a statement accusing her of adultery, yet the law provides redress when such a statement is provably false.701 The communications with real power to injure a woman now rely on a vulgar and vituperative wit that degrades. Too clever for mundane assertions about adultery or venereal disease, these statements instead demean in relation to sex. Yet, with interpretive blinders on, courts consider only the literal meaning of statements that clearly are not intended to be read literally.702 They typically fail to look beyond facial meaning to subtext, to a determination of what the offending statement is saying.

A few judges, of course, have deviated from this trend and applied more realistic interpretations to the offending statements that have given rise to these cases. The approach of Judge Breitenstein, dissenting in Pring, along with the district and appellate judges who decided Globe Publishing, stand out.703 Considering the communications in those cases, both of which were admittedly parodic and fanciful, the judges focused nevertheless on specific elements of the

699. See supra note 116 and accompanying text (discussing cases where less straightforward language was still found to be defamatory).
700. See supra Part III(c)(3) (discussing new chastity cases).
701. See supra note 332 and accompanying text (discussing successful actions for statements alleging adultery).
702. See supra notes 497-499 and accompanying text (examining courts' consideration of literal meaning instead of subtext or innuendo).
703. See Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982); Peoples Bank & Trust Co. v. Globe Int'l Publ'g, Inc., 978 F.2d 1065 (8th Cir. 1992).
respective statements that were real. In this sense, they sought out the literal from amidst the fanciful as a basis for their ultimate conclusions that the statements asserted facts about the respective plaintiffs. Judge Breitenstein distinguished between details of the levitation, dreams, and public performance, which were fiction, and fellatio, which is not. Writing that it “is a physical act, a fact, not a mental idea,” and that it was “not used as hyperbole or epithet,” he also observed that fellatio has long been considered sexually deviant. On this basis, he concluded that Pring was defamed.

Similarly, in Globe Publishing, the Eighth Circuit judges focused on the reality of pregnancy, embracing literality with respect to at least part of the offending story. Calling pregnancy “a physical condition, not an opinion, metaphor, fantasy, or surrealism,” the court refused to say as a matter of law that readers could not reasonably have believed the story as portraying actual facts. The court specifically found the “circumstances in which the statements were made, the medium by which they were published, and the audience for which they were intended” relevant to this determination, suggesting that consumers of tabloid magazines may not be the most discerning people. On the other hand, the court acknowledged the nuances, noting that the implication of sexual impropriety, as well as some of

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704. Pring, 695 F.2d at 444 (Breitenstein, J., dissenting); Peoples Bank & Trust Co., 978 F.2d at 1069.
705. Pring, 695 F.2d at 444 (Breitenstein, J., dissenting); Peoples Bank & Trust Co., 978 F.2d at 1069.
706. Pring, 695 F.2d at 443-44 (Breitenstein, J., dissenting).
707. Id. He went on to say that Responsibility for an irresponsible and reckless statement of fact, fellatio, may not be avoided by the gratuitous addition of fantasy. Penthouse does not claim that the fact statement was truthful. Moral standards may have changed since the First Amendment was adopted but that change has not gone so far as to protect a publisher which defames [a person] by relating commission of an act of sexual deviation and perversion.

Id. at 444. Breitenstein also pointed out that “nothing in Greenbelt or National Association of Letter Carriers applies a 'reasonably understood' test to defamation actions generally.” Id.
708. Id.
709. Id.
711. Id.
712. Id.
713. Id. (citing Dworkin v. Hustler Magazine, Inc., 668 F. Supp. 1408, 1416 (C.D. Cal. 1987)).
the express assertions (the report that the plaintiff was leaving her long-time paper delivery), were reasonably believable.\textsuperscript{714}

These judges’ approach leads to a result more consistent with that of Judge Hand in \textit{Burton v. Crowell Publishing Co.} in that all would provide redress for statements that ridicule—even if they are, in some sense, so outrageous and unbelievable as to “carry [their] corrections on [their] face.”\textsuperscript{715} Judge Hand’s approach, however, differed from that of these other judges; he acknowledged the absurdity of taking such statements literally and nevertheless recognized the harm done.\textsuperscript{716} Contemporary judges, on the other hand, stretch to identify elements of a statement that might possibly be reasonably believed.\textsuperscript{717} They then hinge the defamatory or highly offensive meaning on the technical falsity of that assertion.\textsuperscript{718} For example, Kimerli Pring did not perform fellatio on her coach, and Nellie Mitchell, at 95, was not pregnant.\textsuperscript{719} Judge Hand was less circuitous, more candid, about the harms wrought by such statements.\textsuperscript{720}

