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# Terror, Tort, and the First Amendment: Hatfill v. The New York Times and Media Liability for Intentional Infliction of Emotional Distress

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# NOTES

# Terror, Tort, and the First Amendment

## *HATFILL V. NEW YORK TIMES* AND MEDIA LIABILITY FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

> "Someone must have been telling lies about Joseph K., for without having done anything wrong he was arrested one fine morning."[1]

### I. INTRODUCTION

On the morning of August 6, 2002, CBS's "The Early Show" and NBC's "Today" broadcast a statement read by Attorney General John Ashcroft naming Dr. Steven Jay Hatfill a "person of interest" to the Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI") in their investigation into the 2001 anthrax attacks.[2] While Dr. Hatfill was never arrested in connection with the "Amerithrax" investigation, the accusations against him nevertheless drastically impacted his life.[3] The federal government repeatedly interrogated, monitored, and searched Dr. Hatfill, the press made him the subject of numerous news stories, and the DOJ caused him to lose a lucrative and prominent position in the bio-defense field.[4] In a public statement on August 25,

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[1] FRANZ KAFKA, THE TRIAL 1 (Willa Muir et al. trans., Schocken Books 1995) (1937).

[2] Hatfill v. Ashcroft, 404 F. Supp. 2d 104, 108 (D.D.C. 2005).

[3] Scott Shane, *In 4-Year Anthrax Hunt, F.B.I. Finds Itself Stymied, and Sued*, N.Y. TIMES, Sept. 17, 2005, at A1. The investigation into the 2001 anthrax attacks was named "Amerithrax" by the FBI. Amerithrax Links Page, http://www.fbi.gov/anthrax/amerithraxlinks.htm (last visited Sept. 18, 2006).

[4] *Late Edition with Wolf Blitzer* (CNN television broadcast Aug. 25, 2002), transcript *available at* http://transcripts.cnn.com/TRANSCRIPTS/0208/25/le.00.html. Before the accusations, Dr. Hatfill held a position at Louisiana State University paying

2002, Dr. Hatfill expressed his considerable frustration: "My life is being destroyed by arrogant government bureaucrats who are peddling groundless innuendo and half information about me to gullible reporters who, in turn, repeat this . . . under the guise of news."[5] One reporter in particular drew Dr. Hatfill's wrath—Nicholas D. Kristof of the *New York Times* ("*Times*").[6] Kristof wrote a series of columns spanning from May to August 2002, harshly criticizing the FBI for, among other things, not thoroughly investigating Dr. Hatfill, whom he named "Mr. Z."[7] Dr. Hatfill blamed Kristof and his allegedly irresponsible reporting in large part for his ordeal, which he likened in its absurdity to that of "Joseph K." in Kafka's *The Trial*.[8] Dr. Hatfill wholeheartedly maintained his innocence throughout and eventually turned to the courts to vindicate his name, filing two lawsuits—one against Kristof and the *Times* claiming defamation and intentional infliction of emotional distress ("IIED"),[9] and another against John Ashcroft, the FBI, and the DOJ claiming violations of his rights under the First and Fifth Amendments and the Privacy Act.[10] This Note focuses on the first suit, specifically the claim of IIED, the dismissal of that claim by the United States District Court for the Eastern District of Virginia,[11] its reinstatement

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$150,000 per year. The Justice Department, however, funded this position and they, apparently, were reticent to continue lining the pockets of their "person of interest." *See* Marilyn W. Thompson, *The Persuit* [sic] *of Steven Hatfill*, WASH. POST, Sept. 14, 2003, at W6.

[5] *Late Edition with Wolf Blitzer*, *supra* note 4.

[6] *Id.* ("Why is it necessary, right or fair, Mr. Kristoff [sic], for you to write these things?").

[7] Nicholas D. Kristof, *Connecting Deadly Dots*, N.Y. TIMES, May 24, 2002, at A25 [hereinafter Kristof, *Connecting Deadly Dots*]; Nicholas D. Kristof, *Anthrax? The F.B.I. Yawns*, N.Y. TIMES, July 2, 2002, at A21 [hereinafter Kristof, *The FBI Yawns*]; Nicholas D. Kristof, *The Anthrax Files*, N.Y. TIMES, July 12, 2002, at A19 [hereinafter Kristof, *The Anthrax Files I*]; Nicholas D. Kristof, *Case of the Missing Anthrax*, N.Y. TIMES, July 19, 2002, at A17 [hereinafter Kristof, *Case of the Missing Anthrax*]; Nicholas D. Kristof, *The Anthrax Files*, N.Y. TIMES, Aug. 13, 2002, at A19 [hereinafter Kristof, *The Anthrax Files II*].

[8] *Late Edition with Wolf Blitzer*, *supra* note 4. Dr. Hatfill even sarcastically suggested that *The Trial* was Kristof's inspiration for dubbing him "Mr. Z." *Id*.

[9] Hatfill v. New York Times Co., 33 Media L. Rep. (BNA) 1129 (E.D. Va. 2004), *rev'd*, 416 F.3d 320 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1619 (2006).

[10] Hatfill v. Ashcroft, 404 F. Supp. 2d 104, 106 (D.D.C. 2005). Hatfill also sued Vassar professor and handwriting expert Donald Foster because of an article written by Foster in *Vanity Fair* expressing the conclusion, based largely on his analysis of the handwriting on the anthrax letters, that the FBI should focus its investigation on Hatfill. *See generally* Hatfill v. Foster, 372 F. Supp. 2d 725 (S.D.N.Y. 2005).

[11] *Hatfill*, 33 Media L. Rep. (BNA) 1129.

and denial of rehearing by the United States Court of Appeals for the Fourth Circuit,[12] and the implications presented by allowing such claims to proceed against the press pursuant to their coverage of the paramount issues of the day.

After developing the factual landscape that gave rise to the *Times* lawsuit in Part II, Part III discusses the procedural history of *Hatfill v. New York Times*. Part IV briefly surveys the development of the tort of IIED before focusing on the tort's application against media defendants, paying special attention to the First Amendment problems that arise when plaintiffs use the tort to punish speech on matters of legitimate public concern. Part V maintains that these problems require courts to adopt a newsworthiness defense to IIED, applicable at the pleading stage, which would account for tort law's remedial objectives in compensating emotional damages while ensuring that the press will be free to responsibly report on public issues without fear of reprisal. This Note concludes by demonstrating that the application of such a defense in *Hatfill* would have required the Fourth Circuit to affirm the district court's dismissal.

## II. FACTS

### *A. The Anthrax Attacks*

In late 2001, while the nation was still reeling from the terrorist attacks in New York City and Washington D.C., a subtle but insidious threat revealed itself in South Florida. On October 4, the public learned that a photo editor named Robert Stevens lay dying in a West Palm Beach hospital from acute inhalational anthrax disease, caused by exposure to anthrax, one of the world's deadliest known pathogens.[13] Mr. Stevens died the following day, and within two days, his friend and co-worker Ernesto Blanco—a mailroom employee at the Boca

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[12] Hatfill v. New York Times Co., 416 F.3d 320 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1619 (2006).

[13] Laurie Garrett, *Questions Linger; Unknown Dominates Probe a Year After Deadly Anthrax Mailings*, NEWSDAY, Oct. 7, 2002, at A7 [hereinafter Garrett, *Questions Linger*].

Raton headquarters of American Media, Inc.[14]—fell ill from the same anthrax-induced affliction.[15]

In the weeks that followed, a series of anthrax-laden letters surfaced in several conspicuous places in a manner clearly geared to garner public attention. The first such letter, addressed to broadcaster Tom Brokaw, was discovered in the office of his assistant at the Manhattan headquarters of NBC News.[16] Shortly thereafter, two more contaminated envelopes appeared, one addressed to the "Editor" of the *New York Post*, and then on October 15, another addressed to Senator Tom Daschle at his Washington D.C. office.[17] Following the discovery of the Daschle letter, the FBI placed a large quantity of mail from Capitol Hill in quarantine.[18] Amongst this sequestered mail, agents discovered another letter teeming with anthrax spores and addressed to Senator Patrick Leahy on November 16, 2001.[19]

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[14] American Media, Inc. publishes the *National Enquirer*. Thompson, *supra* note 4.

[15] *Id.* The source of the anthrax that killed Mr. Stevens and sickened Mr. Blanco was never determined, although Mr. Stevens' office mail slot and computer keyboard later tested positive for contamination. *Id.*; Garrett, *Questions Linger*, *supra* note 13.

[16] Laurie Garrett, *The Anthrax Crisis; How a Suspected Case in NYC Threaded Its Way to Diagnosis Despite Initial CDC Uncertainty*, NEWSDAY, Oct. 8, 2002, at A37 [hereinafter Garrett, *The Anthrax Crisis*]. As the events in Florida unfolded, Tom Brokaw's assistant, Erin O'Connor became certain that she had been exposed to anthrax. She recalled opening an envelope addressed to Mr. Brokaw on September 25 and noticing a white powder within. Several days later, she developed a painless, but unsightly sore on her collarbone. Initial testing of the suspected envelope and Ms. O'Connor's skin tissue was negative, but a Center for Disease Control (CDC) lab in Atlanta eventually concluded that her sore was the result of anthrax exposure. On October 12, New York City Mayor Rudy Giuliani informed the city and nation of the CDC's determination. Later that day, another envelope addressed to Mr. Brokaw was discovered in Ms. O'Connor's desk and was delivered to a city health department lab by the NYPD where it not only tested positive for anthrax, but contaminated the entire lab, causing the lab to be sealed shut for months following the incident. *Id.*

[17] Shane, *supra* note 3; Susan Schmidt, *Only One Barrel of Congress Mail Tainted; Officials Say Batch Included Letter to Leahy, Now Under Analysis for Anthrax*, WASH. POST, Nov. 18, 2001, at A6. *See also* Press Release, FBI, Photos of Anthrax Letters to NBC, Senator Daschle, and NY Post (Oct. 23, 2001), *available at* http://www.fbi.gov/pressrel/pressrel01/102301.htm.

[18] Schmidt, *supra* note 17.

[19] *Id.*; Opening of the Letter: An Interview with Van A. Harp, Asst. Dir. of the Washington field office, FBI, http://www.fbi.gov/anthrax/vanharp/transcript.htm (last visited Oct. 4, 2005) [hereinafter An Interview with Van A. Harp]. The letters to NBC and the New York Post were postmarked September 18, while the letters to the two Senators were postmarked October 9 and their return address indicated they were mailed by a fourth grader from a fictitious "Greendale School" in Franklin Park, New Jersey. Thompson, *supra* note 4; Schmidt, *supra* note 17; Press Release, *supra* note 17. The letter to Senator Daschle was dated "9-11-01" and contained a message scrawled in childish handwriting:

All four letters bore postmarks from Trenton, New Jersey.[20] Before arriving at Capitol Hill, the letters addressed to the two Senators passed through the massive Brentwood postal distribution center in Northeast D.C. and, as a result, caused the deaths of two postal workers there—Joseph Curseen and Thomas Morris Jr.[21] By the time the threat subsided, the anthrax attacks claimed the lives of five people and sickened seventeen others.[22] Evidence of anthrax spores surfaced not only in New York, New Jersey, Washington D.C., and Florida, but also in places as seemingly far removed from the attacks as Kansas City, Missouri, and the United States Embassy in Vilnius, Lithuania.[23]

### *B. The FBI's Investigation, Nicholas Kristof's Articles, and Dr. Steven Hatfill's "Emergence" as a Person of Interest*

Before the struggle in Florida for Robert Stevens' life had ended, the FBI's investigation into the source of his affliction had begun.[24] After discovering the letters in New

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YOU CAN NOT STOP US.
WE HAVE THIS ANTHRAX.
YOU DIE NOW.
ARE YOU AFRAID?
DEATH TO AMERICA.
DEATH TO ISRAEL.
ALLAH IS GREAT.

Press Release, *supra* note 17. Senator Leahy's letter contained a nearly identical message. Opening of the Letter, Amerithrax: Seeking Information, FBI, http://www.fbi.gov/anthrax/vanharp/introleahy.htm (last visited Jan. 3, 2006). While the envelopes addressed to Mr. Brokaw and the New York Post were without a return address, the letters within were also dated "9-11-01" and their message, in the same handwriting, was similar:

THIS IS NEXT
TAKE PENACILIN [sic] NOW
DEATH TO AMERICA
DEATH TO ISRAEL
ALLAH IS GREAT

Press Release, *supra* note 17.

[20] Schmidt, *supra* note 4.

[21] Thompson, *supra* note 4.

[22] Shane, *supra* note 3. The deaths of an elderly Connecticut woman, Ottilie Lundgren, and a hospital worker from the Bronx, Kathy Nguyen, were also determined to have been caused by anthrax exposure, but how they came into contact with the pathogen remains a mystery. Garrett, *The Anthrax Crisis*, *supra* note 16.

[23] Thompson, *supra* note 4.