Judge Hand’s approach also differs from that of modern judges because Hand’s analysis relied on a dichotomy different to Milkovich’s legacy of fact versus non-fact. Hand advocated privileging only statements that are verifiably true.\textsuperscript{721} Accordingly, statements that are verifiably false—or what I call technically false—are not privileged. Hand’s dichotomy makes sense in the context of the new chastity cases because it would permit a woman who has been sexually ridiculed to prove that she is not whatever the statement effectively represents her to be.\textsuperscript{722} This means the \textit{Seelig} plaintiff should have had an opportunity to prove the falsity of what the broadcast really “said”: that she was sexually promiscuous or inappropriate. It would ensure that Kimerli Pring could have chosen to prove not only that she had not performed fellatio on either her baton twirling coach or a football

\textsuperscript{714} \textit{Id.} The district court had similarly focused on the part of the article that went to Mitchell’s sexual propriety. There, Judge Waters wrote that even if some facts contained in the article could not reasonably be believed, “the implication of sexual promiscuity” could. Peoples Bank \& Trust Co. v. Globe Int’l, Inc., 786 F. Supp. 791, 798 (W.D. Ark. 1992).

\textsuperscript{715} Burton v. Cromwell Publ’g Co., 82 F.2d 154, 155 (2d Cir. 1936).

\textsuperscript{716} See \textit{id.} at 155.

\textsuperscript{717} See \textit{Pring v. Penthouse Int’l, Ltd.}, 695 F.2d 438, 443 (10th Cir. 1982) (holding that the story could not describe “actual facts” because the “setting was impossible”).

\textsuperscript{718} See \textit{id.}

\textsuperscript{719} \textit{Id.} at 441-43; \textit{Burton}, 82 F.2d at 155.

\textsuperscript{720} See \textit{Burton}, 82 F.2d at 155 (noting that “such a caricature affects a man’s reputation . . . he may become known indefinitely as the absurd victim of this unhappy mishap”).

\textsuperscript{721} \textit{Id.} at 156.

\textsuperscript{722} See \textit{id.} (noting that the “plaintiff has been substantially enough ridiculed to be in a position to complain”).
player—the literal assertions of the story—but also that she was not the sexually promiscuous woman that the *Penthouse* article suggested. Alternatively, if a court found a hyperbolic statement conveyed the meaning that the plaintiff was a foolish, ridiculous person, the plaintiff would have had an opportunity to prove the inaccuracy of that portrayal.

Hand's opinion in *Burton* also offers insight regarding the damage done by speech that ridicules, even when its facial or superficial message will not be taken literally by those perceiving it. As Hand noted regarding the embarrassing photo of the plaintiff in *Burton*, it "carries its correction on its face." He thus understood, just as contemporary courts do in analogous cases, that viewers of the ad would not literally believe that the plaintiff is grotesquely endowed. Unlike contemporary courts, he was frank about the fact that the harm does not arise from a literal interpretation, but rather from a portrayal that makes the plaintiff the object of ridicule, the butt of a joke that is publicly displayed and consumed.

In analogous contemporary cases, courts are halfway to this solution. They realize that the parody "carries its correction on its face" in the sense that its literal meaning will not be taken seriously. For example, the *Pring* court realized that readers would not believe that Miss Wyoming could cause a man to levitate by performing oral sex on him. The court also realized that no one would believe that Miss Wyoming had actually performed fellatio on a man at the edge of the stage as the contest proceeded a few yards away. What courts like *Pring* have not acknowledged is that offending publication still conveys meaning; indeed, it often conveys multiple messages. One of the messages conveyed by the *Penthouse* story was that Pring was sexually improper. Another was that she was a fool, a ridiculous figure. Yet the court never acknowledged these alternate interpretations of the messages conveyed, nor did it take up their truth or falsity.
2. Milkovich, Hepps, and Proving Truth.—Any agreement that it is appropriate to consider subtext, innuendo, and non-literal meaning by no means renders Milkovich meaningless. Recall that Milkovich also endorsed Hepps' protection of speech on matters of public concern that cannot be proven false. Thus, even if a statement clears the Falwell hurdle (a reasonable person would believe it), it must also clear the Hepps hurdle in order to be actionable. This Hepps limitation applies, however, only in cases that involve both media defendants and speech about matters of public concern. Although most of the new chastity cases involve media defendants, they rarely regard statements about matters of public concern. Indeed, they regard quintessentially private matters, an individual's sexuality. Hepps would, therefore, have no relevance to most of the new chastity cases, meaning the objectionable statement's characterization as fact or non-fact would likely be irrelevant for purposes of a constitutional analysis.