[24] Before he died, samples of Mr. Stevens' blood were taken to a laboratory at Northern Arizona University in Flagstaff to be analyzed by Paul Keim, a specialist in bacterial evolution and caretaker of a collection of genetic variants of anthrax. Keim's

York, the FBI revealed that a variant of anthrax known as the "Ames" strain was being used in the attacks.[25] Although it was initially unclear where the Ames strain originated,[26] the FBI knew that it resembled a strain of anthrax commonly used in American bio-defense research and held at several military facilities, including the U.S. Army Medical Research Institute for Infectious Diseases ("USAMRIID") at Fort Detrick, Maryland.[27]

The USAMRIID facility quickly became an important base of operations in the FBI's investigation, dubbed "Amerithrax."[28] USAMRIID had long been a leader in the study of deadly biological agents; both defensively, in creating vaccines and treatments and also prior to 1969, offensively, in engineering military uses for them.[29] Due to this amassed expertise, the FBI naturally turned to the facility to aid in its investigation and brought the letters addressed to Senators Daschle and Leahy there to be studied.[30] As the Fort Detrick scientists opened and examined these letters, it became apparent that the anthrax mailer had used sophisticated methods to weaponize his anthrax and make it optimal for inhalation.[31]

Based in part on these findings, the FBI offered a tentative outline of some of the characteristics they believed

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lab studied the Stevens sample, quickly identified it as the "Ames" strand and relayed the information to the FBI. Debora MacKenzie, *The Insider*, NEW SCIENTIST, Feb. 9, 2002, at 88 [hereinafter MacKenzie, *The Insider*].

[25] *Id.*

[26] *Id.* In an earlier article, MacKenzie had opined that the Ames strand identified by Keim and the FBI referred to a variant of anthrax developed under a USAMRIID weapons program that was terminated in 1969. Debora MacKenzie, *Trail of Terror*, NEW SCIENTIST, Oct. 27, 2001, at 44. The Department of Agriculture later identified the Ames strand as being isolated from a Texas cow in 1981. It was named Ames after a veterinary lab in Ames, Iowa that was on the return address of the envelopes that were used to post the sample to army scientists. MacKenzie, *The Insider*, *supra* note 24.

[27] Shane, *supra* note 3; MacKenzie, *The Insider*, *supra* note 24.

[28] *See* Shane, *supra* note 3. *See also* Martin Enserink, *On Biowarfare's Frontline: Heightened Fears of Bioterrorism Have Shone the Spotlight on the Army's Biodefense Lab—and Pulled its Researchers out of Their Isolation*, SCIENCE, June 14, 2002, at 1954.

[29] Enserink, *supra* note 28.

[30] *See id.*

[31] MacKenzie, *The Insider*, *supra* note 24; An Interview with Van A. Harp, *supra* note 19. The anthrax particles in the letter were of a uniform size, highly concentrated with no debris, coated to prevent clumping and had been treated with an unusual form of silica to facilitate the drying process. MacKenzie, *The Insider*, *supra* note 24.

the suspect possessed in a January 29, 2002 letter to the Members of the American Society for Microbiology:

> [A] single person is most likely responsible for these mailings. . . . Based on his or her selection of the Ames strain of Bacillus anthracis one would expect that this individual has or had legitimate access to select biological agents at some time. This person has the technical knowledge and/or expertise to produce a highly refined and deadly product.[32]

Because of USAMRIID's expertise, history and inventory of Ames anthrax, some of its scientists clearly had the access and technical knowledge described in the FBI's profile.[33] These scientists seemed all the more suspicious because of Fort Detrick's allegedly questionable security, specifically its reported loss of anthrax, ebola, and other pathogen samples during the early 1990's.[34] Thus, it was not surprising that the lab and its researchers, in addition to being a vital tool in the Amerithrax investigation, quickly became its prominent focus.[35]

It was this attention on Fort Detrick that first led investigators to Dr. Hatfill. Dr. Hatfill worked at USAMRIID from 1997 to 1999 on a fellowship studying Ebola and related viruses.[36] Prior to that, he spent a good portion of his adult life in Africa pursuing various degrees and affiliating himself with the militaries of several countries.[37] After his fellowship at USAMRIID expired, Hatfill landed a job at Science Applications International Corporation ("SAIC"), a huge government contractor that works closely with the CIA and other government agencies.[38] In the summer of 2001, while working at SAIC, Hatfill applied for a heightened security clearance to work with the CIA, which required him to pass a

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[32] Letter from Van Harp, Asst. Dir. Washington Field Office, FBI, to Members of the American Society for Microbiology (Jan. 29, 2002), *available at* http://www.fas.org/bwc/news/anthraxreport.htm.

[33] *See* Enserink, *supra* note 29.

[34] *Id*.

[35] *Id*. The only other government lab that received comparable attention to USAMRIID at the early stages of the investigation was the Army's Dugway Proving Ground in Utah, which was revealed to have secretly weaponized anthrax after the USAMRIID program was stopped by President Nixon in 1969. *Id*.; MacKenzie, *supra* note 24.

[36] David Tell, *The Hunting of Steven J. Hatfill*, WKLY. STANDARD, Sept. 16, 2002, at 21.

[37] Thompson, *supra* note 4.

[38] *Id.*

polygraph.[39] Reportedly, the results of this polygraph were less than satisfactory and the CIA denied Hatfill's application for upgraded clearance in August 2001.[40] Shortly thereafter, the Department of Defense revoked his regular security clearance.[41] Rightly or wrongly, Hatfill's eccentric past, his connections to Fort Detrick, and the perception that he might be angry at the government over his security clearance placed him in the unenviable position of being on the FBI's short list of possible suspects.[42]

In the beginning of 2002, Barbara Hatch Rosenberg, a college professor and bio-defense expert, became frustrated at the pace of the FBI's investigation and began collecting available evidence and posting her detailed analysis of it online.[43] After earlier posting her belief that the anthrax killer was likely a USAMRIID scientist, she wrote on February 5, 2002, that "[f]or more than three months now the FBI has known that the perpetrator of the anthrax attacks is American. This conclusion must have been based on the perpetrator's evident connection to the US biodefense program."[44] On February 25, 2002, White House Press Secretary Ari Fleischer addressed Ms. Rosenberg's allegations in a press briefing when a reporter asked if there had been a suspect for three months and if it was an American scientist from Fort Detrick. After explaining that the FBI was still investigating several possible suspects, Mr. Fleischer responded, "[a]ll indications are that the source of the anthrax is domestic . . . [a]nd I just can't go beyond that."[45]

On May 24, 2002, writing in his regular column on the *Times*' editorial page, Nicholas Kristof did go beyond Mr.

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[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] Thompson, *supra* note 4. Ms. Rosenberg is a professor of biology and environmental studies at the State University of New York (SUNY) at Purchase and affiliated with the Federation of American Scientists. *Id.*; SUNY at Purchase Environmental Studies Faculty, http://www.ns.purchase.edu/envsci/faculty.htm.

[44] Barbara Hatch Rosenberg, Federation of American Scientists, Analysis of Anthrax Attacks, Commentary: Is the FBI Dragging its Feet? (Feb. 5, 2002), *available at* http://www.fas.org/bwc/news/anthraxreport.htm. Ms. Rosenberg went on to analyze how characteristics of the initial anthrax letters and subsequent hoax letters allowed for "a more refined estimate of the perpetrator's motives. He must be angry at some biodefense agency or component, and he is driven to demonstrate, in a spectacular way, his capabilities and the government's inability to respond." *Id.*

[45] Press Briefing, Ari Fleischer, White House Press Secretary (Feb. 25, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020225-16.html#12.

Fleischer's description. With the stated goal of "light[ing] a fire under the F.B.I. in its investigation of the anthrax case," Kristof wrote:

> Experts in the bioterror field are already buzzing about a handful of individuals who had the ability, access and motive to send the anthrax. These experts point, for example, to one middle-aged American who has worked for the United States military bio-defense program and had access to the labs at Fort Detrick, Md. His anthrax vaccinations are up to date, he unquestionably had the ability to make first-rate anthrax, and he was upset at the United States government in the period preceding the anthrax attacks.[46]

One month later, on June 24, 2002, Barbara Rosenberg and several FBI officials attended a closed meeting before the Senate Judiciary Committee, which was then chaired by anthrax letter recipient Senator Patrick Leahy.[47] The following day, federal agents sought and received permission from Dr. Hatfill to conduct the first of several searches of his Frederick, Maryland apartment.[48]

Shortly thereafter on July 2, 2002, the *Times* published another of Kristof's columns criticizing the FBI's investigation and calling attention to the national security threats posed by the bureau's "lackadaisical ineptitude in pursuing the anthrax killer."[49] The column read:

> Almost everyone who has encountered the F.B.I. anthrax investigation is aghast at the bureau's lethargy. Some in the biodefense community think they know a likely culprit, whom I'll call Mr. Z. Although the bureau has polygraphed Mr. Z, searched his home twice and interviewed him four times, it has not placed him under surveillance or asked its outside handwriting expert to compare his writing to that on the anthrax letters. . . . He denies any wrongdoing, and his friends are heartsick at suspicions directed against a man they regard as a patriot. Some of his polygraphs show evasion, I hear, although that may be because of his temperament.
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> If Mr. Z were an Arab national, he would have been imprisoned long ago. But he is a true-blue American with close ties to the U.S. Defense Department, the C.I.A. and the American biodefense program. On the other hand, he was once caught with a girlfriend in a biohazard "hot suite" at Fort Detrick, surrounded only by blushing germs. . . . [I]t's time for the F.B.I. to make a move: either it should

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[46] Kristof, *Connecting Deadly Dots*, *supra* note 7.

[47] Thompson, *supra* note 4.

[48] *Id.*

[49] Kristof, *The F.B.I. Yawns*, *supra* note 7.

> go after him more aggressively . . . or it should seek to exculpate him and remove this cloud of suspicion.[50]

Kristof then went on to pose a series of questions to the FBI:

> Do you know how many identities and passports Mr. Z has and are you monitoring his international travel? . . . Why was his top security clearance suspended . . . less than a month before the anthrax attacks began? . . . Have you searched the isolated residence that he had access to last fall? The F.B.I. . . . knows that Mr. Z gave Cipro to people who visited it. . . . Have you examined whether Mr. Z has connections to the biggest anthrax outbreak among humans ever recorded . . . in Zimbabwe in 1978-90? There is evidence that the anthrax was released by the white Rhodesian Army . . . Mr. Z has claimed that he participated in the white army's much feared Selous Scouts. . . . Mr. Z's resume also claims involvement in the former South African Defense Force; all else aside, who knew that the U.S. Defense Department would pick an American who had served in the armed forces of two white-racist regimes to work . . . with some of the world's deadliest germs?[51]

Kristof's next column appeared on July 12 and it discussed the possibility that earlier anthrax hoaxes in 1997 and 1999 may have been connected to the 2001 attacks.[52] Much of the column criticized the FBI's failure to look to these earlier incidents to aid in their current investigation.[53] However, Kristof did mention Mr. Z again, this time in connection with a 1997 anthrax scare in Washington D.C.[54] Kristof noted that the incident occurred on the same day as a terrorism seminar held in the D.C. area. According to Kristof, "Mr. Z seemed peeved that neither he nor any other bio-defense expert had been included as a speaker."[55] Kristof quoted a letter that Dr. Hatfill apparently sent to the organizer of the seminar in which he wrote that he was "rather concerned" at the omission.[56] Without mentioning specifics, Kristof also wrote that Dr. Hatfill subsequently used the 1997 incident "to underscore the importance of his field and his own status within it," and to demonstrate how future attacks might occur.[57]

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[50] *Id.*
[51] *Id.*
[52] Kristof, *The Anthrax Files I*, *supra* note 7.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

The column also explained that the 1997 hoax involved a fake anthrax gelatin, while a series of letters sent to a combination of media and government targets in 1999 had used fake anthrax powder.[58] Kristof found this interesting because "Mr. Z apparently learned about powders during those two years. His 1999 resume adds something missing from the 1997 version: 'working knowledge of wet and dry BW [biological warfare] agents . . . .'"[59] The column concluded by again chastising the FBI for failing to properly investigate these earlier incidents for links to the 2001 attacks.[60]

The *Times* published Kristof's next column dealing with the anthrax attacks one week later on July 19, but it was primarily limited to discussing the reported security breaches at the USAMRIID labs at Fort Detrick. Mr. Z was mentioned in passing, but only to explain "what piqued [Kristof's] interest in U[SAMRIID] in the first place."[61] Kristof did not write of Mr. Z again until after the Attorney General identified Dr. Hatfill as a "person of interest" on August 6, 2002 and Dr. Hatfill himself held a press conference disavowing his guilt on August 11.[62] On August 13, 2002, when Kristof next wrote about the anthrax attacks, he focused exclusively on Dr. Hatfill.[63]

Kristof began the August 13 column by "com[ing] clean on 'Mr. Z'" and identifying him as Dr. Hatfill, but urging his readers to maintain a presumption of innocence because "[i]t must be a genuine assumption that he is an innocent man caught in a nightmare. There is not a shred of traditional . . . evidence linking him to the attacks."[64] Much of the rest of the column reiterated the circumstantial evidence already compiled, however, Kristof did add several new bits of information. Among this was the only physical evidence against Hatfill—Kristof reported that specially trained bloodhounds, which had been given scent packets taken from the anthrax letters "responded strongly to Dr. Hatfill, to his apartment, to his girlfriend's apartment and even to his former

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[58] Kristof, *The Anthrax Files I*, *supra* note 7.

[59] *Id.*

[60] *Id.*

[61] Kristof, *Case of the Missing Anthrax*, *supra* note 7.

[62] For the text of Hatfill's initial press conferences see Text of Hatfill's Statement (Aug. 11, 2002), http://www.foxnews.com/printer_friendly_story/0,3566, 60124,00.html.

[63] Kristof, *The Anthrax Files II*, *supra* note 7.

[64] *Id.*

girlfriend's apartment, as well as to restaurants that he had recently entered . . . . The dogs did not respond to other people, apartments or restaurants."[65]

Kristof went on to question why it took the FBI so long to bring in the bloodhounds, or to read Hatfill's unpublished novel, "Emergence," which depicts a biological attack on Congress.[66] Kristof also called attention to several apparently false claims on Hatfill's resume, namely, "a Ph.D. degree, work with the U.S. Special Forces [and] membership in Britain's Royal Society of Medicine."[67] The column concluded by crediting the FBI for "pick[ing] up its pace" and noting that "[p]eople very close to Dr. Hatfill are now cooperating with the authorities, information has been presented to a grand jury, and there is reason to hope that the bureau may soon be able to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him."[68] Despite Kristof's optimistic prediction, the Amerithrax investigation remains unsolved and the FBI has yet to arrest Dr. Hatfill or anyone else in connection with it.[69]

## III. HISTORY OF *HATFILL V. NEW YORK TIMES*

On June 18, 2003, shortly before the statute of limitations was to run with respect to Kristof's July 2002 columns, Dr. Hatfill filed a complaint in Virginia state court against Kristof and the *Times* claiming that the four columns from July and August 2002 defamed him. Taking advantage of Virginia's tolling statute, Dr. Hatfill preserved the viability of his claims but never proceeded with his state action, instead taking a voluntary non-suit in March 2004.[70] He then commenced an action in the United States District Court for the Eastern District of Virginia on July 13, 2004.[71]

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[65] *Id.* The bloodhounds apparently made a positive identification of Dr. Hatfill's scent after smelling the decontaminated anthrax letters. Dr. Hatfill explained that the only identification was a friendly reaction that one dog had when Dr. Hatfill reached down to pet him. Thompson, *supra* note 4.

[66] Kristof, *The Anthrax Files II*, *supra* note 7. For a more detailed discussion of Dr. Hatfill's novel, see Ted Bridis, *Hatfill Novel Depicts Terror Attack*, ASSOCIATED PRESS, Aug. 14, 2002, *available at* http://www.ph.ucla.edu/epi/bioter/hatfillnovelterror.html.

[67] Kristof, *The Anthrax Files II*, *supra* note 7.

[68] *Id.*

[69] *See* Editorial, *The Anthrax Metaphor*, WASH. POST, Sept. 22, 2005, at A24.

[70] Hatfill v. New York Times Co., 33 Media L. Rep. (BNA) 1129, 1132 (E.D. Va. 2004), *rev'd*, 416 F.3d 320 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1619 (2006).

[71] *Id*.

### *A. Dismissal by the District Court*

Dr. Hatfill's federal complaint purported to state three causes of action against both Kristof individually and the *Times*. Count I claimed that Kristof's five columns, taken as a whole, stated or implied that Dr. Hatfill was responsible for the anthrax mailings, thereby falsely imputing to him homicidal conduct, and that Kristof and the *Times* intended the columns to convey this message.[72] Count II asserted an independent claim of libel based on a number of "discrete untruths" purportedly contained in Kristof's columns.[73] Count III of the complaint claimed IIED.[74] After being served, Kristof and the *Times* moved the court, pursuant to Rule 12(b), to dismiss the complaint for failure to state a claim upon which relief can be granted, and as to Kristof, because the court lacked personal jurisdiction over him.[75] As to Count I, the court framed the issue before it as:

> [W]hether the challenged columns reasonably can be read to accuse Hatfill of actually being the anthrax mailer, based upon consideration of the full content of the columns and upon the context in which they were published, i.e., as a series of opinion pieces appearing on the Op-Ed page of a national newspaper.[76]

Despite the fact that Kristof's columns raised a number of questions about Dr. Hatfill and accurately described him "as the overwhelming focus of the [FBI's] investigation," the court failed to find that they endorsed a belief in his guilt.[77] Nor did it find that a reasonable reader would have viewed the columns as intending to defame Dr. Hatfill.[78] "Because the columns specifically and repeatedly disavow[ed] any conclusion of guilt," the court rejected Dr. Hatfill's contention that they were written in such a manner as to impute his responsibility for the

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[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* at 1130. Kristof argued that he had insufficient contacts with the state of Virginia to allow a court sitting in that state to exercise jurisdiction over him without violating his constitutional right of due process. *Id*. at 1137-38.

[76] *Hatfill*, 33 Media L. Rep. (BNA) at 1133.

[77] *Id.* at 1134.

[78] *Id.* (citing White v. Fraternal Order of Police, 909 F.2d 512, 519 (D.C. Cir. 1990) (citations omitted)). The court required a finding of such intent because innuendo, rather than a direct accusation, supported the claim of defamation. *Id.* (citing Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1110 (4th Cir. 1993)).

anthrax mailings in the minds of reasonable readers.[79] Based on these findings, the court dismissed Count I of the complaint.[80]

Having found that Kristof's columns collectively failed to be capable of defamatory meaning, the district court had little difficulty in ruling that each of the several "discrete untruths" alleged by Dr. Hatfill independently failed to convey such meaning.[81] Since even according to the complaint, the allegedly false statements "simply reinforce[d] the purported inference that Hatfill is the anthrax mailer," the court dismissed Count II, ruling as a matter of law that such statements could not independently support a separate claim for libel.[82]

The court began its analysis of Count III by noting that Virginia law considered IIED to be a traditionally disfavored claim.[83] Although the court did not elaborate on why this was so, it cited to *Barret v. Applied Radiant Energy Corp.*, which explains that Virginia courts disfavor IIED and similar torts because of their speculative nature and tendency to presume harm.[84] The court continued by explaining that in order to state a claim for IIED under Virginia law, a plaintiff must both plead and prove by clear and convincing evidence four distinct elements: (1) that the defendant acted intentionally or recklessly; (2) that the conduct complained of was outrageous and intolerable; (3) that such conduct caused plaintiff emotional distress; and (4) that the emotional distress suffered

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[79] *Id.* at 1134-35.

[80] *Id.*

[81] *Hatfill*, 33 Media L. Rep. at 1135-36. The allegedly false statements in question were that Hatfill had the "ability to access and motive to send the anthrax"; that he had access to an "isolated residence" around the time of the attacks and "gave Cipro . . . to people who visited the [residence]"; that he had "up to date" anthrax vaccinations; that he "failed 3 successive polygraph examinations"; that he was "upset with the United States Government for a period preceding the anthrax attack"; and that he "was once caught with a girlfriend in a biohazard 'hot suite' at Fort Detrick . . . surrounded only by blushing germs." *Id*. at 1136.

[82] *Id.* As an additional ground for dismissing Count II, the court held that the claim was barred by Virginia's one year statute of limitations. Noting that the second cause of action was not alleged in Dr. Hatfill's original state court complaint, the court determined that Dr. Hatfill was unable to take advantage of Virginia's tolling statute as to that claim, and was thus barred from bringing it in federal court after the one year statute of limitations had run. *Id*. at 1135.

[83] *Id.* at 1136 (citing Ruth v. Fletcher, 377 S.E.2d 412, 415 (Va. 1989); Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 269 (4th Cir. 2001)).

[84] 240 F.3d at 269 (citing Ruth v. Fletcher, 377 S.E.2d 412, 415 (Va. 1989); Bowles v. May, 166 S.E. 550, 555 (Va. 1932)). *See also infra* Part IV.

was severe.[85] Finding that Dr. Hatfill's pleading failed to prove outrageous conduct and severity of harm, as well as that the IIED claim was duplicative of the defamation claim, the court dismissed Count III as well.[86]

Hatfill's complaint failed to satisfy the district court regarding two of the four elements required to state a claim for IIED. First, and most significantly, the court declined to find that the defendants' conduct was outrageous and intolerable.[87] Drawing on Virginia precedent, the court explained that for it to make such a finding, the conduct in question must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[88] The court held that the publication of news or commentary on important public matters, like the FBI's investigation into the anthrax attacks, simply could not constitute the type of "outrageous and intolerable" conduct needed to support a claim for IIED.[89] This conclusion finds support in a number of other decisions,[90] despite the fact that IIED—unlike the overlapping

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[85] *Hatfill*, 33 Media L. Rep. (BNA) at 1136-37 (citing Russo v. White, 400 S.E.2d 160, 162 (Va. 1991); Womack v. Eldridge, 210 S.E.2d 145, 148 (Va. 1974)). Virginia's is a common articulation of the tort, mirroring the Restatement version which provides: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). *See infra* Part IV.

[86] *Hatfill*, 33 Media L. Rep. (BNA) at 1137.

[87] Resolution of the "outrageousness" question is of such significance because of its tendency to overshadow all other elements of the tort. Finding that a defendant intentionally engaged in outrageous conduct will generally enable a reviewing court to presume the state-of-mind, severity of distress, and causation elements of the tort. Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 47-49 (1982). The *Restatement* itself suggests that "[s]evere distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965). *See infra* Part IV.

[88] *Hatfill*, 33 Media L. Rep. (BNA) at 1137 (quoting *Russo*, 400 S.E.2d at 162 (citation omitted)). This language is taken from a comment to the *Restatement*. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965). *See infra* Part IV.

[89] *Hatfill*, 33 Media L. Rep. (BNA) at 1137.

[90] *See* Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL'Y 469, 491 (2000) (surveying cases from the 1990's where media defendants were sued for IIED and noting that "[t]he tort . . . does not contain a newsworthiness or public interest defense, but when considering such claims . . . some courts seemed to create one"). *See also infra* Parts IV and V.

public disclosure of private facts tort—does not contain an inherent "newsworthiness" defense.[91]

Additionally, the court found that Dr. Hatfill only made "conclusory assertions" of suffering the requisite level of emotional distress and thus failed to sufficiently plead the fourth element of IIED.[92] When a defendant's conduct is sufficiently outrageous, courts tend to presume the requisite degree of harm.[93] Given the district court's failure to find the columns in question "outrageous and intolerable," it is not surprising that it also failed to find that such columns caused Dr. Hatfill severe emotional distress.

As the final ground for dismissing Count III, the court found it duplicative of Dr. Hatfill's defamation claim, and that it amounted to an attempt to evade constitutional limits on damage awards stemming from a single act of publication.[94] Noting that both Dr. Hatfill's defamation and IIED claims were "expressly and solely based on . . . publication of the [same] series of columns," the court found that the latter claim must be dismissed.[95] Whether or not a claim for IIED may lie when the underlying facts form the basis for another tort is a matter in some dispute. A number of jurisdictions view IIED as a "gap-filler" tort that is only available to redress wrongs not covered by a traditional area of tort law.[96] Others take a seemingly opposite view and only allow IIED claims to proceed where the elements of another tort are satisfied, thus

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[91] *See infra* notes 203, 216.

[92] *Hatfill*, 33 Media L. Rep. (BNA) at 1137.

[93] Givelber, *supra* note 87, at 47-49.

[94] *Hatfill*, 33 Media L. Rep. (BNA) at 1137 ("[A] separate action for [IIED] which is premised solely on allegedly slanderous or libelous words themselves[] is not only superfluous but impermissibly duplicative." (quoting Smith v. Dameron, 12 Va. Cir. 105, 14 Media L. Rep. (BNA) 1879, 1881 (Va. Cir. Ct. 1987))).

[95] *Id.* (citing *Smith*, 14 Media L. Rep. (BNA) at 1881). All three counts against Kristof were additionally dismissed for want of personal jurisdiction. *Id*.