In the event that a statement ridiculing a woman on the basis of sexuality were deemed to be a matter of public concern, the Hepps-based part of Milkovich would be relevant. Speech protected by Hepps is what commentators have closely associated with the opinion side of what was once the fact-opinion dichotomy, now essentially the divide between unprotected false facts and protected non-fact. In the new chastity cases, the question thus becomes whether the subtext or implication that the plaintiff is sexually improper (or a fool deserving of ridicule, depending on the interpretation) is fact or non-fact.

First, the Milkovich Court made clear that cloaking a statement in opinion language did not make it opinion. The Court then offered some guidelines in this regard, illustrating an actionable "fact" by reference to a general assertion, one of dishonesty.

Unlike the statement "In my opinion Mayor Jones is a liar," the statement, "In my opinion, Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and

732. Id.
733. Id.
734. Instead of the constitutional analysis, the common law fair comment privilege might be invoked. See supra notes 253-256 and accompanying text.
735. This is at least conceivable in a case such as Dworkin because of the plaintiff's involvement in the anti-pornography campaign.
736. See supra notes 271-274 and accompanying text (discussing the almost unassailable conclusion that opinions are protected speech).
737. Milkovich, 497 U.S. at 18.
738. Id. at 19-29.
Lenin," would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection. 739

*Milkovich*, therefore, suggests that the more general statement—that "Mayor Jones is a liar"—would be actionable because it contains a provably false factual connotation. The more detailed statement, somewhat paradoxically, is not actionable even though it suggests reliance on facts as the basis for the opinion expressed. A statement generally imputing sexual impropriety—or one imputing foolishness or idiocy, an alternate interpretation of many of the statements in the new chastity cases—is more akin to the former of *Milkovich*’s illustrations and therefore would probably be considered actionable fact. As a statement with a "provably false factual connotation," the statement would then become subject to an inquiry into its truth or falsity. 740

The conclusion that a statement imputing to a woman general sexual impropriety is factual thus leads to an uncomfortable inquiry: Is she, in fact, "unchaste"? The technical falsity solution, therefore,

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739. *Id.* (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)). Other contemporary cases suggest that calling someone a liar constitutes a defamatory statement. See, e.g., Dwyer v. Smith, 867 F.2d 184, 195 (4th Cir. 1989) (holding that a statement that a female police officer was a "liar" did not constitute defamation only because there was no publication).

740. The *Hepps* conclusion that calling the mayor a liar carries a "provably false factual connotation" raises as many questions as it answers. What evidence, as a practical matter, would be necessary to establish the falsity of the statement? Would proof that the mayor had ever, in his entire life, lied about anything make the statement true? Or would proof of a falsehood related to the role as mayor be required? Would the recency of the mayor's last lie matter? The *Milkovich* court gives no guidelines regarding what would constitute sufficient proof, yet the same questions would arise in the new chastity cases. For example, if the subtext of a hyperbolic statement is that the plaintiff is sexually promiscuous, how would the truth or falsity of the statement be established? If the plaintiff bore the burden of proof of falsity, would she have to prove that she had never had sexual relations outside of wedlock? What would be required to establish one's sexual propriety?

*Milkovich* does not answer these questions, but implicit in finding that a statement accusing someone of being a "liar" or "slut" is actionable in defamation is the establishment of a dichotomy. One is either a liar or one is not. One is either a slut or one is not. This is problematic because reality is more nuanced than that dichotomy accommodates, particularly with regard to sexual practices. The logical conclusion of the *Milkovich* analysis, however, would reinforce a sort of Madonna-whore dichotomy, suggesting that women are either one or the other. This illustrates, once again, how inadequate defamation law is for purposes of redressing the sort of communicative injuries that many women suffer.