[96] Lowe v. Hearst Commc'ns, Inc., 414 F. Supp. 2d 669, 675 (W.D. Tex. 2006) ("I[IED] is a 'gap-filler' tort, allowing recovery in the rare instances in which a defendant intentionally inflicts severe emotional distress in an unusual manner so the victim has no other recognized theory of redress." (citing Hoffman-La Roche, Inc. v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004))); Idema v. Wager, 120 F. Supp. 2d 361 (S.D.N.Y. 2000) ("[A] cause of action for [IIED] should not be entertained where the conduct complained of falls well within the ambit of other traditional tort liability." (quoting Sweeney v. Prisoners' Legal Servs. of New York, 538 N.Y.S.2d 370, 374 (App. Div. 1989) (internal quotation marks omitted))); Nix v. Cox Enters., Inc., 545 S.E.2d 319, 325 (Ga. Ct. App. 2001) ("Publication of allegedly false statements cannot give rise to an action for [IIED], because the exclusive legal remedy where published works cause injury remains an action for defamation."), *rev'd on other grounds*, 560 S.E.2d 650 (Ga. 2002).

essentially relegating IIED to a "parasitic" role as an element of a traditional tort's damages.[97] Although Virginia law appears somewhat muddled on the issue,[98] once the court dismissed Dr. Hatfill's defamation claim, it could have proceeded under either of the aforementioned theories in order to dismiss the IIED claim. However, the court's concern about multiple damage awards suggests it viewed the "gap-filler" approach as the more constitutionally sound.[99] Following his resounding defeat in district court, Dr. Hatfill appealed all of his claims against the *Times* to the United States Court of Appeals for the Fourth Circuit.[100]

### *B. Reinstatement by the Court of Appeals*

Dr. Hatfill's claims found a much more receptive audience when they were brought before a three-judge panel of the Fourth Circuit, a court notoriously unmoved by the familiar First Amendment pleas of media defendants.[101] In an opinion written by Judge Dennis Shedd[102] and issued on July 28, 2005, the court reinstated all three of Dr. Hatfill's claims against the *Times*.[103]

In its consideration of Count I, the court surveyed Virginia defamation law and came to the conclusion that

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[97] Harris v. City of Seattle, 32 Media L. Rep. 1279 (W.D. Wash. 2003) (Although IIED claims based on unsuccessful libel claims must be dismissed, it is improper to dismiss an IIED claim where an actionable tort that accounts for mental suffering, such as false light, survives the pleading stage. (citing Dworkin v. Hustler Magazine, 867 F.2d 1188, 1193 n.2 (9th Cir. 1989)); Leidholdt v. L.F.P., Inc., 860 F.2d 890, 893 n.4 (9th Cir. 1988)); Daly v. Viacom, Inc., 238 F. Supp. 2d 1118, 1125 n.4 (N.D. Cal. 2002) (Where libel and false light claims fail to state a cause of action, the underlying behavior likewise must fail to state a cause of action for IIED.).

[98] *Compare Smith*, 14 Media L. Rep. (BNA) at 1881 ("[A] separate action for [IIED] which is based solely on allegedly slanderous or libelous words themselves, is . . . impermissibly duplicative," because it would allow a plaintiff to circumvent "the strictures of modern defamation law."), *with* Foretech v. Advance Magazine Publishers, Inc., 765 F. Supp. 1099, 1104-05 (D.D.C. 1991) (applying Virginia law and holding that although *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), alleviated some of *Smith*'s concerns, an IIED claim cannot stand where a libel claim based on the same statements fails "absent a specific factual showing that [a defendant] acted for the specific purpose of inflicting emotional distress").

[99] *See Hatfill*, 33 Media L. Rep. (BNA) at 1136-37.

[100] Being unable to establish personal jurisdiction, Hatfill voluntarily dismissed all claims against Kristof individually. Hatfill v. New York Times Co., 416 F.3d 320, 329 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1619 (2006).

[101] *See, e.g.*, Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986), *rev'd*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

[102] Chief Judge William Wilkins joined in the opinion, and Judge Paul Niemeyer dissented.

[103] *Hatfill*, 416 F.3d 320.

Kristof's columns were capable of defamatory meaning in that they imputed to Hatfill the commission of a "criminal offense involving moral turpitude," namely the murders of five people, for which, if true, Dr. Hatfill could be indicted and punished.[104] Notwithstanding Kristof's cursory, but oft-repeated statements urging his readers to maintain a presumption of innocence as to Dr. Hatfill, the court found that "the unmistakable theme of Kristof's columns [was] that the FBI should investigate Hatfill more vigorously because all of the evidence (known to Kristof) pointed to him," and that a reasonable reader of the columns would likely conclude that Dr. Hatfill was, in fact, the anthrax killer.[105] The court reinstated Count II as well, finding that the district court erred in concluding both that the claim was time-barred and that the "discrete false statements" were independently incapable of defamatory meaning.[106]

The analysis of Count III began by rejecting as too broad the district court's assertion that "[p]ublishing news or commentary on matters of public concern" can never be sufficiently extreme or outrageous to satisfy the elements of IIED.[107] Reiterating its conclusion that Kristof's columns are reasonably read as accusing Dr. Hatfill of being responsible for the anthrax attacks, the court found that such an accusation could constitute extreme and outrageous conduct.[108] Specifically, if as Dr. Hatfill alleged, the *Times* intentionally published a false accusation of murder without regard for its veracity and without allowing for response, extreme and outrageous conduct could be found.[109] Particularly important to the court's determination was "the notoriety of the case, the charge of murder, and the refusal" of the *Times* to permit Dr. Hatfill's lawyer an opportunity to respond.[110]

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[104] *Id.* at 330-34 (citing Carwile v. Richmond Newspapers, Inc., 82 S.E.2d 588, 591 (Va. 1954)).

[105] *Id.* at 333.

[106] *Id.* at 334-35. The court also rejected the district court's conclusion that the statute of limitations barred Count II. *Id.*

[107] *Id.* at 336.

[108] *Hatfill*, 416 F.3d at 336.

[109] *Id.*

[110] *Id.* The court's treatment of the effects of "notoriety" poses an interesting First Amendment dilemma. Considering that the constitutional protections afforded the press are at their apex when commenting on matters of public concern, *see* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) ("It is speech on matters of public concern that is at the heart of the First Amendment's protection." (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (internal quotation marks omitted))), courts often privilege such activity, *see* Robert E. Dreschel, *Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media*, 89

The court went on to discount the *Times*' and the district court's contentions that allowing the IIED claim to proceed would allow Dr. Hatfill to evade constitutional limitations on defamation actions. The court reasoned that if Dr. Hatfill was unable to meet the constitutional requirements for recovery on his defamation claim, he would likely also be unable to recover for IIED.[111] However, no mention was made as to what the basis seemingly was for the district court's concern, namely that the *Times* would be twice punished for a single act of publication.[112] Instead the court saw their sole duty as determining whether Dr. Hatfill's complaint alleged intentional and outrageous misconduct.[113]

The court also found that Dr. Hatfill sufficiently pled severe emotional distress because the complaint alleged that the columns caused him to "suffer[] severe and ongoing loss of reputation and professional standing, loss of employment, past and ongoing financial injury, severe emotional distress and other injury," as well as "grievous emotional distress."[114] Like the district court, the Fourth Circuit's treatment of the severity of harm element of IIED was typical, in that it was overshadowed and seemingly determined by the outrageousness analysis. Sufficiently outrageous conduct

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DICK. L. REV. 339, 349 (1985) ("[C]ourts have indicated their sensitivity to constitutional interests by noting that intentional infliction claims may interfere with the media's privilege to publish news in the public interest." (citing Tumminello v. Bergen Evening Record, Inc., 454 F. Supp. 1156 (D.N.J. 1978))); Cape Pub'ns v. Bridges, 423 So.2d 426, 428 (Fla. App. 1982); Costlow v. Cusimano, 311 N.Y.S.2d 92, 95-96 (N.Y. App. Div. 1970); *see also* Dougherty v. Capital Cities Commc'ns, Inc., 631 F. Supp. 1566, 1570 (E.D. Mich. 1986) ("[T]he Sixth Circuit has expressly held that under Michigan law, [the press] ha[s] a qualified privilege to report on matters of public interest." (internal citations, quotations, and quotation marks omitted)), or at least consider it a powerful counterweight to allegations of outrageous or offensive conduct, *see* Markin, *supra* note 90, at 487 (surveying cases where media defendants were sued for IIED in the 1990's and finding that "[i]n about one-eighth of the cases, courts cited First Amendment concerns and generally ruled that the act of publishing the news, however shocking the report might be, does not constitute outrageous behavior"). Thus, the court's determination that the anthrax attacks' "notoriety" helped render the *Times*' coverage of those attacks tortious seems to run against an important theme of First Amendment doctrine. Yet, undeniably, someone falsely accused of a notorious murder will be more outraged than someone falsely accused of petty theft, despite, or perhaps because of the fact that the latter crime is of far less public consequence. This conflict demonstrates one of the difficulties of relying on an outrageousness standard to determine when otherwise protected speech should subject the speaker to liability. Other difficulties created by the outrageousness standard are discussed further in Parts IV and V.

111 *Hatfill*, 416 F.3d at 336-37.

112 *See supra* notes 94-99 and accompanying text.

113 *Hatfill*, 416 F.3d at 337.

114 *Id.*

generally leads courts to presume sufficiently severe harm.[115] The court reversed the district court on each of Dr. Hatfill's claims and remanded the case for further proceedings.[116] In a brief one page dissent that relied largely on the reasoning of the district court, Judge Paul Niemeyer stated that the claims should be dismissed because he found "nothing in the letter or spirit of the columns" amounting to an accusation.[117]

### *C. Denial of Rehearing En Banc*

After the Fourth Circuit's reversal, two out of the four judges who heard the case had voted to dismiss Dr. Hatfill's claims against the *Times*, yet all three counts of the complaint survived the 12(b)(6) motion. Hoping they would be able to tip the balance in their favor, the *Times* petitioned the full Fourth Circuit for a rehearing en banc.[118] Of the twelve judges weighing in on whether to grant the rehearing, only six voted in favor of doing so.[119] Falling just short of producing the majority necessary to grant rehearing, the decision of the three-judge panel remained intact, as did Dr. Hatfill's claims.[120] However, the views of the *Times*, and those of the press generally, did enjoy some measure of validation from the panel. In a rare move, Judge J. Harvie Wilkinson III, a former newspaper editorial page editor, issued a scathing ten page dissent from the denial of rehearing.[121] The opinion, which sounded in clear First Amendment tones, began by stating:

> The panel's decision in this case will restrict speech on a matter of vital public concern. The columns at issue urged government action on a question of grave national import and life-or-death consequence. . . . It is worth remembering the context in which the columns at issue were published. In the aftermath of the September 11 attacks, the nation was alerted to the fact that someone was

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[115] *See supra* note 87.

[116] *Hatfill*, 416 F.3d at 337.

[117] *Id.* at 337-38 (Niemeyer, J., dissenting).

[118] Hatfill v. New York Times Co., 427 F.3d 253 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1619 (2006).

[119] *Id.*

[120] *Id.*

[121] Reporter's Comm. for the Freedom of the Press, *Divided Appeals Court Won't Review Libel Suit Decision*, Oct. 19, 2005, http://www.rcfp.org/news/2005/1019-lib-divide.html. Judge Wilkinson wrote another memorable dissent from a denial of rehearing involving an IIED claim brought under Virginia law against a media defendant. Falwell v. Flynt, 805 F.2d 484 (4th Cir. 1986) (Wilkinson, J., dissenting). His views in that opinion eventually found favor with a unanimous Supreme Court. *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

> sending letters laced with anthrax through the mails. The letters were not simply directed at public officials but apparently at private individuals as well. Those who handled mail on a regular basis were concerned for their safety, and even ordinary residents were advised to take special precautions when opening their mail. At least five people died from anthrax exposure. There was, in addition, worry that law enforcement was ineffectual in locating the source of the anthrax production and distribution. In other words, both the problem and the steps necessary to resolve it were matters of public, indeed national, concern.[122]

Judge Wilkinson clearly felt Dr. Hatfill's complaint should have been dismissed and he went on to explain the threats posed by allowing these types of meritless claims to survive early dismissals. Acknowledging that the *Times* likely possessed the resources to defend its interests in lengthy court battles, Judge Wilkinson worried that many other smaller daily and weekly newspapers within the Fourth Circuit did not: "[t]he prospect of legal bills, court appearances, and settlement conferences means that all but the most fearless will pull their punches even where robust comment might check the worst impulses of government and serve the community well."[123] Judge Wilkinson's concern was justified, as historically, plaintiffs have sued smaller news outlets quite frequently, despite their presumably shallow pockets.[124]

Regarding the IIED claim, Judge Wilkinson was "quite at a loss" to see how publishing Kristof's columns was utterly intolerable in a civilized community, since they reported on "matters of unquestioned public interest with urgent national security implications."[125] According to Wilkinson, "[t]he First Amendment expressly specifies that the 'civilized community' in which we live is one that encourages public commentary of this type."[126] The dissent went on to explain how the anthrax attacks and the government's responses to them were "at the heart of a legitimate public inquiry" and how the *Times*, by publishing critical, albeit hard-hitting, columns regarding this inquiry was merely doing its job, "a job that the Constitution protects," and that it was inappropriate for a federal court to

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[122] *Hatfill*, 427 F.3d at 253-54 (Wilkinson, J., dissenting).

[123] *Id.* at 255.

[124] *See, e.g.*, Markin, *supra* note 90, at 501 ("One might anticipate that most [of the IIED] cases [from the 1990's] stemmed from the acts of the stereotypic aggressive network television news reporter. Such was not the case. More than half involved newspapers, some of them quite small.").

[125] *Hatfill*, 427 F.3d at 258 (Wilkinson, J., dissenting).

[126] *Id.*

"construe gray areas of Virginia law to punish [that job] and deter others from performing it."[127]

Judge Wilkinson's eloquent dissent, while no doubt appreciated by the *Times*, did not prevent their 12(b)(6) motion from ultimately failing and their case from being remanded back to the district court.[128] While the *Times* may eventually prevail in its case, the decision of the Fourth Circuit remains. What precedential value it acquires remains to be seen, but as noted by Judge Wilkinson, the court's readiness to accept that commentary "on a subject of unquestioned public interest" could support a claim for IIED constitutes a marked departure from the overwhelming trend of case law.[129]

## IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A detailed discussion of the development and implications of the tort of IIED is beyond the scope of this Note, and has already been ably undertaken in a number of works committed solely to that endeavor.[130] Nevertheless, a brief history helps lay the foundation for what is this Note's focus, namely, application of the tort against the media pursuant to their coverage of matters of public concern. The goal of this section is to demonstrate that IIED is an extraordinarily vague and undeveloped tort. Given the tort's ambiguity, and the First Amendment's need for clear principles by which to adjudicate disputes regarding protected speech, this section argues that this area of the law needs greater clarity. While the Supreme Court offered some clarification in *Hustler Magazine v. Falwell*, many questions remain unanswered.

### *A. The Rise of the Tort of Outrage*

The general recognition of IIED as an independent cause of action, sometimes referred to as "prima facie tort" or "outrage," is a relatively recent development in the law.[131]

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[127] *Id.* at 258-59.

[128] The Supreme Court denied the *Times*' petition for a writ of certiorari. 126 S. Ct. 1619 (2006).

[129] *Hatfill*, 427 F.3d at 258 (Wilkinson, J., dissenting).

[130] *See, e.g.*, Givelber, *supra* note 87; Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); William Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

[131] The English case of *Wilkinson v. Downton* is generally credited as the first time that a court allowed recovery for emotional distress independently of an

Legal scholarship, more than court action, spurred this development.[132] It was a 1936 article written by Professor Calvin Magruder in the *Harvard Law Review* that first noted that courts had "in an *ad hoc* manner, and perhaps not very scientifically . . . in large measure afforded legal redress for mental or emotional distress in the more outrageous cases, without formulating too broad a general principle."[133] Magruder saw this judicial recognition as a preliminary stage in the evolution toward accepting the idea that:

> [O]ne who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue.[134]

Shortly after the Magruder article, Professor William Prosser wrote that "[i]t is time to recognize that the courts have created

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established cause of action. 2 Q.B. 57 (1897). The court in that case, attempting to achieve a just result in the absence of precedent, awarded damages to a woman who suffered permanent physical harm as a result of an ill conceived prank, in which the defendant erroneously informed her that her husband had broken both his legs in a horrible accident. *Id.* at 58-61; *see also* WILLIAM K. JONES, INSULT TO INJURY: LIBEL, SLANDER, AND INVASIONS OF PRIVACY 19 (2003). In the following decades, recovery for emotional distress was occasionally allowed in other circumstances, but only when, like Mrs. Wilkinson, such distress was embodied by actual physical harm. *See* Magruder, *supra* note 130, at 1045-48 (surveying and discussing some of the more colorful early cases). The prevailing view regarding recovery of purely emotional damages was aptly summarized by Lord Wensleydale in a frequently repeated passage from *Lynch v. Knight*: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." *See id.* at 1033 (citing Lynch v. Knight, Eng. Rep. 854, 863 (1861)). Yet, compensation for emotional distress unaccompanied by physical pain was allowed, if pled "parasitically" as an element of damages of another established cause of action. *See id.* at 1049 (The original *Restatement* provided that "emotional distress caused by the . . . tortious conduct which is the cause thereof is taken into account in assessing the damages recoverable by the other." (citing RESTATEMENT OF THE LAW, TORTS § 47(b) (1934))); *see also* Terrance C. Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 WASHBURN L.J. 24, 28 & n.20 (1983) (listing authorities). However, this situation would not endure the test of time and reason, for as astute legal scholars of the day correctly observed, "[t]he treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is to-day recognized as parasitic will, forsooth, to-morrow be recognized as an independent basis of liability." *See* Magruder, *supra* note 130, at 1049 (quoting 1 STREET, THE FOUNDATIONS OF LEGAL LIABILITY 470 (1906)). Despite the fact that all jurisdictions now appear to technically recognize IIED as an independent tort, 2 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS §13.6, at 13-45 (3d ed. 2005), many continue, in practice, to treat the tort parasitically, *see supra* text accompanying notes 96-98.

[132] Givelber, *supra* note 87, at 42.

[133] Magruder, *supra* note 130, at 1035.

[134] *Id*. at 1058.

a new tort. It appears . . . in more than a hundred decisions . . . It is something very like assault. It consists of the intentional, outrageous infliction of mental suffering in an extreme form."[135] While acknowledging that attempting to ascertain the ultimate limits of this evolving tort was doubtlessly a "matter of conjecture," Prosser observed that when courts find liability in this area, it is because the defendant has intentionally sought to inflict emotional distress on a particularly vulnerable plaintiff.[136]

Some years after Professor Magruder's first tentative definition of the principle behind compensating emotional distress, the American Law Institute, in its *Restatements*, developed what is now the commonly accepted articulation of the tort of IIED: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[137] IIED is now universally recognized as a cause of action by the states, and virtually all jurisdictions follow the *Restatement*'s four element formulation.[138]

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[135] Prosser, *supra* note 130, at 874.

[136] *Id*. at 888. In the early cases, successful plaintiffs were almost universally women, in part because of the then prevailing view that "[t]here is a difference between violent and vile profanity addressed to a lady, and the same language to a Butte miner and a United States marine." *Id*. at 887. However, the noble protection of a lady's sensibilities only extended so far, as the courts had proved unwilling "to compensate the silly, hysterical fright of a woman at the approach of a man dressed up in feminine clothing." *Id*. at 888 (citing Nelson v. Crawford, 81 N.W. 335 (Mich. 1899)). Furthermore, claims seeking "damages for mental distress and humiliation on account of being addressed by a proposal of illicit intercourse" were also denied, "the view being, apparently, that there is no harm in asking." Magruder, *supra* note 130, at 1055. However, at the time "it [was] not altogether certain how long the chivalry of the southern courts [could] stand the strain" of allowing such propositions to go unpunished. Prosser, *supra* note 130, at 889.

[137] RESTATEMENT (SECOND) OF TORTS § 46(1) (1965); Givelber, *supra* note 87, at 42. The Institute first acknowledged the cause of action in its 1948 supplement to the original *Restatement*, which provided that "[o]ne who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." *Id*. at 43 & n.7 (quoting RESTATEMENT OF THE LAW, SUPPLEMENT, TORTS § 46 (1948)).

[138] These four elements are: (1) extreme or outrageous conduct, (2) conduct was intentional or reckless, (3) conduct caused emotional distress, (4) the emotional distress was severe. SACK, *supra* note 131, at § 13.6. Rhode Island imposes the additional requirement that the conduct in question have caused some form of physical harm as well. *See* Clift v. Narragansett Television, L.P., 688 A.3d 805, 813 (R.I. 1996). For a comprehensive list of decisions recognizing the tort in various jurisdictions see SACK, *supra* note 131, at § 13.6 at 13-45; Markin, *supra* note 90, at 472 n.17.

As was the case in *Hatfill*, the question often centers around outrageousness,[139] and whether "the conduct [was] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[140] In a passage aptly characterized as a "strange description of a rule of law,"[141] the *Restatement* explains that "[g]enerally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"[142]

As a general matter, this passage is troubling because it appears to hinge civil liability on the "passion and prejudice of the moment," thus frustrating a central goal of due process.[143] Using the outrageousness standard to judge speech further compounds the problem, given the First Amendment's doctrinal "hostility to overbreadth and vagueness," and its requirement that courts "look beyond the case at hand to the effects that liability *might have on other speakers*."[144] Supreme Court jurisprudence makes clear the constitutional dilemmas provoked when unclear rules of state law restrict First Amendment freedoms.[145]

This definitional vagueness combines with a general lack of judicially created limitations to make IIED potentially applicable in an extraordinarily broad range of settings. As Chief Judge Judith Kaye of the New York Court of Appeals

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[139] *See supra* note 87.

[140] RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

[141] Givelber, *supra* note 87, at 52.

[142] RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

[143] Givelber, *supra* note 87, at 52.

[144] David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 771 (2004). *See also* Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) ("'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.").

[145] *See, e.g.*, Coates v. City of Cincinatti, 402 U.S. 611, 614 (1971). In Coates, the Court held that a city ordinance was "unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct." *Id*. The Court continued, "[c]onduct that annoys some people does not annoy others. Thus, the ordinance is vague . . . in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.'" *Id.* (citing Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)). IIED's outrageousness standard seems equally vague, as the activity prohibited is "outrageous conduct [which the *Restatement* explains] is conduct that is outrageous." *See* Givelber, *supra* note 87, at 53.

observed, "[t]he tort is as limitless as the human capacity for cruelty."[146] However, protecting emotional tranquility must at times give way, when doing so would abridge another's constitutional rights.[147] This situation can and frequently does arise when the otherwise-protected speech of one citizen disturbs the emotional tranquility of another.[148] Given its wide dissemination and often controversial nature, the speech in such situations frequently belongs to members of the media.[149] The following sections discuss the interplay between tort law and the First Amendment when plaintiffs sue members of the media for IIED.

### *B. Outrageous Acts of the Media*

Suits for IIED against media defendants, much to their dismay, have steadily increased in the past three decades. In 1985, Professor Robert E. Dreschel identified thirty-five cases in which plaintiffs alleged IIED as an independent cause of action against the media, and noted that all but six had been brought since 1978.[150] Terrance C. Mead conducted a survey of cases reported in the *Media Law Reporter* between the years 1977 and 1981, and found eighteen involving claims of IIED.[151] In 2000, using the same methodology, Dr. Karen Markin found ninety-four such cases reported between 1990 and 1999.[152] Between 2000 and 2004 alone, the *Media Law Reporter* tells us that plaintiffs brought claims of IIED against media defendants at least fifty-nine times.[153] Because of the tort's

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[146] Howell v. New York Post Co., 81 N.Y.2d 115, 122 (1993). *See also* RESTATEMENT (SECOND) OF TORTS § 46 cmt. c (2006) ("The law is still in a stage of development, and the ultimate limits of this tort are not yet determined.").

[147] *See generally* Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Richard D. Bernstein, Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749 (1985).

[148] *See infra* Part IV.B.

[149] *Id.*

[150] Robert E. Dreschel, *Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media*, 89 DICK. L. REV. 339, 346 (1984-1985).

[151] Mead, *supra* note 131, at 32-33 & n.52.

[152] Markin, *supra* note 90, at 478.

[153] Botts v. New York Times Co., 106 F. App'x 109 (3d Cir. 2004); Hussain v. Palmer Commc'ns, Inc., 60 F. App'x 747 (10th Cir. 2003); Yohe v. Nugent, 321 F.3d 35 (1st Cir. 2003); Riley v. Harr, 292 F.3d 282 (1st Cir. 2002); Worrell-Payne v. Gannett Co., 49 F. App'x. 105 (9th Cir. 2002); Ruffin-Steinback v. dePasse, 267 F.3d 457 (6th Cir. 2001); Zeran v. Diamond Broad., 203 F.3d 714 (10th Cir. 2000); Lynch v. Omaha World-Herald Co., 300 F. Supp. 2d 896 (D. Neb. 2004); Harris v. Seattle, 315 F. Supp. 2d 1105 (W.D. Wash. 2004); Hatfill v. New York Times Co., 33 Media L. Rep. (BNA) 1129 (E.D. Va. 2004), *rev'd*, 416 F.3d 320 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1619

indeterminate scope, the increase in IIED suits justifiably creates worry amongst the press, who necessarily report on highly disturbing and controversial matters.[154]

The cases in which members of the media have been sued for IIED can roughly be divided into two categories—those in which the allegedly outrageous conduct stemmed from actions taken in gathering, or in some instances, making the news, and those cases in which the allegedly outrageous