Bezanson, Cranberg, and Soloski, in their 1987 book, discuss the ambiguous role of falsity in contemporary libel litigation. They observe that reputation, whether deserved or not, tended to be protected at common law. *BEZANSON ET AL.*, supra note 17, at 191-93. This would seem to be a likely outcome if the truth or falsity of a general assertion of sexual impropriety were adjudicated, in particular if the burden of proof of truth rested with the defendant.
has the consequence of actually progressing the analysis to the question of the statement's truth or falsity. While I am uncomfortable with this consequence, it should allay any concerns about runaway litigation of a new dignitary tort. It would necessarily suppress frivolous litigation because women will not lightly choose to expose themselves to such disclosures.\textsuperscript{741} In addition, because \textit{Hepps} shifts the burden of proof with respect to falsity to the plaintiff only in cases involving media defendants speaking about matters of public concern, the Constitution does not mandate that other plaintiffs must bear the burden of proof regarding falsity.\textsuperscript{742} Because the statement at issue in a new chastity case rarely involves any matter of public concern, the defendant should still bear the burden of proving its falsity. Most plaintiffs would accordingly enjoy a presumption of sexual appropriateness.

VI. CONCLUSION

Some have argued that defamation law is obsolete at the turn of the twenty-first century.\textsuperscript{743} Constitutional protections, and those associated with the common law, are said to be so stringent that contemporary libel law is not a "general remedy with exceptions, but a general scheme of nonliability that permits a remedy only in exceptional cases."\textsuperscript{744} It has become merely a "residual remedy."\textsuperscript{745}

The hypothesized obsolescence of defamation law may be particularly poignant for women plaintiffs seeking redress for statements related to them as sexual beings. For many years, judges altered their approaches to defamatory meaning in response to the changing nature of statements regarding a woman's chastity, as well as to society's

\textsuperscript{741}. \textit{See supra} note 299 and accompanying text (discussing the plaintiff's strategic decision in \textit{Pring} to focus on the defamatory meaning of the acts in question to avoid questioning about her sexual history).

\textsuperscript{742}. \textit{See Milkovich}, 497 U.S. at 19-29 (endorsing the \textit{Hepps} holding).

\textsuperscript{743}. \textit{See, e.g., Logan, supra} note 34, at 519 (noting that the volume of libel litigation has fallen dramatically in the past twenty years, especially when compared to other types of tort litigation). Professor Robert Sack has written, in this vein:

The few plaintiffs who succeed resemble the remnants of an army platoon caught in an enemy crossfire. Their awards stand witness to their good luck, not to their virtue, their skill or the justice of their cause. It is difficult to perceive the law of defamation, in this light, as a real "system" for protection of reputation at all.

\textsuperscript{744}. \textit{Bezanson et al., supra} note 17, at 199 (quoting Robert Sack, \textit{Libel, Slander and Related Problems} (1980)). \textit{But see Smolla, Suing the Press, supra} note 36, at ch. 1; Smolla, \textit{Let the Author Beware, supra} note 36 (discussing, respectively, the proverbial "thinning American skin" and the proliferation of litigation against the press).

\textsuperscript{745}. \textit{Id.} Professor David Anderson, a long-time scholar of libel law, has gone as far as to say that "a world in which reputation is not a legally protected interest is no longer inconceivable." \textit{Id.} at 551.
expectations of women. For example, during the era of yellow journalism, courts were so attuned to society's resistance to women's increasing freedoms that they reinforced that resistance. They did so, for example, by inferring assertions of sexual impropriety even from depictions of women in public places, engaging in pursuits therefore strictly male, e.g., working as a journalist (Ervin) or the "muscular" pursuit of rowing a boat in the park (McFadden). As I have already discussed, this phenomenon was not altogether a good thing for women.

Defamation law's adaptive capacity has been strained in recent decades. Contemporary courts show little unease at not providing a remedy to women who have been injured by what is arguably a present-day successor to sexual slander. Even when they do express angst over sexually demeaning portrayals, courts are now constrained by constitutional doctrines. As the cases demonstrate, these doctrines have made it especially difficult for women to prevail in the contemporary lawsuits I call the new chastity cases. On the other hand, among the suits women still win with considerable frequency are those in which they seek redress for straightforward assertions that they are unchaste. Between these two categories of cases are the epithet-based cases, in which courts have shown some sensitivity to the fact that hateful words and phrases containing sexual content are injurious. When courts have recognized the harms from these statements, however, they have done so on the basis that the epithets—most often taken in context with other assertions capable of being interpreted as regarding sexual behavior—undermine a woman's reputation for chastity.