(2006); Albright v. Morton, 321 F. Supp. 2d 130 (D. Mass. 2004), *aff'd*, Amrak Prods., Inc. v. Morton, 410 F.3d 69 (1st Cir. 2005); Marks v. Seattle, 32 Media L. Rep. (BNA) 1949 (W.D. Wash. 2003); Garrett v. Viacom, 31 Media L. Rep. (BNA) 2433 (N.D.W. Va., 2003); Gales v. CBS Broad., Inc., 269 F. Supp. 2d 772 (S.D. Miss. 2003), *aff'd*, 124 F. App'x 275 (5th Cir. 2005); Muzikowski v. Paramount Pictures Corp., 31 Media L. Rep. (BNA) 2601 (N.D. Ill. 2003); Collier v. Murphy, 31 Media L. Rep. (BNA) 2159 (N.D. Ill. 2003); Campoverde v. Sony Pictures Entm't, 31 Media L. Rep. (BNA) 1361 (S.D.N.Y. 2002); Daly v. Viacom, 238 F. Supp. 2d 1118 (N.D. Cal. 2002); Isbrigg v. Cosmos Broad. Corp., 30 Media L. Rep. (BNA) 1331 (S.D. Ind. 2002); A.M.P. v. Hubbard Broad., Inc., 216 F. Supp. 2d 933 (D. Minn. 2001); Miracle v. New Yorker Magazine, 190 F. Supp. 2d 1192 (D. Haw. 2001); Ferris v. Larry Flynt Publ'g, Inc., 29 Media L. Rep. (BNA) 1833 (D. Haw. 2001); Stanley v. Gen. Media Commc'ns, Inc., 149 F. Supp. 2d 701 (W.D. Ark. 2001); Idema v. Eager, 120 F. Supp. 2d 361 (S.D.N.Y. 2000); Van Buskirk v. New York Times Co., 28 Media L. Rep. (BNA) 2525 (S.D.N.Y. 2000); Mineer v. Williams, 82 F. Supp. 2d 702 (E.D. Ky. 2000); Long v. Walt Disney Co., 10 Cal. Rptr. 3d 836 (Cal Ct. App. 2004); Laird v. Spelling, 30 Media L. Rep. (BNA) 1085 (Cal. Ct. App. 2001); Walker v. Kiousis, 114 Cal. Rptr. 2d 69 (Cal. Ct. App. 2001); Wiley v. AIDS Healthcare Found., Inc., 33 Media L. Rep. (BNA) 1307 (Cal. Super. Ct. 2004); Clawson v. Saint Louis Post-Dispatch L.L.C., 32 Media L. Rep. (BNA) 2608 (D.C. Super. Ct. 2004); Smith v. Kranert, 28 Media L. Rep. (BNA) 2375 (Fla. Cir. Ct. 2000); Lewis v. Sunbeam Television, 28 Media L. Rep. (BNA) 2214 (Fla. Cir. Ct. 2000); Collins v. Creative Loafing Savannah, 592 S.E.2d 170 (Ga. App. 2003); Nix v. Cox Enters., Inc., 545 S.E.2d 319 (Ga. App. 2001), *rev'd on other grounds*, 560 S.E.2d 650 (Ga. 2002); Bahktiernejad v. Cox Enters., Inc., 541 S.E.2d 33 (Ga. Ct. App. 2000); Crawl v. Cox Enters., Inc., 29 Media L. Rep. (BNA) 1826 (Ga. State Ct. 2001); Steele v. Spokesman-Review, 61 P.3d 606 (Idaho 2002); Uranga v. Federated Publ'ns, Inc., 29 Media L. Rep. (BNA) 1961 (Idaho 2001), *superceded on reh'g by* 67 P.3d 29 (Idaho 2003); Tuite v. Corbitt, 830 N.E.2d 779 (Ill. App. 2005); Delaney v. Int'l Union UAW Local No. 94, 675 N.W.2d 832 (Iowa 2004); Lane v. Mem'l Press, Inc., 11 Mass L. Rptr. 468 (Mass. Super. Ct. 2000); Mitchell v. Baltimore Sun Co., 32 Media L. Rep. (BNA) 1819 (Md. Cir. Ct. 2004), *rev'd on other grounds*, 883 A.2d 1008 (Md. Ct. Sp. App. 2005); March Funeral Homes West, Inc. v. WJZ-TV Channel 13, Media L. Rep. 2207 (Md. Ct. Sp. App. 2003); Collins v. Detroit Free Press, Inc., 627 N.W.2d 5 (Mich. Ct. App. 2001); Shriner v. Flint Journal, 29 Media L. Rep. (BNA) 1525 (Mich. Cir. Ct. 2000); Craver v. Povitch, 32 Media L. Rep. (BNA) 2385 (N.Y. App. Div. 2004); Bement v. N.Y.P. Holdings, Inc., 307 A.D.2d 86 (N.Y. App. Div. 2003); Garns v. Lonsberry, 32 Media L. Rep. (BNA) 1907 (N.Y. Sup. Ct. 2003); Mayhew v. Imus, 30 Media L. Rep. (BNA) 1061 (N.Y. Sup. Ct. 2001); Gelbman v. Valleycrest Prod., Ltd., 732 N.Y.S.2d 528 (N.Y. Sup. Ct. 2001); Irvine v. Akron Beacon Journal, 30 Media L. Rep. (BNA) 2008 (Ohio Ct. App. 2002); Conese v. Hamilton Journal-News, Inc., 29 Media L. Rep. (BNA) 2499 (Ohio Ct. App. 2001); Dominick v. Index Journal, 29 Media L. Rep. (BNA) 2329 (S.C. Cir. Ct. 2001); Piper v. Mize, 31 Media L. Rep. (BNA) 1833 (Tenn. Ct. App. 2003); Dolcefino v. Randolph, 30 Media L. Rep. (BNA) 1161 (Tex. Ct. App. 2001); Cox Texas Newspapers v. Wootten, 59 S.W.3d 717 (Tex. Ct. App. 2001); Provencio v. Paradigm Media, Inc., 44 S.W.3d 677 (Tex. Ct. App. 2001); Doe v. Mobile Video Tapes, Inc., 43 S.W.2d 40 (Tex. Ct. App. 2001); Davis v. Star-Telegram Operating, Ltd., 29 Media L. Rep. (BNA) 1755 (Tex. Ct. App. 2000).

[154] Markin, *supra* note 90, at 473; Dreschel, *supra* note 150, at 361.

conduct was the publication or the broadcast itself.[155] Often times these categories overlap, most typically when a journalist acts in a dubious manner while obtaining material that is later published.[156] However, when courts find outrageous conduct in such situations it is generally based on the conduct of the journalists in obtaining the news, rather than the content of the news itself.[157] This is largely because the First Amendment offers much less protection for the media when they are pursuing the news than it does when they are disseminating it.[158] The press have "no special immunity from the application of general laws[, nor any] special privilege to invade the rights and liberties of others."[159] While the Supreme Court offered some protection to newsgathering by upholding the right of the press to publish information culled from public records and proceedings,[160] "the First Amendment has never been construed to accord a newsman immunity from *torts* or crimes committed" while in pursuit of a story.[161]

Constitutional concerns assume a much more prominent role when media defendants are sued for IIED based on the

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[155] *See generally* Markin, *supra* note 90, at 479-91 (dividing IIED claims brought against media defendants into those based on newsgathering activity and those based on the content of the publication or broadcast).

[156] *See* Barrett v. Outlet Broad., Inc., 22 F. Supp. 2d 726 (S.D. Ohio 1997) (television journalists accompanied police to suicide scene, entered house while family was forced to wait outside and obtained footage of dead woman that was later broadcast on evening news); Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668 (Cal. Ct. App. 1986) (news crew accompanied paramedics into plaintiff's house and filmed her dying husband and broadcast footage without plaintiff's consent); Green v. Chicago Tribune Co., 675 N.E.2d 249 (Ill. App. Ct. 1997) (newspaper journalists photographed plaintiff's dying son and recorded plaintiff's last words to him, then published photo and last words without plaintiff's consent); Howell v. New York Post Co., Inc., 81 N.Y.2d 115, 122 (1993) (photographer trespassed on to psychiatric hospital's property to obtain photograph, later published, of plaintiff walking with famous crime victim); Dolcefino v. Randolph, 30 Media L. Rep. (BNA) 1161 (Tex. Ct. App. 2001) (reporter used hidden video camera to record segment that was later aired of city controller and staff member wasting city funds by not working on a work day).

[157] *Barrett*, 22 F. Supp. 2d at 747; *Miller*, 232 Cal. Rptr. at 682; *Green*, 675 N.E.2d at 257. *See also* KOVR-TV, Inc. v. Superior Court, 37 Cal. Rptr.2d 431, 435 (Cal. Ct. of App. 1995) (although footage was never broadcast, reporter's conduct of approaching young children in their home and informing them that their neighbor had murdered her two children and committed suicide and then filming their reaction could reasonably be understood by jury as outrageous enough to support claim of IIED).

[158] Markin, *supra* note 90, at 479 (citing Houchins v. KQED, Inc., 438 U.S. 1 (1978); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972)).

[159] Cohen v. Cowles Media, 501 U.S. 663, 670 (1991) (quoting Associated Press v. Nat'l Labor Relations Bd., 301 U.S. 103, 132-33 (1937)).

[160] *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

[161] *Miller*, 232 Cal. Rptr. at 685 (quoting Dietmann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971)).

content of their publications.[162] Successful suits against the media in these situations are rare,[163] especially when the subject matter in question rises above the level of mere ridicule.[164] However, these suits, often pled side by side with actions for defamation and invasion of privacy, by far constitute the majority of IIED claims brought against the press.[165] While the content of a disputed publication or broadcast is rarely adjudged outrageous, media defendants must nevertheless endure the costs and distractions of these increasingly common lawsuits, defending against claims overwhelmingly proven to be without merit.[166] The burden of

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[162] *See* Markin, *supra* note 90, at 491-92.

[163] SACK, *supra* note 131, § 13.6, 13-50 to 13-51.

[164] *See* Esposito-Hilder v. SFX Broad., Inc., 236 A.D.2d 186 (N.Y. App. Div. 1997) (radio show hosts held contest where plaintiff was named "ugliest bride"); Murray v. Schlosser, 574 A.2d 1339 (Conn. Super. Ct. 1990) (plaintiff, also a new bride, was declared "dog of the week" by DJs and won prize of dog food and collar); Kolegas v. Heftel Broad. Corp. (radio show hosts derided plaintiff for marrying wife that had "Elephant Man" disease, despite fact that plaintiff paid station to promote festival being held to raise awareness of the disease).

[165] Of the fifty-nine reported cases between 2000 and 2004, *supra* note 153, only eleven were based on something other than content: Lynch v. Omaha World-Herald Co., 300 F. Supp. 2d 896 (D. Neb. 2004) (plaintiff who "hacked" into defendant newspaper's website claimed that defendant destroyed evidence and acted fraudulently in order to obtain criminal conviction against him); Campoverde v. Sony Pictures Entm't, 31 Media L. Rep. (BNA) 1361 (S.D.N.Y. 2002) (lawyer involved in highly publicized adoption proceeding appeared on "The Ricki Lake Show" and claimed that he was coerced into signing new contract); Walker v. Kiousis, 114 Cal. Rptr. 2d 69 (Cal. Ct. App. 2001) (citizen arrested for drunken driving filed allegedly false complaint claiming that arresting officer acted improperly); Lewis v. Sunbeam Television, Inc., 28 Media L. Rep. (BNA) 2214 (Fla. Cir. Ct. 2000) (television station broadcast intercepted conversation in which police officer brags to friend about beating up her cheating boyfriend); Mitchell v. Baltimore Sun Co., 32 Media L. Rep. (BNA) 1819 (Md. Cir. Ct. 2004) (reporters visited former Congressman in nursing home and refused to leave), *rev'd on other grounds*, 883 A.2d 1008 (Md. Ct. Sp. App.); Shriner v. Flint Journal, 29 Media L. Rep. (BNA) 1525-26 (Mich. Cir. Ct. 2000) (reporter sued newspaper over statements made in the newsroom regarding the termination of reporter's employment); Craver v. Povitch, 32 Media L. Rep. (BNA) 2385 (N.Y. App. Div. 2004) (minor sued "The Maury Povitch Show" after show introduced her to man that allegedly raped her); Gelbman v. Valleycrest Prods., Ltd., 732 N.Y.S.2d 528 (N.Y. Sup. Ct. 2001) (contestant eliminated from "Who Wants to Be a Millionaire?" claimed that he was asked unfair question with multiple correct answers); Piper v. Mize, 31 Media L. Rep. (BNA) 1833 (Tenn. Ct. App. 2003) (defendant allowed allegedly defamatory underground newspaper to be placed with free periodicals at his place of business); Dolcefino v. Randolph, 30 Media L. Rep. (BNA) 1161 (Tex. Ct. App. 2001) (reporter used hidden video camera to record city controller and staff member waste city funds by not working on a work day); Provencio v. Paradigm Media, Inc, 44 S.W.3d 677 (Tex. Ct. App. 2001) (media outlet sent postcards falsely claiming to be from the "Texas Department of Public Safety" to plaintiff sex offender's trailer park seeking address verification).

[166] Of the cases surveyed, *supra* note 153, no final judgments were reported where plaintiffs prevailed on a content-based IIED claim, however, there were several plaintiff "victories" where such claims survived dismissal and summary judgment

defending these suits is heightened by the vague and unprincipled standards by which IIED claims are typically evaluated.[167] The lack of clear standards evidences the *Restatement*'s concession that the tort of IIED is "still in a stage of development."[168] This immaturity becomes especially apparent when the tort is applied against speech alongside the ancient tort of defamation. Defamation, unlike IIED, is not only clearly articulated as a matter of tort law, but also has had its constitutional ramifications carefully examined, albeit with somewhat complicated results.[169] Despite the complex constitutional guidelines associated with defamation, would-be speakers still know the standards by which their speech will be judged and thus the fear of self-censorship is thought to be alleviated.[170] The same can not be said for IIED.

### *C. Preachers, Porn & Public Discourse: The Implications of* Hustler Magazine v. Falwell

The constitutional considerations associated with defamation actions have, however, to a certain extent influenced courts' resolution of IIED claims. This influence achieved its most famous expression by the Supreme Court in *Hustler Magazine v. Falwell*.[171] The dispute giving rise to that

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motions. Marks v. City of Seattle, 32 Media L. Rep. (BNA) 1949 (W.D. Wash. 2003) (false light based IIED claim survived 12(b)(6) motion where video broadcast of city official's assistant portrayed her as using city-paid rental car for personal use); Muzikowski v. Paramount Pictures Corp., 31 Media L. Rep. (BNA) 2601 (N.D. Ill. 2003) (claim survived 12(b)(6) motion because defendant's bare assertion that the First Amendment provides a defense, while possibly accurate, does not address whether plaintiff stated a legally cognizable claim); Uranga v. Federated Publ'ns, Inc., 29 Media L. Rep. (BNA) 1961, 1970 (Idaho 2001) (summary judgment on IIED claim reversed because based on meritless constitutional and fair report privileges), *superceded on reh'g*, 67 P.3d 29, 35-36 (summary judgment reinstated because "[c]hanging the cause of action from invasion of privacy to infliction of emotional distress does not circumvent the constitutional protection of the publication");The Fourth Circuit's decision in *Hatfill v. New York Times Co.* is of course another example of an IIED claim surviving a motion for early dismissal. 416 F.3d 320, 337 (2005), *cert. denied*, 126 S. Ct. 1619 (2006). *See supra* note 10.