This hierarchy of success among these three categories of chastity cases is somewhat ironic given the diminished power of the most suc-

746. Compare supra Part III (discussing the reaction of courts to the era of yellow journalism, often issuing verdicts for women in cases dealing with offensive statements or portrayals and idealizing the notion of chastity), with supra Part IV.C.3 (discussing the failure of women's suits in the new chastity cases).

747. See supra text accompanying notes 167-208 (discussing cases in which courts idealized the chastity of women during the era of yellow journalism).

748. See supra notes 196-208 and accompanying text (discussing the Ervin court's decision to uphold the jury finding that an article describing a female journalist's relationship with a prize fighter was defamatory).

749. See supra notes 167-175 and accompanying text (discussing the holding of McFadden, which found that an article describing a rowing race between two women was defamatory).

750. See supra Part IV.C.1 (discussing contemporary cases stemming from straightforward statements of unchastity).

751. See supra Part IV.C.2 (discussing the epithet-based cases).

752. See supra text accompanying note 377.
cessful of these types of statements to undermine a woman's reputation in contemporary society, and therefore to harm her. In sharp contrast, sexually hateful portrayals of women are highly injurious to the individual woman's dignity, identity, and sense of self. The trends reflected in the disposition of all three types of cases are disturbing because all relegate women, at least symbolically, to the private sphere. The new chastity cases do so by failing to provide redress for sexually hateful portrayals that associate women, involuntarily and crudely, with sex and the broader private sphere. The traditional chastity cases, along with the successful epithet cases that are interpreted as being of the traditional variety, do so with the normative authority of law by reviving and reinforcing society's attention to women's sexual nature, which also symbolically aligns women with the private and all it encompasses. As Professor Nancy Levit has observed, "[t]ort law is quintessentially normative." By recognizing a cause of action, the law says, effectively, "this matters." By denying recognition, it effectively denies the injury.

The analysis dictated by prevailing defamation doctrines obscures the very real dignitary injuries suffered by women who have been sexually ridiculed and demeaned. The harm the statements inflict is unacknowledged by our legal and social culture, both in terms of its complexity and its potency. Thus, as courts discuss concepts of fact, opinion, rhetorical hyperbole, epithet, truth, and falsity, they fail to

753. This is not to assert that such statements have no capacity to injury women socially. While an allegation of unchastity might have "undone" a woman as recently as a century ago, see Friedman, Name Robbers, supra note 23, at 1094-96, that is rarely so today. Nevertheless, some courts arguably over react to these statements about sexual behavior and, in so doing, signal that society does and should view such statements very seriously. One court wrote, regarding a statement that alleged both adultery and homosexuality:

[T]he "unchastity" category of slander per se has been generalized . . . to make actionable any false allegation of "serious sexual misconduct." We agree with this approach. Matters of sexuality and sexual conduct are intensely private, intensely sensitive, and a false public statement concerning them is particularly harmful.

Nazeri v. Mo. Valley Coll., 860 S.W.2d 303, 312 (Mo. 1993) (citation omitted). The court's conclusion suggested that, in fact, an allegation of adultery sets a standard of damage against which other types of arguably defamatory statements are measured: "In this society, an untruthful declaration concerning homosexual orientation must be considered as damaging to reputation as one concerning adulterous conduct." Id. at 312.

754. See Bowman, supra note 19, at 526 (arguing that street harassment conveys to women the message that they belong in the private sphere "by intruding upon a woman's privacy as she enters the public sphere").


756. See id. at 193 (noting that legal recognition of interests elevates the importance of the injury).

757. See id. at 174 (arguing that the diminishment of emotional injury makes the injury unreal).
give due to the harm caused, both in terms of its character and its magnitude. This injury is not solely—and sometimes not at all—a reputational injury, even though a traditional defamation concept (that the statement holds the subject up to ridicule or humiliation) is present. Rather, the abusive and degrading nature of the communication—not the factual or semi-factual assertion that the plaintiff has done something improper—is what inflicts the injury. That communication arguably has many consequences, not least for the woman targeted. As Professor Robin West has written, sexually degrading statements "teach[ ] girls that their sexuality implies their vulnerability. It is damaging to be pointed at, jeered at, and laughed at for one's sexuality."758 These communications also wound because they fundamentally undermine a woman's ability to construct her own identity; they undermine her autonomy. Finally, being protected from such hateful portrayals is arguably more critical to women than to some others because women generally enjoy little social power, including limited access to the media, in our patriarchal society.759

To be clear, prudery is not my motive for advocating recognition of and redress for the injuries caused by sexually degrading and demeaning statements, nor would it be a good reason for doing so. As I have already observed, reinforcing and playing to society's sensibilities about female sexual propriety is a way in which adjudication of traditional chastity cases has ultimately disserved women. Because adjudicating a woman's sexual respectability limits and undermines women collectively over the long run, it is one of the drawbacks to my proposal. My proposal to rely on a statement's technical falsity not only keeps us talking about women's sexual behavior and personhood, if courts interpret these statements as suggesting sexual impropriety, it also has courts litigating the truth or falsity of those suggestions.760


759. As Susan Moller Okin has written, women are "handicapped by being deprived of any authority in their speech. As one recent feminist analysis has diagnosed the problem, it is not 'that women have not learned how to be in authority,' but rather 'that authority is currently conceptualized so that female voices are excluded from it.'" MOLLER OKIN, supra note 15, at 132 (quoting Kathleen Jones, On Authority: Or, Why Women are Not Entitled to Speak, in AUTHORITY REVISITED (J. Roland Pennock & John W. Chapman eds., 1987)).

760. Of course, the ultimate interpretive coup in these cases would acknowledge that the statement is not about sexual propriety, but rather an assertion of the plaintiff's foolishness or idiocy. An inquiry into the truth or falsity of such a statement would be somewhat less sensitive.
There are, however, greater problems with the present legal regime. By concluding that these offending statements and portrayals do not really assert information about the plaintiff because they are imaginative, vague, or fanciful, or that a reasonable person would not take them literally, most courts fail altogether to discuss what the statements do, in fact, say and mean. This is a critical oversight because these communications do convey information about the individual women whose identities they use, ridicule and debase. If the offending statement is “just a joke,” the plaintiff is the butt of the joke. Even while courts use words such as coarse, degrading, vile, and vulgar to refer to the publications, and terms such as scornful, debasing, and derisive to refer to the message about the targeted woman, courts conclude that the statements are not actionable.\textsuperscript{761}

Although the constitutional basis articulated for the different outcomes among the chastity cases are comprehensible, they are not necessarily constitutionally mandated. As I have demonstrated, \textit{Falwell} mistakenly read \textit{Greenbelt Publishing} as protecting all rhetorical hyperbole as that which “cannot ‘reasonably be interpreted as stating actual facts’ about an individual.”\textsuperscript{762} \textit{Milkovich}, in turn, failed to correct this misunderstanding.\textsuperscript{763} As my analysis has demonstrated, however, it does not necessarily follow that a statement in the form of rhetorical hyperbole cannot be actionable in defamation law. The blanket protection for rhetorical hyperbole can be circumvented by a more sophisticated inquiry into defamatory meaning, which I have called technical falsity.\textsuperscript{764}

Having dealt with this \textit{Falwell}-based part of \textit{Milkovich}, the \textit{Hepps}-based protection remains. The \textit{Milkovich} Court endorsed \textit{Hepps}' protection of media speech about a public controversy when the statement is not provably false.\textsuperscript{765} As I have shown, however, most communications that give rise to the new chastity cases carry a provably false connotation.\textsuperscript{766} Further, speech about a woman’s sexual

\textsuperscript{761} See supra Part IV.C.3 (discussing courts’ findings in cases dealing with offensive statements and portrayals); see also Pring v. Penthouse Int’l, Inc., 695 F.2d 438, 443 (10th Cir. 1982) (classifying the offensive article as “a gross, unpleasant, crude, distorted attempt to ridicule” the plaintiff, but not finding for the plaintiff).


\textsuperscript{763} Milkovich, 497 U.S. at 20.