[167] *See supra* notes 153-61 and accompanying text.

[168] RESTATEMENT (SECOND) OF TORTS § 46 cmt. c (1965).

[169] *See* Anderson, *supra* note 144, at 787-88 (listing cases and describing "the phalanx of constitutional rules limiting defamation").

[170] *See* Herbert v. Lando, 441 U.S. 153, 159 (1979) (explaining that the Court's defamation jurisprudence "rested primarily on the conviction that the common law of libel gave insufficient protection to the First Amendment guarantees . . . and that to avoid self-censorship it was essential that liability for damages be conditioned on the specified showing of culpable conduct by those who publish damaging falsehood").

[171] 485 U.S. 46 (1988).

decision concerned a lewd ad parody of televangelist Reverend Jerry Falwell published in the pages of *Hustler*, a pornographic men's magazine.[172] Falwell, an admitted public figure, sued *Hustler* and its publisher, Larry Flynt,[173] for invasion of privacy under Virginia statute, defamation, and IIED.[174] When the case came before the Supreme Court on certiorari from the Fourth Circuit, only the IIED claim was at issue.[175] The Court unanimously ruled that the parody was not actionable and found for Flynt and his magazine.[176]

Observers see the *Falwell* decision primarily as the Court's clarification and reiteration of the "actual malice" standard, and the reasons giving rise to that standard, pronounced in *New York Times v. Sullivan*.[177] Rejecting the Fourth Circuit's focus on outrageousness and Flynt's stated

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[172] *Id.* at 48. The parody contained a fictionalized interview where Falwell described his "first time" as a "drunken incestuous rendezvous with his mother in an outhouse." *Id.* For a detailed discussion of the decision and its implications, see Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990); Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of* Hustler v. Falwell, 20 ARIZ. ST. L. J. 423 (1988). *See also* Catherine L. Amspacher & Randal Steven Springer, Note, *Humor, Defamation and Intentional Infliction of Emotional Distress: The Potential Predicament for Private Figure Plaintiffs*, 31 WM. & MARY L. REV. 701 (1990) (expressing concern over the ability of private figure plaintiffs to protect their emotional well being after *Falwell*).

[173] For an interview with Larry Flynt regarding his First Amendment legacy, see Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMMLAW CONSPECTUS 159 (2001). For an interview with Flynt's attorney, see Clay Calvert & Robert D. Richards, *Alan Isaacman and the First Amendment: A Candid Interview with Larry Flynt's Attorney*, 19 CARDOZO ARTS & ENT. L.J. 313 (2001).

[174] *Falwell*, 485 U.S. at 47-48.

[175] *Id.* at 48-49. The district court had dismissed the privacy claim, because although the *Hustler* parody had used Falwell's name and likeness, it had not done so "for purposes of trade" within the meaning of the statute that Falwell sued under. Falwell v. Flynt, 797 F.2d 1270, 1273 (4th Cir. 1986), *overruled*, Hustler Magazine v. Falwell, 485 U.S. 45 (1988). The jury found for Flynt and *Hustler* on the defamation claim, "finding that no reasonable man would believe that the parody was describing actual facts about Falwell." *Id.*

[176] *Falwell*, 485 U.S. at 47, 57. Justice Kennedy took no part in the decision and Justice White filed a brief concurring opinion. *Id.*

[177] 376 U.S. 254 (1964). *See, e.g.*, Post, *supra* note 172, at 612; Smolla, *supra* note 172, at 435 (describing Chief Justice Rehnquist's opinion in *Falwell*: "[I]n both letter and spirit, he was reaffirming *New York Times* with relish."). *New York Times* held that a public official could not recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). Subsequent cases extended the actual malice requirement to defamation claims brought by "public figures," as opposed to just public officials. Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker 389 U.S. 28 (1967).

intent to "assassinate" Falwell's integrity,[178] the Court held that public figures and public officials could not recover for the tort of IIED stemming from publications such as the Falwell parody without additionally demonstrating that the publication contains a false statement of fact made with "actual malice, *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether it was true."[179] Because the statements at issue were not reasonably capable of being perceived as statements of fact, the Court reversed the jury verdict against *Hustler* and Flynt.[180] Thus, the ultimate rule emerging from *Falwell*, the only instance in which the Supreme Court has attempted to reconcile the tort of IIED and the First Amendment, is a narrow one, and has been criticized as offering little guidance beyond the particular circumstances of the case.[181] Nevertheless, the Court discussed the concept of "outrageousness," found it an inappropriate standard to determine liability in the area of "political and social discourse," and ultimately rejected it as a guide for judging speech about public persons.[182]

The decisions of the lower courts over the past eighteen years, whether mentioning *Falwell* or not, seem largely in agreement that speech on matters of public concern should not give rise to liability for IIED. Despite the multitude of IIED claims challenging such speech during this period, successful plaintiffs are conspicuously lacking.[183] The courts considering these claims utilized a variety of approaches but generally reached the same conclusion and found liability in such situations inappropriate. Some courts found reporting on newsworthy events simply unable to constitute outrageous conduct;[184] others determined the plaintiff bringing the suit was

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[178] Falwell v. Flynt, 797 F.2d 1270, 1273, 1275 (4th Cir. 1986), *overruled*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

[179] *Falwell*, 485 U.S. at 56. The court maintained that this holding was "not merely a 'blind application' of the New York Times standard," but rather reflected their "considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id*.

[180] *Id.* at 57.

[181] *See* Post, *supra* note 172, at 614-15 & n.66.

[182] *Falwell*, 485 U.S. at 55.

[183] *See* Hatfill v. New York Times Co., 427 F.3d at 253, 258 (4th Cir. 2005) (Wilkinson, J., dissenting) ("The panel offers no decision from Virginia or any other state that holds a news report on a subject of unquestioned public interest to be an intentional infliction of emotional distress.").

[184] Brown v. Hearst Corp., 54 F.3d 21, 27 (1st Cir. 1995) (news segment implying plaintiff murdered his missing wife was not outrageous because segment consisted of generally accurate coverage of a legitimate news story); Ross v. Burns, 612

a public figure unable to prove actual malice;[185] while still others found the conduct in question possibly outrageous, but held the First Amendment nevertheless protected the defendant from liability.[186] Many other courts considering IIED claims failed to undertake any real substantive analysis at all and instead merely reiterated the *Restatement* test before concluding, without explanation, that the plaintiff failed to meet it.[187]

In some respects, the current situation parallels the condition present when Professors Magruder and Prosser first noted that the courts, without clearly articulating their reasons, recognized that plaintiffs had an interest in their emotional wellbeing independent from any other interest.

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F.2d 271, 274 (6th Cir. 1980) (publishing photos and identity of undercover police officer with headline "Know Your Enemies" not outrageous—publishing photos taken in public place in conjunction with "news story" cannot be "extreme and outrageous"); Hatfill v. New York Times Co., 33 Media L. Rep. (BNA) 1129, 1137 (E.D. Va. 2004) ("[p]ublishing news or commentary on matters of public concern simply cannot be deemed . . . outrageous"), *rev'd*, 416 F.3d 320 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1619 (2006); Dougherty v. Capitol Cities Commc'ns, Inc., 631 F. Supp. 1566, 1576 (E.D. Mich. 1986) ("reporting on . . . matters of legitimate public interest . . . without actual malice . . . cannot be . . . extreme and outrageous"); Crawl v. Cox Enters., 29 Media L. Rep. (BNA) 1826, 1830 (Ga. State Ct. 2001) (publishing witness' name in connection with noteworthy crime is not outrageous because it is accurate news account of event of public concern). *See also* Van Buskirk v. New York Times Co., 28 Media L. Rep. (BNA) 2525, 2528 (S.D.N.Y. 2000) (writing a letter claiming plaintiff lied about committing war crimes found not to be outrageous).

[185] *See, e.g.*, Worrell-Payne v. Gannett Co., 49 F. App'x. 105 (9th Cir. 2002); Harris v. Seattle, 315 F. Supp. 2d 1105, 1111 (W.D. Wash. 2004); Isgrigg v. Cosmos Broad. Corp., 30 Media L. Rep. (BNA) 1331 (S.D. Ind. 2002); Steele v. Spokesman-Review, 61 P.3d 606, 610 (Idaho 2002); Garns v. Lonsberry, 32 Media L. Rep. (BNA) 1907, 1909 (N.Y. Sup. Ct. 2003); Conese v. Hamilton Journal-News, Inc., 29 Media L. Rep. (BNA) 2499, 2502 (Ohio Ct. App. 2001). *See also* Lane v. Mem'l Press, Inc., 11 Mass. L. Rptr. 468 (Super. Ct. 2000) (finding it unlikely that allegations concerning public officials could ever be extreme and outrageous).

[186] *See, e.g.*, Citizen Publ'g Co. v. Miller, 115 P.3d 107, 110, 115 (Ariz. 2005) (en banc) (conceding that letter to editor published in newspaper that called for readers to randomly execute local Muslims in order to win war in Iraq was outrageous, but finding it protected by the First Amendment as political speech).

[187] The analysis of the Tenth Circuit in *Hussain v. Palmer Commc'ns, Inc.* typifies this approach. 60 F. App'x 747 (10th Cir. 2003). In that case, plaintiff's digitally altered photo was aired on defendant's news program and plaintiff was falsely identified as being sought by authorities in connection with the 1995 Oklahoma City bombing. *Id.* at 748-49. After explaining the *Restatement* test, the court's entire substantive analysis of the IIED claim consisted of the following:

> After careful review, we find nothing in the record which indicates that the defendants behaved in such an extreme or outrageous manner towards Hussain as to impose liability for [IIED]. There is no evidence in the record to indicate that the plaintiff could prove that the defendants' conduct qualified under any of these standards.

*Id.* at 754.

Likewise courts considering IIED claims, aware of the time honored principle "that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection,"[188] have found ways, "in an *ad hoc* manner, and perhaps not very scientifically"[189] to protect the media from liability for IIED when they are fulfilling their constitutional role.

Despite this piecemeal recognition of a newsworthiness defense, absent binding precedent in a given jurisdiction, courts are under no obligation to shield speech on matters of public concern from liability for IIED. The Fourth Circuit's decision in *Hatfill* evidences this.[190] Furthermore, the variety of techniques being employed by the courts creates great uncertainty as to how any given claim will be adjudicated. Considering the widespread distribution of modern media product, this creates a significant impediment to effectively evaluating the potential liability of a given publication and can lead to self-censorship, a central fear of First Amendment doctrine.[191] "Having to evaluate the liability schemes of fifty jurisdictions imposes a considerable burden on speech itself, quite apart from the actual effects of those schemes."[192] This situation is in need of remedy, and "[a]lthough there is little evidence that [IIED] will ever provide the basis for principled adjudication" as a matter of tort law, the First Amendment is capable of imposing requirements so that the principled adjudication of claims against protected speech is possible.[193] Such constitutional requirements appear most clearly in the

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[188] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980)).

[189] *See supra* note 133 and accompanying text.

[190] A district court already relied upon this decision as grounds for refusing to dismiss an IIED claim, albeit in an almost factually identical case concerning a separate article written about Dr. Hatfill in *Vanity Fair*. *See* Hatfill v. Foster, 401 F. Supp. 2d 320, 335 (S.D.N.Y. 2005), *rev'd on other grounds*, 415 F. Supp. 2d 353 (S.D.N.Y. 2006).

[191] *See, e.g.*, City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 759 (1988) (identifying self censorship as a "major First Amendment risk[] associated with unbridled licensing schemes"); Philadelphia Newspapers v. Hepps, Inc., 475 U.S. 767, 789 (1986) (Stevens, J., dissenting) (opining that the possibility of an erroneous defamation verdict "would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate" (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971) (Brennan, J., plurality)).

[192] Anderson, *supra* note 144, at 794.

[193] *See* Givelber, *supra* note 88, at 75.

field of defamation law,[194] but *Falwell* demonstrates the possibility that similar rules may be adopted and applied in other areas of tort law as well.