\textsuperscript{764} See supra Part V.C (discussing technical falsity in relation to a new dignitary tort for demeaning false speech).

\textsuperscript{765} See supra notes 268-269, 731-732 and accompanying text (discussing \textit{Milkovich}'s endorsement of \textit{Hepps}).

\textsuperscript{766} See supra Part IV.C.3 (discussing courts' failure to put the non-literal meaning of offending statements and portrayals at issue in the new chastity cases).
personhood rarely implicates a public controversy, also rendering irrelevant Hepps' shift in the burden of proof regarding truth or falsity.\textsuperscript{767}

The technical falsity of a statement provides a basis for limiting the First Amendment protection it receives, rendering constitutional my proposal for tort liability based on such speech.\textsuperscript{768} This concept of technical falsity could be the cornerstone of a new communicative tort for technically false speech that degrades or demeans. That tort would draw the most fitting elements from defamation and false light invasion of privacy to provide an option for legal redress in the new chastity cases.

Of course, hinging a plaintiff's tort victory—a defamation or false light victory for all practical purposes—on a technicality may be attacked as deceptive. This focus on technical falsity, after all—particularly under a defamation theory—makes it appear that the injury being redressed is primarily a reputational one that arises from the woman's portrayal as sexually unrespectable. In fact, reputational injury is not the primary concern. Further, granting redress for the dignitary injury inflicted should have nothing to do with assessing or commenting upon what is or is not sexually proper. Rather, it should hinge on recognition that being ridiculed, particularly in relation to sex, is demeaning and degrading and that a woman who is involuntarily so portrayed is injured. The nature of the injury is linked to the right to self-determination, identity, and dignity as reflected in the tort of invasion of privacy. That right should include redress for being portrayed in a highly offensive, derisive, and inauthentic way. Hinging liability on falsity is therefore misleading. It is, admittedly, a technicality.

Although granting legal relief based on a technicality may seem a disingenuous solution, tort law is no more a stranger to legal technicalities than it is to dignitary torts.\textsuperscript{769} Consider the example of offensive battery. Offensive battery, a dignitary tort, evolved from harmful battery based on the implicit recognition that offensive touchings, like

\textsuperscript{767} See supra Part IV.C.3 (discussing private nature of offending statements and portrayals in new chastity cases).

\textsuperscript{768} See supra Part V.D (discussing the importance of technical falsity in making the new tort constitutional).

\textsuperscript{769} The protection of human dignity is an important function of tort law. This may be accomplished, as Professor Smolla has written, by recognizing torts that deter "the violation of an individual's personal or psychological integrity."

Smolla, Let the Author Beware, supra note 36, at 19 (quoting Stanley Ingber, Defamation: A Conflict Between Reason and Decency, 65 Va. L. Rev. 785, 791 (1979)); see also supra Part V.A.2 (discussing the harm recognized by the tort of false light invasion of privacy).
harmful ones, are injurious in ways that should be legally cognizable.\textsuperscript{770} Cases such as \textit{Fisher v. Carousel Motor Hotel, Inc.},\textsuperscript{771} illustrate the law turning a metaphorical corner in its recognition that redress should be available not only for intentional contact that physically harms, but also for intentional contact that offends "a reasonable sense of personal dignity."\textsuperscript{772}

The \textit{Fisher} litigation arose from the racist action of a Texas restaurant manager in the 1960s.\textsuperscript{773} The manager "snatched" from an African-American patron, Fisher, the plate upon which he was about to be served lunch, shouting that Fisher could not be served at that establishment.\textsuperscript{774} Even though Fisher admitted that the manager never touched his body, but rather only his dinner plate, he testified that he was "highly embarrassed and hurt" by these actions, occurring as they did in the presence of his business associates.\textsuperscript{775} A jury found that the manager's actions and words subjected Fisher to "humiliation and indignity."\textsuperscript{776} In upholding the jury verdict, the court went on to note that it is well settled that "actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body."\textsuperscript{777} The court continued:

The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body . . . .

. . . Damages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm to the plaintiff's body. Personal indig-


\textsuperscript{771} 424 S.W.2d 627, 630 (Tex. 1967) (recognizing that harm can be caused by offensive touching and finding the defendant liable for such).

\textsuperscript{772} \textsc{Restatement (Second) of Torts} § 19 (1977). The comment elaborates:

In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.