## V. CONCLUSION

### *A. Proposed Newsworthiness Defense*

In *Falwell*, the Supreme Court questioned the constitutionality of judging public discourse by an outrageousness standard.[195] This inevitably casts doubt on using the accepted formulation of IIED to judge public discourse, as the *Restatement*'s four-element test, in practice, generally reduces the analysis to the single element of outrageousness.[196] In order to reconcile IIED with the First Amendment, at least to the extent needed to decide *Falwell*, the Court engrafted the actual malice standard onto the *Restatement* test—thus assuring that the Court's carefully crafted protections regarding speech on public figures would not be torn down by the emerging tort of IIED.[197] Consequently, one element of public discourse was granted constitutional protection from emotional distress claims. The First Amendment's conception of public discourse, however, encompasses more than simply speech about public figures, it "embraces at the least the liberty to discuss publicly . . . all matters of public concern."[198] The facts giving rise to *Hatfill* make clear the potential of important public matters to draw ostensibly private figures into their vortex.[199] Yet, the current legal framework leaves it to the lower courts to determine for themselves how to treat these cases.[200] While it is rare indeed that a court finds the content of a legitimate news story to be outrageous,[201] the problem remains that outrageousness, with all its inherent vagueness and subjectivity, still governs the

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194 *See supra* note 183 and accompanying text.

195 *See supra* notes 181-82 and accompanying text. Commentators quickly echoed this concern. *See, e.g.*, Smolla, *supra* note 172, at 446 ("[N]othing could be more antithetical to settled first amendment doctrine than the notion that speech may be penalized merely for being 'outrageous.'").

196 *See supra* notes 87, 140-45 and accompanying text.

197 *See supra* notes 177-79 and accompanying text.

198 Thornhill v. Alabama, 310 U.S. 88, 101 (1940).

199 *See supra* Part II.

200 *See supra* notes 184-87 and accompanying text.

201 *Id.*

analysis.[202] In order to protect the important constitutional principles espoused in *Falwell*, courts considering IIED claims based on the content of speech should recognize a newsworthiness defense and dismiss plaintiffs' claims when they seek to punish speech on matters of legitimate public concern.

The adoption of a newsworthiness defense to speech-based torts is by no means a novel idea; the common law embraces such a defense with respect to the privacy tort of public disclosure of private facts,[203] and the Supreme Court seemingly accepted, then firmly rejected the defense as applied to defamation claims—at least insofar as asserting the defense required plaintiffs to prove actual malice, rather than mere negligence.[204] Neither the common law nor the Court have definitively spoken on such a defense for IIED claims; the experience of the other speech torts, however, provides valuable insight regarding both the applicability and the constitutional necessity of such a defense in the IIED context.

The roots of the public disclosure tort's newsworthiness defense can be traced back as far as 1890, when Samuel Warren and Louis Brandeis wrote in their seminal article, *The Right to Privacy*, that "[t]he right to privacy does not prohibit any publication of matter which is of public or general interest."[205] The current formulation of the public disclosure tort, as embodied in the *Restatement*, provides for liability when a defendant publicizes private facts about a plaintiff that "would be highly offensive to a reasonable person," and are "*not of legitimate concern to the public*."[206] Judge Richard Posner

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[202] *See supra* notes 140-45 and accompanying text.

[203] *See* RESTATEMENT (SECOND) OF TORTS § 652D (1965) ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is *not of legitimate concern to the public*." (emphasis added)).

[204] The Court, in a plurality opinion written by Justice Brennan, seemingly extended the *New York Times* requirement—that a plaintiff prove actual malice—to cases brought by private individuals where the allegedly defamatory speech related to matters of public concern. Rosenbloom v. Metromedia, Inc. 402 U.S. 29, 52 (1971) (Brennan, J., plurality opinion). This state of the law was short-lived, however, for three years later, a majority of the Court rejected the proposed extension of the *New York Times* test and held that the Constitution only required a private libel plaintiff to prove that the defendant was negligent. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

[205] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890).

[206] RESTATEMENT (SECOND) OF TORTS § 652D (1965) (emphasis added)

explained that these two elements of the tort are largely inseparable, as "[a]n individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger."[207] Thus, one probably best understands the concept of newsworthiness in this context as a creature of tort law, mitigating the offensiveness of a given disclosure. While the First Amendment lurks in the background whenever tort law seeks to punish speech—public disclosure's newsworthiness defense was conceived as one of the tort's inherent elements, rather than as an explicit constitutional prohibition.[208]

In contrast, the Supreme Court's flirtation with a newsworthiness defense to defamation claims was born wholly of First Amendment concerns. In *Rosenbloom v. Metromedia, Inc.*, Justice Brennan, writing for a plurality, observed that the constitutional conceptions of free speech and free press embody more than simply the ability to comment upon the affairs of public persons.[209] Brennan explained that the interest of the public centers around public events and a plaintiff's participation in those events, not the plaintiff's "prior anonymity or notoriety."[210] In order to "honor the [First Amendment's] commitment to robust debate on public issues," Brennan thought it necessary to extend constitutional protection to all speech on matters of public concern, regardless of whether the persons involved were public or private figures.[211] Just three years later in *Gertz v. Robert Welch, Inc.*, however, a majority of the court rejected the *Rosenbloom* plurality's extension of the *New York Times* test.[212] Reasoning that private persons were more vulnerable to *reputational*

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[207] Haynes v. Alfred A. Knopf, 8 F.3d 1222, 1232 (7th Cir. 1993).

[208] In explaining the rationale for the defense, Warren and Brandeis discussed libel law and the notion of a qualified privilege to discuss matters of public concern, specifically topics concerning public figures. Warren & Brandeis, *supra* note 205, at 214-16. While this concept became a canon of First Amendment doctrine in *New York Times v. Sullivan*, at the time it was merely a concern of tort law. *See* 376 U.S. 254. Warren and Brandeis's focus on tort remedies rather than First Amendment implications is further evidenced by the fact that they explained the importance of the newsworthiness defense by looking to French law, not the Constitution. Warren & Brandeis, *supra* note 205, at 214-16.

[209] 403 U.S. 29, 41 (1971) (Brennan, J., plurality opinion).

[210] *Id.* at 43.

[211] *Id.* at 41, 43-44.

[212] 418 U.S. 323, 346-47 (1974).

injury and more deserving of recovery than public persons, the Court found the extension unacceptable.[213] Justice Powell's majority opinion also expressed concern about forcing on the lower courts the task of determining, on a case-by-case basis, what publications concerned matters of legitimate public interest.[214]

At first blush, one might see *Gertz* as foreclosing the possibility of a constitutionally based newsworthiness defense for IIED claims. After all, *Falwell* was based on *New York Times*[215] and *Gertz* declined to extend *New York Times* to situations involving private persons. While this argument contains a certain logical appeal, it leaves something important out of the equation—namely, that defamation and IIED are different torts. While they often apply to the same situation, they seek to redress different wrongs, and thus require plaintiffs to prove completely different elements.[216] The First Amendment necessarily requires different things from each.[217] *Falwell* does not say otherwise, rather, the court explicitly noted that its holding was not a "blind application of the *New York Times* standard," but rather reflected that such a standard was needed in the IIED context to provide sufficient "breathing space" to First Amendment freedoms.[218] The problem left unresolved by *Falwell* and not answered by *Gertz* is that, in IIED claims, publicly important speech involving private persons is still judged by an extremely subjective outrageousness standard. In the libel context, such speech cannot be the basis for liability, unless a court at the very least finds that defamatory statements were published with negligence as to their veracity.[219] This is a factual finding properly left to the jury. In the IIED context, however, liability hinges on whether a given publication leads the jury, as representatives of community sentiment, to exclaim

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[213] *Id.* at 345-46.

[214] *Id.* at 346.

[215] *See supra* notes 177-82 and accompanying text.

[216] *See* Smolla, *supra* note 172, at 439 (explaining why, because of the differing objectives of the two torts, it was "logically indefensible" to mechanically and literally apply *New York Times* to IIED claims).

[217] *See* Smolla, *supra* note 172, at 438 ("moving from one tort context to another changes not only the elements of the tort cause of action, but also the balance of first amendment interests").

[218] Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988).

[219] *Gertz*, 418 U.S. at 347.

"Outrageous!"[220] This latter test clearly poses different First Amendment problems than the former, thus, *Gertz*'s rejection of a newsworthiness defense to defamation claims fails to foreclose the possibility of adopting such a defense to IIED claims.

In the context of speech, the elements of IIED parallel those of the public disclosure tort to a far greater degree than they do those of defamation. In order for speech to be a tortious public disclosure, it must be "highly offensive to a reasonable person,"[221] whereas in the IIED context tortious speech consists of that which is "extreme and outrageous" as determined by community sentiment.[222] Assuming that the community's sentiments are reasonable, it is difficult to differentiate between these two standards in any sort of principled manner.[223] Because of this, commentators have noted the lack of any "logical reason" why a newsworthiness defense should apply to one tort action but not the other.[224] While the newsworthiness defense to public disclosure claims was conceived in tort law,[225] it suffices to protect defendants from being punished for exercising their First Amendment right to speak on public matters simply because one might find their speech "highly offensive." Such a defense is likewise needed to prevent plaintiffs from using IIED claims to punish the press, or any other speaker, simply because their speech on public matters could be considered "outrageous" by some.

"[T]he world of debate about public affairs"[226] occupies a preeminent role in our constitutional scheme.[227] In order to adequately safeguard the right to freely engage in this debate,

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[220] *See supra* note 141 and accompanying text.

[221] *See supra* note 206 and accompanying text.

[222] *See supra* notes 140-45 and accompanying text.

[223] *See* Dreschel, *supra* note 150, at 354 ("In fact, the proof requirements of the two torts resemble each other rather closely."). Although IIED technically requires proof of severity of harm and intent to inflict emotional suffering, courts generally infer these elements upon finding sufficiently outrageous conduct. *See supra* notes 87, 140-45 and accompanying text.

[224] Dreschel, *supra* note 150, at 355. The First Amendment aside, it seems the newsworthiness defense to the public disclosure tort could easily become meaningless if a plaintiff could circumvent it simply by recasting their action as a claim for IIED. *Id.*

[225] *See supra* notes 207-08 and accompanying text.

[226] Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988).

[227] *See, e.g.*, Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., dissenting) ("Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

courts considering IIED claims based on the content of speech should allow defendants to assert a newsworthiness defense. Where the contested speech unquestionably relates to a matter of legitimate public concern, the IIED claim should be dismissed. When a court "can determine from the pleadings a case-dispositive First Amendment defense," dismissal is appropriate as it protects First Amendment rights and obviates the need for an extended, costly, and ultimately futile trial.[228] Despite the concerns expressed by Justice Powell in *Gertz*, the making of this determination seems well within the faculties of the judiciary.[229] Courts have been undertaking this exact inquiry in the context of the public disclosure tort for years. As the Court in *Falwell* saw the need to borrow a principle of defamation law to address the First Amendment threat presented by a public figure's IIED claim, so too should courts today borrow a principle from the field of privacy law to address the threat presented by the burgeoning numbers of IIED claims being adjudicated under an unconstitutionally vague standard. Adopting a newsworthiness defense is not merely a "blind application" of a principle of privacy law; rather it is necessary to prevent constitutionally protected expression from being judged by an inherently subjective standard—thus providing adequate "breathing space" for First Amendment freedoms.[230]

### *B.* Hatfill v. New York Times *Revisited*

In *Hatfill*, the newsworthiness of Kristof's columns placed no formal obligation on the Fourth Circuit to dismiss Dr. Hatfill's IIED claim. The public importance of Kristof's subject matter was only relevant insofar as it factored into the court's outrageousness analysis. While the district court believed that publishing news or commentary on a matter of legitimate concern could never be sufficiently outrageous, the Fourth Circuit disagreed.[231] In holding that an op-ed piece on such an undeniably important item of news could be outrageous, the court single-handedly expanded the scope of IIED.[232] While a

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[228] *See* Citizen Publ'g Co. v. Miller, 115 P.3d 107 (Ariz. 2005).

[229] *See supra* note 214 and accompanying text.

[230] *See supra* note 217 and accompanying text.

[231] *See supra* note 107 and accompanying text.

[232] *See* Markin, *supra* note 90, at 488 (exhaustively surveying IIED claims against media defendants in the 1990's and opining that "[a]t most one can conclude that the publication of editorial content, no matter how intrusive into a person's

false accusation of murder is no trivial matter, the law of defamation is far better suited to remedy the harm caused by injurious falsehood than is the law of IIED.[233] Application of a newsworthiness defense to IIED claims would not deny remedy to one falsely implicated in a crime, any more so than the constitutional standards governing defamation already limit remedies in such situations.[234] Recognition of a newsworthiness defense would instead merely prevent an unhappy subject of a legitimate news story from punishing constitutionally favored speech by suing under a vague and ambiguous cause of action. Recognition of a newsworthiness defense would require courts dismiss IIED claims such as Dr. Hatfill's, and would add much needed clarity to this neglected area of the law. Failure to adopt the defense, on the other hand, licenses IIED's continued encroachment into the world of public discourse. The Supreme Court noted in *New York Times v. Sullivan* that "[w]hatever is added to the field of libel is taken from the field of free debate."[235] When other torts seek to punish speech, the effect of their expansion is no different.

*Ben Battles*[†]

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private affairs, most likely will not be found outrageous as a matter of law, unless it pointedly ridicules an individual or horrifies a bereaved family.")

[233] Injurious falsehood is, in fact, the harm libel law seeks to redress. *See* RESTATEMENT (SECOND) OF TORTS § 581A (1977) ("To create liability for defamation there must be publication of a statement that is both defamatory and false.").

[234] *See supra* notes 169, 209-14 and accompanying text.

[235] New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964) (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)).

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