\textit{Id.} at cmt. a.

\textsuperscript{773} 424 S.W.2d at 628-29.

\textsuperscript{774} \textit{Id.}

\textsuperscript{775} \textit{Id.} at 629.

\textsuperscript{776} \textit{Id.}

\textsuperscript{777} \textit{Id.}
nity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting. We hold, therefore, that plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury.\textsuperscript{778}

The tort that I propose is analogous to what the \textit{Fisher} court did in recognizing offensive battery on a technicality. \textit{Fisher} used the plate snatching as the physical contact required for a battery, in order that relief might be granted for what was entirely a dignitary injury. I argue that the technical falsity of the highly offensive statements in the new chastity cases can be the hook with which to hold the defendant liable for a dignitary injury. Relying on this technicality is a way of making the law work for individual women who have been injured by sexually hateful statements. It is a strategy for gaining recognition for their heretofore largely invisible injuries, even while relying on existing legal categories.\textsuperscript{779}

Also like the step taken in \textit{Fisher}, what I propose is only an incremental change in existing law. Yet it is a change that will provide an option to women who have suffered dignitary injuries as a consequence of sexually contemptuous depictions. As has proven the case with \textit{Fisher}, this solution might be viewed as a stop-gap remedy. Following \textit{Fisher} and similar cases, courts ultimately recognized the tort of intentional infliction of emotional distress, which has largely replaced offensive battery in providing a remedy for dignitary injuries in cases where the touching was only a technicality.\textsuperscript{780} Similarly, we can hope that a new constitutional window will ultimately open, thereby permitting courts to provide a remedy based on a more candid assessment of both what a sexually hateful statement says and the harms it does. Were this to happen, technical falsity would be rendered obsolete in the same way that the technicality of the contact largely has been.

Professor Cynthia Grant Bowman has observed that a recurring complaint of feminist legal scholars is the law's failure "to take seriously events that affect women's lives."\textsuperscript{781} The history of tort law is a

\textsuperscript{778} Id. at 629-30 (citations omitted).

\textsuperscript{779} Professor Bowman made the same argument with respect to her proposed cause of action to redress street harassment. \textit{See} Bowman, \textit{Street Harassment}, supra note 19, at 577-79 (arguing that the torts of assault, intentional infliction of emotional distress, and invasion of privacy should be expanded to encompass harassment).

\textsuperscript{780} \textit{See} Heyman, supra note 770, at 1331 (noting the judicial shift from providing damages for psychological damage under the tort of battery to compensating victims under intentional infliction of emotional distress).

\textsuperscript{781} Bowman, supra note 19, at 518.
history of failure to acknowledge the injuries that women suffer, even when those injuries profoundly affect women’s well-being. Bowman has argued that men’s street harassment of women is “the quintessential moment of femininity in our culture.” While not disagreeing with that assertion, I would argue that being the butt of a misogynistic joke is similarly such a quintessential moment. So, too, is being portrayed in a sexually derisive way. Such communications catapult women back to the realm of the private—the sexual, natural world, the realm of disempowerment, and frequently, degradation and debasement. They tell women, in the cruelest fashion, that the private or domestic sphere is their “proper place.”

As Warren and Brandeis appeared to realize in their germinal 1890 article on privacy, the concept they presented was “deeply entrenched in culture, evolving over time, fundamental to the wholeness of the individual, and reflecting the social environment in which people exist.” The time has surely now come to acknowledge that this long-recognized right to privacy has evolved in a way that it reflects the fundamental personhood of women. The concept of privacy, which is indelibly linked to human dignity, implicates a right to construct and, within some limits, control our own identities and personas. Surely a key component of that right is the opportunity for redress in tort for highly offensive communications that are technically false and which degrade or ridicule.

783. Bowman, supra note 19, at 518.
784. In a similar vein, Bowman has observed that society has an expectation of women’s association with the private or domestic. Accordingly, men are less likely to challenge or harass women when they are in places associated with women and their domestic responsibilities. Id. at 526, 530. The same might be said of the new chastity cases. Women who work inside the home are not subjected to demeaning portrayals in the way that those who work outside the home are.
785. Warren & Brandeis, Privacy, supra note 46.
786. Bezanson, supra note 143, at 1134.